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SENATE BILL NO. 1301

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Rehabilitation and Social Services)

(Patron Prior to Substitute—Senator Morrissey)

Senate Amendments in [] - February 4, 2021

A BILL to amend the Code of Virginia by adding sections numbered 53.1-39.2 and 66-20.1, relating to correctional facilities; use of isolated confinement.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding sections numbered 53.1-39.2 and 66-20.1 as follows:

§ 53.1-39.2. *Isolated confinement; restrictions on use.*

A. As used in this section:

"Facility administrator" means the superintendent, warden, or person otherwise in charge of the correctional facility.

"Isolated confinement" means confinement of a prisoner to a cell, alone or with another prisoner, for 20 hours or more per day.

"Medical practitioner" means a physician, physician's assistant, or nurse practitioner licensed to practice medicine in the Commonwealth or in the jurisdiction where the treatment is to be rendered or withheld.

B. No prisoner in a state correctional facility shall be placed in isolated confinement, other than for the purpose of providing medical or mental health treatment. Cell confinement that is implemented due to medical or mental health treatment shall be done in a manner that is consistent with the signed recommendations of a medical practitioner and within a clinical area in the correctional facility or in as close proximity to a medical or mental health unit as possible.

C. Notwithstanding the provisions of subsection B, isolated confinement may be permitted for a prisoner in a state correctional facility in the following circumstances:

1. If the facility administrator determines that the prisoner needs to be placed in isolated confinement to prevent an imminent threat of physical harm to the prisoner or another person, the prisoner may be placed in isolated confinement for no longer than 48 hours, and the facility administrator shall:

a. Make a written record of the facts and circumstances that necessitated the prisoner's placement in isolated confinement, to be kept in the prisoner's institutional file;

b. Prepare a written action plan, to be kept in the prisoner's institutional file, describing how the correctional facility will transition the prisoner out of isolated confinement at the earliest opportunity;

c. Ensure that the prisoner receives an initial medical and mental health evaluation within eight hours of placement in isolated confinement [~~and a personal and comprehensive medical and mental health evaluation within 24 hours~~] ; and

d. Notify the Director in writing that the prisoner was placed in isolated confinement in accordance with this subdivision 1.

2. For any prisoner placed in isolated confinement under subdivision 1 or retained in isolated confinement under this subdivision, if a facility administrator finds that the prisoner continues to pose an ongoing and realistic threat of imminent physical harm to another person after 48 hours of isolated confinement, the prisoner may be retained in isolated confinement for [~~no more than~~] an additional 48 consecutive hours, [or longer if necessary to complete the investigation of an incident,] and the facility administrator shall:

a. Certify that other methods for ensuring the safety of the threatened person have been considered and determined insufficient, impracticable, or inappropriate;

b. Ensure that the prisoner is placed in isolated confinement for the shortest time period necessary and under the least restrictive conditions practicable;

c. Make a written record of the facts and circumstances that necessitated the prisoner's continued placement in isolated confinement, to be kept in the prisoner's institutional file;

d. Prepare a written action plan, to be kept in the prisoner's institutional file, describing how the correctional facility will transition the prisoner out of isolated confinement at the earliest opportunity;

e. Ensure that the prisoner receives an additional medical and mental health evaluation within eight hours of a decision to retain the prisoner in isolated confinement [~~and additional medical and mental health evaluations as indicated~~] ; and

f. Notify the Director in writing that the prisoner was retained in isolated confinement in accordance with this subdivision 2.

3. If the facility administrator determines that a facility-wide lockdown is required to ensure the

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safety of the prisoners in the facility, and also requires isolated confinement of one or more prisoners, then such prisoners may be placed in isolated confinement provided that the facility administrator documents in writing specific reasons why any lockdown lasting for more than 24 hours is necessary, and why less restrictive interventions are insufficient to accomplish the facility's safety goals. Such documentation shall be provided to the Director and published on the Department's website.

4. If the facility administrator determines that the prisoner needs to be placed in isolated confinement for his own protection, but only as follows:

a. A prisoner may be placed in isolated confinement with informed, voluntary consent when there is reasonable cause to believe that such confinement is necessary to prevent reasonably foreseeable harm to the prisoner, provided that:

(1) When a prisoner makes an informed voluntary request to be placed in an isolated confinement setting for his own protection, the facility shall bear the burden of establishing a basis for refusing the request; and

(2) A prisoner who is in isolated confinement for his own protection based on his informed voluntary request may opt out of that status by providing informed voluntary refusal of that status.

b. A prisoner may be placed in isolated confinement for his own protection without his informed, voluntary consent when there is clear and convincing evidence that such confinement is necessary to prevent reasonably foreseeable harm to the prisoner.

c. Before placing the prisoner in isolated confinement for his own protection, the facility administrator shall place a prisoner in a less-restrictive setting, including by transfer to the general population of another institution or to a special-purpose housing unit for prisoners who face similar threats, unless the prisoner faces a security risk so great that no less-restrictive setting would be sufficient or practicable to ensure the prisoner's safety.

d. A prisoner placed in isolated confinement for his own protection shall receive similar opportunities for activities, movement, and social interaction, taking into account his safety and the safety of others, as are provided to prisoners in the general population of the facility.

e. A prisoner who has been placed in isolated confinement for his own protection and is subject to removal from such confinement shall be provided with a timely and meaningful opportunity to contest the removal.

f. All voluntary and involuntary placements in isolated confinement under this subdivision 4 shall be reviewed every 48 hours and the reason why a less-restrictive setting could not be utilized must be recorded in writing by the facility administrator and placed in the prisoner's institutional file.

~~D. [All prisoners who are neither in isolated confinement nor in full privilege general population shall be offered a minimum of three hours of out-of-cell programmatic interventions or other congregate activities per day, including classes, work assignments, or therapeutic treatment aimed at promoting personal development or addressing underlying causes of problematic behavior, in addition to a minimum of one hour of recreation per day. Such recreation shall take place in a congregate setting unless exceptional circumstances mean doing so would create a significant and unreasonable risk to the safety and security of other prisoners, staff, or the facility.~~

~~E.]~~ Nothing in this section shall be construed to prevent the placement of prisoners in protective custody settings that do not constitute isolated confinement.

~~[F E]~~ . In any event of a prisoner's placement in isolated confinement, the facility administrator shall document the date and duration of such placement, as well as the statutory basis under this section for such placement. Such documentation shall be included in the prisoner's institutional file.

~~[G F]~~ . The Director shall develop policies and procedures, and submit proposed regulations, to effectuate the provisions of this section.

§ 66-20.1. Isolated confinement; restrictions on use.

A. As used in this section:

"Facility administrator" means the superintendent, warden, or person otherwise in charge of the juvenile correctional facility.

"Isolated confinement" means confinement of a juvenile to a cell, alone or with someone else, for 17 hours or more per day.

"Medical practitioner" means a physician, physician's assistant, or nurse practitioner licensed to practice medicine in the Commonwealth or in the jurisdiction where the treatment is to be rendered or withheld.

B. No juvenile in a juvenile correctional facility shall be placed in isolated confinement, other than for the purpose of providing medical or mental health treatment. Cell confinement that is implemented due to medical or mental health treatment shall be done in a manner that is consistent with the signed recommendations of a medical practitioner.

C. Notwithstanding the provisions of subsection B, isolated confinement may be permitted for a juvenile in a juvenile correctional facility in the following circumstances:

1. If the facility administrator determines that the juvenile needs to be placed in isolated confinement

to prevent an imminent threat of physical harm to the juvenile or another person, the juvenile may be placed in isolated confinement for no longer than 24 hours, and the facility administrator shall:

a. Make a written record of the facts and circumstances that necessitated the juvenile's placement in isolated confinement, to be kept in the juvenile's institutional file;

b. Prepare a written action plan, to be kept in the juvenile's institutional file, describing how the correctional facility will transition the juvenile out of isolated confinement at the earliest opportunity;

c. Ensure that the juvenile receives an initial medical and mental health evaluation within four hours of placement in isolated confinement and follow-up evaluations at least every hour unless deemed unnecessary by a medical practitioner, and in either case, a medical practitioner shall document in writing the reasons why an hourly evaluation is necessary or unnecessary; and

d. Notify the Director in writing that the juvenile was placed in isolated confinement in accordance with this subdivision 1.

2. For any juvenile placed in isolated confinement under subdivision 1 or retained in isolated confinement under this subdivision, if a facility administrator finds that the juvenile continues to pose an ongoing and realistic threat of imminent physical harm to another person after 24 hours of isolated confinement, the juvenile may be retained in isolated confinement for no more than an additional 24 consecutive hours, and the facility administrator shall:

a. Certify that other methods for ensuring the safety of the threatened person have been considered and determined insufficient, impracticable, or inappropriate;

b. Ensure that the juvenile is placed in isolated confinement for the shortest time period necessary and under the least restrictive conditions practicable;

c. Make a written record of the facts and circumstances that necessitated the juvenile's continued placement in isolated confinement, to be kept in the juvenile's institutional file;

d. Prepare a written action plan, to be kept in the juvenile's institutional file, describing how the correctional facility will transition the juvenile out of isolated confinement at the earliest opportunity;

e. Ensure that the juvenile receives an additional medical and mental health evaluation within four hours of a decision to retain the juvenile in isolated confinement and additional medical and mental health evaluations as indicated; and

f. Notify the Director in writing that the juvenile was retained in isolated confinement in accordance with this subdivision 2.

3. If the facility administrator determines that the juvenile needs to be placed in isolated confinement for his own protection, but only when such confinement is necessary to prevent reasonably foreseeable harm to the juvenile, provided that:

a. A juvenile placed in isolated confinement for his own protection shall receive similar opportunities for activities, programming, movement, and social interaction, taking into account his safety and the safety of others, as are provided to other juveniles in the facility who are not in isolated confinement.

b. A juvenile who has been placed in isolated confinement for his own protection and is subject to removal from such confinement shall be provided with a timely and meaningful opportunity to contest the removal.

c. All placements in isolated confinement under this subdivision 3 shall be reviewed every 48 hours and the reason why a less-restrictive setting could not be utilized must be recorded in writing by the facility administrator and placed in the juvenile's institutional file.

4. If the facility administrator determines that a facility-wide lockdown is required to ensure the safety of the juveniles in the facility, and also requires isolated confinement of one or more juveniles, then such juveniles may be placed in isolated confinement provided that the facility administrator documents in writing specific reasons why any lockdown lasting for more than 24 hours is necessary, and why less restrictive interventions are insufficient to accomplish the facility's safety goals. Such documentation shall be provided to the Director and published on the Department's website.

D. Nothing in this section shall be construed to prevent the placement of juveniles in protective custody settings that do not constitute isolated confinement.

E. In any event of a juvenile's placement in isolated confinement, the facility administrator shall document the date and duration of such placement, as well as the statutory basis under this section for such placement. Such documentation shall be included in the juvenile's institutional file.

F. The Director shall develop policies and procedures, and submit proposed regulations, to effectuate the provisions of this section.

2. That the provisions of this act shall become effective on July 1, 2022.

[3. That the provisions of this act shall not become effective unless an appropriation effectuating the purposes of this act is included in a general appropriation act passed in 2021 by the General Assembly that becomes law.]