SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	SB 591	**Hearing Date:**	April 23, 2019
Author:	Galgiani		
Version:	March 27, 2019		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SJ		

Subject: ***Incarcerated Persons: Health Records***

HISTORY

Source: AFSCME California
AFSCME Council 57

Prior Legislation: SB 350 (Galgiani), held in Senate Appropriations in 2017
SB 1443 (Galgiani), held in Senate Appropriations in 2016

Support: Unknown

Opposition: California Public Defenders Association

PURPOSE

The purpose of this bill is to: 1) require the disclosure of medical, dental, and mental health information, by electronic transmission when possible, between a county correctional facility, a county medical facility, a state correctional facility, a state hospital, or a state-assigned mental health provider when an inmate is transferred from or between state and county facilities, as specified; and 2) authorize a practicing psychiatrist or psychologist from the State Department of State Hospitals (DSH) or the California Department of Corrections and Rehabilitation (CDCR) to have prompt and unimpeded access to an inmate who is temporarily housed at a county correctional facility, a county medical facility, or a state-assigned mental health provider, as well as their records for the period of confinement at that facility in order to complete a mentally disordered offender evaluation.

Existing law provides, pursuant to the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const., art. I, § 1.)

Existing federal law, the Health Insurance Portability and Accountability Act (HIPAA), specifies privacy protections for patients' protected health information and generally provides that a covered entity, as defined (health plan, health care provider, and health care clearing house), may not use or disclose protected health information except as specified or as authorized by the patient in writing. (45 C.F.R. Sec. 164.500 et seq.)

Existing law prohibits, under the State Confidentiality of Medical Information Act (CMIA), providers of health care, health care service plans, or contractors, as defined, from sharing medical information without the patient's written authorization, subject to certain exceptions. (Civ. Code, § 56 et seq.)

Existing law defines "health care service plan" as any entity regulated pursuant to the Knox-Keene Health Care Service Plan Act of 1975. Defines "medical information" as any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental or physical condition, or treatment. Defines "individually identifiable" to mean that the medical information includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the individual's identity. (Civ. Code, § 56.05, subds. (g) & (j).)

Existing law defines a "licensed health care professional" to mean any person licensed or certified pursuant to the Business and Professions Code, the Osteopathic Initiative Act or the Chiropractic Initiative Act, or the Health and Safety Code, as specified. (Civ. Code, § 56.05, subd. (h).)

Existing law defines "provider of health care" to include: any person licensed or certified pursuant to the Business & Professions Code; any person licensed pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act; any clinic, health dispensary, or health facility licensed pursuant to the Health & Safety Code, as specified. (Civ. Code, § 56.05, subd. (m).)

Existing law provides that any provider of health care, a health care service plan, pharmaceutical company, or contractor who negligently releases or discloses medical information or records shall be subject to damages in a civil action or an administrative fine, as specified. (Civ. Code, § 56.36.)

This bill requires that medical information be disclosed between a county correctional facility, a county medical facility, a state correctional facility, a state hospital, or to the extent authorized, a facility of the Federal Bureau of Prisons to ensure the continuity of health care of an inmate being transferred between those facilities.

Existing law states that person sentenced to imprisonment in a state prison or to imprisonment pursuant to subdivision (h) of Section 1170 may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests, as specified. (Pen. Code, § 2600.)

Existing law delineates the civil rights of a person sentenced to imprisonment in a state prison or to imprisonment pursuant to subdivision (h) of Section 1170. (Pen. Code, § 2601.)

This bill expressly states that an inmate's civil rights include, subject to the bill's provisions relating to the disclosure of medical information described above, all privacy rights legally applicable to inmates.

Existing law requires that as a condition of parole, an inmate who meets the following criteria be provided necessary treatment by DSH:

- The inmate has a severe mental disorder that is not in remission or that cannot be kept in remission without treatment.

- The severe mental disorder was one of the causes of, or was an aggravating factor in, the commission of a crime for which the inmate was sentenced to prison.
- The inmate has been in treatment for the severe mental disorder for 90 days or more within the year prior to the inmate's parole or release.
- The crime for which the inmate was sentenced to prison has a determinate sentence and is one of several enumerated offenses, or an offense that involved force or violence, or caused serious bodily injury, or an offense that involved an explicit or implicit threat of force or violence likely to produce substantial physical harm.
- Prior to release on parole, the person in charge of treating the inmate and a practicing psychiatrist or psychologist from DSH have evaluated the inmate at a CDCR facility, and a chief psychiatrist of CDCR has certified to the Board of Parole Hearings (BPH) that the inmate has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the inmate's criminal behavior, that the inmate has been in treatment for the severe mental disorder for 90 days or more within the year prior to the inmate's parole release day, and that by reason of the inmate's severe mental disorder the inmate represents a substantial danger of physical harm to others. Specifies that for inmates being treated by DSH pursuant to Penal Code section 2684, the chief psychiatrist of CDCR is required to complete the certification, and the evaluation is to be done at the state hospital by the person at the state hospital in charge of treating the inmate and a practicing psychiatrist or psychologist from CDCR.

(Pen. Code, § 2962.)

Existing law defines "severe mental disorder" as an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. Clarifies that the term "severe mental disorder" does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. (Pen. Code, § 2962, subd. (a)(2).)

Existing law defines "remission" as a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. (Pen. Code, § 2962, subd. (a)(3).)

Existing law provides, upon a showing of good cause, that BPH may order that a person remain in custody for no more than 45 days beyond the person's scheduled release date for full evaluation as a mentally disordered offender. Provides that good cause means circumstances where there is a recalculation of credits or a restoration of denied or lost credits, a resentencing by a court, the receipt of the prisoner into custody, or equivalent exigent circumstances which result in there being less than 45 days prior to the person's scheduled release date for the evaluations described above. (Pen. Code, § 2963.)

This bill provides that prior to release on parole, the person in charge of treating the inmate, a practicing psychiatrist or psychologist from DSH, and a practicing psychologist from CDCR have evaluated the inmate at a CDCR, county correctional facility, county medical facility, or facility of the Federal Bureau of Prisons, and a chief psychiatrist of CDCR has certified to BPH that the prisoner has a severe mental disorder, that the disorder has not been in remission for the

6 months immediately preceding the evaluation, or cannot be kept in remission without treatment as evidenced by a review of the inmate's treatment records for the 12 months immediately preceding the evaluation, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to their parole release day, and that by reason of a severe mental disorder the prisoner represents a substantial danger of physical harm to others. Specifies that for inmates being treated by DSH pursuant to Penal Code section 2684, the certification must be completed by a chief psychiatrist of CDCR, and the evaluation must be done at a state hospital by the person at the state hospital in charge of treating the inmate and a practicing psychiatrist or psychologist from CDCR.

This bill requires, for the evaluation of inmates temporarily housed at a county correctional facility, a county medical facility, or a state-assigned mental health provider, that a practicing psychiatrist or psychologist from DSH or CDCR be afforded prompt and unimpeded access to the inmate as well as their records for the period of confinement at that facility upon submission of current and valid proof of state employment and a departmental letter or memorandum arranging the appointment.

Existing law provides that an inmate who is released on parole or postrelease community supervision (PRCS) must be returned to the county that was the last legal residence of the inmate prior to his or her incarceration, as specified, except as otherwise provided. Provides that an inmate may be returned to another county if that would be in the best interests of the public. (Pen. Code, § 3003, subds. (a)-(c).)

Existing law specifies the information, if available, that must be released by CDCR to local law enforcement agencies regarding a paroled inmate or inmate placed on PRCS, who is released in their jurisdictions. (Pen. Code, § 3003, subd. (e)(1).)

Existing law states that unless the information is unavailable, CDCR is required to electronically transmit to a county agency, the inmate's tuberculosis status, specific medical, mental health, and outpatient clinic needs, and any medical concerns or disabilities for the county to consider as the offender transitions onto postrelease community supervision, for the purpose of identifying the medical and mental health needs of the individual, as specified. (Pen. Code, § 3003, subd. (e)(2)-(5).)

This bill deletes this provision of law.

Existing law provides that an inmate may be paroled to another state pursuant to any other law, as specified. (Pen. Code, § 3003, subd. (j).)

Existing law provides that CDCR is the agency primarily responsible for, and that has control over, the program, resources, and staff implementing the Law Enforcement Automated Data System (LEADS) in order to comply with the requirement that it share specified information with local law enforcement agencies regarding a person on parole or PRCS. Requires county agencies supervising inmates released to PRCS to provide any information requested by CDCR to ensure the availability of accurate information regarding inmates released from state prison. (Pen. Code, § 3003, subd. (k).)

This bill requires medical information to be disclosed between a county correctional facility, a county medical facility, a state correctional facility, a state hospital, or a state-assigned mental

health provider to ensure the continuity of health care of an inmate being transferred from or between those facilities, and would require that all transmissions made pursuant to its provisions comply with the CMIA, the Information Practices Act, HIPAA, the federal Health Information Technology for Clinical Health Act (HITECH) (Public Law 111-005), and the corresponding implementing federal regulations relating to privacy and security, as specified.

COMMENTS

1. Need for This Bill

According to the author:

> It is so important to promote the continuity of care for inmates to make sure they are getting the services and mental health care they need, while also ensuring a high standard for public safety, once a person is paroled. Current law requires that an evaluation must take place prior to parole, making it necessary to guarantee that state personnel can access CDCR prisoners and their health records while housed in non-state facilities in a timely manner. Having health records transferred with the inmate will provide both continuity of care and consistent, complete records required for evaluation purposes.
>
> Although current law offers a variety of statutory schemes discussing the transfer of patient records for the public, none apply to the correctional setting. State correctional facilities receive medically and mentally unstable inmates from county jails and other non-CDCR facilities where the medical and/or mental health history at the time of transfer is not included. Having health records transferred with the inmate will provide both continuity of care and consistent, complete records required for evaluation purposes.
>
> In order to satisfy the requirements and goals of Penal Code 2962, the psychologist(s) or psychiatrist(s) performing an evaluation need to have the most recent 12-months of treatment records available for review. With shorter sentences in state custody due to Proposition 57, it is more important than ever to ensure access to records from an inmates' time in non-CDCR facilities.

2. Sharing Inmate Medical Information Between Relevant Entities

The proponents of this bill assert that it is necessary for the medical records of inmates to be shared between CDCR and other entities, including county correctional facilities and county medical facilities, in order to provide continuity of care to this population. Given that such a high percentage of individuals who are incarcerated have a mental illness, sharing information between entities that have possession of records pertaining to an inmate's diagnoses and treatment plan, among other things, should help facilitate continuity of care and result in better patient outcomes. The privacy aspects of this bill were addressed when the bill was heard in the Senate Judiciary Committee.

3. Mentally Disordered Offenders

The Mentally Disordered Offender (MDO) commitment is a post-prison civil commitment and was "created to provide a mechanism to detain and treat severely mentally ill prisoners who reach the end of a determinate prison term and are dangerous to others as a result of a severe mental disorder." (<https://www.cdcr.ca.gov/BOPH/mdo.html> [as of Apr/ 16, 2019].) MDO is a two-phase commitment. First, the person is certified as a mentally disordered offender by the Chief Psychiatrist of CDCR and a parole condition is imposed by BPH. Then, CDCR paroles the inmate to the supervision of the state hospital for involuntary treatment. Existing law mandates inpatient treatment at a state hospital unless DSH certifies that the person can be safely and effectively treated in an outpatient setting. Penal Code section 2970 provides for the continued involuntary treatment of the person for one year upon termination of parole. Finally, a petition for recommitment may be filed prior to the termination of the one-year continued treatment. (Pen. Code, § 2972).

Penal Code section 2962 lists six criteria that must be met for an initial MDO certification: (1) the inmate has a severe mental disorder; (2) the inmate used force or violence in committing the underlying offense; (3) the severe mental disorder was one of the causes or an aggravating factor in the commission of the offense; (4) the disorder is not in remission or capable of being kept in remission without treatment; (5) the inmate was treated for the disorder for at least 90 days in the year before the inmate's release; and (6) by reason of the severe mental disorder, the inmate poses a substantial danger of physical harm to others. (Pen. Code, § 2962, subds. (a)-(d); *People v. Cobb* (2010) 48 Cal.4th 243, 251-252.)

The initial determination that the inmate meets the MDO criteria is made administratively. The person in charge of treating the inmate and a practicing psychiatrist or psychologist from DSH will evaluate the inmate. If the inmate meets the MDO criteria, the chief psychiatrist will certify to BPH that the inmates meets the criteria for an MDO commitment. The inmate may request a hearing before BPH, and BPH must then conduct a hearing for the purpose of proving that the inmate meets the required MDO criteria. An inmate who disagrees with the MDO determination, may file a petition for a hearing on whether he or she meets MDO criteria in the superior court of the county in which he or she is incarcerated or is being treated. The inmate has a right to a jury trial, and the jury must unanimously agree beyond a reasonable doubt that the inmate is an MDO. If the jury, or the court in the event that a jury trial is waived, reverses the determination of BPH, the court is required to stay the execution of the decision for five working days to allow for an orderly release of the inmate.

As stated above, an MDO commitment is for one year, but the commitment can be extended for another one-year period. The state may file successive petitions for additional extensions, raising the prospect that, despite the completion of a prison sentence, the MDO may never be released. The trial for each one-year commitment is done according to the same standards and rules that apply to the initial trial.

4. Effect of This Bill

This bill amends existing law to require the disclosure of medical, dental, and mental health information, by electronic transmission when possible, between a county correctional facility, a county medical facility, a state correctional facility, a state hospital, or a state-assigned mental health provider when an inmate is transferred from or between state and county facilities. As

stated above, the privacy implications of the bill were addressed when it was heard in the Senate Judiciary Committee.

This bill amends Penal Code section 2962 to add a practicing CDCR psychologist to the individuals who must evaluate the inmate, and adds other facilities in which the evaluations may take place, including a county correctional facility, county medical facility, and federal correctional facility. This bill additionally amends Penal Code section 2962 to change the criteria upon which the MDO certification is based from "the disorder is not in remission, or cannot be kept in remission without treatment" to "the disorder has not been in remission for the 6 months immediately preceding the evaluation, or cannot be kept in remission without treatment as evidenced by a review of the inmate's treatment records for the 12 months immediately preceding the evaluation."

This bill also adds language to Penal Code section 2962 to authorize a practicing psychiatrist or psychologist from DSH or CDCR to have prompt and unimpeded access to an inmate who is temporarily housed at a county correctional facility, a county medical facility, or a state-assigned mental health provider, as well as their records for the period of confinement at that facility in order to complete an MDO evaluation.

The proponents of the bill assert that the language in the bill authorizing clinicians performing MDO evaluations to have access to an inmate and the inmate's records while the inmate is temporarily housed in a non-CDCR or non-DSH facility is necessary to perform the MDO evaluation. According to the bill's proponents, it sometimes the case that the time when the MDO evaluation is supposed to take place coincides with the time that a particular inmate is temporarily housed in a non-CDCR or non-DSH facility. This bill seeks to address that problem by authorizing the evaluation to take place in these other facilities which includes authorizing the MDO evaluators' access to the inmates as well as their records.

Penal Code section 2963 appears to anticipate a scenario in which the inmate is not housed at a CDCR facility at the end of the inmate's term when the MDO evaluation would typically take place, and permits BPH to keep the inmate in custody for up to 45 days beyond the inmate's scheduled release date, upon a showing of good cause, for the purpose of affording time for the MDO evaluation to take place.

Penal Code section 2963 provides:

> a) Upon a showing of good cause, the Board of Parole Hearings may order that a person remain in custody for no more than 45 days beyond the person's scheduled release date for full evaluation pursuant to paragraph (1) of subdivision (d) of Section 2962 and any additional evaluations pursuant to paragraph (2) of subdivision (d) of Section 2962.
> (b) For purposes of this section, good cause means circumstances where there is a recalculation of credits or a restoration of denied or lost credits, a resentencing by a court, the receipt of the prisoner into custody, or equivalent exigent circumstances which result in there being less than 45 days prior to the person's scheduled release date for the evaluations described in subdivision (d) of Section 2962.

However, the proponents of the bill assert that it is difficult to meet the good cause standard in Penal Code section 2963 in order to obtain an MDO hold, and that changes to Penal Code section

2962 are necessary in order to conduct the MDO evaluations required by law. To the extent that this bill amends Penal Code section 2962 to permit an MDO evaluation of an inmate who would otherwise be evaluated but for the inmate's placement in a non-CDCR or non-DSH facility, this bill does not expand MDO screening.

5. Argument in Support

According to AFSCME:

> In accordance with Penal Code section 2962, prior to releasing a prisoner on parole, an evaluation of the prisoner must be conducted by specified clinicians. The purpose of this evaluation is to both ensure society is protected from prisoners with dangerous mental disorders and to provide treatment for those prisoners.
>
> … With the recent passage of Proposition 57 and other changes to the criminal justice system, prisoners are spending less time in our state facilities. It is difficult to provide prisoners with an adequate evaluation because there is no guarantee that state personnel can access the prisoner's health records for their time in other non-state facilities. There are no medical record statutes that apply to correctional settings. Existing law prohibits health care providers and others from disclosing medical information without a patient's authorization, [and] this often results in prisoners moving from facility to facility without medical records. This lack of record accessibility risks the prisoners' continuity of care and cerates challenges for the health professionals who are charged with reviewing records prior to parole.
>
> … SB 591 would authorize and require health records for inmates to follow the inmate as he/she transfers between state, county or federal facilities with the goal of ensuring continuity in health care and completeness of medical records.
>
> Additionally, we need to ensure that the clinicians performing the evaluations are able to physically access and interview the prisoners, wherever they are located. This has proven to be extremely difficult and inconsistent when prisoners are sent to non-state facilities.

6. Argument in Opposition

The California Public Defenders Association writes:

> SB 591 amends Civil Code section 56.10… These provisions of SB 591 are cost-effective and sensible. They benefit both the prisoner/patient and the taxpayers.
>
> SB 591 also greatly expands screening under Penal Code section 2962 for involuntary commitment as Mentally Disordered Offenders (MDO's) to local jails, county medical facilities, and federal prisons before an inmate is released on parole. Under existing law, only inmates suffering from mental illness who are in state prison or already in state hospitals for treatment pursuant to Penal Code section 2684 are screened for involuntary commitment

…

SB 591 would result in a substantial increase in the number of MDO's involuntarily hospitalized. State hospital beds are in short supply and there is already a wait list of over 1,000 individuals who are incompetent to stand trial languishing in county jails waiting for beds in the same state hospitals as the MDO's. Increasing the number of MDO's involuntarily committed would exacerbate this problem.

SB 591 is short sighted public policy. The underlying policy rationale of dealing with mass incarceration by having mass involuntary commitment is seriously flawed. Not only is involuntary hospitalization more expensive than adequately funded outpatient treatment, it doesn't work. Community outpatient treatment combined with brief periods of treatment in general hospitals when needed is both cheaper and more effective for most individuals. The World Health Organization promotes a model of treatment in the community or in small protected facilities located in the community closer to family and friends. When periods of acute psychiatric hospitalization are needed it should take place in general psychiatric units in general hospitalizations. …

Ultimately, SB 591 proposes to spend millions of dollars to involuntarily hospitalize more Californians while real basic reforms including investments in schools, jobs, health care, mental health treatment and housing which have been proven to reduce crime in our communities and provide stability for residents lack needed resources.

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