
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 219 **Hearing Date:** April 7, 2015
Author: Liu
Version: March 26, 2015
Urgency: No **Fiscal:** Yes
Consultant: JRD

*Subject: California Department Of Corrections and Rehabilitation:
Alternative Custody Program*

HISTORY

Source: Justice Now and Californians United for a Responsible Budget

Prior Legislation: SB 1266 (Lui) — Ch. 644, Stats. of 2010
SB 1021 (Comm. on Budget and Fiscal Review) — Ch. 41, Stats. of 2012

Support: A New PATH; California Attorneys for Criminal Justice; California Catholic Conference; California Families Against Solitary Confinement; California Partnership; California Public Defenders Association; Californians for Safety and Justice; Communities United or Restorative youth Justice; Friends Committee on Legislation of California; Western Regional Advocacy Project; Western Regional Advocacy Project; Women's Prison Association; 1 individual

Opposition: None Known

PURPOSE

The purpose of this bill is to: (1) provide that an inmate's existing psychiatric or medical condition that requires ongoing care is not a basis for excluding the inmate from eligibility from the California Department of Corrections and Rehabilitation's (CDCR) voluntary alternative custody program (ACP); (2) require CDCR to meet a variety of timeframes in processing applications for ACP; and, (3) require CDCR to assist individuals participating in ACP in obtaining health care coverage, including, but not limited to Medi-Cal benefits.

Current law creates in state government the CDCR, to be headed by a secretary, who shall be appointed by the Governor, subject to Senate confirmation, and shall serve at the pleasure of the Governor. (Government Code § 12838.) CDCR shall consist of Adult Operations, Adult Programs, Health Care Services, Juvenile Justice, the Board of Parole Hearings, the State Commission on Juvenile Justice, the Prison Industry Authority, and the Prison Industry Board. (*Id.*) As explained in the Legislative Analyst's Office Analysis of the Governor's 2015-16 Proposed Budget:

The CDCR is responsible for the incarceration of adult felons, including the provision of training, education, and health care services. As of February 4, 2015, CDCR housed about 132,000 adult inmates in the state's prison system. Most of these inmates are housed in the state's 34 prisons and 43 conservation camps.

About 15,000 inmates are housed in either in-state or out-of-state contracted prisons. The department also supervises and treats about 44,000 adult parolees

and is responsible for the apprehension of those parolees who commit new offenses or parole violations. In addition, about 700 juvenile offenders are housed in facilities operated by CDCR's Division of Juvenile Justice, which includes three facilities and one conservation camp.

The Governor's budget proposes total expenditures of \$10.3 billion (\$10 billion General Fund) for CDCR operations in 2015-16.

Existing law authorizes the Secretary of CDCR to offer a program under which female inmates, as specified, who have been committed to state prison may be allowed to participate in a voluntary ACP in lieu of their confinement in state prison. In order to qualify for the program an offender need not be confined in an institution under the jurisdiction of CDCR. Under this program, one day of participation is in lieu of one day of incarceration. Participants in the program receive any sentence reduction credits that they would have received had they served their sentence in the state prison, and shall be subject to denial and loss of credit, as specified. (Penal Code § 1170.05(a).)

Existing law states that an ACP must include, but not be limited to, the following:

- Confinement to a residential home during the hours designated by the department.
- Confinement to a residential drug or treatment program during the hours designated by the department.
- Confinement to a transitional care facility that offers appropriate services.

(Penal Code § 1170.05 (b).)

Under existing law female inmates sentenced to state prison for a determinate term of imprisonment pursuant to Section 1170, and only those persons, must be eligible to participate in an ACP, except for an inmate who:

- Has a current conviction for a violent felony as defined in Section 667.5.
- Has a current conviction for a serious felony as defined in Sections 1192.7 and 1192.8.
- Has a current or prior conviction for an offense that requires the person to register as a sex offender as provided in Chapter 5.5 of Title 9 of Part 1.
- Was screened by the department using a validated risk assessment tool and determined to pose a high risk to commit a violent offense.
- Has a history, within the last 10 years, of escape from a facility while under juvenile or adult custody, including, but not limited to, any detention facility, camp, jail, or state prison facility.

(Penal Code § 1170.05 (c) and (d).)

Existing law requires an ACP to include the use of electronic monitoring, global positioning system devices, or other supervising devices for the purpose of helping to verify a participant's compliance with the rules and regulations of the program. (Penal Code § 1170.05(e).)

Under existing law CDCR must create, and the participant shall agree to and fully participate in, an individualized treatment and rehabilitation plan. When available and appropriate for the individualized treatment and rehabilitation plan, the department shall prioritize the use of evidence-based programs and services that will aid in the successful reentry into society while she takes part in alternative custody. Case management services must be provided to support rehabilitation and to track the progress and individualized treatment plan compliance of the inmate. (Penal Code § 1170.05(f).)

Existing law states that CDCR is not required to allow an inmate to participate in this program if it appears from the record that the inmate has not satisfactorily complied with reasonable rules and regulations while in custody. An inmate is eligible for participation in an ACP only if it is concluded that the inmate meets the criteria for program participation and that the inmate's participation is consistent with any reasonable rules and regulations prescribed by CDCR. CDCR has the sole discretion concerning whether to permit program participation as an alternative to custody in state prison. A risk and needs assessment must be completed on each inmate to assist in the determination of eligibility for participation and the type of alternative custody. (Penal Code § 1170.05 (i).)

Existing law permits the secretary or his or her designee to permit program participants to seek and retain employment in the community, attend psychological counseling sessions or educational or vocational training classes, participate in life skills or parenting training, utilize substance abuse treatment services, or seek medical and dental assistance based upon the participant's individualized treatment and release plan. Participation in other rehabilitative services and programs may be approved by the case manager if it is specified as a requirement of the inmate's individualized treatment and rehabilitative case plan. Willful failure of the program participant to return to the place of detention not later than the expiration of any period of time during which she is authorized to be away, unauthorized departures, or tampering with or disabling, or attempting to tamper with or disable, an electronic monitoring device subjects the participant to a return to custody. In addition, participants may be subject to forfeiture of credits, or to discipline for violation of rules established by CDCR. (Penal Code § 1170.05 (j).)

Existing law allows CDCR to administer an ACP pursuant to written contracts with appropriate public agencies or entities to provide specified program services. The department is required to determine the recidivism rate of each participant in an alternative custody program. (Penal Code § 1170.05 (l).)

Existing law states that an inmate participating in an ACP must voluntarily agree to all of the provisions of the program in writing, including that she may be returned to confinement at any time with or without cause, and cannot be charged fees or costs for the program. (Penal Code § 1170.05 (m).)

Existing law requires the state to retain responsibility for the medical, dental, and mental health needs of individuals participating in ACP. (Penal Code § 1170.05 (n).)

This bill would provide that an inmate's existing psychiatric or medical condition that requires ongoing care is not a basis for excluding the inmate from eligibility for the program.

The bill would prescribe specific timeframes for, among other things, the review of an application to participate in the program and notifying an applicant when a determination has been made on that application. The bill would require a notice of denial to specify the reasons the inmate has been denied participation in the program, and authorize an inmate to reapply for participation in the program or appeal a denial, as specified.

The bill would require CDCR to assist an individual participating in the alternative custody program in obtaining health care coverage, including, but not limited to, assistance with having suspended Medi-Cal benefits reinstated, applying for Medi-Cal benefits, or obtaining health care coverage under a private health plan or policy. The bill would require that, to the extent not covered by a participant's health care coverage, the state would retain responsibility for the medical, dental, and mental health needs of individuals participating in ACP.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity." (Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;

- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Legislation

According to the author:

The Alternative Custody Program was established by SB 1266 (Liu) in 2010 and was intended to offer more appropriate rehabilitative settings to incarcerated female offenders and inmates who were primary caregivers. The program, predating AB 109, at its inception was designed for the approximately 4,500 low-level women offenders then incarcerated that could be eligible for placement in secure, community-based programs without risking community safety (National Council on Crime and delinquency (NCCD), 2006).

After the implementation of AB 109 an additional program, the Enhance Alternative Custody Program (EACP) was established and the applications for the two programs streamlined. This new program includes women that have committed violent and serious crimes. Since ACP was implemented in September of 2011 approximately 7,200 applications have been submitted. Of those applications, only 460 offenders have been approved for Alternative Custody.

After three and a half years it is time to update and clarify the Alternative Custody Program to ensure that women continue to benefit from its robust offerings. SB 219 clarifies that an inmate cannot be excluded from ACP based on an existing medical or psychiatric condition. Further, it establishes a timeline for application review, appeal, and release. Additionally, it requires the Secretary or his/her designee to assist participants in obtaining Medi-Cal or private insurance coverage.

2. Effect of the Legislation

According to information provided by CDCR, there are currently 67 offenders in the ACP. As of March 17, 2015, CDCR had approximately 440 active ACP/EACP applications at various stages of the process. Applications are generally screened within 3 to 5 days of receipt, and the entire process takes approximately 55 days. According to CDCR, “[i]nmates with mental or medical conditions are accepted to participate in ACP/EACP on a case-by-case basis, and are not categorically denied participation solely based on such a condition. Such inmates may be denied participation because their condition requires a level of care not available in an acceptable ACP environment upon release.”

An Individual Treatment Rehabilitative Plan (ITRP) is requested once the application is screened for criteria eligibility. The ITRP is generally completed within 5 days. CDCR states that, in

most cases, once the inmate is endorsed to ACP by the Classification Services Representative; the inmate is transferred within 14 days.

This legislation makes it clear that that an inmate's existing psychiatric or medical condition that requires ongoing care is not a basis for excluding the inmate from eligibility for the program. It further places specific timeframes on the application process and release to ACP and requires that an ITRP be done for every inmate that applies. Specifically CDCR would be required to:

- Respond to an applicant within two weeks to inform the inmate that the application was received, and to notify the inmate of the ineligibility criteria of the program.
- Develop the ITRP during the two weeks following the notice of receipt of the application, in consultation with the inmate, during which time the decision whether to accept the inmate into the program shall be made, and requires CDCR to provide a written notice to the inmate of her acceptance or denial into the program.
- Release an offender to ACP no later than five business days following notice of acceptance into the program.

In cases where the inmate is denied participation, the notice of denial shall specify the reason the inmate was denied. The inmate may, 30 days after the notice of denial, reapply for participation in ACP, or appeal the decision through the normal grievance process.

This legislation, additionally, would require CDCR to assist individual's participating in ACP to obtain health care coverage, including Medi-Cal benefits.

SHOULD THE ITRP BE DONE PRIOR TO CDCR DETERMINING THAT THE INMATE IS ELIGIBLE FOR ACP?

3. Constitutional Considerations - Equal Protection

Penal Code section 1170.05 is currently being challenged in federal court. (*Sassman v. Brown*, 2:14-cv-01679-MCE-KJN, Eastern District, California.) Plaintiff is claiming that his exclusion from ACP, as authorized by California Penal Code section 1170.05, violates the Equal Protection Clause of the Fourteenth Amendment. This matter is still pending before the federal court and both parties have filed motions for summary judgment. While the court has not yet ruled on the motions for summary judgment, the court, in ruling on Plaintiff's Motion for Preliminary Injunction, stated:

Defendants claim that Plaintiff cannot succeed on the merits of his Equal Protection claim because he is not similarly situated to those female inmates applying for and being approved to participate in the ACP. Plaintiff, on the other hand, claims that he is similarly situated to female inmates for purposes of the ACP by referencing the gender-neutral exclusionary criteria contained within the implementing regulations that ensure only low-risk, low-level offenders participate in the program. More specifically, Plaintiff contends that because he qualifies to submit an application to the ACP with reference to those criteria, he is similarly situated to females who qualify as well. Plaintiff's argument is well taken. (*Sassman v. Brown*, 2014 U.S. Dist. LEXIS 146536 (E.D. Cal., 2014) (*Citations Omitted*).

The court goes on to state:

CDCR has repeatedly made clear that the primary objectives of the ACP are family reunification and community reintegration. However, since all women are permitted to participate in the ACP, not just women with children, it is unclear how the statute furthers those goals. Moreover, this Court still cannot see how either goal is advanced by excluding male prisoners. To the contrary, it seems that permitting men to participate in the program would actually serve the State's objectives. Defendants have thus failed to show how the ACP can be substantially related to the State's interests of family reunification and community reintegration when, to apply, women need not be mothers, nor must they show a need for rehabilitation or recovery services aimed at substance abuse or domestic violence, but men, even if they show all of the foregoing, may not apply at all. Absent a closer connection between the statute and the goals it is intended to serve, Plaintiff is likely to succeed on the merits of his claim. (*Id.* (Citations and footnotes omitted).)

4. Enhanced Alternative Custody Program

As discussed above, on February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In its most recent status report to the court (February 2015), the administration reported that as “of February 11, 2015, 112,993 inmates were housed in the State’s 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity.”(Defendants’ February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted). Included in the bed capacity are Enhanced Alternative Custody Program beds. According to the February status report,

On August 4, 2014, the State activated an 82 bed facility in San Diego, and expects to open a second facility in Southern California in 2015 for the expanded alternative custody program for females, called the Custody to Community Transitional Reentry Program (CCTRP). As of January 15, 2015, 77 female inmates are housed at the San Diego facility. An additional 5 female inmates are scheduled for transfer to the program on January 23, 2015, filling the program to its current capacity. Female inmates in the CCTRP are provided with a range of rehabilitative services that assist with alcohol and drug recovery, employment, education, housing, family reunification, and social support. (*Id.*)

HOW DOES THIS LEGISLATION IMPACT ONGOING POPULATION REDUCTION EFFORTS?

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