F I S C A L I M P A C T R E P O R T

SPONSOR House Floor **ORIGINAL DATE** 2/12/19 **LAST UPDATED** 3/11/19 **HB** 364/HFlS

SHORT TITLE Corrections Restricted Housing Act **SB**

ANALYST Edwards

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		At least $1,300.0	At least $1,300.0	At least $1,300.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Children, Youth and Families Department (CYFD)
New Mexico Corrections Department (NMCD)
New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of Bill

The House Floor Substitute for House Bill 364 creates the Restricted Housing act. The act prohibits a detention or correctional facility from placing an inmate younger than 18 years old or inmates known to be pregnant in restricted housing. The act includes provisions on restricted housing for inmates with serious mental disabilities, prohibiting placing a seriously mentally disabled inmate in restricted housing for more than 48 hours and mandating reporting requirements.

Section 4, governing restricted housing of inmates with serious mental disabilities, does not allow for an inmate clearly exhibiting self-injurious behavior to be placed in restrictive housing unless a qualified healthcare professional has determined the behavior is unrelated to a serious mental disability.

Also in Section 4, after the appropriate reporting required by the bill for the first 48 hours has been made, a warden or jail administrator may place an inmate in restricted housing for more than 48 hours if all other methods of ensuring the safety of the person have been deemed insufficient, impractical, or inappropriate; if the shortest duration and least restrictive conditions are used; if the facility has regular access to medical and behavioral healthcare for the inmate; and if proper reporting is made by the warden or administrator.

The floor substitute expands the definition of qualified healthcare professional to include prescribing psychologists, certified nurse practitioners, clinical nurse specialists with a specialty in mental health, or a physician assistant with a specialty in mental health.

The act requires every detention facility to report every three months to the Legislature and the board of county commissioners in which facilities are located on the facility's use of restricted housing. The Act also requires privately operated facilities to submit every three months to the appropriate board of county commissioners and the Legislature a report on all monetary settlements as a result of lawsuits made to current or former inmates or their estates related to the use of restricted housing. The act requires all reports to be filed at the legislative library.

The effective date of Sections 1 (short title), 2 (definitions), 3 (restrictions on the use of restricted housing), 5 (correctional facility reporting), 6 (reporting by private facilities), and 7 (reports filed with the legislative library) is July 1, 2019. The effective date of Section 4 (restrictions on the use of restrictive housing for those with a serious mental disability) is July 1, 2020.

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 or having these inmates in the general population is unquantifiable. Isolated inmates can reduce tension in the general population. Having fewer isolated inmates may require increased guard to prisoner ratios and increased litigation.

NMCD reports in the agency's FY20 budget request that 6.6 percent of the population is in restricted housing, about 480 inmates; the department's goal is to have 5 percent of fewer of the population in restricted housing. In January 2016, NMCD reported it houses about 460 inmates, or 6.5 percent, in restricted housing.

Neither LFC nor NMCD has a marginal cost estimate for these inmates, but the average per inmate per day cost to house inmates at state owned facilities in FY18 was $123.90. Other states, such as Arizona, have put the cost of housing maximum security inmates at about $50 thousand annually, compared with $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.

If 1 percent of the 480 inmates the Corrections Department reported in restricted housing in their FY2 budget request are removed from restricted housing and have a correctional officer accompaniment at all times to ensure staff and inmate safety, assuming an officer is making time-and-a-half to supervise the inmates (about $31 an hour), it could cost around $3,600 per day or $1.3 million per year.

In response to a 2015 version of HB242 (HB376) the Association of Counties stated, "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."

Requiring correctional facilities to report on the usage of solitary confinement will result in additional costs to county and state correctional facilities. In previous analysis of similar bills, NMCD has estimated the reporting requirements of the bill could require the hiring of an additional staff member at a cost of approximately $60 thousand per year.

In response to this bill NMCD explains:

> While longer term restrictive housing of known mentally ill inmates is certainly not what the Department is seeking, it does need some way to protect other inmates and staff from mentally ill inmates who have acted out […] to harm others. If the Department has to engage in a one-on-one monitoring process with each inmate who cannot be placed into the [Mental Health Treatment Center (MHTC) or Alternative Placement Area (APA)] within the Act's prescribed time period of 48 hours, [it] would require one correctional officer to solely focus on, observe and supervise this one inmate.[...] [T]he fiscal impact on the NMCD will be substantial to moderate.
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> The bill will result in a substantial amount of expensive litigation when staff members and inmates are harmed or killed by the inmates who have already been in restricted housing for 45 days are placed back into the general population.
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> The bill will also result in a substantial amount of expensive litigation to determine the exact meaning of the term "daily, meaningful and sustained human interaction." Thereafter, if one or more of the inmates with mental illnesses or disabilities who are placed in the Mental Health Treatment Center (MHTC) or Alternative Placement Area (APA) are determined by a court to lack this nebulous but requisite level of interaction even though the NMCD's position is that those inmates already receive those levels of interactions in those programs, the NMCD will have to amend its contract with its medical services vendor to provide more psychiatric services and staff to reach these levels of interactions and also hire more NMCD behavioral health staff to work even more closely with the inmates placed in these two areas or programs to reach these levels of interactions.
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> The Department also anticipates that some current staff, both managers and correctional officers, will terminate their employment because they will not want to work in a prison environment where the most violent and disruptive inmates can attack and harm them after those inmates have served their 45 days in restrictive housing for the year and have to be placed back in the general population. This will increase overtime among remaining staff, and overtime use is already high. This will also make it much more difficult to recruit and retain correctional staff, and correctional staffing vacancies are already high. This bill will only exacerbate the NMCD's high vacancy rates and overtime rates.
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> This bill will also likely result in some behavioral staff resigning their positions in order to meet their ethical obligations and maintain their professional licenses. When a behavioral health staff member makes a clinical determination that an inmate with a serious mental disability absolutely needs to remain in restricted housing even after the 48 hour time limit mandated by this bills has expired, that staff member will likely resign rather than risk losing his professional license or stay working in an environment where that staff member's clinical training, judgment and expertise means nothing. Finding and recruiting behavioral health staff to work under such conditions seems unlikely, which will unfortunately and ironically actually result in less clinical staff on site and less clinical staff interactions with these mentally disabled inmates.

Similarly, if a behavioral health staff member makes a clinical determination that an inmate must remain on suicide watch (where the inmate is in a special cell, and not yet placed in the MHTC or APA due to lack of bed space, and who is observed every minute by staff or an assigned approved inmate) for more than 48 hours, the clinician is faced with sending the inmate back to his cell where he may kill himself in order to comply with the Act or violating the Act by keeping him on suicide watch for more than 48 hours. The clinician, and the Department, is then faced with a "no win" situation—get sued for allowing the mentally ill or mentally disabled inmate to go back to his regular cell (and likely kill himself) in order to comply with the 48 hour limitation in the Act, or get sued for violating the Act by keeping the inmate in what will likely constitute restricted housing--on a clinically sound, clinically authorized suicide watch--for more than 48 hours. Clinical staff are likely to resign or not come work for the Department in the first place to avoid being placed in this very difficult "no win" situation.

The bill appropriates no money to the NMCD to cover any of these various costs and expenses, which are estimated to be anywhere from $10 million to $20 million per year each and every year. The bill if passed therefore constitutes an unfunded mandate. Please also see significant issues section below.

CYFD stated the agency will not face costs related to this bill.

SIGNIFICANT ISSUES

The Sentencing Commission explains:

In October 2018, the Association of State Correctional Administrators and the Liman Center for Public Interest Law at Yale Law School published a survey on the use of restricted housing, "Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in Cell" (attached for your reference). The definition of restrictive housing used in the HB 364 parallels the definition in the report.

From the Executive Summary to the report:

For the 2017–2018 data collection, ASCA-Liman sent surveys to the 50 states, the Federal Bureau of Prisons (FBOP), the District of Columbia, and four jail systems in large metropolitan areas. The 43 prison systems that provided data on prisoners in restrictive housing held 80.6% of the U.S. prison population. They reported that 49,197 individuals—4.5% of the people in their custody—were in restrictive housing. Across all the reporting jurisdictions, the median percentage of the population held in restrictive housing was 4.2%; the average was 4.6%. The percentage of prisoners in restrictive housing ranged from 0.05% to 19%. Extrapolating from these numbers to the systems not reporting, we estimate that some 61,000 individuals were in isolation in prisons in the fall of 2017.

Thirty jurisdictions reported when they began to track how long people had been in restrictive housing. Some jurisdictions began tracking this information as recently as 2017. Within the responding jurisdictions, most people were held in segregation for a year or less. Twenty-five jurisdictions counted more than 3,500 individuals who were held for more than three years. Almost 2,000 of those individuals had been there for more than six years. (pp. 4-5)

> The report noted, "In more than two dozen states, the numbers of people in restrictive housing decreased. In 11 states, the numbers went up." However, "What accounts for the changing numbers is unclear. Variables include new policies and practices, litigation, legislation, fluctuations in the overall prison population, and staffing patterns." (p. 6)

The Executive Summary concludes:

> The amount of time spent in restrictive housing is of increasing concern. Not all correctional systems track length of confinement. Nineteen jurisdictions reported that they began tracking in 2013 or thereafter. In 31 jurisdictions responding to questions about length of time in both 2015 and 2017, the number of individuals in restrictive housing for three months or less increased. The number of people in isolation for longer than three months decreased. The decreases were greatest for time periods longer than six months.
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> Correctional administrations' efforts to reduce the numbers of people in restrictive housing are part of a larger picture in which legislatures, courts, and other institutions are seeking to limit holding people in cells 22 hours or more for 15 days or more. These endeavors reflect the national and international consensus that restrictive housing imposes grave harms on individuals confined, on staff, and on the communities to which prisoners return. Once solitary confinement was seen as a solution to a problem. Now prison officials around the United States are finding ways to solve the problem of restrictive housing. (p. 6)
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> New Mexico was one of the reporting jurisdictions for the report. According to the report, New Mexico's total custodial population for facilities reporting restricted housing data was 7,047, with 294 inmates in restrictive housing, representing 4.2% of the population, which is a bit lower than the 4.5% aggregate for the report. (p. 13)

CYFD submitted the following analysis:

> The definition of restrictive housing in the bill is of issue. CYFD- [Juvenile Justice Services] JJS does not classify clients into restrictive housing units like segregation and/or isolation units. As a matter of policy/procedure, clients are not placed in long term confinements. However, there may be limited instances when less restrictive levels of care have proven ineffective to promote safe and pro-social behaviors and individual and/or unit violence is escalating and chronic, where clients may be secured in their rooms for a period to exceed 22 hours.
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> CYFD-JJS policy/procedure requires that during room confinement, all clients are offered programming and services:
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> - Meals and hygiene breaks,
> - Behavior Health therapy,
> - Educational programming (however, class attendance may be limited),
> - Medical care (however, non-essential off-site appointments may be rescheduled or delayed), and
> - 1 hour of large muscle exercise daily, thus addressing the bill's mandate of "meaningful and sustained human interaction".
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> The bill does not provide for exceptions in the case of quarantine or other medical circumstances that might require client segregation.

This bill specifically prohibits isolated confinement for an "inmate" that is younger than eighteen years of age. However, in CYFD secure facilities, we have clients that are 18, 19, and 20 years of age. Programming requirements are the same for all clients and, therefore, having different standards for different age groups could be problematic.

CYFD's room confinement data reporting mechanism is in place but aggregate data integrity with such a small population is at risk ("law" of 20).

Though CYFD's mission and efforts are focused on rehabilitation and not punishment, the dynamics of a running a "correctional facility" are challenging. There should be caution used when trying to legislate that which should/can be addressed through policy/procedure. Addressing this change cannot be forced, it must be forged. Staff must be engaged in the process and leadership must be fully invested in the implementation process. Policies and procedures must align to govern isolation practices, evidence based practices must be employed, staffing ratios must be adequate and staff must be provided with the skills and resources to deal with high risk/needs clients and encourage positive youth development, and data must be collected and used to analyze and manage change.

NMCD states:

The Department already does not use restrictive housing as it is defined in the bill for its pregnant female prisoners.

The Department also does not normally incarcerate inmates who are under the age of eighteen years old. However, the American Correctional Association (ACA) and the Prison Rape Elimination Act (PREA) standards (generally, PREA Standard 114.14 and CD-150011 R.) require that a juvenile be housed separately from adult inmates. A juvenile would thus be housed alone, and if the juvenile goes outside of his housing unit, he would have to have direct contact/supervision with staff if there is the possibility that adult inmates could have sight, sound or direct physical contact with him. Juveniles would have to receive programming alone (no other adult inmates present), and his interactions would have to be with staff and staff alone, and perhaps with visitors when appropriate. It would also not be appropriate to leave a juvenile unsupervised in a cell or living quarters without adult supervision for more than a short period of time. In other words, while juveniles would be restricted from adult inmate contact and would live alone unless there is more than one juvenile in the Department's custody at any given time, their required, regular contact with staff many times a day would provide the sustained human interaction would prevent the juveniles from ever living in a situation which could be defined as restrictive housing.

Further, the bill indicates that if an inmate has daily, meaningful and sustained human interactions, his housing would not be considered as restrictive housing. However, the exact level of human interaction which would be required to make the inmate's housing not considered restrictive housing is not clear. Would a five minute conversation or interaction with the inmate every hour or two qualify as meaning and sustained human interaction? Some inmates would consider that to be meaningful and sustained interactions. Is this standard intended to be an objective or subjective standard? Inmates who are depressed or are mentally ill as well as inmates working through adjustment issues, have periods of time where because of their symptoms are unable or unwilling to have meaningful interactions with anyone--and yet this bill still requires staff to engage in such interaction with these inmates. It seems likely that litigation will ensue to try to determine exactly what is

considered meaningful and sustained interactions for one or more inmates, as there is likely to be disagreements between the Department and some inmates or their lawyers regarding this issue.

While the Department does not house its inmates with serious mental disabilities in restrictive housing as that term is defined in the bill, it nevertheless has concerns about the bill. The Department's treatment programs/housing areas and its concerns generated by the bill regarding the programs are explained below.

The Department has established two programs used to treat and rehabilitate known mentally ill inmates, some of which try to harm themselves or others and need to be removed or isolated from the general population. The Department's Alternative Placement Area (APA) program is used to divert inmates with known serious mental illnesses out of its predatory behavior management program. However, these APA inmates are normally out of their cells more than two hours per day, and are offered meaningful and sustained human interaction through groups, activities, classes, etc. The APA does not meet the definition of restrictive housing contained in the bill, but if the bill passes it is likely that some inmates will claim in litigation that their placement therein does constitute restrictive housing.

The Department's second program for the treatment of known seriously mentally ill inmates, including those who try to harm themselves or others and must be removed from the general population, is the Mental Health Treatment Center (MHTC). The MHTC is an inpatient psychiatric hospital where decisions are made by a treatment team with rehabilitation and recovery always kept in mind. While there may be times that certain inmates within the MHTC are temporarily kept within their cells twenty two hours a day with limited but still meaningful interactions with others for more than 48 hours in a seclusion or restraint cell, this would be a decision made by the treatment team and not the facility warden. These cells are used for mentally ill inmates who have harmed themselves in some way, and these cells protect the inmates in them from other inmates and from having access to things to harm himself. It must be noted that mentally inmates are subject to being manipulated, preyed upon, and targeted because of their mental illness in general population. Some seriously mentally ill inmates also act violently, and need to be isolated even while their treatment plans and treatment are implemented and take time to become effective. Again, the Department's position is that all inmates in the MHTC, even those in seclusion or restraint cells, always have access to and are provided with interactions with others and ample opportunities to participate in educational, vocational or rehabilitative programs—MHTC inmate are seen daily by nursing and psychiatry, and have regular meetings with their therapist, classification officer, unit manager, recreation officer, education staff member, and other members of the treatment team. MHTC units are very busy units with inmate porters, different members of security, multiple therapists, other treatment team members, etc., walking through and talking with inmates almost constantly. Therapeutically, each MHTC inmate is offered the level of services in which they are able to meaningfully participate. Seclusion and restraint cells at the MHTC are always used as a therapeutic tool, not as a disciplinary decision, and always stems from a psychiatrist's order with the goal of treatment and safety. The treatment team at the MHTC operates in accordance to the "least drastic means" principle. The treatment team meets weekly, sometimes more often, and evaluates every inmate therein see if they can be moved to a less restrictive setting. The Department's MHTC is an inpatient psychiatric hospital and rehabilitative program, and it offers what it considers to be sustained, meaningful interactions even for inmates temporarily placed in therapeutic seclusion. Again, however, the passage of this bill will likely result in litigation

by some inmates claiming that their placement in this program or within therapeutic seclusion within the program somehow constitutes restrictive housing prohibited by the Act. There are also some instances where inmates who are known to be mentally ill sometimes do attack or harm other inmates, themselves or staff, and are placed in restrictive housing awaiting placement into the APA or the MHTC. Placement into the APA or the MHTC is often done the same day, but this is not always possible due to limited bed space. It could in some cases take more than 48 hours before a particular inmate can be placed in the APA or MHTC. The bill offers no administrative alternative to the NMCD for this circumstance of limited bed space even while it prohibits the use of restrictive housing for mentally ill inmates for more than 48 hours.

While longer term restrictive housing known mentally ill inmates is certainly not what the Department is seeking, it does need some way to protect other inmates and staff from mentally ill inmates who have acted out to act out to harm others. If the Department has to engage in a one-on-one monitoring process with any inmate who cannot be placed into the MHTC or APA with the Act's prescribed time period of 48 hours, which would require one correctional officer to solely focus on, observe and supervise this one inmate, then the fiscal impact on the NMCD will be substantial to moderate. The Department is already short staffed, and this requirement would limit the availability of existing staff to supervise its inmates.

The requirement for the private facilities to provide quarterly lawsuit settlement-related information to the county commission regarding all settlements and not just those related to restrictive housing is interesting. State agency settlements are subject to a six month confidentiality period under state law, but this bill provides no such protection for the private prison operators who provide services for NMCD inmates in county owned correctional facilities. If the bill passes, then the information generated by this portion of the bill could be perhaps used to initiate efforts to shut down these private prisons. This state's government certainly has the ability and right to end the use of private prisons; however, the NMCD and/or the General Services Department would need to be appropriated substantial amounts of money to build and operate new state prisons to house the large number of inmates displaced by the closing of the private prisons.

NMCD also explains "the definition of qualified health care professional, although expanded by the floor substitute, still does not include licensed mental health professionals. Such professionals routinely work in NMCD prisons and also in county jails. Licensed mental health professional possess the experience and skills to determine whenever an inmate with a serious mental disability can be placed in restrictive housing because the inmate is engaging in self-injurious or other behavior not related to his serious mental disability, but this bill even including the new definitions from the floor substitute will not allow them to make these determinations."

TE/sb/gb/al