

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 779 Restraint of Incarcerated Pregnant Women

**SPONSOR(S):** Criminal Justice Subcommittee; Reed

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/SB 1086

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 4 N, As CS	Krol	Cunningham
2) Appropriations Committee	22 Y, 0 N	McAuliffe	Leznoff
3) Judiciary Committee			

### SUMMARY ANALYSIS

CS/HB 779 prohibits corrections officials from using restraints on a prisoner who is known to be pregnant during labor, delivery, and postpartum recovery unless the corrections official makes an individualized determination that the prisoner presents an extraordinary circumstance.

The bill requires a corrections official to make written findings within 10 days after the use of restraints as to extraordinary circumstances that dictated the use of restraints. The correctional institution must maintain this documentation on file and make it available for public inspection for at least 5 years.

The bill allows a prisoner who is restrained in violation of this section to file a grievance within one year after the incident.

The bill authorizes the Department of Corrections and the Department of Juvenile Justice to adopt rules to administer the new law.

The bill appears to have no fiscal impact and is effective July 1, 2011.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

On October 10, 2010, the National Commission on Correctional Health Care Board of Directors adopted the following Position Statement on Restraint of Pregnant Inmates:

“Restraint is potentially harmful to the expectant mother and fetus, especially in the third trimester as well as during labor and delivery. Restraint of pregnant inmates during labor and delivery should not be used. The application of restraints during all other pre-and postpartum periods should be restricted as much as possible and, when used, done so with consultation from medical staff. For the most successful outcome of a pregnancy, cooperation among custody staff, medical staff, and the patient is required.”<sup>1</sup>

#### **The Department of Juvenile Justice**

The Department of Juvenile Justice (DJJ), through administrative rule, currently limits the use of mechanical restraints on pregnant youth: “If handcuffs are used on pregnant youth, they shall be cuffed in front. Leg restraints, waist chains, and the restraint belt shall not be used on pregnant youth.”<sup>2</sup>

While this rule does not address the removal of restraints during labor and delivery, current practice is to remove the restraints during labor and delivery and any time a health care professional treating the youth requests the removal.<sup>3</sup>

#### **County and Municipal Jails**

The Florida Model Jail Standards contain the following provision related to the shackling of inmates:

“Shackles or other personal restraints may be used within the secured areas of the facility. This standard should apply to inmates in transit or to inmates whose behavior presents an immediate danger to themselves, other inmates, or staff. Such inmates may be temporarily restrained by such devices only upon orders of the Officer-in-Charge or designee. Restraints shall never be used as punishment.”<sup>4</sup>

These standards currently have no provisions related to the shackling of pregnant inmates, however, the standards direct local jails’ written policies and defined procedures to require that pregnant inmates receive advice on appropriate levels of safety precautions.<sup>5</sup>

#### **The Department of Corrections**

The Department of Corrections (DOC) is responsible for the health care of inmates in its custody<sup>6</sup> and treats more than 80 pregnant inmates per year.<sup>7</sup> Florida refers each pregnant inmate to an OB/GYN

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<sup>1</sup> Position Paper on Restraint of Pregnant Inmates, adopted by the National Commission on Correctional Health Care Board of Directors (October 10, 2010), [http://www.ncchc.org/resources/statements/restraint\\_pregnant\\_inmates.html](http://www.ncchc.org/resources/statements/restraint_pregnant_inmates.html) (Last accessed March 31, 2011.)

<sup>2</sup> 63H-1.005(10), F.A.C.

<sup>3</sup> Department of Juvenile Justice 2011 Analysis of HB 779.

<sup>4</sup> “Chapter 11 Security and Control.” 11.11. Florida Model Jail Standards. Effective 1/1/11. [http://secure.flsheriffs.org/content/44/File/FMJS\\_-\\_010111.doc](http://secure.flsheriffs.org/content/44/File/FMJS_-_010111.doc) (Last accessed April 4, 2011.)

<sup>5</sup> *Ibid.* “Chapter 7 Medical.” 7.25 - Prenatal Care.

<sup>6</sup> Section 945.6034, F.S.

physician to provide prenatal care and to follow her throughout her pregnancy. Inmates receive an extra nutritional meal each day, prenatal counseling, vitamins, and exams.<sup>8</sup>

DOC has an established procedure that limits the use of restraints on pregnant inmates.<sup>9</sup> Key components include:

- After it is learned that an inmate is pregnant (and during her postpartum period), her hands are not restrained behind her back and leg irons are not used. The use of waist chains or black boxes is also prohibited when there is any danger that they will cause harm to the inmate or fetus. The inmate's hands can be handcuffed in front of her body during transport and at the medical facility if required by security conditions due to her custody level and behavior. The shift supervisor's approval is required to remove handcuffs for medical reasons, except that approval is not required in an emergency situation.
- Unarmed escort officers are required to maintain close supervision of a pregnant inmate and to provide a "custodial touch" when necessary to prevent falls.
- An inmate in labor is not restrained, but after delivery she may be restrained to the bed with normal procedures (tethered to the bed by one ankle) for the remainder of her hospital stay. A correctional officer is stationed in the room with the inmate to be sure that she has access to the bathroom or can perform other needs that require movement.<sup>10</sup>

From 2001 to the present, there have been no formal inmate medical grievances submitted regarding the application of restraints during pregnancy.<sup>11</sup>

### **Other States' Laws**

Currently 10 states<sup>12</sup> have laws prohibiting the use of restraints on pregnant prisoners.<sup>13</sup>

### **Federal Policies**

In October 2008, the Federal Bureau of Prisons revised its policy regarding the shackling of pregnant women in their custody.<sup>14</sup> The policy states:

"Restraints should not be used when compelling medical reasons dictate, including when a pregnant prisoner is in labor, is delivering her baby, or is in immediate post-delivery recuperation... If a pregnant prisoner is restrained, the restraints used must be the least restrictive necessary to ensure safety and security. Any restraints used must not physically constrict the direct area of the pregnancy."<sup>15</sup>

In addition to this policy, Section 232 of the Second Chance Act requires the Attorney General to report to Congress on the use of physical restraints on pregnant prisoners by agencies within the Department

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<sup>7</sup> Department of Corrections 2011 Analysis of HB 779.

<sup>8</sup> *Id.*

<sup>9</sup> Department of Corrections Procedure 602.024 (The Utilization of Restraints on Inmates During Prenatal and Postpartum Periods.)

<sup>10</sup> *Id.* Department of Corrections 2011 Analysis of HB 779.

<sup>11</sup> Department of Corrections 2011 Analysis of HB 779.

<sup>12</sup> California, Colorado, Illinois, New Mexico, New York, Pennsylvania, Texas, Vermont, Washington, and West Virginia.

<sup>13</sup> "Mothers Behind Bars: A state-by-state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children." National Women's Law Center. October 2010.

<sup>14</sup> "Escorted Trips, Program Statement." Fed. Bureau of Prisons, No. 5538.05, 2008.

[http://www.bop.gov/policy/progstat/5538\\_005.pdf](http://www.bop.gov/policy/progstat/5538_005.pdf) (Last accessed April 6, 2011.)

<sup>15</sup> *Id.*

of Justice (DOJ).<sup>16</sup> As an agency within DOJ, the Bureau of Prisons is required to report data regarding the use of restraints to the Attorney General.

Immigration and Customs Enforcement (ICE) allows restraints to be used on pregnant detainees. Specifically ICE standards require medical staff to determine precautions required to protect the fetus, including:

- Safest method of restraint,
- Presence of a medical professional, and
- Medical necessity of restraining the detainee.<sup>17</sup>

The Second Chance Act also requires ICE to report on its use of restraints to the Department of Justice.<sup>18</sup>

### **Effect of the Bill**

CS/HB 779 contains the following whereas clauses:

- Whereas, restraining a pregnant prisoner can pose undue health risks and increase the potential for physical harm to the woman and her pregnancy;
- Whereas, the vast majority of female prisoners in this state are nonviolent offenders;
- Whereas, the impact of such harm to a pregnant woman can negatively affect her pregnancy;
- Whereas, freedom from physical restraints is especially critical during labor, delivery, and postpartum recovery after delivery as women often need to move around during labor and recovery, including moving their legs as part of the birthing process;
- Whereas, restraints on a pregnant woman can interfere with the medical staff's ability to appropriately assist in childbirth or to conduct sudden emergency procedures; and
- Whereas, the Federal Bureau of Prisons, the United States Marshals Service, the American Correctional Association, the American College of Obstetricians and Gynecologists, and the American Public Health Association all oppose restraining women during labor, delivery, and postpartum recovery because it is unnecessary and dangerous to a woman's health and well-being.

The bill creates the following definitions:

- "Corrections official" as "the official who is responsible for oversight of a correctional institution, or his or her designee."
- "Correctional institution" as "any facility under the authority of DOC or DJJ, a county and municipal detention facility, or a detention facility operated by a private entity."
- "Department" as "the Department of Corrections."

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<sup>16</sup> The Second Chance Act, Pub. L. No. 110-199, 122 Stat. 657. 2008. (requiring agencies to report on the use of restraints during "pregnancy, labor, delivery of a child, or post-delivery recuperation" and "the reasons for the use of the physical restraints, the length of time that the physical restraints were used, and the security concerns that justified the use of the physical restraints").

<sup>17</sup> "ICE/DRO Detention Standard, Use of Force and Restraints." § 5.F1, [http://www.ice.gov/doclib/dro/detention-standards/pdf/use\\_of\\_force\\_and\\_restraints.pdf](http://www.ice.gov/doclib/dro/detention-standards/pdf/use_of_force_and_restraints.pdf) (Last accessed April 6, 2011.)

<sup>18</sup> *Supra*, the Second Chance Act.

- “Labor” as “the period of time before a birth during which contractions are of sufficient frequency, intensity, and duration to bring about effacement and progressive dilation of the cervix.”
- “Postpartum recovery” as “the period immediately following delivery, including recovery period when a woman is in the hospital or infirmary following birth.” The duration of postpartum recovery is determined by the physician.
- “Prisoner” as “any person who is incarcerated or detained in any correctional who is accused of, convicted of, sentenced for, or adjudicated delinquent for a violation of criminal law or the terms and conditions of parole, probation, community control, pretrial release, or a diversionary program. For the purposes of this section, the term includes any woman detained under the immigration laws of the United States at any correctional institution.”
- “Restraints” as “any physical restraint or mechanical device used to control the movement of a prisoner’s body or limbs, including, but not limited to, flex cuffs, soft restraints, hard metal handcuffs, a black box, chubb cuffs, leg irons, belly chains, a security or tether chain, or a convex shield.”

The bill prohibits corrections officials from using restraints on a prisoner who is known to be pregnant during labor, delivery, and postpartum recovery unless the corrections official makes an individualized determination that the prisoner presents an extraordinary circumstance. The bill defines “extraordinary circumstances” as an instance when:

- (1) The prisoner presents a substantial flight risk; or
- (2) There is an extraordinary medical or security circumstance that dictates the use of restraints for the safety and security of the prisoner, correctional institution, or medical facility staff, other prisoners, or the public.

The bill specifies that even if there are extraordinary circumstances:

- (1) The corrections official, correctional institution employee, or other officer accompanying the pregnant prisoner must remove all restraints if removal is requested by the treating doctor, nurse, or other health care professional; and
- (2) The use of leg, ankle, and waist restraints is completely prohibited during labor and delivery.

The bill requires that if restraints are used on a pregnant prisoner during labor, delivery, and postpartum recovery the type of restraint applied and the application of the restraint must be done in the least restrictive manner necessary.

The bill requires a corrections official to make written findings within 10 days after the use of restraints as to extraordinary circumstances that dictated the use of restraints. The correctional institution must maintain this documentation on file and make it available for public inspection for at least 5 years. However, the prisoner’s identifying information may not be made public without the prisoner’s consent.

The bill also establishes additional requirements regarding restraint of pregnant prisoners during the last trimester of pregnancy. These additional requirements also apply at any time during pregnancy if requested by the treating doctor, nurse, or other health care professional. These requirements are:

- Waist restraints that directly constrict the area of pregnancy cannot be used.
- Any wrist restraints must be applied so that the pregnant prisoner can protect herself in the event of a forward fall (handcuff must be in front).
- Leg and ankle restraints that restrain the legs close together cannot be used when the prisoner is required to walk or stand.

In addition to maintaining a record of exceptions, the bill requires the secretaries of DOC and DJJ and the official responsible for any local correctional facility to, where an exception was made to allow restraint or where the restraint requirements have been violated during the previous year, submit a written report to the Governor with an account of every such instance. The bill provides that these reports will be made available to the public.

The bill authorizes DOC and DJJ to adopt rules to administer the new law.

The bill requires each correctional institution to inform female prisoners of the rules when they are admitted to the institution, include the policies and practices in the prisoner handbook, and post the policies in appropriate places within the institution, including common housing areas and medical care facilities.

The bill allows a prisoner who is restrained in violation of this section to file a grievance with the correctional institution within one year after the incident and does not prevent her from filing a complaint under any other relevant provision of federal or state law.

#### B. SECTION DIRECTORY:

Section 1. Creates a new section of statute relating to shackling of incarcerated pregnant women.

Section 2. Provides an effective date of July 1, 2011.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

The Department of Corrections reports that this bill would create an additional workload for staff as the bill requires the department to develop rules; update procedures and training materials; document the use of restraints; maintain documentation for five years and make it available for public inspection; and prepare any needed annual reports.<sup>19</sup> The DOC should be able to absorb this workload with existing resources.

The Department of Juvenile Justice reports no fiscal impact.<sup>20</sup> However, the bill may create additional workload for staff to update procedures and training materials; document the use of restraints; maintain documentation for five years and make it available for public inspection; and prepare any needed annual reports.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

This bill may create additional staff workload for county and municipal detention facilities to update procedures and training materials; document the use of restraints; maintain documentation for five years and make it available for public inspection; and prepare any needed annual reports.

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<sup>19</sup> Department of Corrections 2011 Analysis of HB 779.

<sup>20</sup> Department of Juvenile Justice 2011 Analysis of HB 779.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may create additional staff workload for private prison facilities to update procedures and training materials; document the use of restraints; maintain documentation for five years and make it available for public inspection; and prepare any needed annual reports.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes the Department of Corrections and the Department of Juvenile Justice to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to administer the bill's provisions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Unless it is already covered by an existing exemption, the requirement to redact prisoner's identifying information from publicly obtainable information creates a new public records exemption and therefore must meet requirements for enacting such legislation. It is unclear whether this new law provides protection of this personal identifying information within existing public records exemptions found in s. 945.10, F.S.

However, it appears that s. 985.04, F.S., which states that records in the custody of the DJJ regarding children are not open to inspection by the public, is consistent with the bill as it prohibits releasing the name of a child prisoner.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 6, 2011, the Criminal Justice Subcommittee adopted a strike-all amendment to the bill and reported the bill favorably as a Committee Substitute. The strike-all amendment:

- Clarifies that the bill is only intended to apply to restraint of pregnant inmates during specified times in the latter stages of pregnancy.
- Establishes regulations for restraint of pregnant women during the third trimester.
- Modifies the annual report requirement to apply only to instances when an exception is made to allow restraint or when the requirements are violated, not to all instances of shackling during pregnancy.
- Clarifies that the bill applies to correctional facilities operated by private companies.
- Clarifies the time within which a corrections official must make written findings justifying the use of restraints.

- Clarifies that an incarcerated woman who has been restrained during her third trimester, labor, delivery, or postpartum recovery may file a grievance with the correctional institution.

This analysis is drafted to the Committee Substitute.