

JUSTICE AND PUBLIC SAFETY CABINET

Department of Corrections (Amended After Comments)

501 KAR 16:310. Pre-execution medical actions.

RELATES TO: KRS 196.030, 196.070, 196.180, 431.213-431.270

STATUTORY AUTHORITY: KRS 196.035, 197.020, 314.011, 431.218, 431.220, 431.224, 431.240, 431.250, 431.260, 431.270

NECESSITY, FUNCTION, AND CONFORMITY: KRS 196.035 and 197.020 authorize the Justice and Public Safety Cabinet and Department of Corrections to promulgate administrative regulations necessary and suitable for the proper administration of the cabinet or any of its divisions. KRS 431.220 establishes requirements for the execution of the death penalty. This administrative regulation establishes medical actions to be performed after receipt of the execution order and prior to the execution.

Section 1. Pre-execution Medical Actions after Receipt of Execution Order.

(1) For the fourteen (14) days prior to an execution, or for the remaining days if an execution order is received less than fourteen (14) days prior to an execution:

(a) All medical documentation shall be made in special notes in the condemned person's medical record.

(b) The department shall arrange for nurse visits for the condemned person during each shift daily. The contacts and observations from these nurse visits shall be recorded in the special notes of the medical record referenced in paragraph (a) of this subsection. The nurse notes shall state the presence or absence of signs of physical or emotional distress observed.

(c) A licensed psychologist shall:

1. Personally observe and evaluate the condemned person five (5) days per week on Monday through Friday;

2. Document his or her observations and evaluations in the condemned person's medical record immediately after personal contact with the condemned person;

3. Review the department medical records for the condemned person for:

a. A diagnosis of an intellectual disability as:

(i) Indicated by the criteria in the Diagnostic and Statistical Manual (DSM);~~†~~
~~or†~~

(ii) Defined by the American Association on Intellectual and Developmental Disabilities (AAIDD); or

(iii) Indicated by other similar prevailing medical standards and clinical guidelines; or

b. An IQ test score of seventy-five (75) or lower after adjustment for the applicable standard error of measurement; and

4. If any record is located that meets the criteria in subparagraph 3 of this paragraph, the psychologist shall notify the warden.

(d) The designated medical professional shall review and sign the nursing documentation referenced in paragraph (b) of this subsection daily.

(e) A psychiatrist shall review the nursing documentation referenced in paragraph (b) of this subsection and any other mental health or medical documentation weekly.

(2) For the seven (7) days prior to an execution, or for the remaining days if an execution order is received less than seven (7) days prior to an execution:

(a) A doctor or advanced practice registered nurse shall:

1. Complete a physical examination; and

2. Place the documentation of the physical in the condemned person's medical record upon completion of the documentation.
- (b) A psychiatric interview and evaluation to assess for signs of insanity shall be:
 1. Completed by a licensed psychiatrist or a licensed advanced practice registered nurse (APRN) certified in a psychiatric mental health population focus;
 2. Placed in the condemned person's medical record; and
 3. Sent to the warden.
- (3) The designated medical professional shall:
 - (a) Personally observe and evaluate the condemned person's medical condition at least twice on nonconsecutive days; and
 - (b) Document his or her observations and evaluations in the special notes of the condemned person's medical record immediately after personal contact with the condemned person.
- (4) All Kentucky State Penitentiary medical and mental health staff shall be instructed to immediately notify the warden and the designated professionals of any change in the condemned person's medical or psychiatric condition.

Section 2. Pregnancy Testing for Female Condemned Persons.

- (1) If the condemned person is female, a pregnancy test shall be administered.
- (2) A pregnancy test shall be administered at least seven (7) days prior to the scheduled date of execution, unless the execution order is received less than seven (7) days prior to the scheduled date of execution.
- (3) If the execution order is received less than seven (7) days prior to the scheduled date of execution, a pregnancy test shall be administered as soon as practicable.
- (4) If a pregnancy test is positive, then the department shall:
 - (a) Give written notice to the Attorney General or his designee, the condemned person's counsel, the condemned person, and the Governor's Office or court issuing the mandate that the condemned person is pregnant; and
 - (b) Suspend the execution pursuant to KRS 431.240(2).

Section 3. Insanity Issues.

- (1) If the warden receives information from medical or mental health staff that the condemned person exhibits signs or symptoms indicating that he or she may be insane as **demonstrated by an inability to rationally understand why the state wants to execute him or her**~~[defined in KRS 431.213(2)]~~, the warden shall inform the designated medical professional.
- (2) If the designated medical professional receives information from the warden or department medical or mental health staff, he shall determine:
 - (a) The source of the information; and
 - (b) If the information is not from the department psychiatrist, whether it is sufficient to indicate that an additional psychiatric evaluation needs to be performed on the condemned person.
- (3) The designated medical professional shall order a psychiatric evaluation if he determines one is needed.
- (4) If a department psychiatric evaluation determines that the condemned person may be insane as **demonstrated by an inability to rationally understand why the state wants to execute him or her**~~[defined in KRS 431.213(2)]~~, the department shall:
 - (a) Give written notice to the Attorney General or his designee, the condemned person's counsel, the condemned person, and the Governor's Office or court issuing the mandate that the condemned person appears to be insane; and
 - (b) Suspend the execution pursuant to KRS 431.240(2) to allow procedures consistent with KRS 431.2135.

Section 4. Serious Intellectual Disability. If the warden is notified by the psychologist described in Section 1(1)(c) of this administrative regulation concerning ~~the diagnosis of~~ an intellectual disability or an IQ test score of seventy-five (75) or less for the condemned person after adjustment for the applicable standard error of measurement, the:

- (1) Warden shall notify the Commissioner; ~~and~~
- (2) Commissioner shall notify in writing the Attorney General or his designee, the condemned person's counsel, and the condemned person of the record located ~~the notice shall state that a court order is required for the execution to be suspended.~~; and
- (3) Commissioner shall suspend the execution pursuant to KRS 532.140 to allow procedures consistent with KRS 532.135.

Section 5. Execution Substances. ~~The warden shall:~~

(1) **The warden shall:**

(a) Notify medical staff and the ambulance service of the substances that may be used for the execution so that planning can be done in case of suspension of the execution after the drugs have been administered; and

(b) ~~(2)~~ Direct medical staff to review the medications of the condemned person for a potential adverse reaction to the substances and notify the warden if a known potential adverse reaction is identified.

(2) If the warden is notified that a known potential adverse reaction has been identified, the warden shall notify the commissioner and the ambulance service.

(3) If the commissioner is notified that a known potential adverse reaction has been identified, the commissioner shall notify the Attorney General or designee, the condemned person's counsel, the condemned person, and the Governor's Office in writing of the potential adverse reaction.

KERRY HARVEY, Secretary

APPROVED BY AGENCY: September 12, 2023

FILED WITH LRC: September 14, 2023 at 10:00 a.m.

CONTACT PERSON: Nathan Goens, Attorney, Justice and Public Safety Cabinet, 125 Holmes Street, Frankfort, Kentucky 40601, phone (502) 564-8216, fax (502) 564-6686, email Justice.RegContact@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person:Nathan Goens

(1) Provide a brief summary of:

(a) What this administrative regulation does:

This regulation establishes medical actions to be performed after receipt of the execution order and prior to the execution of a condemned inmate.

(b) The necessity of this administrative regulation:

This administrative regulation is necessary to ensure the Department of Corrections execution protocol compliance with constitutional and statutory requirements.

(c) How this administrative regulation conforms to the content of the authorizing statutes:

KRS 196.035 and 197.020 authorize the Justice and Public Safety Cabinet and Department of Corrections to promulgate administrative regulations necessary and suitable for the proper administration of the cabinet or any of its divisions.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:

This administrative regulation assists the Department of Corrections execution protocol to be compliant with statutory and constitutional requirements.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation:

The amendment to this administrative regulation will require a suspension of an execution in the event the Department of Corrections discovers a diagnosis or specific signs of an intellectual disability during the pre-execution medical actions.

(b) The necessity of the amendment to this administrative regulation:

The amendment to the administrative regulation is necessary because of constitutional requirements related to the execution of condemned inmates developed by recent Supreme Court of the United States and Supreme Court of Kentucky case law.

(c) How the amendment conforms to the content of the authorizing statutes:

The amendment to the regulation conforms with the authorizing statutes because KRS 196.035 and 197.020 authorize the Justice and Public Safety Cabinet and Department of Corrections to promulgate administrative regulations necessary and suitable for the proper administration of the cabinet or any of its divisions, and the Department of Corrections is a division of the Justice and Public Safety Cabinet.

(d) How the amendment will assist in the effective administration of the statutes:

This amendment will assist the Justice and Public Safety Cabinet, Department of Corrections effectively administer the death penalty as established by KRS 431.220 and ensures that it is administered in a way that complies with constitutional requirements.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:

This administrative regulation will affect condemned inmates, their attorneys, judges with sentences of death in their circuits, and employees of the Governor's Office, the

Attorney General's Office, the Department of Public Advocacy, and the Department of Corrections involved with criminal sentences of death.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:

The Department of Corrections will be responsible for ensuring pre-execution medical actions are completed and the Warden of the Kentucky State Penitentiary is notified in the event a record of a diagnosis or specific signs of a serious intellectual disability is discovered during the pre-execution medical actions. The Commissioner of the Department of Corrections will be responsible for suspending the execution upon notification of the discovery of a diagnosis or specific signs of an intellectual disability. The condemned person or the condemned person's counsel as well as the Governor's Office, the Attorney General's Office, and judges will be responsible for taking the appropriate steps to litigate whether such an intellectual disability exists.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):

The regulation does not include any requirements of the entities affected that would exact a cost beyond the time required to be compliant.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

Each of the parties named in question (3) will benefit by ensuring that no seriously intellectually disabled individual will be executed.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially:

The Department's medical services are under contract at a rate of \$17.36 per inmate per day. Most costs involved with execution result from statutes.

(b) On a continuing basis:

Medical costs typically rise between 5% and 7% annually, but this is not a result of the amendment to this administrative regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:

Appropriations of General Funds to the Department of Corrections

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:

This administrative regulation amendment will not require an increase in fees or funding for implementation. An increase in funding may be necessary for annual increases in medical costs and staffing costs, but no new costs are expected to result from the implementation of the administrative regulation.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees:

No fees are directly or indirectly established by this administrative regulation.

(9) TIERING: Is tiering applied?

Tiering is not appropriate in this instance because the regulation and its impact will not disproportionately impact any particular class regulated entity.

FISCAL NOTE

(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?

Members of the judicial branch including courts and judges with sentences of death in their circuits, as well as members of the executive branch including employees of the Governor's Office, the Attorney General's Office, the Department of Public Advocacy, and the Department of Corrections involved with criminal sentences of death will be impacted by this administrative regulation.

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 196.035 and 197.020 authorize the Justice and Public Safety Cabinet and Department of Corrections to promulgate administrative regulations necessary and suitable for the proper administration of the cabinet or any of its divisions, and the Department of Corrections is a division of the Justice and Public Safety Cabinet. The death penalty is established by KRS 431.220.

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?

This administrative regulation will not generate revenue.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?

This administrative regulation will not generate revenue.

(c) How much will it cost to administer this program for the first year?

The Department's medical cost per inmate per day is currently \$17.36. This administrative regulation should not cause any additional medical costs.

(d) How much will it cost to administer this program for subsequent years?

Cost will depend on the contracted rate for medical services, which typically increases by 5% to 7% annually. The Department does not expect to incur any additional costs other than the current medical contract costs already incurred.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

(4) Estimate the effect of this administrative regulation on the expenditures and cost savings of regulated entities for the first full year the administrative regulation is to be in effect.

(a) How much cost savings will this administrative regulation generate for the regulated entities for the first year?

Cost savings are not expected.

(b) How much cost savings will this administrative regulation generate for the regulated entities for subsequent years?

Cost savings are not expected.

(c) How much will it cost the regulated entities for the first year?

The current medical contract rate of \$17.36 per inmate per day are anticipated.

(d) How much will it cost the regulated entities for subsequent years?

Medical costs typically rise between 5% and 7% annually, but this is not a result of the amendment to this administrative regulation.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Cost Savings (+/-):

Expenditures (+/-):

Other Explanation:

(5) Explain whether this administrative regulation will have a major economic impact, as defined below.

"Major economic impact" means an overall negative or adverse economic impact from an administrative regulation of five hundred thousand dollars (\$500,000) or more on state or local government or regulated entities, in aggregate, as determined by the promulgating administrative bodies. [KRS 13A.010(13)]. This administrative regulation will not have a major economic impact.