



Rights of Transgender Prisoners

Do transgender prisoners have a right to be housed in a facility consistent with their gender identity?

Transgender people who have not had genital surgery are generally classified according to their birth sex for purposes of prison housing, regardless of how long they may have lived as a member of the other gender, and regardless of how much other medical treatment they may have undergone¹ — a situation which puts male-to-female transsexual women at great risk of sexual violence. Transsexual people who have had genital surgery are generally classified and housed according to their reassigned sex. One mechanism that is sometimes used to protect transsexual women who are at risk of violence due to being housed in male prisons is to separate them from other prisoners.

This is referred to as “administrative segregation.” On the positive side, placing a transgender or transsexual woman in administrative segregation may provide her with greater protection than being housed in the general population. On the negative side, however, administrative segregation also results in exclusion from recreation, educational and occupational opportunities, and associational rights.² Such exclusion may violate the constitutional rights of prisoners if the conditions of segregation are excessively harsh.³ Furthermore, administrative segregation does

¹ See *Farmer v. Brennan*, 511 U.S. 825, 829 (1994); *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993). Although transgender people who have not undergone genital surgery are typically classified according to birth sex, there may be exceptions. See *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991) (rejecting privacy claim of female detainee housed in jail cell with pre-operative MTF transsexual based on jail physician’s recommendation that transsexual was psychologically female and placement with female detainees would be in her best physical and psychological interest).

² See Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 530 (2000).

³ See *R.G. v. Koller*, 2006 WL 291637, at *23-24 (D. Haw. Feb. 7, 2006) (placing LGBT juvenile offenders in isolation to protect them from abuse by other wards violated their due process rights); *DiMarco v. Wyoming Dep’t of Corrections*, 300 F. Supp. 2d 1183 (D. Wyo. 2004) (segregating intersex prisoner from the general population of a male prison for 438 days in severe conditions violated her due process rights); *Tates v. Blanas*, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. Mar. 6, 2003) (holding that transgender inmate’s constitutional rights were violated by jail’s blanket policy of automatically placing all transgender detainees in “total separation” thus exposing them to harsh conditions normally reserved for most dangerous inmates).

not protect transgender prisoners from abuse at the hands of guards and may even lead to increased exposure to violence.⁴

What protections are available to transgender prisoners who are victims of violence in prison?

Prison officials are required to protect prisoners from violence at the hands of other prisoners. Prison officials who display a “deliberate indifference” to this duty violate the Eighth Amendment prohibition of cruel and unusual punishment. The U.S. Supreme Court adopted a narrow definition of “deliberate indifference” in the case *Farmer v. Brennan*, which involved a male-to-female transsexual who was badly beaten and raped by her male cellmate in a maximum security prison.⁵ The Court declined to adopt an objective rule that would hold a prison official liable for violence inflicted on a prisoner when the risks are obvious enough that the official “should have known” the prisoner was in danger.⁶ Instead, the Court ruled that, to violate the Eighth Amendment, an official must have actual subjective knowledge that the prisoner is at risk of violence and deliberately fail to act on that knowledge.⁷

Do transsexual prisoners have a right to obtain hormone therapy while in prison?

At least one state, Wisconsin, has a law expressly prohibiting the use of government funds to provide hormone therapy or sex reassignment surgery for prisoners.⁸ In states that do not

⁴ See, e.g., Emily Alpert, *Gender Outlaws: Transgender Prisoners Face Discrimination, Harassment, and Abuse Above and Beyond That of the Traditional Male and Female Prison Population*, IN THE FRAY MAGAZINE, Nov. 21, 2005, <http://www.inthefray.com/html/article.php?sid=1381>.

⁵ 511 U.S. 825 (1994).

⁶ *Id.* at 852.

⁷ *Id.* at 837. See also *Lucrecia v. Samples*, 1995 WL 630016 (N.D. Cal. Oct. 16, 1995) (finding no Eighth Amendment violation where prison officials transferred male-to-female transsexual prisoner, who had developed breasts and had her testicles surgically removed, from female prison to male prison, where she was subjected to constant verbal, physical, and sexual harassment and assault by other prisoners and by prison guards). But see *R.G. v. Koller*, 2006 WL 291637, at *26 (D. Haw. Feb. 7, 2006) (finding deliberate indifference where juvenile facility lacked adequate policies, training or supervision necessary to ensure safety of LGBT wards); *Greene v. Bowles*, 361 F.3d 290 (6th Cir. 2004) (finding that a transsexual prisoner who was attacked by another inmate had raised a triable issue of fact as to deliberate indifference “because of her status as a vulnerable inmate”); *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999) (holding that qualified immunity did not protect prison official from claim that the disclosure of the inmate’s transsexual status constituted deliberate indifference to a substantial risk of serious harm, in violation of the Eighth Amendment).

⁸ Wis. Stat. § 302.386(5m) (2005). A challenge to the constitutionality of this statute has been brought by a group of transgender inmates whose hormone therapy was abruptly reduced when the law took effect. The lawsuit has been successful in its initial stages. See *Sundstrom v. Frank*, No. 06-C-112 (E.D. Wis. Jan. 27, 2006) (granting preliminary injunction and enjoining prison

explicitly prohibit such treatment, some transsexual prisoners have been able to receive hormone treatment in prison.⁹ Many prisons only provide hormone treatment to individuals who had been receiving such treatment before incarceration.¹⁰ However, some prisons consider providing hormones to prisoners who had not received hormones before incarceration on a case-by-case basis.¹¹ The policy of the U.S. Bureau of Prisons is to provide hormones at the level that was maintained prior to incarceration. Specifically, the policy provides:

Inmates who have undergone treatment for gender identity disorder will be maintained only at the level of change which existed when they were incarcerated in the Bureau. Such inmates will receive thorough medical and mental health evaluations, including the review of all available outside records. The Medical Director will be consulted prior to continuing or implementing such treatment. The Medical Director must approve, in writing,¹² hormone use for the maintenance of secondary sexual characteristics in writing.¹³

The above language suggests that exceptions may be possible in individual cases to allow the initiation of hormones or other treatment where the prisoner had not received such treatment prior to incarceration, so long as the treatment is recommended as medically necessary by prison medical personnel and then approved by the Medical Director.¹³

from withdrawing hormone therapy for transgender prisoners based on likelihood that they would be able to establish an Eighth Amendment violation by showing that irreparable injuries to their long-term health would arise from withdrawal of hormone therapy).

⁹ See Dennis Duggan, *Is Treatment for Sex Change a Prison Perk?*, NEWSDAY, Dec. 13, 1994, at A14 (noting that, at the time of the article, there were seventy prisoners on hormone treatments in New York State prisons and seventeen in the New York City prisons).

¹⁰ Cf. *Philips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 800 (W.D. Mich. 1990) (ordering prison officials to reinstate hormone treatment for transsexual inmate who had received such treatment for years before prison, distinguishing failure “to provide an inmate with care that would improve his or her medical state, such as refusing to provide sex reassignment surgery” from “[t]aking measures which actually reverse the effects of years of healing medical treatment”), *aff'd*, 932 F.2d 969 (6th Cir. 1991).

¹¹ Cf. *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003) (“Prisons must provide inmates with serious medical needs some treatment based on sound medical judgment. There is no exception to this rule for serious medical needs that are first diagnosed in prison. Prison officials are thus obliged to determine whether [a transsexual prisoner] has a serious medical need and, if so, to provide him with at least some treatment.”), *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 193 (D. Mass. 2002) (holding that while prisons may maintain a “presumptive freeze-frame policy,” determinations of whether specific forms of treatment are called for “must be based on an individualized medical evaluation [of prisoners] rather than as a result of a blanket rule”) (citations omitted).

¹² U.S. Dept. of Justice, Federal Bureau of Prisons Program Statement 6031.01, *Patient Care* (Jan. 15, 2005), available at http://www.bop.gov/policy/progstat/6031_001.pdf.

¹³ Cf. *Farmer v. Moritsugu*, 163 F.3d 610, 615-16 (D.C. Cir. 1998) (granting qualified immunity to the Medical Director of the Bureau of Prisons, holding that he was not obligated to provide hormone treatment to a transsexual inmate whose request was “completely unsupported by

Even if the prison does provide hormones, however, there is no guarantee that they will be provided at the appropriate levels and with the necessary physical and psychological support services.¹⁴ In addition, it is often difficult for transsexual prisoners to document a prior prescription for hormones, either because of the practical difficulties and limitations imposed by incarceration, or because many transsexual prisoners are indigent and do not have private physicians willing to advocate for them. Moreover, even when transsexual prisoners are able to provide sufficient documentation, prison officials may disregard or flout the policy. A prisoner's access to hormone treatment may also be impeded if a prison psychologist does not believe that the prisoner is transgender.¹⁵

The issue of whether a transsexual person is entitled to hormone therapy while in prison has been litigated extensively, based on the established constitutional principle that it is a violation of the Eighth Amendment prohibition on cruel and unusual punishment for prison officials to exhibit "deliberate indifference" to a prisoner's "serious medical needs."¹⁶ Until the last several years, in

treatment records or recommendations from local medical personnel establishing a need for treatment.").

¹⁴ See Rosenblum, *supra* note 2, at 545.

¹⁵ See *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997) (affirming dismissal of claim that denying hormone therapy constituted cruel and unusual punishment because prison psychologist believed that plaintiff's "sexual identity [was] polymorphous and his sexual aims ambiguous" but did not believe that plaintiff "suffer[ed] from gender dysphoria").

¹⁶ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

almost every case, courts have ruled in favor of prison officials.¹⁷ More recently, however, prisoners have had more success.¹⁸

¹⁷ See *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997) (recognizing that sex reassignment is the only effective treatment for transsexual prisoners, but holding that it is permissible to withhold treatment from transsexual prisoners in light of fact that neither public nor private health insurance programs will pay for sex reassignment); *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996) (holding that prisoner diagnosed with gender identity disorder had no right to cross-dress or to estrogen therapy); *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995) (rejecting equal protection claim brought by pre-operative male-to-female transsexual based on evidence that Colorado provided hormone therapy to non-transsexual prisoners with low hormone levels and to post-operative male-to-female transsexuals); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988) (holding that male-to-female transsexual prisoner is not entitled to cross-dress or wear cosmetics and does not have a constitutional right to hormone therapy); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987) (holding that transsexual prisoner is constitutionally entitled to some type of medical treatment for diagnosed condition of transsexualism, but she “does not have a right to any particular type of treatment, such as estrogen therapy”), *cert. denied*, 484 U.S. 935 (1987); *Jones v. Flannigan*, 1991 U.S. App. LEXIS 29605 (7th Cir. Nov. 12, 1991) (same); *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986) (same); *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986) (holding that transsexual prisoner had no right to hormone therapy). See also *Cuoco v. Mortisugo*, 222 F.3d 99 (2d Cir. 2000) (holding officials entitled to immunity against claim by transsexual pre-trial detainee who was denied hormones).

¹⁸ See *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003) (holding that a transsexual prisoner whose hormone treatment was terminated had stated a valid claim that the lack of adequate treatment for her compulsion to mutilate herself after her hormone treatment was cut off could constitute deliberate indifference); *Barrett v. Coplan*, 292 F. Supp. 2d 281 (D.N.H. 2003) (holding that a transsexual prisoner had stated a valid Eighth Amendment claim when prison officials refused any treatment for her gender identity disorder); *Brooks v. Berg*, 270 F. Supp. 2d 302 (N.D.N.Y. 2003) (denying qualified immunity to defendant prison officials who refused a transsexual prisoner all medical treatment for her gender identity disorder based on a blanket policy), *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003); *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002) (finding that plaintiff’s transsexualism constituted a serious medical need and directing prison officials to provide adequate treatment as recommended by a physician experienced with treating gender identity disorders and without excluding the possibility that necessary treatment might include initiating hormones or providing sex reassignment surgery); *Allard v. Gomez*, 2001 WL 638413 at *1 (9th Cir. June 8, 2001) (finding a triable question of fact as to whether a transsexual prisoner was denied hormone therapy based on “an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to [plaintiff’s] medical needs”); *Wolfe v. Horn*, 130 F. Supp. 2d 648 (D. Pa. 2001) (noting that abrupt termination of prescribed hormonal treatment by a prison official with no understanding of Wolfe’s condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute deliberate indifference); *South v. Gomez*, 211 F.2d 1275 (9th Cir. 2000) (finding Eighth Amendment violation where a prisoner’s course of hormone treatment was abruptly cut off after being transferred to a new prison); *Phillips v. Michigan Dep’t of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990) (granting preliminary injunction directing prison officials to provide estrogen therapy to transsexual woman who had been taking estrogen for several years prior to her transfer to a new prison), *aff’d*, 932 F.2d 969 (6th Cir. 1991). Cf. *Praylor v. Texas Dep’t of Criminal Justice*, 430 F.3d 1208 (5th Cir. 2005)

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(assuming without deciding that transsexualism is a serious medical need, but finding insufficient evidence of deliberate indifference); *Kosilek v. Nelson*, 2000 WL 1346898, at *3 (D. Mass. Sept. 12, 2000) (same).

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