

RESOLUTION 14-04-2017 (REVISED)

DIGEST

Incarceration: Gender Transition -Related Surgery Permitted

Amends 15 California Code of Regulations section 3350.1 to remove castration, vaginoplasty, and cosmetic breast reduction or enlargement from the list of treatments that may not be performed during incarceration.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

Similar to Resolutions 02-23-2008 and 11-03-2011, which were approved in principle, and Resolutions 06-11-2009 and 01-08-2010, which were approved as amended.

Reasons:

This resolution amends 15 California Code of Regulations section 3350.1 to remove castration, vaginoplasty, and cosmetic breast reduction or enlargement from the list of treatments that may not be performed during incarceration.

The current procedure for determining whether a surgery is appropriate is by referral to committee. Members of the committee have no knowledge about gender dysphoria or transgender people, and include custody officer. No other cases allow custody officers to weigh in on whether a medical procedure is appropriate. Only 4 surgeries have been approved under the current system

Transgender people are overrepresented in the prison system. This resolution is not overbroad, but takes down a barrier so that incarcerated transgender people can access medical care.

The Resolutions Committee initially recommended disapproval of this resolution. The full Conference voted to approve.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Regulations section 3350.1 to read as follows:

- 1 § 3350.1
- 2 (a) Treatment refers to attempted curative treatment and does not preclude palliative
- 3 therapies to alleviate serious debilitating conditions such as pain management and nutritional
- 4 support. Treatment shall not be provided for the following conditions:
- 5 (1) Conditions that improve on their own without treatment. Examples include, but are
- 6 not limited to:
- 7 (A) Common cold.
- 8 (B) Mononucleosis.
- 9 (C) Viral hepatitis A.

- 10 (D) Viral pharyngitis.
 11 (E) Mild sprains.
 12 (F) Benign oral lesions.
 13 (G) Traumatic oral ulcers.
 14 (H) Recurrent aphthous ulcer.
- 15 (2) Conditions that are not readily amenable to treatment, including, but not limited to,
 16 those which may be made worse by treatment with conventional medication or surgery, and
 17 those that are so advanced in the disease process that the outcome would not change with
 18 existing conventional or heroic treatment regimens. Examples include, but are not limited to:
- 19 (A) Multiple organ transplants.
 20 (B) Temporomandibular joint dysfunction.
 21 (C) Grossly metastatic cancer.
 22 (D) Shrinkage and atrophy of the bony ridges of the jaws.
 23 (E) Benign root fragments whose removal would cause greater damage or trauma than if
 24 retained for observation.
- 25 (3) Conditions that are cosmetic. Examples include, but are not limited to:
- 26 (A) Removal of tattoos.
 27 (B) Removal of nontoxic goiter.
 28 ~~(C) Breast reduction or enlargement.~~
 29 ~~(D) Penile implants.~~
 30 ~~(E) Removal of existing body piercing metal or plastic rings or similar devices within~~
 31 ~~the oral cavity, except for security reasons.~~
 32 ~~(F) Restoration or replacement of teeth for esthetic reasons.~~
 33 ~~(G) Restoration of any natural or artificial teeth with unauthorized biomaterials.~~
- 34 (b) Surgery not medically necessary shall not be provided. Examples include, but are not
 35 limited to:
- 36 ~~(1) Castration.~~
 37 ~~(2) Vaginoplasty (except for Cystocele or Rectocele).~~
 38 ~~(3) (1) Vasectomy.~~
 39 ~~(4) (2) Tubal ligation.~~
 40 ~~(5) (3) Extractions of asymptomatic teeth or root fragments unless required for a dental~~
 41 ~~prosthesis, or for the general health of the patient's mouth.~~
 42 ~~(6) (4) Removal of a benign bony enlargement (torus) unless required for a dental~~
 43 ~~prosthesis.~~
 44 ~~(7) (5) Surgical extraction of asymptomatic unerupted teeth.~~
- 45 (c) Services that have no established outcome on morbidity or improved mortality for
 46 acute health conditions shall not be provided. Examples include, but are not limited to:
- 47 (1) Acupuncture.
 48 (2) Orthoptics.
 49 (3) Pleoptics.
 50 (4) Root canals on posterior teeth (bicuspid and molars).
 51 (5) Dental Implants.
 52 (6) Fixed prosthodontics (dental bridges).
 53 (7) Laboratory processed crowns.
 54 (8) Orthodontics.

55 (d) Treatment for those conditions that are excluded within these regulations may be
56 provided in cases where all of the following criteria are met:

57 (1) The inmate’s attending physician or dentist prescribes the treatment as clinically
58 necessary.

59 (2) The service is approved by the Dental Authorization Review committee and the
60 Dental Program Health Care Review Committee for dental treatment, or the Institutional
61 Utilization Management committee and the Headquarters Utilization Management committee for
62 medical treatment. The decision of the review committee, as applicable, to approve an otherwise
63 excluded service shall be based on:

64 (A) Available health and dental care outcome data supporting the effectiveness of the
65 services as medical or dental treatment.

66 (B) Other factors, such as:

- 67 1. Coexisting medical or dental problems.
- 68 2. Acuity.
- 69 3. Length of the inmate’s sentence.
- 70 4. Availability of the service.
- 71 5. Cost.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: The California Department of Corrections and Rehabilitation (CDCR) explicitly excludes gender transition related surgeries under Title 15 section 3350.1. In response to constitutional challenges to this section, CDCR has created a multi-tiered and multi-person process to determine if sex reassignment surgery (SRS) is medically necessary. The process removes the medical determination as to whether SRS is medically necessary from the treating provider and places it in the hands of administrative personnel who have had no contact with the patient and have little-to-no experience or training treating individuals with gender dysphoria. The administrative process also considers the patient’s correctional and criminal history, which are not considered in any other determination related to access to medical treatment.

Blanket bars and unequal access to medically necessary treatment based on gender are recognized as unacceptable under California law, but are acceptable when it comes to the treatment provided prisoners. Decades of careful and methodologically sound scientific research has demonstrated that SRS is a safe and effective treatment for severe gender dysphoria and, for many people, it is the only effective treatment.

In, *Norsworthy v. Beard*, Ms. Norsworthy alleged Defendants discriminated against her on the basis of her transgender status, specifically citing 15 C.C.R. § 3350.1 as facially discriminatory because it explicitly distinguishes between treatment for transsexual women that is designated as presumptively “not medically necessary” (i.e. castration and vaginoplasty for treatment of gender dysphoria) and the same treatments for non-transgender women (i.e. vaginoplasty for treatment of cystocele or rectocele), which are explicitly exempt from this bar (2014 WL 6842935

(N.D.Cal)). The Court agreed with Ms. Norsworthy holding she had adequately stated a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment. In April 2015, she was granted her motion for preliminary injunction ordering the defendants to provide her with access to adequate medical care, including SRS. She demonstrated the surgery was medically necessary and failure to treat her could result in further injury.

Nearly 2 years since *Norsworthy*, 64 referrals have been made by CDCR employed treating providers who found SRS to be medically necessary for their patients. Of those, CDCR Headquarters has approved 4, denied 51, and 13 remain pending. Only one individual has received SRS due to a settlement agreement, not this procedure.

The Solution: Would remove all SRS exclusions from Title 15 and bring it into compliance with case law indicating such exclusions are unconstitutional on Fourteenth and Eighth Amendment grounds. Removing the Title 15 requirements that excluded surgeries must be approved through an administrative process would make the administrative procedure (a supplement to the GD Care Guide) unnecessary and would enable access to SRS for individuals' whose treating provider has determined it to be medically necessary. Furthermore, the removal of the procedures would make the GD Care Guide consistent with the Inmate Medical Services Policies & Procedures, which states the GD Care Guide, "is not a substitute for the clinical judgment of the primary care provider or mental health professional".

IMPACT STATEMENT

This resolution should invalidate the California Correctional Health Care Services Supplement to the Gender Care Guide, which outlines the administrative process for obtaining gender confirming surgeries.

The supplement to the GD Care Guide currently creates a procedure that explicitly substitutes the clinical judgment of the treating primary care provider or mental health professional with an administrative committee. Removing the express exclusions from Title 15 would make the supplement to the GD Care Guide, and the procedure it creates, unnecessary, thereby making all relevant rules, policies and procedures in line with the Inmate Medical Services Policies & Procedures that indicate treatment for gender dysphoria should be based on the clinical judgement of the provider.

CURRENT OR PRIOR RELATED LEGISLATION

None known

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