LETTER OPINION
95-L-20

January 30, 1995

Tim Schuetzle, Warden
North Dakota State Penitentiary
PO Box 5521
Bismarck, ND 58502

Dear Warden Schuetzle:

Thank you for your letter requesting my opinion on what procedures must be taken prior to a penitentiary inmate being forcibly injected with antipsychotic drugs.

In 1990 the United States Supreme Court addressed the issue raised in your letter in Washington v. Harper, 494 U.S. 210 (1990). In Harper, a prisoner alleged that the state of Washington violated his constitutional rights by giving him antipsychotic drugs against his will. The Supreme Court found that a prisoner "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." Id. at 221-22. The court further noted, however, that prison administrators have an interest "in ensuring the safety of prison staffs and administrative personnel" and a "duty to take reasonable measures for the prisoners' own safety." Id. at 225. In light of the unique circumstances of penal confinement, the Court held that due process allows a state to involuntarily treat a mentally ill inmate with antipsychotic drugs if there is a determination that "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." Id. at 227.

The Harper decision makes clear that absent a finding of dangerousness the state cannot compel treatment, even in a prison setting. The Harper decision also requires the involuntary treatment be directly related to controlling dangerous behavior, not solely to treating aspects of mental disorder unrelated to dangerousness. Moreover, the Court's holding requires that any such treatment be determined medically appropriate. See Riggins v. Nevada, 112 S. Ct. 1810, 1815 (1992).

After finding a prisoner has a liberty interest in avoiding the unwanted administration of antipsychotic drugs, the Court in Harper v. Washington went on to hold that the challenged prison policy adequately protects an inmate's liberty interest. 494 U.S. at 228. The challenged policy provides several procedural protections. The policy provides that an inmate who refuses to voluntarily take ordered medication is entitled to a hearing. Id. at 215. This hearing is before a special committee consisting of a psychiatrist, psychologist, and the Associate Superintendent of the prison. None of the committee members can be involved in the inmate's treatment or diagnosis. Id. at 215.

In addition to the hearing, under the policy the inmate is provided at least 24 hours' notice of the hearing, during which time he may not be medicated. Id. at 216. The inmate is also provided notice of the tentative diagnosis, the factual basis for the diagnosis, and why it is believed medication is necessary. The inmate has the right to attend the hearing, present evidence, cross-examine witnesses, and be assisted by a lay advisor who understands the psychiatric issues involved. Id. at 216. Minutes are kept at the hearing and a copy of the minutes is provided the inmate. The inmate can appeal the Committee's decision to the Superintendent, who must decide the appeal within 24 hours. The inmate may also seek judicial review in state court. Finally, if it is determined to involuntarily medicate, such medication can only continue with a periodic review. Id. at 216.

Although Harper does not require that each state provide the same procedural protections to prisoners as provided by Washington, Harper requires certain essential due process protective measures:

> First, to administer involuntary treatment the state must find that medication is in the prisoner's medical interest (independent of institutional concerns). Second, the tribunal or panel that reviews a treating physician's decision to prescribe forced medication must exercise impartial and independent judgment, taking account of the inmate's best interest. Third, the prisoner must be able to argue capably before a review tribunal that he does not need forced medication.

Sullivan v. Flannigan, 8 F.3d 591, 598 (7th Cir. 1993) (citations to Harper omitted), cert. denied, 114 S.Ct. 1376 (1994). If the state fails to meet these requirements in a particular case, the state runs the risk of violating an

inmate's constitutional rights. Id. at 598.

A prisoner is entitled to the same procedural protection whether the antipsychotic drug is administered under the direction of a penitentiary employee, penitentiary staff, or psychiatric consultant. The prisoner's liberty interest in avoiding the unwanted administration of antipsychotic drugs is the same whether the order stems from a penitentiary employee or penitentiary consultant. In fact, a prisoner is entitled to the same protection even if he is voluntarily or involuntarily transferred to the forensic facility of the North Dakota State Hospital pursuant to N.D.C.C. ? 12-47-27. The procedural protections that must be provided an inmate prior to the forcible administration of antipsychotic drugs are not appreciably changed if the inmate is involuntarily committed to the State Hospital pursuant to N.D.C.C. ch. 25-03.1. At that point, the procedures of chapter 25-03.1 apply. Justice Blackman, concurring in Washington v. Harper, observed that difficulty in assessing what due process is required would be lessened in an appropriate case if the prisoner was formally committed involuntarily. This would protect "all concerned, the inmate, the institution, its staff, the physician, and the State itself." Washington v. Harper, 494 U.S. at 236-37.

It should be noted that in an emergency medical treatment may be administered involuntarily without violating due process rights. See Walker v. Shansky, 28 F.3d 666 (7th Cir. 1994) (applying law before Washington v. Harper in holding the involuntary administration of antipsychotic medication recommended by a consulting psychiatrist in an emergency to a hemophilic prisoner who cursed and threatened doctors, defecated in his cell, and resisted restraints did not violate the prisoner's due process rights under Illinois law permitting medical treatment of a prisoner in an emergency); Chambers v. Ingram, 858 F.2d 351, 359-360 (7th Cir. 1988) (holding that a doctor's decision to forcibly administer a drug to a possibly suicidal patient was not a due process violation because the doctor was responding to an emergency); Davis v. Hubbard, 506 F.Supp. 915, 939 (N.D. Ohio 1980) ("While a prior hearing may be required in most circumstances, it certainly is not required in all. Due process, for instance, has generally not required the State to conduct a prior hearing when confronted with an emergency."). Cf. N.D.C.C. ? 25-03.1-24 (in an emergency, treatment with prescribed medication, or a less restrictive alternative, is allowed "to prevent bodily harm to the patient or others or to prevent imminent deterioration of the [voluntary or committed patient's] physical or mental condition"); N.D.C.C.

? 12.1-05-05 (in an emergency a physician or a person acting at his direction may use force in order to administer "a recognized form of treatment to promote the physical or mental health of a patient without the patient's consent." However, even in an emergency situation an inmate cannot be forcibly medicated with antipsychotic drugs if there is a less restrictive alternative available. For example, if temporarily restraining the inmate will resolve the emergency, antipsychotic drugs may not be forcibly administered until after a hearing. Legal sanction to administer medication in an emergency does not dispense with due process procedures that are required to regularly administer involuntary antipsychotic medication to prisoners.

I suggest the North Dakota State Penitentiary and the North Dakota State Hospital adopt policies regarding forcible administration of antipsychotic drugs upon prisoners commensurate with the essential due process requirements set forth in Washington v. Harper, 494 U.S. 210 (1990).

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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