SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	AB 998	**Hearing Date:**	July 6, 2021
Author:	Lackey		
Version:	March 30, 2021		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SJ		

Subject: ***Incarcerated persons: health records***

HISTORY

Source: AFSCME, AFL-CIO

Prior Legislation: SB 591 (Galgiani), Ch. 649, Stats. 2019
SB 350 (Galgiani), held in Senate Appropriations in 2017
SB 1443 (Galgiani), held in Senate Appropriations in 2016

Support: California Catholic Conference; California Judges Association; California State Association of Psychiatrists; California State Sheriffs' Association; National Association of Social Workers, California Chapter

Opposition: None known

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this bill is to require the Department of Corrections and Rehabilitation (CDCR), the Department of State Hospitals (DSH), and county agencies caring for inmates to disclose, by electronic transmission, mental health records regarding each transferred inmate who received mental health services while in custody of the transferring facility, at the time of transfer or within 7 days of the transfer.

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

- The inmate has a severe mental health disorder that is not in remission or that cannot be kept in remission without treatment.
- 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 inmate was sentenced to prison.
- The inmate has been in treatment for the severe mental health disorder for 90 days or more within the year prior to the inmate's parole or release.
- 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 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 inmate'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 inmate's parole release day, and that by reason of the inmate's severe mental health disorder the inmate represents a substantial danger of physical harm to others.

- 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. (Pen. Code, § 2962.)

Existing law allows 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 mentally disordered offender (MDO) evaluation. (Pen. Code, § 2963.)

Existing law 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).)

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 PRCS, for the purpose of identifying the medical and mental health needs of the individual, as specified. (Pen. Code, § 3003, subd. (e)(2)-(5).)

Existing law delineates the circumstances under which a health care provider or health care service plan may disclose medical information. (Civ. Code, § 56.10, subd. (c).)

This bill provides that 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.

This bill requires, when jurisdiction of an inmate is transferred from or between CDCR, DSH, and county agencies caring for inmates, that these agencies 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.

This bill requires mental health records to 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 BPH and to ensure the continuity of mental health treatment of an inmate being transferred between those facilities.

This bill requires that the mental health records be disclosed at the time of transfer or within seven days of the transfer of custody between those facilities.

This bill provides that "mental health records" includes, but is not limited to, the following:

- Clinician assessments, contact notes, and progress notes.
- Date of mental health treatment and services.
- Incident reports.
- List of an inmate's medical conditions and medications.
- Psychiatrist assessments, contact notes, and progress notes.
- Suicide watch, mental health crisis, or alternative housing placement records.

This bill requires that all transmissions made pursuant to the provisions of this bill comply with the Confidentiality of Medical Information Act, the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), the federal Health Information Technology for Economic and Clinical Health Act (HITECH), and the corresponding implementing federal regulations.

COMMENTS

1. 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.
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> 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.

2. 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 inmates with a severe mental health disorder 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/bph/divisions/severe-mental-health-disorder/> [as of Jun. 29, 2021].) 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.

This bill requires that CDCR, DSH, and county agencies 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. Specifically, this bill requires mental health records to be disclosed by and between a county correctional facility, county medical facility, state correctional facility, state hospital, or state-assigned mental health provider within seven days of the transfer of custody between those facilities to ensure sufficient mental health history is available for the purpose of satisfying the requirements for inmate evaluations prior to the question being before BPH and to ensure the continuity of mental health treatment of an inmate being transferred between those facilities.

This bill further specifies that "mental health records" includes, but is not limited to, clinician assessments, contact notes, and progress notes; date of mental health treatment and services; incident reports; list of an inmate's medical conditions and medications; psychiatrist assessments, contact notes, and progress notes; and suicide watch, mental health crisis, or alternative housing placement records. Finally, this bill requires all transmissions of records to comply with state and federal privacy laws, including CIMA and HIPAA.

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