ACO Supplemental Core:

19.5 - Liability

DETENTION
TRAINING UNIT

1

Liability

Performance Objectives

- Identify the mandates around access to MHBI services
- Identify the liability for refusing access to MHBI services
- Identify potential liabilities resulting from a suicide

IMPORTANT TRAINING NOTE:

Key Discussion Point: If Classification is done appropriately, it will decrease potential liability

2

Identifying Mandates Around Access To MHBI Services

- Legal precedents that exist at the federal and state level which require certain minimal standards of care for offenders needing mental health services.
- These legal precedents serve as a general basis of what is essentially mandated in relation to access-to-services for offenders with mental health issues.
- Though not specific statutes, per se, and though not tailored to the state of California, these standards are set by federal rulings that may be enforced at multiple levels of government.

3

Identifying Liability For Refusing Access To MHBI

IMPORTANT NOTE:

Offenders have a RIGHT to access mental health services

4

Identifying Liability For Refusing Access To MHBI

- Staff CANNOT refuse services to persons in need of such services
- Unless it is staffs specific job function, they are not to make judgments as to whether an offender has bona fide mental health problems(*this function is reserved for those specifically identified within the agency as having such duties*)

5

Identifying Liability For Refusing Access To MHBI

What can occur if staff acts contrary?

LIABILITY for the Individual & Agency

6

DISCUSSION

Why do offenders not receive mental health services while in custodial confinement (even if they wish to do so)?

7

HANDOUT # 1

Things to know about liability related to offender access to mental health services

What does it mean in your everyday work?

What is the main theme/point being made?

8

Review Points

1. The refusal of mental health services may not necessarily occur due to the actual intent of staff to deny these services; sometimes this is accidental or seemingly inevitable when there is a shortage of these services.

2. Sufficient psychological personnel may not be available to assess offenders and diagnose them.

3. Standardized Assessment Instruments are those that are tested and found to be valid and reliable through officially accepted processes of evaluation. Standardized assessment instruments usually are only able to be used by appropriately licensed and trained mental health practitioners; security staff seldom have such education and/or experience. Many of the screening tools used by correctional staff in facilities are not actually standardized assessment instruments but are instead, screening tools that focus more on security than clinical issues.

4. Correctional budgets may restrict access to mental health services to only those with acute needs. The use of outside clinicians is often cost prohibitive due to transportation, security, and billing challenges.

9

Review Points

5. Lastly, one must remember that incarceration, itself, can and usually does exacerbate mental health diagnoses. The crowded living spaces, lack of privacy, and increased likelihood of victimization all serve to intensify mental health problems. Often this results in self-injurious behavior by offenders with mental health problems, including self-mutilating behaviors and suicide attempts.

These challenges make it difficult to provide services. What is important is that staff never make a point to actually say "no" to requests but, instead, provide the option pending the availability of resources.

IMPORTANT: Good documentation of requests and attempts to secure services for offenders will act as a protection against liability. Documentation as to why services could not be provided is also critical.

10

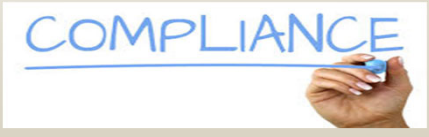
Review Points

- As long as staff take the request seriously and act in ***good faith*** to secure services, they will likely not be found liable for the lack of services for the offender.
- Good faith basically means that the person has the honest intent to fulfill one's duty as best as they are capable of doing so.

11

Review Points

- When providing assistance or when attempting to address issues related to mental health or suicidal behavior, staff must act in a manner that is prudent and appropriate. This does NOT mean that their actions must be perfect. However, this DOES mean that their actions should exhibit policy compliance.
- ***Policy compliance*** means that one follows the agency policy. This is important because following agency policy is the best defense against individual liability. In addition, staff must provide assistance or responses that are consistent with the reasonable person standard.



12

Review Points

- The reasonable person standard simply means that, in hindsight, if other average persons were in similar circumstances, they would find the actions of the employee to be reasonable in action to mitigate negative outcomes for the safety and welfare of the offender.
- In some cases, an "objective reasonableness" may be used within agencies, which considers three factors: 1) would an officer with same or similar training and experience, 2) facing similar circumstances and with similar knowledge, 3) act the same way or use similar judgment.

13

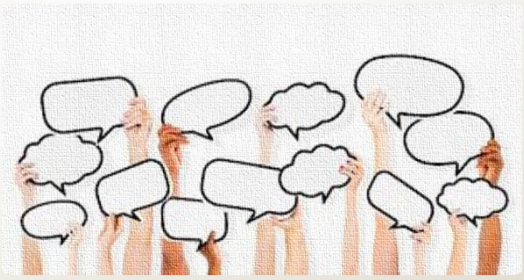
Review Points

- Good ***bedside manners*** means that one takes the time to explain, with consideration, the circumstances to the individual. Litigation, grievances, and dissatisfaction with services are much less often lodged against persons with good bedside manners than with those who have non-supportive and/or non-caring approaches. Thus, good bedside manners can reduce the likelihood of liability findings against staff.
- IMPORTANT NOTE: ***Qualified immunity*** protects public officials from being sued for damages unless they violated "clearly established" law of which a reasonable official in his position would have known.

14

Discussion

When considering mandates related to access to mental health services, these cases have been instrumental in defining responsibility and accountability of correctional staff and in determining the minimal standards of care that should be provided.

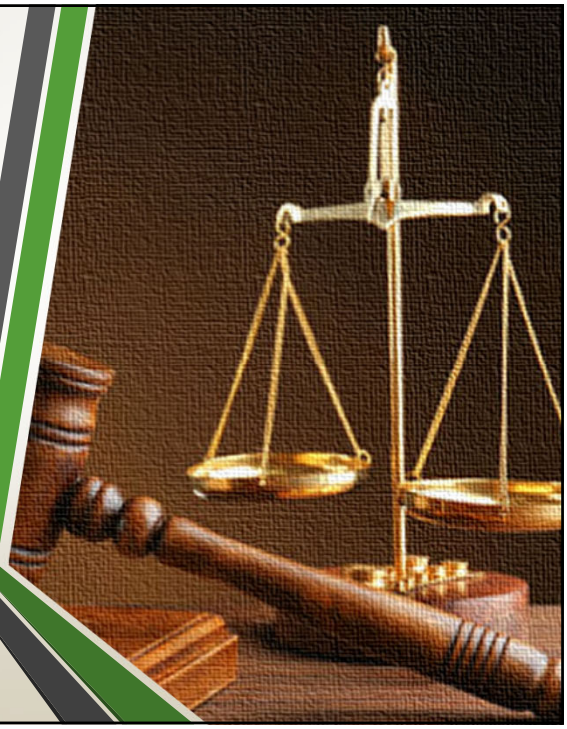


15

Significant Court Cases

Estelle v. Gamble (1976), it was found that deliberate indifference to an inmate's medical needs constitutes cruel and unusual punishment and is a violation of the Eighth Amendment.

Farmer v. Brennan, have equated deliberate indifference with having a culpable state of mind.



16

Significant Court Cases

Ruiz v. Estelle, the Court established the Four Standards of Mental Health Care, which are as follows:

*Correctional administrators must provide an adequate system to ensure mental health screening for inmates,

*Correctional facilities must provide access to mental health treatment while inmates are in segregation or special housing units,

*Correctional facilities must adequately monitor the appropriate use of psychotropic medication.

*A suicide prevention program must be implemented.

17

Handout #2

Mental Health Liability – Learning Activity #1

Group Work – Class Discussion

How does proper classification reduce liability?

18

ANSWERS/RESPONSES

- Increase level of security
- Reduces possible victimization of MHBI offenders
- More…

19

Potential Liability Resulting from Suicide (Handout #3)

Per *Estelle v. Gamble*, courts have recognized that where officials know or have reason to know that an offender is on the verge of suicide the psychological condition can constitute a serious medical need to which state officials must not be deliberately indifferent.

However, as mentioned earlier, ***Farmer v. Brennan*** has further refined the notion of deliberate indifference to essentially constitute a culpable state of mind. Under this standard, it must be specifically proven that correctional staff knew and yet chose to engage in inadequate treatment, being consciously and intentionally indifferent to the consequences.

This makes it difficult for offenders to prevail in litigation regarding facility suicide liability.

20

Potential Liability Resulting from Suicide

On the other hand, agencies that fail to train employees in proper suicide prevention or to place proactive policies in writing essentially increase their likelihood of liability.

Importantly, when officers engage in training on appropriate responses to offenders with mental health concerns, including suicidality, and when they follow institutional policy, officers reduce their own personal liability.

Officers must provide response to prevent suicide when threat is known. These precautionary measures must meet the reasonable person standard.

With this said, facility staff cannot be placed in the position of guaranteeing that offenders will not commit suicide, but if custodial staff know or should have known of suicidal ideation, staff may not act with deliberate or reckless indifference.

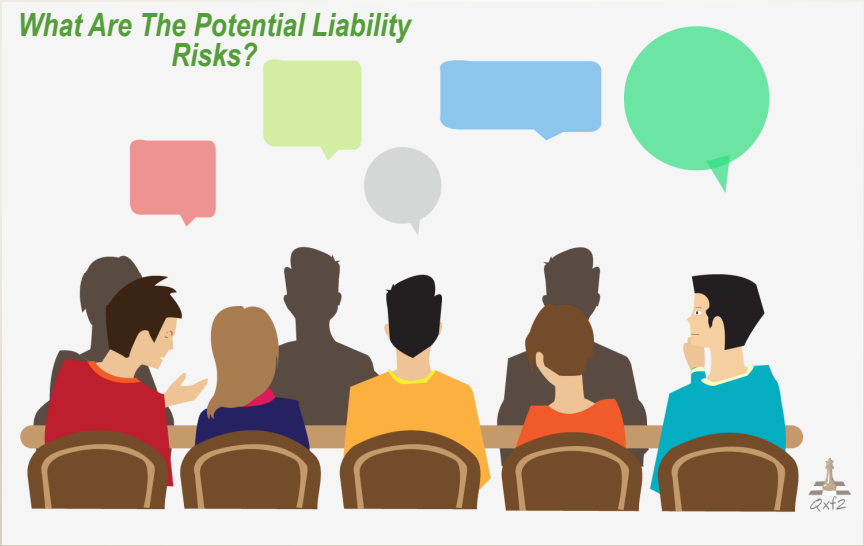
21

Offender Vignette Group Activity and Discussion Handout #4

The Case of Nathan & Access to Mental Health Services

22

GROUP DISCUSSION



23

24

HANDOUT #1

THINGS TO KNOW ABOUT LIABILITY RELATED TO OFFENDER ACCESS TO MENTAL HEALTH SERVICES

1. Often, "refusal" of mental health services is due to lack of resources, not calloused disregard of staff.

2. Standardized Screening Instruments are those that are tested and found to be valid and reliable through officially accepted processes of evaluation. Day-to-day correctional staff, including both institutional and community-based staff, usually cannot administer these instruments because they typically require additional training and/or licensure as a mental health professional.

3. Providing full mental health services to meet all the demand is often cost prohibitive. This is especially the case when one considers circumstances of malingering among offenders.

4. Facility conditions can and usually do aggravate mental health diagnoses.

5. Never flat-out say "no" to requests for mental health services. Rather, state this as a possibility as resources permit and document your response.

6. Follow policy as closely as possible. This is your key defense to liability.

7. Respond in Good Faith.

8. Ensure that what you do would seem reasonable to another common person placed in similar circumstances.

9. Remain professional in your response… use good bedside manners.

10. Understand the significance of Estelle v. Gamble (1976), Ruiz v. Estelle (1980), and Farmer v. Brennan (1994)

11. The Four Standards of Mental Health Care, are:

(a) An adequate system of mental health screening must be in place for offenders.
(b) Access to mental health treatment is required for offenders in segregation or special housing.
(c) The appropriate use of psychotropic medication must be adequately monitored.
(d) A suicide prevention program must be in place.

HANDOUT #2

MENTAL HEALTH LIABILITY

LEARNING ACTIVITY #1

You are an officer at an agency (NOTE: *depending on the background of the officer completing this activity, they will be from an agency with a specific facility or a probation officer at an office in the region*) who has been selected to attend a state-wide problem-solving commission related developing a coordinated response to offenders with MHBI.

It is the purpose of this commission to gain perspectives from front-line staff rather than supervisors and administrators as to how these challenges can be addressed.

Some facilities have absorbed a large number of offenders with mental health issues while, at the same time, many probation offices have experienced an increase in the number of offenders with MHBI coming from short-term facilities and ending up on their caseloads. As the number of MHBI offenders has increased, so too have reported suicide ideations and suicide attempts among offenders at facilities and probation offices around the state. As it stands, juvenile correctional officers, adult correctional officers, and probation officers are finding it more common to be in contact with offenders with MHBI as well as those who have suicidal ideations.

The goal of the commission is for you all to suggest some type of policy and some type of brief training that will address the needs of line level officers while also mitigating legal concerns that have emerged due to this influx of offenders with mental health needs.

TO THE GROUP:

For this exercise, consider the information from HANDOUT #1 and from your prior discussion to develop some type of overarching policy that would address the need to work with offenders with mental health issues and to ensure that none are denied mental health services when needed.

In addition, determine what you might include in a brief (i.e. no more than 4-hour) training session to address potential liability from MHBI and the increase in suicide attempts among offenders throughout the state.

Be sure to write down your answers and share with the class, at the request of your instructor.

HANDOUT #3

POTENTIAL LIABILITY RESULTING FROM SUICIDE

1. Per *Estelle v. Gamble*, courts have recognized that where officials know or have reason to know that an offender is on the verge of suicide the psychological condition can constitute a serious medical need to which state officials must not be deliberately indifferent.

2. However, *Farmer v. Brennan* has further refined the notion of deliberate indifference to essentially constitute a culpable state of mind. Under this standard, it must be specifically proven that correctional staff knew and yet chose to engage in inadequate treatment, being consciously and intentionally indifferent to the consequences.

3. This makes it difficult for offenders to prevail in litigation regarding facility suicide liability.

4. On the other hand, agencies that fail to train employees in proper suicide prevention or to place proactive policies in writing essentially increase their likelihood of liability.

5. Importantly, when officers engage in training on appropriate responses to MHBI offenders, including those with suicidal ideations, and they follow institutional policy, they reduce their personal liability.

6. Officers must provide a response to prevent suicide when threat is known. These precautionary measures must meet the reasonable person standard.

7. With this said, facility staff cannot be placed in the position of guaranteeing that offenders will not commit suicide, but if custodial staff know or should have known of suicidal ideation, staff may not act with deliberate or reckless indifference.

HANDOUT #4

Offender Vignette: The Case of Nathan and Access to Mental Health Services

Nathan is a 23 year-old Caucasian male who is of small frame and size. This is his first stint of long-term incarceration and he has had a very difficult time adjusting to the experience. He is known to have bi-polar disorder and to have abused pain medicine in his past, prior to incarceration.

Currently, he has served only 19 days at your facility but has requested assistance to see the psychologist or counselor. No mental health professional has seen him, yet, mainly due to backlogged requests and because some of the clinicians have been on vacation or at a professional conference during this time of year. He has not served prior time other than one sentence for theft. He is a known poly-drug user and has also made several prior suicide attempts in the past.

Nathan has had a difficult time leading a settled life and, as a child, was jostled around from family member to family member. For a while, he was in a foster home where allegations of sexual abuse committed by one of the other kids against him were never confirmed. He was moved out of the foster home and placed with his aunt and uncle who begrudgingly raised him until he left at 17 years of age.

While in school he was in specialized learning programs and had numerous behavioral problems. When moving out at 17, he lived with "friends" or was homeless. Some of his friends were men who provided basic necessities for sexual favors. During this time, he had extensive contact with mental health services. His default demeanor is withdrawn and apprehensive.

There are rumors that he has been sexually assaulted by a group of offenders in the facility during this initial first few days of his stint. He has not reported the incident and one officer mentioned it to a sergeant and was told the following "look, this kind of stuff is impossible to untangle. Half the time it is consensual but then there is a spat between the two. All of a sudden, they wanna file a PREA claim, only to rescind on it. If he complains to you, directly, about being sexually assaulted, then we can do something. Until then, it is offender games."

He has also been self-mutilating. His wounds are not deep and are not conducive to the completion of a suicide. An officer asked him why he does this and Nathan answered, "it relieves my anxiety and makes me feel better." The officer did not report this any further but told him to quit being "such a drama queen" about everything.

He has recently told several of the offenders and a couple of correctional officers that he does not "have much time left" and also has been giving away small inexpensive items. While on duty at the facility, you were tasked to do a routine dorm inspection. While looking through Nathan's bunk, you found a note that reads as follows:

"Dear Jimmy Ray,

I am leaving you my commissary and what little else that I have. I appreciated that you did not take advantage of me and think that you deserve it more than anyone else. I am never going to be able to do this time, nobody cares what happens to me and I cannot do what they are forcing me to do for the next 3 or 4 years. I am going to end up a pin-cushion for that gang if I don't. So this just makes more sense."

TO THE GROUP:

For this scenario, address the following three questions:

1) Where is the current potential for liability, based on the actions of the officers in the scenario?

2) How could Nathan's circumstances have been handled differently to mitigate liability in the first place?

3) What should now be done to ensure this offender is receiving the treatment he is entitled to?

Be sure and write these ideas down and share with the class when asked to do so by your instructor.

FOR THE INSTRUCTOR: Though not all-encompassing, some of the potential answers/responses to questions in this learning activity are provided below:

1) Where is the current potential for liability, based on the actions of the officers in the scenario?

There is potential liability because Nathan has requested mental health assistance and has not received this services, yet. This is enhanced by the fact that he has had known prior suicide attempts and that he engages in self-harm.

There is potential for liability due to the sergeant not looking into the potential sexual assault as a PREA claim.

There is clear potential liability for the officer that did not report the self-harming behavior and who also responded with the comment to quit being "such a drama queen."

There is potential liability for the two officers who heard Nathan say he does not "have much time left" and who also have observed him giving away small inexpensive items.

*There is liability for **you**, as the officer on the scene, if you do nothing with the note that you just found …*

2) How could Nathan's circumstances have been handled differently to mitigate liability in the first place?

He could have been referred more expediently to mental health professionals.

The sergeant could have investigated the potential PREA issues.

The officer observing self-harm should have reported the behavior in a verifiable manner with documentation.

Officers overhearing Nathan and seeing him give away items should have talked with him and documented their discussion.

3) What should now be done to ensure this offender is receiving the treatment he is entitled to?

The officers should ensure that the letter is submitted to their supervisor, with documentation. The officer should make a copy and submit to mental health professionals at the facility, and document that they provided the letter. Officers should talk directly to Nathan about his suicidal intent and implementation of a suicide watch should be considered. Nathan should be put in the front-of-the-line to see a mental health professional at the facility.