

STORAGE NAME: h0889a.go

DATE: February 22, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: HB 889 (PCB COR 00-02a)

RELATING TO: Correctional Medical Authority

SPONSOR(S): Committee on Corrections and Representative Trovillion

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CORRECTIONS YEAS 6 NAYS 0
 - (2) GOVERNMENTAL OPERATIONS YEAS 6 NAYS 0
 - (3) CRIMINAL JUSTICE APPROPRIATIONS
 - (4)
 - (5)
-

I. SUMMARY:

The bill amends current statutes dealing with the Correctional Medical Authority (CMA) and the Department of Corrections (DOC or department).

Section 1 clarifies the definition of the medical records of the Department of Corrections concerning inmates or offenders which are confidential and exempt from s.119.07(1), F.S., to specifically add medical quality management records, individual inmate medical records, and records of the department related to a decision not to provide mental health, medical, or substance abuse treatment. It also permits the release of confidential records, including mental health, medical or substance abuse records, and quality management records to the executive director of the Correctional Medical Authority (CMA). The request from the CMA must be in writing from the Director of the CMA (or their designee) and state the need for the records or information.

Section 2 clarifies the CMA's powers and duties to include investigative inquiries and reviews of health care services, including medical quality management records deemed necessary to assess the adequacy of inmate health care.

Section 3 clarifies the CMA's oversight for the department's inmate health care quality management program and medical quality management records.

Section 4 concerns resolution of disputes between DOC and the CMA. It shortens the time in which the department must respond to a written notice regarding a dispute. It permits the CMA to determine by majority vote: (a) whether the current practice of the department fails to comply with an adopted health care standard; or (b) whether the standard of care existing at the department fails to conform to the standard of health care accepted in the professional health care community; and (c) whether the CMA should begin an action to enforce its written notice of noncompliance. The decision of the CMA to enforce its recommendation is not subject to proceedings or review pursuant to Chapter 120. Venue for review of the CMA's decision is Leon County Circuit Court, and the standard for review is abuse of agency discretion or unlawfulness of the action proposed by CMA.

Section 5 authorizes the CMA to institute an enforcement action in Leon County Circuit Court which establishes a time for compliance with the written notice.

Section 6 provides an effective date of July 1, 2000.

The bill requires no additional appropriations in order to implement its provisions.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

In recent months, there have been a series of news articles which have suggested that a number of inmate deaths at department institutions may have been the result of inadequate medical care.¹ Should this pattern continue, lawsuits concerning inmate health care may be filed in both state and federal courts²; and the courts may, once again, seize virtual control over every aspect of inmate medical care, including the monitoring³ and supervising of care in the state correctional system or awarding tort damages for causes of action such as medical malpractice or wrongful death. The November/December 1999 *Correctional Mental*

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"Bad care has killed dozens of inmates," St. Petersburg Times September 26, 1999;
"Many prison doctors have troubled past," St. Petersburg Times September 27, 1999;
"Care of mentally ill prisoners questioned," St. Petersburg Times September 28, 1999;
"Bush admits 'neglect' in prisons," St. Petersburg Times October 2, 1999.
"Family sues over prisoner's death," The Orlando Sentinel January 8, 2000.

²*Osterback et al. V. Michael Moore, et al.* Has been filed in federal district court and alleges violations of the Eighth Amendment, including the denial of necessary mental health treatment.

³ In *Costello v. Wainwright*, a Special Master and Monitor to investigate and monitor medical allegations was appointed in August 1985 by the federal court. Court ordered payments for the fees and costs of the Master, the Monitor, and their staff exceeded \$900,000 for the task. The costs of litigation, settlement fascinated expenses in *Costello* exceeded an additional \$5 million. This \$5.9 million does not include the compliance and implementation costs incurred by the department to improve the delivery and quality of medical services within the corrections system. Case Summary dated October 11, 1993 and December 1992 report of the Florida Senate.

The New Jersey Department of Corrections has recently settled a mental health lawsuit which includes a monitor. Legal fees were \$1.2 million and \$18 million was allocated for corrective action in the first year.

Health Report indicates that the New Jersey Department of Corrections recently settled a suit concerning inadequate mental health care for \$1.2 million in legal fees alone.⁴

A sampling of Level I citations⁵ issued by the CMA in 1999 indicates that replies to a number of the citations have not necessarily been responsive; and that months after issuance of Level I citations, medical issues of concern to the CMA have not yet been resolved with the department. Despite the gravity of some of the situations, no enforcement action under the current statute, which requires the involvement of the Administration Commission, has been initiated.

Many of the current statutes that limit access to medical records were designed to protect the rights of private patients. Auditing the health care provided prison offenders and obtaining access to their medical records for the purpose of avoiding costly litigation against the state was not considered when many of the statutes were drafted. A lack of dispositive authority for CMA to access certain medical records of the department's inmates has resulted in an on-going debate between the agencies which is consuming employee time better spent on substantive issues. Specific statutory language would resolve these inter-agency disagreements and clarify access to records legitimately needed by the CMA, including all aspects of the quality management program discussed below, for its oversight and enforcement responsibilities.

Events which led to the creation of the Correctional Medical Authority: Inmate Health Care

Beginning in the mid-1970's federal litigation established the state's legal obligation to provide physical, mental, and dental health care to inmates. In Estelle v. Gamble, 429 U.S. 98 (1976), the U.S. Supreme Court ruled that certain "elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration" and that "a deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment."

Courts have ruled that systemic deficiencies in staffing, facilities, equipment, and procedures for ensuring access to medical care may amount to deliberate indifference. Capps v. Atiyeh, 559 F. Supp. 894 (D. Or. 1982). A correctional system which is deliberately indifferent to the medical needs of inmates is in violation of the Eighth Amendment of the U.S. Constitution.

⁴*Correctional Mental Health Report*, Volume 1, No. 4, November/December 1999 pages 49 - 64. The department has agreed to spend \$18 million for medical system reforms in 2000.

⁵"Level I citations are based on conditions where the severity and risk of compromise to health care is high as a result of deviation from a health care standard and/or established health care policy/procedure. Level I citations also include deficiencies in administrative support/management that have a high risk of directly or indirectly compromising care. The severity of compromising care has the potential to result in consequences that are (1) life threatening or potentially life threatening, (2) disabling or potentially disabling, (3) likely to affect a large portion of the population, (4) likely to worsen if not immediately corrected, and (5) impossible or potentially impossible to reverse. The risk of compromising care is immediate, or while not immediate has a high probability of seriously affecting health care services over time." Correctional Medical Authority Annual Report for Fiscal Year 1998 - 1999. Appendix A1

The Eighth Amendment also protects inmates against unnecessary serious psychological suffering and courts have ruled that there is "no underlying distinction between the right to medical care for physical ill and its psychiatric counterpart." Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

The medical conditions existing in Florida's corrections system and the provision of health care to inmates were challenged in Costello and Celestineo v. Wainwright, 387 F. Supp. 324 (M.D. Fla. 1973). This case was originally filed in 1972 as a health care lawsuit and was later expanded to cover overcrowding and general prison condition issues. The case was active for 21 years; and for over 14 years, the delivery of medical care by the department was minutely supervised by the federal courts.

In 1981, the Court approved a health care settlement agreement. The agreement established an objective to be achieved, but did not define the way in which the department was to meet this objective. The objective was to ensure access to and delivery of adequate health care.

In 1985, a court-appointed health survey team concluded that significant parts of the health care delivery system continued to fall far short of the health care settlement agreement. The survey team found a pattern of malpractice and substandard health care in which life threatening but treatable illnesses went undiagnosed and untreated and resulted in the death of inmates.

In 1986, the Correctional Medical Authority (CMA) was created and in 1991, the CMA began monitoring the department's physical health care delivery system. In 1992, the responsibility for conducting mental health surveys was given to the CMA.

On March 30, 1993, the Court issued a final judgement order closing the Costello case. In the final order, the Court attributed the successful conclusion of the Costello case, in large part, to the creation of the CMA. The Court stated that the CMA was "an innovative solution to the reoccurring problem of institutionalizing the changes effected by prison litigation, thereby permitting termination of federal involvement." The Court further stated that "the CMA is capable of performing an oversight and monitoring function over the department in order to assure continued compliance with the orders entered in this case."

According to a December 1992 report prepared by the Florida Senate, the costs of litigation, settlement fees, and expenses in the Costello case exceeded \$5 million. This amount does not include the compliance and implementation costs incurred by the department to improve the delivery and quality of medical services within the corrections system.

The Purpose and Powers of the Correctional Medical Authority

The CMA is created by and performs pursuant to ss. 945.601 - 945.6036, F.S. The purpose of the CMA stated in s. 945.603, F.S., is to assist in the delivery of health care services for inmates in the Department of Corrections. Presumably this is to ensure that the health care provided in Florida's correctional institutions is constitutionally adequate so that further federal lawsuits and judicial intervention regarding the system will not occur. Members of the CMA are appointed by the Governor, receive no salary, and are comprised of physicians, dentists, hospital administrators, and mental health professionals. The CMA has specific statutory authority which includes, in part:

- review and advise on cost containment;

- review and make recommendations for the delivery of health care services, including acute hospital based care, primary and tertiary care services, and mental health services;
- develop and recommend an annual budget for operation of the State of Florida prison health care system;
- review and advise Corrections on contracts between the department and third parties for quality management programs;
- review and advise on minimum standards for physical and mental health care delivery system; and
- review and advise on the sufficiency, adequacy, and effectiveness of the department's Office of Health Services quality management program.

The CMA is authorized to initiate a process to resolve any disputes between it and the department regarding the provision of health care to inmates.

Section 945.6031, F.S., requires the CMA to annually report to the Governor and the Legislature the status of the health care delivery system, and to survey the physical and mental health care system at each correctional institution at least once every three years.

When life threatening or serious health deficiencies are found by the CMA, the department is required to submit a written corrective action plan. Failure by the department to file a corrective action plan or timely implement the changes may result in the initiation of the dispute resolution and enforcement procedures contained in ss. 945.6035 - 945.6036, F.S.

The CMA reviews projected medical needs of the inmate population and assists the department in the development and implementation of a health services plan. As a part of its oversight responsibility, the CMA appoints the following committees:

- Medical Review Committee, which provides oversight of the department's health care quality management (QM) program;
- Mental Health Committee, which provides oversight of the department's provision of mental health services to inmates; and
- Budget and Personnel Committee, which provides oversight of the department's budget process and assessment of personnel needs.

In dispute resolution proceedings under s. 945.6035, F.S., the failure of the CMA and the Assistant Secretary for Health Services to reach a resolution can result in the CMA appealing the issue to the Administration Commission (the Governor and Cabinet) for a decision. The decision of the commission is binding, and is not subject to appeal. Under s. 945.6036, F.S., if the department fails to substantially comply with the dispute resolution decision or fails to implement the remedial action, the CMA may petition the Circuit Court in Leon County for an order requiring the department to comply. If the CMA fails to initiate a circuit court proceeding, an inmate may file a petition with the CMA requesting initiation of such a proceeding, and if not initiated, the inmate may file an appropriate proceeding in the same court.

Evaluation and Management of Inmate Health Care in the Department of Corrections

Inmate health care in the state correctional system includes some concepts of the managed care model. Utilization management decisions are centralized and are intended to control the use of resources. In addition, the department has a "Quality Management" program which operates at the institutional, regional, and central office levels. The purpose of the Quality Management (QM) program is to conduct studies and monitor clinical data and other information used to assess the quality of the health care given to inmates. The CMA has established a QM committee which monitors the department's QM activities. Components of the QM program include:

- risk management;
- mortality review;
- infection control;
- credentials review;
- quality assessment studies; and
- utilization management and review.

C. EFFECT OF PROPOSED CHANGES:

The bill makes the following changes:

- clarifies that the Department of Corrections medical quality management records, individual inmate medical records, and records relating to decisions made not to provide mental health, medical, or substance abuse treatment are exempt from s. 119.07(1), F.S.;
- clarifies the department's obligation to provide the Correctional Medical Authority with mental health, medical or substance abuse records, medical quality management records, and all reports and records relating to the department's statewide delivery of those services, provided a written request is made by the Correctional Medical Authority director or their designee;
- clarifies the Correctional Medical Authority's authority to conduct investigative inquiries and reviews of health care services, including medical quality management records, as the authority deems necessary to assess the adequacy of inmate health care;
- provides enforcement authority to the Correctional Medical Authority, following notice to the department and a majority vote by the CMA. The department may appeal the decision to the Leon County Circuit Court, which also has authority to enforce the decisions of the CMA.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 945.10(1)(2), F.S., to include the Department of Correction's medical quality management records, individual inmate medical records, as well as records relating to the department's decisions not to provide medical, mental health or substance abuse treatment to inmates, in the definition of records exempt from the provisions of s. 119.07 (1), F.S. It also creates a new s. 945.10(2)(a), F.S., to delineate the records the department is specifically required to provide the Correctional Medical Authority, upon request of the Correctional Medical Authority's director (or designee) and a written explanation of why such records are requested.

Section 2. Amends s. 945.603, F.S., to specifically authorize the CMA to conduct such investigative inquiries and reviews as the authority deems necessary to assess the adequacy of inmate health care.

Section 3. Amends s. 945.6032(1), F.S., to clarify the authority of the CMA's medical review committee to provide oversight for the department's medical quality management records.

Section 4. Amends s. 945.6035, F.S., to provide the CMA with the authority to notify both the Secretary of the department and the Assistant Secretary for Health Services of noncompliance and the corrective measures sought by the CMA. It decreases to 15 days the time in which the department shall respond to the CMA's notice of noncompliance. In the event that the department does not concur with the corrective measures noticed by the CMA, the CMA may, by majority vote, determine the practice of the department or the standard of care not to be in conformance and may direct the enforcement of compliance upon the department. The department is given 21 days to challenge the decision of the CMA, on the basis that the authority's decision is an abuse of discretion or contrary to law, in Leon County Circuit Court. This section removes the Administration Commission from the dispute resolution process.

Section 5. Amends s. 945.6036, F.S., to authorize the CMA to petition the Leon County Circuit Court for an order requiring the department to substantially comply with the corrective measures contained within the authority's notice of noncompliance and authorizes the Court to establish a specified time frame for the department's compliance.

Section 6. Provides for an effective date of July 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The bill requires no additional appropriations in order to implement its provisions. By permitting the CMA to order corrective actions, an economic savings in monitoring fees, and attorneys costs and fees may be realized through the prevention of inmate lawsuits against the department's health care delivery system.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds or take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

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C. OTHER COMMENTS:

Section one of this bill raises a concern about public record exemptions. Arguably, by specifying the types of records that are within the current exemption of medical records, this bill creates a new exemption, which would require under Art. I, sec. 24(c), Fla. Const., a separate bill with a statement of public necessity. However, the specific records listed in the bill help clarify, rather than expand, the scope of the exemption. The three types of records listed are all "medical records" which are already exempted under current law. Since a clarification of an exemption does not create an exemption, the provision does not require a separate bill. See also State v. Knight, 661 So.2d 344 (Fla. 4th DCA 1995).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CORRECTIONS:

Prepared by:

Jo Ann Levin

Staff Director:

Jo Ann Levin

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

Douglas Pile

Staff Director:

Jimmy O. Helms