

PLS NOTES

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New Law Protects Pregnant Prisoners

Pregnant women's health needs require extra attention. Women should be confident that their health and that of their baby is protected while they are incarcerated. On May 15, 2014, Massachusetts passed a law, G.L. c. 127, § 118, making it illegal to shackle pregnant women in most circumstances and requiring correctional facilities that hold women to provide basic prenatal education and care. This new law applies to all state and county correctional facilities in the state.

If you are a pregnant woman incarcerated in Massachusetts, you can contact PLS for assistance in obtaining the rights provided by this law. PLS is especially interested in tracking and addressing any improper use of restraints on pregnant and postpartum (women who have recently given birth) prisoners. If you are expecting to give birth while incarcerated, please contact PLS in advance of your due date and discuss your situation with us. If you would like us to advocate for removing restraints, if any restraints are used during your labor or postpartum period, it would be best for

us to have releases of information on file. Even if you don't want us to contact the facility regarding your situation, we would appreciate you contacting us to let us know what your experience was so that we can assess whether each facility is following the statute as required.

If you think that correctional or medical staff are not following the requirements of the law, you should file a grievance (a medical grievance if it is medical staff who are not following the law, or an institutional grievance if it is the correctional staff not following the law) and be sure to appeal any denial of that grievance. **You need to file the grievance even if you also contact PLS for assistance.**

Some of the important rights provided by the law are:

(a) Health care

- All pregnant women must be provided counseling and written material, in a form they can understand, on pregnancy options and jail or prison policies and practices regarding care before, during, and after labor. This means the material must be available in a language the woman understands.
- All pregnant and postpartum women must be provided regular prenatal and postpartum medical care.
- All pregnant and postpartum women must be provided the opportunity for at least 1 hour of recreation each day.
- All pregnant and postpartum women must be provided a diet containing the nutrients necessary to maintain a healthy pregnancy, including prenatal vitamins and supplements, and written information regarding prenatal nutrition, maintaining a healthy pregnancy and childbirth.

- All pregnant and postpartum women must be provided the opportunity to be screened for depression. A woman suffering from postpartum depression must have regular access to a mental health clinician and must not be subject to isolation unless she poses a serious risk of harm to herself or others.
- All pregnant and postpartum women must be provided appropriate clothing, undergarments and sanitary materials.
- Prior to her release, facility medical staff must provide a pregnant woman with counseling and discharge planning in order to ensure continuity of pregnancy-related care in the community, including uninterrupted substance abuse treatment.
- During postpartum recuperation, the new mother will remain in the hospital until the attending physician certifies that she may be safely discharged. **A woman in postpartum recuperation must not be placed in restraints, except under extraordinary circumstances.** “Extraordinary circumstances” requires a correction officer determining that the specific woman presents an **immediate and serious threat to herself or others or an immediate and credible risk of escape that cannot be curtailed by other reasonable means.** An officer finding extraordinary circumstances requiring restraint of a post-childbirth woman must document, in writing, the reasons for that finding, the kind of restraints used and the reasons those restraints were considered the least restrictive reasonable alternative available under the circumstances. The superintendent must approve the use of any restraints on a postpartum woman.

(b) Restraints and transportation

- All pregnant women in their **second and third trimesters** of pregnancy or during **recuperation after childbirth** must be transported to and from visits to medical providers and court in a **vehicle with seatbelts and may only be restrained using handcuffs in front.**
- **Leg or waist restraints shall not be used on a pregnant or postpartum woman under any circumstances.**
- **A woman in any stage of labor or delivery,** as determined by a health care professional, **must not be placed in restraints at any time, including during transportation.** There is no exception to this requirement.
- If a correction officer is present in the room during a woman’s physical examinations, labor or childbirth, the officer should be female and should be positioned to maximize the woman’s privacy.
- If the attending physician or nurse treating the pregnant or postpartum woman requests that restraints be removed for medical reasons, the correction officer must immediately remove all restraints.

If you are restrained while you are in labor, PLS will advocate for you to be removed from restraints. You can contact us from any DOC facility at *9004# or any county facility by calling collect at 617-482-4124. If you are unable to call, you can also ask your medical provider or your family to contact our office to report this problem. We will need releases of information to get any information when we advocate, so it is best to get releases of information on file with this office in advance if you think you will be incarcerated at the time you give birth.

Additional protections for pregnant prisoners in MCI-Framingham are provided by a settlement agreement in a case PLS brought called McDonald v. Fair, No. 80352 (Mass. Super. Ct. Apr. 7, 1992) about the care pregnant women are entitled to at MCI-Framingham. The most important parts of that agreement go beyond what G.L. c. 127, § 118 requires and are listed below. If you are pregnant and incarcerated somewhere other than MCI-Framingham, this Agreement does not apply to you, but you are still covered by the law described above.

Diet and Vitamins

- Once your pregnancy has been confirmed, the HSU must notify the Food Services Unit, who must place you on the pregnancy diet which should ensure that you get proper nutrients for the baby's development. Within 2 working days of the confirmation of pregnancy, the HSU must also request that you be seen by a dietician.
- The dietician's consult form will become part of your medical record.
- If you have additional medically based dietary needs or restrictions (for example a diabetic diet), those requirements must also be provided by the dietician to the Food Services Unit in writing, and written into your medical file.
- Whenever you believe that a meal does not conform to the required diet, you should report this to the Institutional Grievance Coordinator on the institutional grievance form. You may also approach food service personnel, shift commanders, and others to voice dietary concerns or problems immediately.
- The DOC must keep the name of each pregnant prisoner on the "Diet Roster" maintained in the Food Services Unit.

Prenatal and Postpartum Counseling

- The DOC must offer pregnant prisoners access to weekly prenatal classes providing counseling and education.
- The DOC must maintain weekly prenatal clinics at MCI-Framingham. Each pregnant prisoner shall be given access monthly at such clinics, or more frequently if medically necessary.
- The DOC must provide access to mental health counseling and HIV counseling.
- The DOC must offer you contact, including telephone access, with the Department of Social Services if your child is to be placed in the custody the Department of Children and Families.

Prenatal Clothing

- The DOC must provide pregnant prisoners with maternity tops, maternity slacks or jeans and appropriate underwear.

Medical Screening

- After intake medical screening, within 48 hours of entrance into MCI Framingham, a pregnant prisoner must be seen by a physician, or nurse practitioner, or perinatal nurse coordinator, who must ask about the following areas: (1) Unusual bleeding or vaginal discharge; (2) Presence of an I.U.D.; (3) Breast masses or nipple discharge.
- After you have been medically screened, if you are pregnant but have no other medical or mental health issues, you should not be placed with unscreened prisoners.
- After medical screening, pregnant prisoners admitted to MCI Framingham who have health or mental health issues aside from pregnancy, must be placed in the HSU, with only medically screened prisoners. You should not come into physical contact with prisoners who are quarantined.

Transportation

- The DOC must ensure that pregnant women being transported to outside medical care, or courts or hospitals, receive the total dietary intake specified above.

Prenatal and Postpartum Medical Examinations

- Pregnant prisoners shall be provided with regular prenatal (before birth) and postpartum (after birth) medical examinations and treatment as medically indicated.
- If you are designated “high risk” status by an obstetrician, the DOC must follow all medical recommendations that are confirmed by the on-site medical personnel of MCI Framingham.

Bills Establishing Compassionate Release and Limiting Solitary

While the legislation protecting pregnant prisoners was a major step forward, two other important bills advanced only partially through the legislature and have now all but died with the end of the session.

H. 1359 would have permitted the commissioner of correction or the superintendent of a county house of correction to identify appropriate prisoner candidates for placement under supervision in locations other than correctional facilities, including hospices and home confinement. The decision, based on a correctional physician’s physical evaluation, would be made by the court that sentenced the prisoner.

Massachusetts is one of only five states that do not have a compassionate release law that applies to dying prisoners. Thirty states permit medical release in some circumstances other than for

prisoners at the verge of death. The Massachusetts proposal failed to gain a favorable report from Ways and Means, which is particularly unfortunate as it had the potential to save correctional authorities some of the spectacular medical costs incurred for terminally ill prisoners.

H. 1486, “An Act Relative to the Appropriate Use of Solitary Confinement,” would have required that disciplinary terms in solitary exceeding fifteen days be imposed only after a hearing at which the prisoner would receive a notice of reasons for extended confinement along with an explanation of what s/he must do to be released from solitary, and a conditional release date. The bill would also have required close mental health monitoring for people held in solitary. The bill would have prohibited long term disciplinary solitary confinement in any unit where the prisoner is locked in his or her cell for 23 hours per day. Massachusetts prisoners presently can be sentenced to disciplinary isolation in the DDU for up to ten years. Only two other states, Arkansas and New York, permit such long periods of solitary as a form of discipline. Administrative solitary confinement would be authorized where a prisoner poses a substantial threat to the safety of others, of damaging property, or to the operation of a state prison.

Segregated units would also have been required to provide light, ventilation, proper sanitary facilities and clothing, along with regular meals. In addition, each such unit would provide for at least one hour per day of out of cell time and rights of visitation and communication. Prisoners in solitary would be given periodic medical exams and psychiatric examinations under the supervision of the department of mental health.

Although the compassionate release and solitary confinement proposals were not enacted, their progress through the legislative process this year has encouraged their supporters. It is likely that both proposals will be reintroduced in the next legislative session.

Lifetime Community Parole Invalidated

In June, the Supreme Judicial Court issued a decision in *Commonwealth v. Cole*, 468 Mass. 294 (2014) holding that the lifetime community parole sentences imposed under M. G. L. c.127, § 133D(c) are unconstitutional. Specifically, the Court found that the statute violated the separation of powers doctrine in Article 30 of the Massachusetts Declaration of Rights by authorizing the Parole Board to impose new mandatory sentences of imprisonment. Imposing sentences is the exclusive power of the judicial branch; the Parole Board is an agency of the executive branch.

As a result of *Cole*, all sentences to lifetime community parole are invalid. Each individual needs to return to their sentencing court with their criminal attorney to have their lifetime community parole sentence vacated.

Unfortunately, the Court permits the possibility of resentencing by the judge for individuals who have not completed the period of incarceration or probation that the judge imposed originally, so long as doing so would not violate the principle of double jeopardy.

Based on information from the Committee for Public Counsel Services, it appears that the following should have already occurred: (1) parole officers removed GPS bracelets from all lifetime community parolees on the street; (2) the Parole Board released every individual held on a parole warrant pending a lifetime community parole violation hearing; and (3) people serving a sentence imposed by the Parole Board for violations of lifetime community parole have been habed into their sentencing court and, with

the assistance of counsel, filed a motion pursuant to Mass. R. Crim. P. 30(a).

If you have been sentenced to lifetime community parole, you should consult with your criminal attorney about having your lifetime community parole sentence vacated and possibly being resentenced. You can contact the main office of the Committee for Public Counsel Services by calling (617) 482-6212 or, for state prisoners, by dialing *9009#.

Weymouth Settlement

Weymouth v. Cousins, et al was brought on behalf of a prisoner at the Essex County Correctional Facility (ECCF) who was assaulted in his cell by officers resulting in multiple injuries including a broken nose, two chipped teeth, and a laceration above his right eye that required three sutures. In addition, the defendants retaliated against Mr. Weymouth for following the grievance process. The case was brought against individual officers and against supervisory officials at the Essex County Sheriff's Department for, essentially, condoning excessive force and retaliation against prisoners by failing to adequately train, supervise, investigate, and discipline officers and by being deliberately indifferent to the dangerous circumstances created by policies and customs of ECCF.

On March 19, 2014, the parties settled the case for a sum of money damages and an agreement mandating significant changes to policies, practices, and training concerning uses of force, the grievance procedure, and investigations in the Correctional Facility. The agreed upon changes include:

Use of Force Policy

- Addition of a philosophy statement making clear that de-escalation techniques should be used whenever feasible and that force shall only be used as a last resort.
- Addition of a requirement that the Shift Supervisor determine whether debriefing is needed following a use of force and complete the "Use of Force Debriefing Form" within five days of the use of force, hold any necessary debriefing within ten days of the use of force, and provide a summary of any debriefing to the Superintendent within two days the debriefing.
- Addition of language placing responsibility on employees who witness excessive use of force to report it to a supervisor.
- Addition of language requiring staff to record in incident reports a description of how any injuries occurred during a use of force, if known.

Grievance Policy and Practice

- Addition of language prohibiting staff retaliation or harassment of any kind against prisoners for exercising their rights, filing a grievance, or otherwise lodging a complaint.
- Removal of the requirement that prisoners exhaust the informal grievance process before they are able to gain access to the formal grievance process.
- Insertion of language that grievance forms must be made readily available to prisoners and may be filed, not only by giving them to a staff member (as was required previously), but also by placing them in a mailbox or drop box.
- Immediate placement of receptacles in

each ECCF housing unit to hold grievance forms and grievance appeal forms that will allow ECCF prisoners to readily obtain the forms without asking staff and receptacles for prisoners to file their completed forms.

Staff Training

- Incorporation of DOC training in de-escalation techniques into the ECSD Training Academy, into annual staff use of force and defensive tactics training, and into written staff training bulletins.

Investigations

- Addition of a responsibility of ECSD Investigators conducting staff interviews into incidents of staff misconduct and assaults to ask each staff member to submit to audio recording and to record the staff member's response to the request in writing.

PLS is monitoring Essex County Sheriff's Department compliance with its terms. Please alert PLS attorney Tatum Pritchard if you are in ECCF and experience noncompliance, such as inability to access grievance forms.

PLS Seeks Information on DOC's Treatment of Deaf and Hard of Hearing Prisoners

PLS is seeking information about the experience of deaf and hard of hearing state prisoners in the DOC. For example, PLS would like to know more about any problems they have with: access to interpreters for medical appointments and

administrative hearings, access to educational and rehabilitative programs, access to religious services, awareness of safety alarms and announcements, and their ability communicating with their loved ones in the community. If you have any information that you would like to share with PLS, please write or call PLS and ask for Tatum Pritchard or Lizz Matos.

Refunds of Essex County Fees Being Calculated

In February, Prisoners' Legal Services, together with attorneys David Kelston and Jeffrey Thorn acting on behalf of the National Lawyers' Guild, settled Bentley v. Sheriff, Essex County. The case is a class action challenging the Essex County Sheriff's unauthorized fees for medical care, including a \$30 "medical processing fee" and other charges imposed on prisoners at the Essex County Correctional Facility (ECCF) in Middleton. Agreement on refunds of money already collected was reached and approved by the Superior Court in February, 2014. Refunds are being processed for all prisoners (who submitted claims) subjected to the medical fees at ECCF from October 7, 2008, to the date the Sheriff stopped collecting the fees on December 15, 2011. **The deadline for submitting refund claims in this case has passed.**

PLS' phone numbers are: *9004# for DOC prisoners and (617) 482-4124 (collect) for county prisoners. The regular business number is (617) 482-2773.

Donate to PLS! The simplest way to donate to PLS is by charging your donation to your credit card or asking a family member to do so. There is a link to a form for doing this on the home page of PLS' website at www.plsma.org. The donation page is secure, and your donation is tax deductible. Or send a donation to PLS, 10 Winthrop Square, 3d floor, Boston, MA 02110

Five-Year Old Killing at Bridgewater Continues to Reverberate

On May 4, 2009, Joshua Messier stopped breathing and died soon after being restrained at the Intensive Treatment Unit ("ITU") at Bridgewater State Hospital ("Bridgewater"). Prior to the restraint, Mr. Messier had become involved in an altercation with corrections officers in the B-1 building at Bridgewater following a visit with his mother.

On February 3, 2010, Medical Examiner Dr. Mindy Hull signed a death certificate determining that the manner of Mr. Messier's death was "homicide." In describing how the injury occurred, Dr. Hull wrote "restrained by correction officers during agitated state." The death certificate also concluded that Mr. Messier's cause of death was "cardiopulmonary arrest during physical restraint, with blunt impact of head and compression of chest, while in agitated state." Although the District Attorney claims that the Medical Examiner later changed her mind about the cause of Mr. Messier's death, the Medical Examiner has not said that she changed her opinion that Messier's death was a homicide, and the death certificate has never been amended or otherwise revised.

On February 3, 2010, Dr. Hull also issued an autopsy report, discussed in more detail below, revealing multiple blunt force traumas to Mr. Messier's head, torso, right arm, left arm, right leg and left leg. The autopsy repeated the findings of the death certificate that the manner of death was a homicide, repeating the language in the previous paragraph. That autopsy report has never been amended or otherwise revised. There have been many investigations. There was an investigation by the district attorney's office. There was an internal investigation by the DOC. There was an investigation by the Disabled Persons Protection Commission ("DPPC"). There was an investigation by the Commissioner of Public Safety. There was an investigation of sorts by the Attorney General, who took it upon herself to represent the seven officers who were present at Mr. Messier's death in civil litigation filed against them by the Messier family. (After Andrea Cabral, the Executive Office of Public Safety Secretary, issued *her* report on Mr. Messier's death, the Attorney General withdrew from representing the DOC officers.) There was an investigation by the Boston Globe. There were investigations of the investigations and why they (specifically the DOC's internal investigations) were delayed for years. On October 7, 2011, the Disabled Persons Protection Commission issued an Appeal Report rejecting the DOC's contention that the actions of two of the seven officers were improperly cited in its initial report for abusing Mr. Messier in violation of Mass. Gen. Laws c. 19C. The DPPC determined, based on the preponderance of the evidence, that these two correctional officers were the cause of Mr. Messier's death and that their behavior constituted "abuse" as that term is defined in Chapter 19C.

To this day, none of the seven correctional officers who were present at Mr. Messier's death have been prosecuted.

This year the guardians of some other men who were subjected to extreme restraint at Bridgewater (they, thankfully, are still alive) sued DOC to moderate the extraordinary reliance on restraint that had accompanied their "treatment" there. On July 2 the Norfolk Superior Court issued a preliminary injunction that requires the Superintendent at Bridgewater and the Massachusetts Partnership for Correctional Healthcare and their agents and employees to comply with the Massachusetts Restraint and Seclusion Statute, G.L. c. 123, sec. 21. The order enjoins defendants from restraining or secluding the plaintiff absent emergency circumstances, and from failing to comply with the restraint authorization procedures in the statute, from restraining the plaintiff for more than six hours absent renewal of the restraint order by a physician upon personal examination, from failing to comply with the documentation requirements for restraint set forth in the statute, and from keeping the plaintiff in restraint or seclusion after the emergency justifying the use of restraint or seclusion has passed. The plaintiffs in this case, called *Minich, et al. v. Spencer, et al.* (it was filed as a class action but no class has been certified) are all non-sentenced commitments to BSH. Similar litigation for men in BSH who are serving sentences would clearly be more difficult.

Meanwhile, the fallout from the killing of Mr. Messier continues, at least in the sense that the killing has brought a sense of urgency to the quest for a more humane and effective response to mentally ill persons who have been convicted of crimes as well as those accused but not convicted. The latest thinking about how to address the need for forensic mental health care developed

from a meeting convened on May 8, 2014 at BSH by Governor Patrick, which included officials from the DOC, from DMH, and other stakeholders from the state's mental health and criminal justice systems. That group produced a set of short, medium, and long term policy proposals ranging from mandated reductions in the number of restraint hours at BSH, which are claimed to be down by 90% since January, reduction in seclusion, reportedly down by 50%; physical improvements to BSH to provide improved spaces for patient de-escalation and rehabilitation; staff training in collaboration with DMH; use of treatment plans for persons committed to BSH that include plans to transfer non-sentenced patients to DMH facilities as they improve; expansion of court clinical services so that DMH or DMH vendor employees can evaluate people locally without sending them to BSH; and moving people currently in DMH institutional placements into community placements so that the space is made available for those who need institutional treatment but not necessarily at BSH. Last but not means least, it is proposed that half a million dollars be committed from the General Government Bond Bill to assess the feasibility of retrofitting an existing state facility or building a new facility which would be secure but under the management of DMH rather than DOC. In other words, a hospital, not a prison.

In June, The National Alliance on Mental Illness / Massachusetts, the Mental Health Legal Advisors Committee, PLS, and the Center for Public Representation, together wrote to Attorney General Martha Coakley in support of the Messier family's call for her to appoint an independent special prosecutor to investigate the killing.

Some justice may yet be done. The lawsuit filed by Joshua Messier's parents against Bridgewater officials recently settled for \$3 million. And now,

five years after the event, Attorney General Coakley has appointed a special prosecutor to investigate the killing.

Detox Commitments to MCI-Framingham Challenged

Doe v. Patrick is a challenge to the discriminatory commitment of women to MCI-Framingham for drug and alcohol detox under G.L. c. 123, sec. 35. The plaintiffs are women who have not been charged with or convicted of any crime. They are at MCI-Framingham, a prison, supposedly for "Inpatient care" as individuals at risk of "serious harm" resulting from addiction, which is a disability. The case was filed in federal court on June 30, 2014 by Wilmer Cutler Pickering Hale and Dorr, LLP, the American Civil Liberties Union of Massachusetts, the Center for Public Representation, and Prisoners' Legal Services.

"Section 35s" are treated worse than sentenced prisoners at MCI-Framingham. Body cavity searches, shakedown, counts, etc. are imposed in the same manner as for sentenced and awaiting trial women. But the "civil commits" get outside no more than 15 hours per week. They cannot visit the library, pray at the chapel, or participate in organized recreation. Strangely, these women are *barred from participating in the prison's substance abuse treatment programs!* Massachusetts is the only state in the country that directly imprisons people for drug or alcohol addiction. The lawsuit charges that this practice violates substantive due process as guaranteed by the Constitutions of the United States and the Commonwealth, their rights under the Americans with Disabilities Act, 42 U.S.C. sec. 12101 *et seq.*

("ADA"), and Massachusetts antidiscrimination law. The parties have agreed to class certification. The class will consist of all women placed at MCI-Framingham solely under Section 35. Relief is requested in the form of preliminary and permanent injunctions requiring the defendants to cease placing women committed solely under Section 35 in a DOC facility, and a judgment declaring that the act of placing women committed solely under Section 35 to DOC facilities violate the 14th Amendment to the United States Constitution, the Americans with Disabilities Act, the Constitution of the Commonwealth, and Massachusetts law.

For more than twenty years, multiple governmental advisory panels and reports have recommended terminating the practice of incarcerating individuals committed under Section 35. Governor Patrick decried the practice in a speech this past February. Although they may mean well, the legislature and the executive have not effectively addressed the problem. The judiciary will now have its turn.

Male Videotaping of Female Strip Searches Rejected

On August 26, the U.S. District Court for MA granted summary judgment to women at the Western Regional Women's Correctional Center (which is run by the Hampden County Sheriff) who were subject to being strip-searched upon transfer to segregation while male guards videotaped them. The court held that the part of the strip search policy that permitted men to be present to do the taping violated the Fourth

Amendment. Baggett, et al. v. Ashe, et al.,
(Ponsor, U.S.D.J.)

Not only did the court rule that the policy violated the U.S. Constitution, but it held that the law so clearly prohibits the presence of male guards during strip searches of female prisoners (except in emergencies) that the defendants were not entitled to qualified immunity. It is important to note that the decision does not prohibit videotaping strip searches, but the routine use of opposite-sex staff to do the taping.

"Underpinning these authorities is the understandable implication that even the nearby presence of an individual of the opposite sex during a strip search can be, in itself, a deeply humiliating experience. No inmate placed in such a vulnerable and exposed position should have to rely, or comfortably would rely, on the scrupulousness of an officer of the opposite sex turning his or her head as a safeguard to the inmate's privacy and basic dignity. Any other conclusion would defy human nature."

The court goes on to say, "[i]t is possible some inmates might not care, but for the vast majority of inmates the scene would reasonably be experienced as painfully degrading. To suggest otherwise is to ignore the inborn sense of privacy most human beings harbor from childhood through the end of life."

Judge Ponsor's decision is very clearly written and the language will likely prove helpful to female plaintiffs subjected to the indignity and psychological assault of men watching while they are forced to expose their private parts.

The plaintiffs in Baggett are represented by the Law Office of Howard Friedman.

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