
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 732 **Hearing Date:** July 31, 2020
Author: Bonta
Version: July 27, 2020
Urgency: No **Fiscal:** Yes
Consultant: NS

Subject: *County Jails: Prisons: Incarcerated Pregnant Persons*

HISTORY

Source: Author

Prior Legislation: AB 2507 (Jones-Sawyer), Ch. 944, Stats. 2018; AB 2530 (Atkins), Ch. 726, Stats. 2012; AB 568 (Skinner) 2012 vetoed, AB 478 (Lieber), Ch. 608, Stats. 2005

Support: Access Women’s Health Justice; America Academy of Pediatrics, California; American Civil Liberties Union of California; American College of Obstetricians and Gynecologists District IX; Asian Americans Advancing Justice; Black Women for Wellness Action Project; BreastfeedLA; Business & Professional Women of Nevada County; California Academy of Family Physicians; California Academy of Physicians Assistants; California Attorneys for Criminal Justice; California Catholic Conference; California Latinas for Reproductive Justice; California Nurse-midwives Association; California Public Defenders Association; California Women’s Law Center; Center on Reproductive Rights and Justice; Christie’s Place; Citizens for Choice; Community Health Partnership; Cornerstone Doula Trainings; Drug Policy Alliance; Ella Baker Center for Human Rights; Ensuring Opportunity Campaign to End Poverty in Contra Costa County; Fresno Barrios Unidos; Friends Committee on Legislation of California; Gender Justice LA; GLIDE; If/When/How: Lawyering for Reproductive Justice; Initiate Justice; Kehilla Community Synagogue; Khmer Girls in Action; Latino Coalition for A Healthy California; Long Beach Immigrant Rights Coalition; Loom; NARAL Pro-Choice California; National Association of Social Workers; National Council of Jewish Women California; Planned Parenthood Affiliates of California; Positive Women’s Network-USA; Riverside Sheriffs’ Association; Training in Early Abortion for Comprehensive Healthcare; Urge: Unite for Reproductive & Gender Equity; Western Center of Law & Poverty; Women’s Foundation of California, Women’s Policy Institute; Young Women’s Freedom Center

Opposition: California State Sheriff’s Association (CSSA)

Assembly Floor Vote: 63 - 0

PURPOSE

The purpose of this bill is to require specified medical treatments and services for pregnant incarcerated women in county jail and state prisons, it also prohibits the use of chemical weapons, like pepper spray and tasers, and solitary confinement on pregnant or postpartum incarcerated women.

Existing law requires the Board of State Community Corrections (BSCC) to establish minimum standards for state and local correctional facilities. BSCC shall review those standards biennially and make any appropriate revisions. The standards shall include, but not be limited to, the following: health and sanitary conditions, fire and life safety, security, rehabilitation programs, recreation, treatment of persons confined in state and local correctional facilities, and, personnel training. The standards include specific ones for pregnant inmates like prenatal and postpartum information, a balanced diet, etc., and health care at the California Department of Corrections and Rehabilitation (CDCR) and in local adult and juvenile facilities. (Pen. Code, § 6030)

Existing law requires every woman committed a CDCR institution be examined mentally and physically and be given the care, training, and treatment adapted to her particular condition. (Pen. Code, § 3403.)

Existing law permits a state prison inmate to obtain an abortion, if so desired, and they are eligible under law. It also requires the rights provided for prisoners by this section be posted in at least one conspicuous place that all female prisoners have access to. (Pen. Code, § 3405.)

Existing law entitles a female inmate in prison to receive medical services to determine if she is pregnant, and if found to be pregnant, entitles the inmate to a determination of the extent of medical services needed and to the receipt of those services from the physician and surgeon of her choice. (Pen. Code, § 3406.)

Existing law prohibits the use of restraints on pregnant or recovering inmates. (Pen. Code, § 3407.)

Existing law mandates any incarcerated person in state prison who menstruates shall, upon request, have access to, and be allowed to use, materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system. Any incarcerated person in state prison who is capable of becoming pregnant shall, upon request, have access to, and be allowed to obtain, contraceptive counseling and their choice of birth control methods, unless medically contraindicated. (Pen. Code, § 3409 (a).)

Existing law requires the CDCR to establish a community treatment program under which women inmates sentenced to state prison who have one or more children under age six are able to participate. The program shall provide for the release of the mother and child or children to a public or private facility in the community and which will provide the best possible care for the mother and child. (Pen. Code, § 3411.)

Existing law provides that every female inmate who is pregnant and not eligible for participation in the community treatment program shall have access to complete prenatal care. (Pen. Code, § 3424.)

Existing law requires the CDCR to establish minimum standards for pregnant inmates not placed in the community treatment program, including:

- 1) A balanced, nutritious diet approved by a doctor;
- 2) Prenatal and postpartum information and health care;
- 3) Information pertaining to childbirth education and infant care; and,
- 4) A dental cleaning. (Pen. Code, § 3424.)

Existing law prohibits sterilization for the purpose of birth control of an individual under the control of the department or a county and imprisoned in the state prison or a reentry facility, community correctional facility, county jail, or any other institution in which an individual is involuntarily confined or detained under a civil or criminal statute. (Pen. Code, § 3440.)

Existing law requires a county sheriff or the administrator of the county jail to develop and implement, by January 1, 2020, an infant and toddler breast milk feeding policy for lactating inmates detained in county jails. The policy shall include:

- 1) Procedures for providing medically appropriate support and care related to the cessation of lactation or weaning.
- 2) Procedures providing for human milk expression, disposal, and same-day storage for later retrieval and delivery to an infant or toddler by an approved person, at the option of the lactating inmate and with the approval of the facility administrator.
- 3) Procedures for conditioning an inmate's participation in the program upon the inmate undergoing drug screening. (Pen. Code, § 4002.5.)

Existing law authorizes a sheriff, chief or director of corrections, or chief of police to charge a fee of \$3 for any inmate-initiated medical visit, but prohibits the denial of medical care if the inmate does not have the money in his or her personal account. (Pen. Code, § 4011.2.)

Existing law states any female confined in any local detention facility shall upon her request be allowed to continue to use materials necessary for personal hygiene with regard to her menstrual cycle and reproductive system and birth control measures as prescribed by her physician. (Pen. Code, § 4023.5 (a).)

This bill requires an incarcerated person who is identified as “possibly pregnant” or capable of becoming pregnant be offered a voluntary pregnancy test during an intake health exam with 72 hours of arrival at the jail or prison, or at any point during incarceration.

This bill states that an incarcerated person that declines a pregnancy test will have to sign an “Informed Refusal of Pregnancy Test” form that becomes a part of their medical file.

This bill states an incarcerated person confirmed to be pregnant, have a pregnancy examination with a physician, nurse practitioner, midwife or physician within 7 days of arrival at the jail or

prison. These medical providers will also provide postpartum exams within one week from childbirth and as necessary for up to 12 weeks.

This bill requires the pregnancy exam include the following: a determination of the term of pregnancy, plan of care which includes referrals to evaluate for the presence of chronic medical conditions or infectious diseases, and an order for any prenatal labs and diagnostic studies needed.

This bill provides a specified schedule for prenatal care visits.

This bill mandates pregnant incarcerated persons have access to the following: daily prenatal vitamins and newborn care as specified.

This bill requires pregnant incarcerated persons in a multi-tier housing unit be assigned lower bunk and lower tier housing.

This bill prohibits the use of tasers, pepper spray, or any other chemical weapon on pregnant incarcerated persons.

This bill states that eligible pregnant incarcerated persons must be notified of community-based programs serving pregnant, birthing or lactating inmates.

This bill requires each incarcerated pregnant person be referred to a social worker who must discuss options for placement and care of the child after delivery, assist with phone access to contact relatives for purposes of placement of the newborn, and oversee the placement.

This bill states that a pregnant incarcerated person in labor should be treated as an emergency, taken to a hospital for purposes of giving birth, and shall be transported in the least restrictive way possible. They are also allowed to have a verified support person present during childbirth.

This bill prohibits solitary confinement, administrative segregation, or any similar practice for an incarcerated person who is pregnant, had a miscarriage, or recently terminated a pregnancy within 12 weeks; unless that placement is for their own safety.

This bill requires before a pregnant or post-partum incarcerated person be placed in solitary confinement or administrative segregation, staff must give them a verbal explanation of the safety concern and advise them about their option to deny placement. The incarcerated person may agree or decline the placement in writing, and if placed in solitary confinement or in a similar practice that placement should be reevaluated every 7 days to assess if the safety risk is still present. In this placement pregnant or postpartum incarcerated persons should have access to programming and exercise given to the general population.

This bill requires incarcerated persons be provided materials necessary for personal hygiene, at no charge, with regard to their menstrual cycle and reproductive system specifying products like tampons, pads, etc.

COMMENTS

1. Need for This Bill

According to the author:

Our criminal justice system does not sufficiently consider or address the particular circumstances of pregnant people. A review of policies and practices of California's county jails revealed that pregnant inmates do not receive adequate care during and after pregnancy. While institutions of incarceration should be meeting all the health needs of people behind bars, reproductive and health care needs are often unique and time sensitive. This bill would help ensure that county jails and state prisons have dignified reproductive healthcare conditions for pregnant inmates before, during, and after birth. AB 732 would require county jails and state prisons to ensure pregnant inmates are scheduled for prenatal visits, referred to social services, given access to community-based programs, and provided with postpartum examinations. This bill would also prohibit the shackling, restraining, and solitary confinement of pregnant inmates

2. Reproductive Health Behind Bars in California Report

California law requires county jails and state prisons provide reproductive health care to incarcerated persons in their institutions. In 2016 the American Civil Liberties Union released a report titled *Reproductive Health Behind Bars in California*¹ which reported on common barriers to reproductive and sexual health like forced pregnancy testing, denial of prenatal and postpartum care and accommodations, and more. In the report they stated, up until 2014 Alameda County conducted mandatory pregnancy testing on their female inmates in county jail, and those administering the test were not medical professionals. This practice ended when ACLU settled a lawsuit against Alameda County Sheriff on behalf of 2 women that were subjected to this practice. The report states “having a good understanding of new arrivals’ medical conditions so as to provide appropriate care is important...[however] Mandatory pregnancy testing violates privacy rights and intrudes into one of the most private areas of people’s lives—reproductive decision making ²”. Forced pregnancy testing does not account for the elderly, LGBTQ+ persons, or women who have received tubal ligation. Some county jails have vague policies that are currently interpreted as requiring pregnancy exams during intake, while others like San Francisco expressly offer it as a choice. This bill creates a consistent policy across jails and prisons that require incarcerated persons to give their consent to receive a pregnancy test.

This bill creates uniform policies for pregnant incarcerated persons in jails and prison based off of the recommendations in this report. Those recommendations entailed provisions that allow a support person during delivery, prohibits solitary confinement, restraints and chemical weapons for pregnant and postpartum incarcerated people, require prenatal and postpartum accommodations, etc.

¹ <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2016/01/Reproductive-Health-Behind-Bars-in-California.pdf>

² *Reproductive Health Behind Bars in California*, *supra*, pg. 6

3. Solitary Confinement Practices for Pregnant Inmates

Reports by *Women's Mental Health* state that between 11-20% of women develop postpartum depression, and as many as 80% experience a "low grade and short-lived form of depression" during pregnancy³. These percentages will most likely increase when observing the pregnant incarcerated persons population. Pregnant incarcerated persons are currently permitted to be placed in solitary confinement in California. Maryland, Texas, Georgia, New Mexico, Florida and Nebraska are beginning to move away from incarcerating pregnant inmates in solitary confinement. In Florida in 2019, a woman gave birth alone in an isolated prison cell after alerting prison staff she was in need of medical attention⁴. This incident prompted Florida to pass HB 1259, which limits the use of solitary confinement for pregnant inmates. Researchers have shown that solitary confinement can be psychologically harmful causing anxiety, depression, self-harm and more. Being placed in these conditions while pregnant or having been recently pregnant not only increase the chances of psychological harm, but can restrict their access to proper healthcare.

This bill aligns with the aforementioned state policies by prohibiting solitary confinement or administrative segregation for pregnant or 12 week postpartum incarcerated persons, unless that placement is for their own safety. If the pregnant or post-partum incarcerated person must be placed in solitary confinement or administrative segregation, staff must give them a verbal explanation of the safety concerns and advise them about their option to deny placement. The incarcerated person can then agree or decline the placement in writing. If placed in solitary confinement or in a similar practice, that placement should be reevaluated every 7 days to assess if the safety risk is still present. This bill also allows the pregnant or postpartum incarcerated persons access to programming and exercise given to the general population.

4. Changes to Current Law

This bill adds specific provisions on pregnancy care and accommodations for prisons and jails by creating new penal codes §3408 and §4023.8.

Penal code § 3408 would codify a California Code of Regulation law on treatment for pregnant inmates (15 CCR § 3355.2) with some changes. It will grants access to postpartum medical care for up to 12 weeks after birth instead of 6 weeks. It also allows access to medication assisted treatment for persons using heroin or methadone, and referral to social workers to assist with feeding, care, and placement of a child.

Proposed penal code §4023.8 will require pregnancy tests be offered at intake with a follow up within 7 days if a pregnancy is confirmed. It also creates a schedule for prenatal visits, and requires pregnant incarcerated persons be given accommodations to lower bunk and lower tier housing. This bill would allow an incarcerated pregnant person to have a support person present during delivery. This bill also prohibits tasing of pregnant people, solitary confinement or administrative segregation for pregnant persons, and shackling to anyone else during transport to hospital during labor.

³ <https://womensmentalhealth.org/specialty-clinics/postpartum-psychiatric-disorders/>

⁴ <https://floridapolitics.com/archives/343307-bill-limiting-the-use-of-solitary-confinement-for-pregnant-inmates-signed-by-gov-desantis>

Existing law states an incarcerated person in state prison and jail must be given access to “materials necessary for personal hygiene with regards to their menstrual cycle and reproductive system” (Pen. Code §3409 & §4023.5). This bill amends penal code sections §3409 and §4023.5 to specify sanitary pads and tampons, replacing materials for personal hygiene, it also states the items be provided at no cost. This bill imposes a state-mandated local program to pay for these items. This bill also further amends §4023.5 to expands what types of providers can prescribe birth control to include nurse practitioner, certified nurse midwife, or physician’s assistant.

Existing law provides an inmate in a prison or jail with the right to summon and receive the services of any physician to determine whether they are pregnant and receive medical services during their pregnancy. This bill amends penal codes §4023.6 and §3046 to also allow incarcerated persons to receive care from licensed nurse practitioners, certified nurse midwives, and physician assistants in addition to physicians.

This bill amends penal codes §4028 and §3405 to reference the Reproductive Privacy Act rather than Therapeutic Abortion Act, and provides examples of impermissible restrictions. The Reproductive Privacy Act deleted the provisions of the Therapeutic Abortion Act, therefore this bill would update the penal code to reference the correct law.

5. Argument in Support

According to the American Civil Liberties Union of California (ACLU):

As detailed in the January 2016 ACLU of California report, Reproductive Health Behind Bars in California, pregnant people housed in incarceration settings face significant barriers to accessing adequate pregnancy care. Once an incarcerated person finds out they are pregnant, they have a decision to make, just as pregnant people outside of jails and prisons do. They must decide whether to carry the pregnancy to term and either parent the child or choose adoption, or whether to terminate the pregnancy through abortion. The National Commission on Correctional Health Care states that incarcerated people who learn they are pregnant should be provided comprehensive and unbiased options counseling that includes information about prenatal care, adoption, and abortion.

A person’s right to terminate a pregnancy under California law is not affected by their incarceration status. Jails and prisons cannot deny or interfere with this decision or impose any condition or restriction on this care. If a person who is incarcerated decides to carry the pregnancy to term, they must be provided timely, scheduled prenatal and postnatal care without delay or having to rely on the as-needed sick-call system. All of these actions must, by necessity, take place within a set timeframe. AB 732 addresses the confusion and disparities in care and services that exist throughout the state’s jails and prisons. The labor and delivery process is a difficult, stressful, and vulnerable time for many people, even when they are surrounded by loved ones. But the vast majority of pregnant people incarcerated in prisons and county jails must give birth without any loved ones present, with a doctor they may have no established relationship with, and in full view of custody staff. In some cases, the custody staff state that they have to be in the room during labor and delivery.

AB 732 will remedy this situation by requiring jails and prisons to allow pregnant people to elect a support person to be present at childbirth, and establishes a presumption that custody staff will not be present. Incarcerated people who are pregnant need a range of accommodations to deal with the intense physical demands and health needs of pregnancy. These include receiving scheduled prenatal vitamins, having regular check-ups with a healthcare provider, and getting a lower-tier housing assignment or bottom bunk to avoid the strain and risk of falling that comes with frequently climbing stairs or steps up to a bunk. AB 732 codifies best standards regarding these accommodations.

Finally, pregnant people may be at a higher risk of contracting infectious diseases such as COVID-19. AB 732 would require care, evaluation, and treatment for infectious diseases, which is a necessary step to stem the tide of contagion in jails and prisons.

6. Argument in Opposition

According to the California State Sheriffs Association (CSSA):

Existing state regulation requires the health authority of a correctional facility to set forth in writing policies and procedures in conformance with applicable state and federal law, which are reviewed and updated at least every two years, on a number of topics including provision for screening and care of pregnant and lactating women, including prenatal and postpartum information and health care, including but not limited to access to necessary vitamins as recommended by a doctor, information pertaining to childbirth education, and infant care.

We believe it is inappropriate to set such rigorous treatment schedules and specifications for care in statute as it limits necessary flexibility. Additionally, the vast unfunded mandates contemplated by this bill related to specific courses of prenatal and postpartum care without regard to local standards or resources will be extremely costly, especially to small counties. Not every county will be able to provide this level of care without extreme budgetary pressure or challenges related to identifying specific items or course of care in 58 diverse counties.

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