

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 1426

INTRODUCER: Senator Jones

SUBJECT: Pregnant Women in Custody

DATE: March 8, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Jones	CJ	Pre-meeting
2.			JU	
3.			AP	

I. Summary:

SB 1426 requires that every female, who is arrested, be notified that she has a right to request a pregnancy test. Such notification must occur at the time of booking. If the female has not been released on bond within 72 hours after her arrest, the facility where she is being held must administer a pregnancy test, if requested. The pregnancy test must be performed within 24 hours of the request and may be conducted through urine or blood tests, by ultrasound scan, or by any other standard pregnancy testing protocols adopted by the facility. The bill provides that “female” includes a juvenile or adult woman.

Under the bill, the sentence of a pregnant woman, who is convicted of a crime and is sentenced to incarceration, must be deferred until 12 weeks after delivery of the baby so that the woman may receive necessary health care for herself and her child. The pregnancy must have been verified by a pregnancy test or through a medical examination performed by a physician.

The bill requires that within 10 days after the end of the deferral period and the woman is incarcerated to serve the imposed sentence, she must be offered an appropriate assessment by a licensed health care provider. If requested, the licensed health care provider must provide a postpartum pregnancy assessment, which includes information regarding any necessary medical tests, procedures, lactation support, or treatments associated with her postpartum condition. Such assessments and treatments must be developed and offered in consultation with community support organizations, licensed health care professionals, social services programs, and local and state government agencies, including nonprofit organizations.

The bill requires county and municipal detention facilities and the Department of Corrections (DOC) to report the number of sentence deferrals granted, the number of prisoners who requested postpartum assistance, and information on the outcomes of the pregnancies. The DOC must compile this information and publish it on its website, quarterly. The information may not

include personally identifiable information and must comply with all state and federal confidentiality laws.

The bill may have an indeterminate fiscal impact on the DOC and municipal and county detention facilities. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2021.

II. Present Situation:

Arrest and Trial

After a person is arrested or charged with a crime, he or she will often be taken into custody and held in a municipal or county jail until first appearance. Within 24 hours of being arrested, the defendant will have his or her first appearance before the court.¹ The presiding judge will advise the defendant whether he or she will receive pretrial release. If granted, the judge will set the requirements for pretrial release, including the amount of bail or bond the defendant must pay to be released. If a person has no right to pretrial release or bond, he or she is immediately delivered into the custody of the sheriff of the county identified in the indictment, information, or affidavit is filed.²

Once the state has filed formal charges, a defendant may enter a not guilty plea and the case will move forward to trial. Alternatively, a defendant may enter a plea of guilty and be sentenced by the judge; or pursuant to a plea agreement, the defendant may plead guilty or nolo contendere and be sentenced accordingly, if approved by the court. Once a trial is held and evidence is presented, the jury or the judge will find the defendant guilty or not guilty. If, at the conclusion of all the evidence, the defendant is found guilty beyond a reasonable doubt, the judge will decide the sentence or other punishment, as required under Florida law.³

The U.S. Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”⁴ If a defendant asserts his or her right to a speedy trial under the Florida Rules of Criminal Procedure and, barring any procedural issues or delays by the defendant, the trial must commence within 60 days.

Pregnancy while Incarcerated

Women are the fastest growing segment of the incarcerated population.⁵ Reports predict that an estimated four to ten percent of women are pregnant upon being committed to prison or jail.⁶ In a

¹ Rule 3.130, Fla. R. of Crim. Proc.

² Section 907.04, F.S.

³ The Criminal Punishment Code is the state’s primary sentencing policy and provides a method by which a judge can calculate the minimum and maximum sentencing range for felonies. *See* ch. 921, F.S. Sections 775.082 and 775.083, F.S., also provides guidelines for sentencing and the assessment of fines, respectively.

⁴ U.S. Const. Amend. V. *See also* Rule 3.191, Fla. R. Crim. Pro.

⁵ Sawyer, Wendy, Prison Policy Initiative, *The Gender Divide: Tracking Women’s State Prison Growth*, p.17, January 9, 2018, available at https://www.prisonpolicy.org/reports/women_overtime.html (last visited March 4, 2021).

⁶ Ferszt, G., Palmer, M., and McGrane, C., Nursing for Women’s Health, *Where Does Your State Stand on Shackling of Pregnant Incarcerated Women?*, February 2018, available at [https://nwhjournal.org/article/S1751-4851\(17\)30335-5/pdf](https://nwhjournal.org/article/S1751-4851(17)30335-5/pdf) (last

survey of 53 jails across the United States, 38 percent reported performing pregnancy tests on all women entering their facilities, and 45 percent relied on inmates to self-report pregnancies and then performing confirmation testing as needed.⁷

Documentation of pregnancies and pregnancy care while incarcerated is sparse. The most recent data from the Bureau of Justice Statistics (BJS) was collected more than 15 years ago. In 2002, the BJS found that five percent of women in local jails were pregnant when admitted. In 2004, the BJS reported that four percent of women in state prisons and three percent of women in federal prisons were pregnant upon admission. The government has not released any further national data since.⁸

The American College of Obstetricians and Gynecologists report that pregnancies among incarcerated women are often higher risk due to a number of factors, including that such pregnancies are often unplanned and are compromised by a lack of prenatal care, poor nutrition, domestic violence, mental illness, and drug and alcohol abuse.⁹ Pregnant women also lack control over their environments while incarcerated, which may negatively affect sleep, dietary requirements, and medication administration.¹⁰ Compared with the general public, incarcerated women are at higher risk for having premature delivery and low birth-weight infants.¹¹

For some women, incarceration may improve pregnancy outcomes. Women in prison experience forced sobriety, regular nutrition, regular prenatal care, a lack of partner violence, and no homelessness.¹² However, these outcomes vary by the woman's personal situation and the facility-specific circumstances.

Pregnant Women in Florida Correctional Facilities

The DOC has five female correctional institutions statewide.¹³ The DOC assigns prisoners to institutions based on current classification procedures while facilitating the individual risk and

visited March 4, 2021); Daniel, R., Prison Policy Initiative, *Prisons Neglect Pregnant Women in Their Healthcare Policies*, December 5, 2019, available at <https://www.prisonpolicy.org/blog/2019/12/05/pregnancy/> (last visited March 4, 2021).

⁷ Friedman, S., Kaempf, Aimee, and Kaufman, Sarah, *The Realities of Pregnancy and Mothering while Incarcerated*, Journal of the American Academy of Psychiatry and the Law, 48(3), November 3, 2020, available at <http://jaapl.org/content/early/2020/05/13/JAAPL.003924-20> (last visited March 4, 2021).

⁸ Daniel, R., Prison Policy Initiative, *Prisons Neglect Pregnant Women in Their Healthcare Policies*, December 5, 2019, available at <https://www.prisonpolicy.org/blog/2019/12/05/pregnancy/> (last visited March 4, 2021). See also Sufrin, C., Beal, L., Clarke, J., Jones, R., and Mosher, W., The American Journal of Public Health, *Pregnancy Outcomes in US Prison, 2016-2017*, January 15, 2019, available at <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2019.305006> (last visited March 4, 2021).

⁹ The American College of Obstetricians and Gynecologists, Committee Opinion, *Health Care for Pregnancy and Postpartum Incarcerated Women and Adolescent Females*, November 2011, available at <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females?IsMobileSet=false> (last visited March 4, 2021); See also Nursing for Women's Health Report.

¹⁰ *Supra* note 7, at p. 2.

¹¹ *Supra* note 3, at p. 3.

¹² *Id.*

¹³ These facilities are Gadsden Correctional Facility in Quincy, Lowell Correctional Institution in Ocala, Florida Women's Reception Center in Ocala, Hernando Correctional Institution in Brooksville, and Homestead Correctional Institution in Florida City. Office of Program Policy Analysis and Government Accountability, *Florida Correctional Facilities, Report No. 19-08*, (October 2019), p. 2, available at <https://oppaga.fl.gov/Documents/Reports/19-08.pdf> (last visited March 4, 2021).

needs of prisoners to the extent possible considering security and health care needs.¹⁴ The DOC also considers other factors, such as the programmatic and education needs of the prisoner. All newly committed females receive a complete physical examination, which includes a complete gynecological and obstetrical history, pelvic examination, and serum pregnancy test.¹⁵ All inmates who are visibly pregnant or confirmed to be pregnant are housed at the Lowell Correctional Institution which houses all pregnant prisoners for the duration of the pregnancy, unless a medical condition prohibits transfer to or housing at the facility.

The DOC has guidelines for the health care of pregnant prisoners. A senior health care professional examines the pregnant prisoner as soon as possible to confirm the pregnancy, determine the stage of pregnancy, and determine the anticipated due date. Pregnant prisoners are transferred to a contract hospital for the actual delivery and then returned to the institution when discharged by the attending obstetrician. The DOC reports that postpartum care is provided at the institution according to the discharge orders of the attending obstetrician, but that the six-week checkup is provided by the obstetrician.¹⁶

The DOC reports the pregnant prisoner population over the last three fiscal years is as follows:

- 69 prisoners in Fiscal Year 2019-2020;
- 101 in Fiscal Year 2018-2019; and
- 98 in Fiscal Year 2017-2018.¹⁷

Protections for Pregnant Prisoners under State Law

Section 944.241, F.S., prohibits restraints¹⁸ from being used on a prisoner¹⁹ who is known to be pregnant during labor,²⁰ delivery, and postpartum recovery,²¹ unless the corrections official²² makes an individualized determination that the prisoner presents an extraordinary circumstance.²³ This section applies to any facility under the authority of the DOC, the

¹⁴ *Id.* at pp. 7-8.

¹⁵ The DOC, *Agency Analysis for SB 1426*, March 8, 2021, p. 2, (on file with the Senate Criminal Justice Committee).

¹⁶ *Id.*

¹⁷ *Id.* This measures the number of different prisoners who were pregnant at some point during the fiscal year; however, some prisoners may be counted in more than one fiscal year.

¹⁸ Section 944.241(2)(h), F.S., defines “restraints” to mean 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.

¹⁹ Section 944.241(2)(g), F.S., defines “prisoner” to mean any person incarcerated or detained in any correctional institution 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. Additionally, the term includes any woman detained under the immigration laws of the United States at any correctional institution.

²⁰ Section 944.241(2)(e), F.S., defines “labor” to mean 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.

²¹ Section 944.241(2)(f), F.S., defines “postpartum recovery” to mean, as determined by her physician, the period immediately following delivery, including the recovery period when a woman is in the hospital or infirmary following birth, up to 24 hours after delivery unless the physician after consultation with the DOC or correctional institution recommends a longer period of time.

²² Section 944.241(2)(b), F.S., defines “corrections official” to mean the official who is responsible for oversight of a correctional institution, or his or her designee.

²³ Section 944.241(2)(d), F.S., defines “extraordinary circumstance” to mean a substantial flight risk or some other extraordinary medical or security circumstance that dictates restraints be used to ensure the safety and security of the prisoner, the staff of the correctional institution or medical facility, other prisoners, or the public.

Department of Juvenile Justice, a county or municipal detention facility, or a detention facility operated by a private entity.²⁴

State law also limits the involuntary placement of a pregnant prisoner in restrictive housing.²⁵ A pregnant prisoner may be involuntarily placed in restrictive housing if the corrections official of the correctional institution makes an individualized determination that such housing is necessary to protect the health and safety of the pregnant prisoner or others.²⁶ Pregnant prisoners placed in restrictive housing must be seen by a qualified healthcare professional every 24 hours and a corrections officer every hour. Pregnant prisoners must be given a medical treatment plan that has been developed and approved by a qualified healthcare professional at the correctional institution.

If a pregnant woman needs medical care or has passed her due date, she must be placed in a designated medical housing unit or admitted to the infirmary. She must have access to outdoor recreation, visitation, mail, telephone calls, and other privileges and classes available to the general population unless:

- A corrections official, in consultation with a qualified health care professional, determines such access poses a threat to the safety and security of the correctional institution; or
- A qualified health care professional determines that such access poses a danger of adverse clinical consequences for the pregnant prisoner or others.²⁷

Pregnant Women in Municipal and County Detention Facilities

Municipal and county detention facilities must provide pregnant prisoners with prenatal care and medical treatment for the duration of her pregnancy.²⁸ The county must ensure that pregnant prisoners receive supplemental food and clothing and are excused from inappropriate work assignments.

A pregnant prisoner must be transferred to a hospital outside the facility if conditions develop that are beyond the scope and capabilities of the county detention facility.²⁹ The charges for the hospital and medical care must be charged against the detention facility's allocated funds.³⁰ The county must also provide care for the newborn and pay for the child's care until the child is suitably placed outside the prison system.³¹

²⁴ See s. 944.241(2)(a), F.S.

²⁵ Section 944.241(2)(k), F.S., defines "restrictive housing" to mean housing a prisoner separately from the general population of a correctional institution and imposing restrictions on her movement, behavior, and privileges. The term includes placing a prisoner in medical isolation, in a medical housing unit, or in the infirmary.

²⁶ Section 944.241(4), F.S.

²⁷ Section 944.241(4)(d), F.S.

²⁸ Section 951.175(4), F.S.

²⁹ *Id.*

³⁰ Section 951.175(5), F.S.

³¹ *Id.*

Privacy of Medical Records

Health Insurance Portability and Accountability Act

The federal Health Insurance Portability and Accountability Act (HIPAA), enacted in 1996, protects personal health information (PHI).³² In 2000, the U.S. Department of Health and Human Services promulgated privacy rules which established national standards to protect medical records and other PHI.³³ These rules address, among other things, the use and disclosure of an individual's PHI.

Only certain entities are subject to HIPAA's provisions. These "covered entities" include:

- Health plans;
- Health care providers;
- Health care clearinghouses; and
- Business associates of any of the above.³⁴

HIPAA requires the disclosure of an individual's PHI to the individual who is the subject of the PHI information or his or her personal representative,³⁵ upon his or her request.³⁶ An individual also has the right to request the disclosure of PHI to another person or entity. Such request must be in writing, signed by the individual, and clearly identify the designated person and where to send the PHI.³⁷

In general, HIPAA privacy rules preempt any state law that is contrary to its provisions.³⁸ However, if the state law is more stringent, the state law will apply.

Florida Law on Medical Records

Patient records are generally protected from disclosure. Section 456.057, F.S., prohibits health care practitioners from disclosing medical records and a patient's medical condition to anyone other than the patient, the patient's legal representative, or other health care practitioners and providers involved in the patient's care or treatment without written authorization of the patient. A health care practitioner may disclose records, without the patient's written authorization under the following circumstances:

- To any person, firm, or corporation that has procured or furnished such care or treatment with the patient's consent;

³² Pub. L. No. 104-191 (1996). Protected health information includes all individually identifiable health information held or transmitted by a covered entity or its business associate.

³³ U.S. Department of Health and Human Services, *Health Information Privacy*, available at <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html> (last visited March 4, 2021). The rules were modified in 2002.

³⁴ U.S. Department of Health and Human Services, Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, (last rev. May 2003), available at <https://www.hhs.gov/sites/default/files/privacysummary.pdf> (last visited March 4, 2021).

³⁵ *Supra*, note 33. A personal representative is generally a person with authority under state law to make health care decisions on behalf of an individual.

³⁶ *Supra*, note 34. HIPAA limits the access to psychotherapy notes, certain lab results, and information compiled for legal proceedings. A covered entity may also deny access to personal health information in certain situations, such as when a health care practitioner believes access could cause harm to the individual or others.

³⁷ *Supra*, note 33.

³⁸ 45 C.F.R. s. 160.203.

- When a compulsory examination is made under Rule 1.360, Florida Rules of Civil Procedure;
- Upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient by the party seeking the records;
- For statistical and scientific research, provided the information is abstracted in a way to protect the identity of the patient, or the patient provided written permission;
- To a regional poison control center for the purpose of treating or managing a poison episode; and
- To the Department of Children and Families or its contracted entity for the purposes of investigations or services for cases of abuse, neglect, or exploitation of children or vulnerable adults.³⁹

A health care practitioner may also release medical records without the patient's consent to facilitate emergency treatment, when the health care provider is unable to obtain the patient's consent due to the patient's condition and the need for immediate medical care.⁴⁰ Medical records related to workers compensation may also be released to certain parties without a patient's written authorization.⁴¹

A third party to whom medical records are disclosed may not further disclose any information in the medical record without the expressed, written consent of the patient or the patient's legal representative.⁴²

Hospitals and ambulatory surgical centers may not disclose patient medical records without the consent of the patient or the patient's legal representative.⁴³ However, certain disclosures are permissible without the patient's consent.⁴⁴

III. Effect of Proposed Changes:

Pregnancy Testing for Arrestees

The bill requires that every female⁴⁵ who is arrested to be notified, upon booking, that she has a right to request a pregnancy test. If the female has not been released on bond within 72 hours after arrest, the facility where she is being held must administer a pregnancy test, if requested. The pregnancy test must be performed within 24 hours of the request and may be conducted through urine or blood tests, by ultrasound scan, or by any other standard pregnancy testing protocols adopted by the facility.

³⁹ Section 456.057(7), F.S.

⁴⁰ Section 408.051(3), F.S.

⁴¹ Section 440.13(4)(c), F.S.

⁴² Section 456.057(11), F.S.

⁴³ Section 395.3025(4), F.S.

⁴⁴ For the list of exceptions to obtaining the patient's written consent for release of records, *see* s. 395.3017(4), F.S.

⁴⁵ The bill provides that the term "female" includes a juvenile or adult woman.

Sentence Deferrals for Pregnant Women

The bill requires the sentence of a pregnant woman,⁴⁶ who is convicted of a crime and sentenced to any length of incarceration, be deferred until 12 weeks after delivery of the baby so that she may receive necessary health care for herself and the unborn child during the deferral period. The bill does not provide exceptions to the deferral nor does it allow the pregnant woman to refuse the referral.

The bill requires that within 10 days after the deferral period and the woman is incarcerated to serve the sentence, she must be offered an appropriate assessment by a licensed health care provider during the postpartum period. If requested, the licensed health care provider must provide a postpartum pregnancy assessment, which includes information regarding any necessary medical tests, procedures, lactation support, or treatments associated with her postpartum condition. Such assessments and treatments must be developed and offered in consultation with community support organizations, licensed health care professionals, social services programs, and local and state government agencies, including nonprofit organizations.

The bill requires each municipal and county detention facility⁴⁷ and the DOC to collect the following information:

- The total number of pregnant women who receive a sentence deferral;
- The total number of women who receive and who decline the postpartum assessment and services described above;
- The total number of births, including the number of live births and stillbirths, to women whose sentences are deferred, and the gestational weight of each infant at the time of birth or stillbirth;
- The total number of such women who experience complications during pregnancy and type of complications experienced; and
- The total number of such women who experience miscarriages.

Municipal and county detention facilities must report the above-listed information to the DOC and the DOC must compile the data with information from its own institutions and quarterly publish the data on its website. The bill requires patient identifying information to be excluded and compliance with state and federal confidentiality laws.

The bill is effective July 1, 2021.

⁴⁶ The bill defines “pregnant woman” as a juvenile or adult woman whose pregnancy has been verified by a pregnancy test or through medical examination by a physician.

⁴⁷ Section 951.23, F.S., defines “municipal detention facility” as a city jail stockade, a city prison camp, and any other place except a county detention facility used by a municipality or municipal officer for the detention of persons charged with or convicted of violation of municipal laws or ordinance; and “county detention facility” as a county jail, a county stockade, a county work camp, a county residential probation center, and any other place except a municipal detention facility used by a county or county officer for the detention of persons charged with or convicted of either felony or misdemeanor.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The bill may cause some municipal and county governments to expend funds for the pregnancy testing and postpartum assessments and treatments, these provisions relate to the defense, prosecution, or punishment of criminal offenses, and criminal laws are exempt from the requirements of Art. VII, s. 18(d) of the Florida Constitution, relating to unfunded mandates.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill will have an indeterminate fiscal impact on the DOC. However, the DOC may incur costs associated with postpartum assessments, data collection, and reporting requirements. There may also be an indeterminate fiscal impact to the inmate and community supervision population.⁴⁸

The DOC and municipal and county detention facilities may reduce expenditures related to prenatal care, delivery services, and postpartum care for pregnant prisoners. Municipal and county detention facilities may expend funds to provide pregnancy testing to women

⁴⁸ *Supra* note 15.

who are arrested. However, they may also realize cost savings related to care of the newborn infant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not address how a pregnant woman is to be monitored, or if she is to be monitored, while under the sentence deferral.

The bill does not address what happens in cases in which the pregnancy does not conclude with the birth of an infant, such as miscarriages or other cases in which the pregnancy may terminate prematurely.

The bill requires the municipal and county detention facilities to report certain pregnancy outcomes for women whose sentences were deferred under the bill's provisions; however, women may choose not to provide this information or refuse to authorize the release of medical information for herself and her child.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 907.033 and 925.13.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.