
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 1433 **Hearing Date:** April 19, 2016
Author: Mitchell
Version: April 7, 2016
Urgency: No **Fiscal:** Yes
Consultant: JRD

Subject: *Incarcerated Persons: Contraceptive Counseling and Services*

HISTORY

Source: California Correctional Health Care Services (CCHCS)

Prior Legislation: None known

Support: American Civil Liberties Union; California Attorneys for Criminal Justice; Planned Parenthood Northern California Action Fund; Planned Parenthood Affiliates of California; Planned Parenthood Advocates Pasadena and San Gabriel Valley; Planned Parenthood Mar Monte; Planned Parenthood of Orange and San Bernardino Counties

Opposition: California Right to Life Committee, Inc. (CRLC); California State Sheriffs' Association

PURPOSE

The purpose of this legislation is to provide inmates who menstruate with improved access to birth control, as specified.

Existing law requires that any female confined in any local detention facility, upon her request, be allowed to continue to use materials necessary for (1) personal hygiene with regard to her menstrual cycle and reproductive system and (2) birth control measures as prescribed by her physician. (Penal Code § 3409(a).)

Existing law requires that each and every female confined in any local detention facility be furnished by the county with information and education regarding the availability of family planning services. (Penal Code § 3409(b).)

Existing law requires family planning services be offered to each and every woman inmate at least 60 days prior to a scheduled release date. Upon request any woman inmate shall be furnished by the county with the services of a licensed physician or she shall be furnished by the county or by any other agency which contracts with the county with services necessary to meet her family planning needs at the time of her release. (Penal Code § 3409(c).)

Existing law requires that any woman inmate, upon her request, be allowed to continue to use materials necessary for (1) personal hygiene with regard to her menstrual cycle and reproductive system and (2) birth control measures as prescribed by her physician. (Penal Code § 4023.5(a).)

Existing law requires that each and every woman inmate shall be furnished with information and education regarding the availability of family planning services. (Penal Code § 4023.5(b).)

Existing law requires that family planning services be offered to each and every woman inmate at least 60 days prior to a scheduled release date. Upon request any woman inmate shall be furnished by the department with the services of a licensed physician or she shall be furnished by the department or by any other agency which contracts with the department with services necessary to meet her family planning needs at the time of her release. (Penal Code § 4023.5(c).)

This bill repeals Penal Code sections 3409 and 4023.5.

This bill adds the following requirements:

- Any incarcerated person in state prison or a local detention facility who menstruates shall, upon request, have access and be allowed to use materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system. Any incarcerated person who is capable of becoming pregnant shall, upon request, have access and be allowed to obtain contraceptive counseling and their choice of birth control methods, as specified, unless medically contraindicated.
- Except as provided, all birth control methods and emergency contraception approved by the United States Food and Drug Administration (FDA) shall be made available to incarcerated persons who are capable of becoming pregnant, with the exception of sterilizing procedures prohibited by Section 3440.
- California Correctional Health Care Services or the local detention facility shall establish a formulary consisting of all FDA-approved birth control methods that shall be available to persons in this legislation. If a birth control method has more than one FDA-approved therapeutic equivalent, only one version of that method shall be required to be made available, unless another version is specifically indicated by a prescribing provider and approved by the chief medical physician at the institution. Persons shall have access to nonprescription birth control methods without the requirement to see a licensed health care provider.
- Any contraceptive service that requires a prescription, or any contraceptive counseling, provided to incarcerated persons who are capable of becoming pregnant provided, shall be furnished by a licensed health care provider who has been provided training in reproductive health care and shall be nondirective, unbiased, and noncoercive. These services shall be furnished by the facility or by any other agency which contracts with the facility. Except as provided, health care providers furnishing contraceptive services shall receive training in the following areas:
 - The requirements of this section.
 - Providing nondirective, unbiased, and noncoercive contraceptive counseling and services.

- Providers who attend an orientation program for the Family Planning, Access, Care, and Treatment Program shall be deemed to have met the training requirements described.
- Any incarcerated person who is capable of becoming pregnant shall be furnished by the facility with information and education regarding the availability of family planning services and their right to receive nondirective, unbiased, and noncoercive contraceptive counseling and services. Each facility shall post this information in conspicuous places to which all incarcerated persons who are capable of becoming pregnant have access.
- Contraceptive counseling and family planning services shall be offered and made available to all incarcerated persons who are capable of becoming pregnant at least 60 days, but not longer than 180 days, prior to a scheduled release date.

This bill is clear that its provisions are not to be construed to limit an incarcerated person's access to any method of contraception that is prescribed or recommended for any medically indicated reason.

This bill defines a "local detention facility" as any city, county, or regional facility used for the confinement of a person for more than 24 hours.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several 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 December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 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).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 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 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:

Penal Code (PC) Section 3409, which was added to law in 1972 and has not been updated since 1975, provided that incarcerated females would be allowed to continue to use birth control, among other provisions. Although existing law allows female inmates to have access to continued use of birth control, it does not specify that women who are not using birth control can have access to it upon request or can switch to a different contraception that suits their needs. Additionally, the California Department of Corrections and Rehabilitation (CDCR) allows conjugal visiting for eligible inmates. Therefore, it is important that the law be made clear that incarcerated females have access to birth control and family planning services upon request.

Recently, the California Correctional Health Care Services (CCHCS) established a Women’s Health Care Initiative that is responsible for ensuring that the health care needs of incarcerated females meet community standards. Among other findings, it was determined that family planning services at the California Institution for Women, the Central California Women’s Facility and the newly established Folsom Women’s Facility must be improved, and that the laws addressing health care needs of incarcerated females needed to be updated.

SB 1433 will require the California Department of Corrections and Rehabilitation (CDCR) and the California Correctional Health Care Services (CCHCS) to provide family planning services upon request, as well as provide that these services shall be offered between 180 to 60 days prior to an individual’s parole release date.

2. Effect of This Legislation

The American Civil Liberties Union of California recently issued a report relating to incarcerated women's ability to access contraception.

Jails must allow women to continue taking any prescribed birth control methods, so that those methods are not interrupted during incarceration. Most policies we reviewed include language to this effect. Indeed, four of the five counties in our PRA sample had specific contraception continuation policies, whereas one county did not but had a general policy on continuation of prescription drugs and an intake screening process that required questions about whether the woman was taking any birth control medications.

California also requires jails to educate women about contraception and the availability of family planning services. Two of the five counties in our in PRA sample had policies that clearly complied with this requirement. One county simply did not address the issue. Another county said contraception counseling would be provided, but only if an incarcerated woman requested the information, thereby putting the onus on the incarcerated person not the jail. The final county addressed family planning education but only in its pregnancy policy, making it unclear whether only pregnant people get the counseling or all women do.

Jails must offer women contraceptive services within two months of release, according to the California Penal Code. At the time of release, if a woman requests family planning services, she is entitled to get those services. ACOG [American College of Obstetricians and Gynecologists] recommends that women should be allowed to initiate a new form of birth control at any point during their incarceration. Only two of the counties in our PRA sample clearly addressed the requirement of offering and providing contraceptives prior to release or initiating new birth control methods earlier than two months prior to release.

While, on paper, jails may be addressing their obligations with respect to contraception generally, their policies are insufficiently clear regarding a person's need for emergency contraception or providing emergency contraception in a timely manner.

(Reproductive Health Behind Bars, Melissa Goodman, Ruth Dawson, and Phyllida Burlingame, American Civil Liberties Union of California, January 2016. [Footnotes Omitted.])

This bill is intended to bring consistency and clarity to the Penal Code provisions relating to a female inmate's access to contraception. Specifically, this bill ensures that incarcerated females have access to birth control and family planning services upon request. Given that this legislation provides that state prison inmates "shall have access to non-prescription birth control methods without the requirement to see a licensed health care provider," it is not clear if this legislation is intended to ensure access to condoms. To the extent that is it, members may wish to consider how this legislation will interact with the law, which was added to the penal code in 2015, relating to providing condoms in state prisons:

Based on the recommendations contained in the "Evaluation of a Prisoner Condom Access Pilot Program Conducted in One California State Prison Facility" report, and in light of the successful pilot project conducted at California State Prison, Solano, the Department of Corrections and Rehabilitation shall develop a five-year plan to

expand the availability of condoms in all California prisons. (Penal Code § 6500.)

3. Argument in Opposition

According to the CRLC:

CRLC perceives that this bill is intended to provide Planned Parenthood access to a captive audience of inmates who are confined to detention facilities, the purpose being to expand their client base and pad their net profit. This has little to do with providing aid, or positive health care services to these women.

Further, CRLC believes that the basic intended cohort of detainees to whom they wish unrestrained access are juveniles detained in Juvenile detention facilities in order to encourage these adolescent boys and girls to always chose [sic] Planned Parenthood and its services before considering other medical agencies.

Planned Parenthood not only promotes itself as a major contraceptive distributing agency, but also desires to have the public think of it as a preferred and exclusive medical care provider to women and children, according to several websites.

The costs to the taxpayer of providing detention services and the basic needs of health care for prisoners should not be expanded merely to accommodate family planning entities. Many inmates of both juvenile and adult detention centers are there for brief periods of time. Their time should be directed to more beneficial activities that will help them return to society and independence.

Detention facilities are not maintained for the benefit of outside agencies, nor should its employees be considered to be agents for family planning sales and services.

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