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FISCAL IMPACT REPORT

ORIGINAL DATE 2/23/15

SPONSOR Maestas LAST UPDATED 3/6/15 HB 376

SHORT TITLE Restrict Isolated Confinement in Prisons SB _____

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 376 would create new sections of law by defining correctional facility, inmate, isolated confinement, and serious mental illness. The bill would restrict inmates with serious mental illness or those under the age of eighteen from being placed in isolated confinement. Additionally, inmates shall not be placed in isolated confinement for more than fifteen consecutive days and a total of sixty days in a twelve-month period. Lastly, the bill requires correctional facilities to submit reports on the usage of isolated confinement to county commissions and to the legislature. For private correctional facilities, the bill requires reporting of monetary settlements paid to inmates or inmate families.

FISCAL IMPLICATIONS

With higher staff to inmate ratios and less efficient prison space usage, the cost to house inmates in isolated confinement is more expensive than housing inmates in the general population. Reducing the use of isolated confinement could reduce costs; however, the cost of having these inmates in the general population is unquantifiable. Isolated inmates reduce tension in the general population. Having fewer isolated inmates may require increased guard to prisoner ratios and increased litigation.

The association of counties stated that without the use of solitary confinement, there will be an increase in inmate altercations. The cost of inmate assault claims varies a great deal depending

upon the extent of injuries. Over the past 4 years the average cost per county detention claim arising out of inmate on inmate altercation has been \$35,740 with the most expensive single claim costing \$245 thousand.

As of late November, NMCD housed about 300 inmates in security level V and VI segregation units at Penitentiary of New Mexico (PNM). Neither LFC nor NMCD has a marginal cost estimate for these inmates, but the average per inmate per day cost to house inmates at PNM in FY14 was \$138.28, or 37 percent more than the average of all facilities. PNM facilities include a range of security levels, but the PNM average cost is higher because of the roughly 300 inmates in segregation there. Other states, such as Arizona, have put the cost of housing maximum security inmates at about \$50 thousand annually compared to \$20 thousand for inmates housed among the general population. There is no estimate for how many inmates would be moved from isolated confinement to the general population under this bill.

Requiring correctional facilities to report on the usage of solitary confinement will result in additional costs to county and state correctional facilities. The NMCD estimated that the reporting requirements of the bill to track 15-day limits would require the hiring of one FTE at a cost of approximately \$60 thousand per year.

This bill would decrease costs in some areas and increase costs in others making the fiscal implications of this bill indeterminate.

SIGNIFICANT ISSUES

NMCD provided the following analysis:

Because the bill requires NMCD to report by name inmates in segregation with a serious mental illness, it seems likely that at least some inmates will sue NMCD for alleged violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Violations of HIPAA would expose the NMCD and its employees to civil penalties of up to \$25 thousand per year, and criminal penalties ranging from a \$50 thousand fine and one year in prison up to a fine of \$250,000 and ten years in prison.

HB376 would force the New Mexico Corrections Department (NMCD) to place high risk inmates, who have been previously assessed as predatory and dangerous, back into general population after 15 consecutive days in segregation. It would also force the NMCD to place protective custody inmates voluntarily placed in segregation for their own safety back into the general population after only 15 consecutive days in segregation. When the predatory inmates then harm or kill their original victim or other inmates, the NMCD may be sued under both the New Mexico Tort Claims Act and 42 United States Code Section 1983. Callaway v. New Mexico Department of Corrections, 1994-NMCA-049, 117 N.M. 637, 875 P.2d 393 (Ct. App. 1994) (NMCD's immunity from liability under Section 41-4-6 NMSA 1978 of the Tort Claims Act was waived when it created a dangerous condition on the premises of the penitentiary by allowing inmates with a known propensity for violence to roam the facility with access to potential weapons); Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970 (1994) (Prison officials have a duty under the Eighth Amendment to protect prisoners from violence committed by other prisoners). While the Tort Claims Act does ultimately cap damages, Section 1983 has no such cap.

While NMCD does not know just exactly how many Tort Claims Act and/or Section

1983 lawsuits would be filed each year as a result of this bill, NMCD estimates that anywhere from ten to thirty such lawsuits would be filed each year, ranging in damages from \$30 thousand up to and in excess of \$1 million. Punitive damages in any particular case can range from none up to hundreds of thousands of dollars, depending on the circumstances of the case.

Additionally, fifteen days is simply not enough time to locate a suitable population in another NMCD prison for prisoners placed in voluntary segregation or protective custody at their own request. Voluntary segregation inmates typically have very sensitive issues resulting in voluntary segregation placement: these inmates are sometimes former gang members, have drug debts, have testified against other inmates, or have committed a sex offense.

The Department, after consulting with the VERA Institute and researching best practices, will very shortly implement the new Special Management Program (SMP). Inmates who have engaged in predatory or other significant disruptive behavior (assaults of staff or other inmates, sexual assaults, prison disturbances, escape attempts, etc.) will be placed in the 360 day SMP program with the right to appeal placement.

The goal of the SMP is to change predatory or violent behavior and thinking through the use of a four step program where inmates are provided extensive programming and incrementally increased visits, phone calls, and other earned privileges.

- Step 1--the evaluation phase--lasts thirty days, and provides the inmates with programming (religious, art therapy, journaling, work book, etc.) in their cell, in addition to five weekly recreation periods, three weekly showers, two monthly phone calls and one monthly visit.
- Step 2--the Self Accountability phase--lasts ninety days, and provides focused programming (interpersonal relationships, anger management, conflict resolution, thinking for change, GED, etc.) in a cubicle or chair where other step 2 inmates are present but kept by restraints from assaulting or attacking each other, along with numerous weekly showers and recreation periods and four monthly phone calls and two monthly visits.
- Step 3--the cultural competency phase--last four months, and provides focused programming (cultural diversity training, etiquette class, GED/College, etc.) in a cubicle or chair, access to television and other electronics, along with numerous weekly showers and recreation periods and six monthly phone calls and four monthly visits.
- Step 4--the re-integration phase--last four months, and provides continued extensive programming in small groups of four to twelve unrestrained inmates, shared meals and five hours of tier time per week, along with numerous weekly showers and recreation periods and ten monthly phone calls and six monthly visits.

According to the National Conference of State Legislatures (NCSL) there are eight states prohibiting or limiting the usage of solitary confinement among juveniles including Texas, Nevada, Alaska, and Connecticut. NCSL states that solitary confinement, or “seclusion,” is the most extreme form of isolation in a detention setting and can include physical and social isolation in a cell for 22 to 24 hours per day. The American Academy of Child & Adolescent Psychiatry says solitary confinement of juveniles can lead to depression, anxiety and even psychosis. In recent years, seven states have passed laws that limit or prohibit the use of solitary

confinement for youth in detention facilities. For example, Connecticut law states that no child at any time shall be held in solitary confinement, but “seclusion” may be used periodically if authorized and the young person is checked every thirty minutes.

CYFD provided the following analysis:

This bill prohibits the use of isolated confinement, defined as confining an inmate in a cell for twenty-two or more hours each day, in CYFD facilities. CYFD does not confine the clients in our facilities in this way. CYFD internal procedure P.21.18 addresses room restriction/room confinement. The policy does not permit room restriction for more than nine hours, and that term would be during sleeping hours from 9 pm to 6 am. The policy outlines many scenarios in which room restriction might be used and the very limited lengths of time which are permitted – usually not more than one hour.

This bill does not provide for exceptions in the case of quarantine or other medical circumstances that might require client segregation. These exceptions are addressed in CYFD internal procedures 4.10 (Environmental Health and Safety and Infection Control) and 5.32D (Epidemics or Pandemics).

EC/je/bb