

Date of Hearing: April 6, 2021  
Counsel: Nikki Moore

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 998 (Lackey) – As Amended March 30, 2021

**SUMMARY:** Facilitates the sharing of mental health records of a person transferred from or between the Department of Corrections and Rehabilitation, the State Department of State Hospitals, and county agencies. Specifically, **this bill:**

- 1) Requires a provider of health care, a health care service plan, or a contractor to disclose mental health records, as defined, may be disclosed by a county correctional facility, county medical facility, state correctional facility, or state hospital, as required by the provisions below.
- 2) Establishes that when jurisdiction of an inmate is transferred from or between the Department of Corrections and Rehabilitation, the State Department of State Hospitals, and county agencies caring for inmates, these agencies shall disclose, by electronic transmission when possible, mental health records for any transferred inmate who received mental health services while in the custody of the transferring facility. Mental health records shall be disclosed by and between a county correctional facility, county medical facility, state correctional facility, state hospital, or state-assigned mental health provider to ensure sufficient mental health history is available for the purpose of satisfying the requirements for inmate evaluations prior to the question being before the Board of Parole Hearings and to ensure the continuity of mental health treatment of an inmate being transferred between those facilities.
- 3) Provides that the mental health records shall be disclosed at the time of transfer or within seven days of the transfer of custody between those facilities.
- 4) Defines “mental health records” to include:
  - a) Clinician assessments, contact notes, and progress notes;
  - b) Date of mental health treatment and services;
  - c) Incident reports;
  - d) List of an inmate’s medical conditions and medications;
  - e) Psychiatrist assessments, contact notes, and progress notes; and,
  - f) Suicide watch, mental health crisis, or alternative housing placement records.

- 5) Provides that all transmissions made pursuant to this section shall comply with the Confidentiality of Medical Information Act, the Information Practices Act of 1977, the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), the federal Health Information Technology for Economic and Clinical Health Act, and the corresponding implementing regulations relating to privacy and security in specified sections of the Code of Federal Regulations.

**EXISTING LAW:**

- 1) Provides that, as a condition of parole, a prisoner who meets the following criteria shall be provided necessary treatment by the State Department of State Hospitals as follows:
  - a) The prisoner has a severe mental health disorder that is not in remission or that cannot be kept in remission without treatment.
  - b) The severe mental health disorder was one of the causes of, or was an aggravating factor in, the commission of a crime for which the prisoner was sentenced to prison.
  - c) The prisoner has been in treatment for the severe mental health disorder for 90 days or more within the year prior to the prisoner's parole or release.
  - d) Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of State Hospitals have evaluated the prisoner at a facility of the Department of Corrections and Rehabilitation, and a chief psychiatrist of the Department of Corrections and Rehabilitation has certified to the Board of Parole Hearings that the prisoner has a severe mental health disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental health 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 health disorder for 90 days or more within the year prior to the prisoner's parole release day, and that by reason of the prisoner's severe mental health disorder the prisoner represents a substantial danger of physical harm to others.
  - e) The crime is one of the specified crimes, including manslaughter, murder, rape, and other serious and violent crimes (Pen. Code, § 2962.)
- 2) Allows the Board of Parole Hearings (BPH), upon a showing of good cause, to order the inmate to remain in custody for up to 45 days past the scheduled release date for a full MDO evaluation. (Pen. Code, § 2963.)
- 3) Allows the prisoner to challenge the MDO determination both administratively (a hearing before the board) and judicially (a superior court jury trial). (Pen. Code, § 2966.)
- 4) Requires MDO treatment to be inpatient treatment unless there is reasonable cause to believe that the parolee can be safely and effectively treated on an outpatient basis. (Penal Code Section 2964(a).) If the hospital does not place the parolee on outpatient treatment within 60 days of receiving custody of the parolee, they may request to hearing to determine whether outpatient treatment is appropriate. (Pen. Code, § 2964(b).)

- 5) Specifies that if the parolee's severe mental disorder is put into remission during the parole period and can be kept that way, the director of the hospital shall notify the BPH and shall discontinue treatment. (Pen. Code, § 2968.)
- 6) Allows the district attorney to file a petition with the superior court seeking a one-year extension of the MDO commitment. (Pen. Code, § 2970.)
- 7) Specifies that the cost of treatment for an MDO, whether inpatient or outpatient, is a state expense while the person is under the jurisdiction of either CDCR or the state hospital. (Pen. Code, § 2976.)
- 8) Provides that an inmate who is released on parole or post-release 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).)
- 9) 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).)
- 10) 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 PRCS, for the purpose of identifying the medical and mental health needs of the individual, as specified. (Pen. Code, § 3003, subd. (e)(2)-(5).)

**FISCAL EFFECT:** Unknown.

**COMMENTS:**

- 1) **Author's Statement:** According to the author, "Lack of available information should not be a reason for someone to have their mental health put in jeopardy. When health professionals do not have the required information on a patient to provide care, it hurts the patient and wastes time and money spent on another diagnosis. AB 998 will ensure that medical records follow an inmate when transferred, guaranteeing that they can get the care they need."
- 2) **Need for this Bill:** According to the author, "Existing law (Penal Code 2962) requires mental health evaluations of certain inmates by CDCR psychologists prior to release on parole to aid in determining if an inmate should be released into the community or needs additional treatment from the Department of State Hospitals (DSH). Among the evaluation requirements is the review of an inmate's treatment and behavior over the most recent 12-month period. At the time of the required evaluation, not all inmates have been in state custody for 12-months so psychologists performing the evaluations do not have the required records and need the records from other facilities where the inmate was prior to CDCR or DSH."

"State correctional facilities, at times, receive mentally unstable inmates where the inmates' mental health history is not included at the time of transfer to CDCR. Not only does this

impact inmate and staff safety, but it is costly as well since many times it may result in duplicate treatment/diagnostic testing by the receiving facility. Although current law offers a variety of statutory schemes discussing the transfer of patient records for the public, none apply in a correctional setting. Having medical records transferred with the inmate will ensure the evaluators have complete records to comply with the statutory requirements, as well as provide continuity of care for inmates as they are transferred between facilities.”

This bill ensures that health providers, and state and local agencies, share relevant documents about a person’s mental health, wherever they are in custody.

- 3) **Background on the Mentally Disordered Offender Act (Pen. Code § 2960 et seq.):** A MDO commitment is a post-prison civil commitment. The MDO Act is designed to confine as mentally ill an inmate who is about to be released on parole when it is deemed that they has a mental illness which contributed to the commission of a violent crime. Rather than release the inmate to the community, CDCR paroles the inmate to the supervision of the state hospital, and the individual remains under hospital supervision throughout the parole period. The MDO law actually addresses treatment in three contexts - first, as a condition of parole (Pen. Code, § 2962); then, as continued treatment for one year upon termination of parole (Pen. Code § 2970); and, finally, as an additional year of treatment after expiration of the original, or previous, one-year commitment (Pen. Code § 2972). (People v. Cobb (2010) 48 Cal.4th 243, 251.)

Penal Code section 2962 lists six criteria that must be proven for an initial MDO certification, namely, whether: (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 serious threat of physical harm to others. (Pen. Code § 2962, subs. (a)-(d); People v. Cobb, supra, 48 Cal.4th at p. 251-252.)

The initial determination that the inmate meets the MDO criteria is made administratively. The person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the DSH will evaluate the inmate. If it appears that the inmate qualifies, the chief psychiatrist then will certify to the Board of Parole Hearings (BPH) that the prisoner meets the criteria for a MDO commitment.

The inmate may request a hearing before BPH to require proof that they are a MDO. If BPH determines that the defendant is a MDO, the inmate may file, in the superior court of the county in which they are incarcerated or is being treated, a petition for a jury trial on whether they meets MDO criteria. The jury must unanimously agree beyond a reasonable doubt that the inmate is a MDO. If the jury, or the court if 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 prisoner.

MDO treatment must be on an inpatient basis, unless there is reasonable cause to believe that the parolee can be safely and effectively treated on an outpatient basis. But if the parolee can no longer be safely and effectively treated in an outpatient program, they may be taken into

custody and placed in a secure mental health facility. A MDO commitment is for one year; however, the commitment can be extended. (Pen. Code § 2972, subd. (c).) When the individual is due to be released from parole, the state can petition to extend the MDO commitment for another year. The state can file successive petitions for further 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) **Argument in Support:** According to the *American Federation of State, County and Municipal Employees (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 further treatment if it is necessary. The lack of adequate mental health records creates a situation that is not safe for our communities if prisoners are released on parole without proper mental health evaluations.

“AFSCME is committed to ensuring our evaluators have the tools to conduct full and complete evaluations of the inmate in accordance with Penal Code requirements so they can make fully informed recommendations about if a prisoner can safely be paroled into the community or needs further treatment from the Department of State Hospitals. There are no medical record statutes that apply to correctional settings; this lack of record accessibility creates challenges for the health professionals who are charged with reviewing records prior to parole and evaluating the prisoner.

“By sponsoring this bill, we are providing our state clinicians the tools they need to conduct a full evaluation prior to parole, ensuring parolees are not a danger to themselves or our communities.”

5) **Prior Legislation:**

- a) SB 591 (Galgiani), Chapter 649, Statutes of 2019, stated that a practicing psychiatrist or psychologist from the Department of State Hospital (DSH) or the California Department of Corrections and Rehabilitation (CDCR) be afforded prompt and unimpeded access to an inmate temporarily housed at a county jail, when the psychiatrist or psychologist is conducting an evaluation of the inmate as a Mentally Disordered Offender (MDO). Made changes to the process to determine whether an inmate is a MDO.
- b) SB 350 (Galgiani), of the 2017-2018 Legislative Session, would have required the disclosure of medical, dental, and mental health information 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. SB 350 was held in the Senate Appropriations Committee.
- c) SB 1443 (Galgiani), of the 2015-2016 Legislative Session, would have permitted the sharing of medical, mental health and dental information between correctional facilities, as specified. SB 1443 was held in the Senate Appropriations Committee.

- d) SB 1295 (Nielsen), Chapter 430, Statutes of 2016, authorized the use of documentary evidence for purposes of satisfying the criteria used to evaluate whether a prisoner released on parole is required to be treated by the State Department of State Hospitals as a MDO.

**REGISTERED SUPPORT / OPPOSITION:****Support**

American Federation of State, County and Municipal Employees, Afl-cio (Sponsor)  
California State Sheriffs' Association  
National Association of Social Workers, California Chapter

**Opposition**

None

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