Legislative Analysis

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MEDICAL CONDITIONAL RELEASE OF PRISONERS

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House Bill 5245 as reported as Substitute H-1
Sponsor: Rep. Klint Kesto
Committee: Law and Justice
Complete to 2-1-18

BRIEF SUMMARY: House Bill 5245 would allow, in certain circumstances, a court to order the medical conditional release of a prisoner to a home or facility outside the supervision of the Department of Corrections (DOC) because the prisoner requires acute long-term medical or mental health treatment or services and/or because the prisoner no longer poses a threat to society due to a deterioration in his or her physical or mental health. This would not be parole, and the prisoner would remain under the jurisdiction of the DOC.

FISCAL IMPACT: The bill would have an indeterminate fiscal impact on the state because it is unclear whether it would supersede existing sentencing law and, if it did, how many prisoners might be eligible. (See ***Fiscal Information***, below, for further discussion.)

THE APPARENT PROBLEM:

Despite the decline of Michigan's prison population to just under 40,000, the Department of Corrections budget remains one of the highest at about $2.0 billion a year, with 98% supplied by the state's general fund. The high costs are due in part to the adoption of long sentences for many crimes during the 1990s, when the *tough on crime* philosophy swept the country. In addition, the *Truth-in-Sentencing* law, enacted during the same time period, requires any prisoner eligible for parole to first serve his or her minimum sentence in a secure facility before being considered by the parole board. One impact of those policies is that Michigan is now housing an increasingly older prison population. By the end of 2016, inmates at least 50 years old accounted for 23% of the DOC prison population, up from 17% at the end of 2009. As inmates age, the prevalence of age-related diseases, including arthritis, cancer, and Alzheimer's disease, and the costs to treat such ailments increase. Terminal and debilitating diseases aren't limited to the old or those facing decades in prison, however. Even younger inmates, and those with short sentences, contract serious physical illnesses or terminal illnesses or develop a serious mental illness that necessitates specialized and costly care.

In response, the DOC has implemented numerous measures to rein in costs while still providing appropriate care. For example, the Duane Waters Health Center in Jackson can treat even serious health needs, including administering on-site chemotherapy; three prisons provide on-site dialysis treatment; several have specialized residential treatment units that administer mental health programs and/or programs to assist prisoners who have a developmental disability or cognitive impairment; and even limited hospice care is available in at least one prison. Provision of such services within DOC facilities is more cost-effective than transporting and supervising a prisoner for treatment at a non-prison facility, but the costs are still higher than similar care provided to the general public in

hospitals or nursing homes. Moreover, since federal law prohibits a person from receiving benefits under Medicaid or Medicare while incarcerated, the costs of providing medical and mental health care to prisoners—regardless of where provided—are fully borne by the state.

Recently, the state of Connecticut has begun providing certain kinds of care, such as end-of-life care, in non-prison facilities to prisoners who pose a minimal risk to public safety. Reportedly, because the prisoners are not housed in facilities under the direct supervision of the state's prison system, many are eligible to receive medical care under Medicare or Medicaid. Many criminal justice stakeholders in Michigan believe that adopting a similar approach could be a way for the state to reduce its expenses related to providing certain types of needed medical or mental health services without negatively impacting the safety of its citizens.

THE CONTENT OF THE BILL:

House Bill 5245 would add a new section to the Corrections Code to allow, by court order, a prisoner to be granted a medical conditional release in certain circumstances to a placement option that is not a public institution. ***Medical conditional release*** would mean release from a correctional facility under the bill's provisions for medical or mental health treatment.

The bill would allow the assistant director in charge of the Bureau of Correctional Facilities (hereafter A.D.) to petition the sentencing court for an order granting the prisoner a medical conditional release, but only *if*:

- The A.D. determines that the medical conditional release would pose a minimal risk to society, and
- The A.D. consulted with a physician who determined that:
    - The prisoner's physical or mental health has deteriorated to a point rendering the prisoner a minimal threat to society; and/or,
    - The prisoner requires acute long-term medical or mental health treatment or services.

The petition would have to be accompanied by the evidence the A.D. used to make his or her determination, including, but not limited to, the results of the validated risk assessment, and also the evidence the physician considered in making a determination.

The bill would allow the sentencing court to enter an order granting a medical conditional release of a prisoner if the court finds that:

- The prisoner requires acute long-term medical or mental health treatment or services; or
- The prisoner's physical or mental health has deteriorated to a point rendering the prisoner a minimal threat to society.

The court's order would have to provide that the medical conditional release be rescinded (resulting in the prisoner's being returned to a correctional facility) *if* the prisoner no longer

met the requirements of this provision *or* if the conditions described below were no longer satisfied.

A court could only enter an order granting a medical conditional release of a prisoner if *all* of the following conditions were satisfied:

- A placement option had been secured in the community. This could include home confinement or a medical or mental health facility that is not a public institution. A placement option would not need to involve any type of supervision of the prisoner by the DOC or an employee of a private contractor of the DOC or otherwise be considered a secure facility, but it could involve electronic monitoring (tether).
- The placement option poses a minimal risk to society for a prisoner requiring acute long-term medical or mental health treatment or services.
- The A.D. made a reasonable effort to determine whether the expenses related to the placement option would be covered by Medicaid (i.e., the prisoner was placed in a nursing home), a health care policy, a certificate of insurance, or another source for the payment of medical expenses or whether the prisoner has sufficient income or assets to pay for expenses related to the transfer.
- The DOC had provided notice to the prosecutor's office in the county in which the prisoner had been sentenced and to each victim entitled to notice under the William Van Regenmorter Crime Victim's Rights Act.

An order entered under this provision could include a requirement that the prisoner submit to periodic reexamination by a physician to assess whether the prisoner continued to meet the requirements of the medical conditional release. If a reexamination revealed that the prisoner no longer met those requirements, the court would have to order the return of the prisoner to a correctional facility for a term of imprisonment not to exceed the prisoner's sentence, less time served, for the offense of conviction. For purposes of calculating time served, the time a prisoner spent on medical conditional release would be treated as if he or she had been imprisoned in a correctional facility.

The bill would take effect 90 days after enactment.

MCL 791.265 and proposed 791.265j

BACKGROUND INFORMATION:

Truth in Sentencing

Currently, with a few exceptions, Michigan's Truth-in-Sentencing law requires a prisoner subject to disciplinary time who is committed to the jurisdiction of the Department of Corrections (DOC) to serve the duration of his or her minimum sentence in a secure correctional facility under the jurisdiction of the department. A prisoner, including those serving certain life sentences, may be released on parole if eligible, if approved by the Parole Board, and if he or she meets all other statutory conditions. Otherwise, a prisoner remains in a secure facility under the DOC's supervision until the maximum sentence is completed or, in the case of a life sentence without parole, the prisoner is deceased.

However, a prisoner may leave a DOC facility, but only if under DOC supervision, when participating in a work detail or to visit a critically ill relative, attend a relative's funeral, or obtain medical services not otherwise available at the prison.

FISCAL INFORMATION:

House Bill 5245 would have an indeterminate fiscal impact on the state because it is unclear whether it would supersede existing sentencing law and, if it did, how many prisoners might be eligible. Any potential savings would be realized in the assumed shift of health care costs from the Department of Corrections to Medicaid. A cost shift to Medicaid would result in a net savings equal to approximately 65%, as the state generally must provide state match equal to 35% of Medicaid expenditures. Under the bill, a health care policy, a certificate of insurance, or some other source of payment could also be used to cover health care costs, though the number of prisoners who might exercise these options is unknown.

Providing health care to an aging prison population is a large and growing cost for the state. Caring for prisoners inside the prison environment is far more expensive than it is on the outside. Under the 1965 law that created Medicaid, anyone entering a state prison forfeited Medicaid eligibility; however, an exception to that general rule opened up in 1997 when the United States Department of Health and Human Services wrote to state Medicaid directors saying that prisoners who leave state or local facilities for care in hospitals or nursing homes are eligible for Medicaid. Most prisoners would qualify under existing Medicaid rules, as long as they receive care outside of prison facilities. Receiving federally subsidized long-term care outside of prison walls potentially could save the state millions of dollars in health care costs.

For prisoners to be eligible for medical conditional release under HB 5245, the Assistant Director in charge of the Bureau of Correctional Facilities would have to determine that the medical conditional release would pose a minimal risk to society, a physician would have to determine that the prisoner's physical or mental health has deteriorated to a point that renders the prisoner a minimal threat to society or that the prisoner requires long-term medical or mental health treatment or services, and a placement option would have to be secured for the prisoner in the community. Under the bill, community placement need not involve any type of supervision or be considered a secure facility.

The bill does not define "minimal risk to society," so the number of prisoners who would be eligible is unknown. The bill does not take into account truth-in-sentencing laws, prisoners' earliest release dates, or prisoners' eligibility for parole. Also, under current law, prisoners under the jurisdiction of the Department of Corrections cannot be placed in the community without supervision.

ARGUMENTS:

For:

House Bill 5245 would essentially create a narrow carve-out from, or exception to, the state's Truth-in-Sentencing law. Under Truth in Sentencing, a person sentenced to prison

must serve his or her entire minimum sentence in a secure facility under the jurisdiction of the Department of Corrections (DOC) before being considered for parole by the Parole Board. Very few exceptions are allowed for a prisoner to leave the grounds of a prison, and even then, the prisoner must be supervised by guards at all times, even in a hospital setting.

However, as prisoners with long sentences and those sentenced to life without parole age, this policy is proving to be increasingly expensive to maintain. According to the DOC, a PEW research study finds that the percentage of a state's prison population over 50 has a direct relationship on prison costs. Among the states, Michigan has the highest percentage of prisoners older than 50.

But even younger prisoners develop terminal illnesses, or have a mental illness, developmental disability, or cognitive impairment for which appropriate care is beyond what prison infirmaries, hospitals, and residential programs can adequately and humanely provide. Specifically, the prison population to which the bill is intended to apply are those with serious or advanced chronic conditions that prisons are ill-equipped to handle.

Importantly, House Bill 5245 would not accelerate parole, nor would it shorten a prisoner's sentence as a commutation does. Instead, the bill would provide a mechanism (medical conditional release) by which a prisoner meeting certain conditions, who needed specialized care, could be treated in a non-prison setting and thereby qualify to obtain those services under Medicaid, Medicare, private insurance, or payment by the prisoner or family members. Though approval by the Assistant Director of the Bureau of Correctional Facilities would be required, eligibility for a medical conditional release would be largely based on a prisoner's medical condition and medical needs as determined by a physician and not on age, type of crime, or length of sentence left to be served. The prisoner would still be under the jurisdiction of the DOC, but would be placed in a setting in which the prisoner would not be under guard.

Public safety would not be compromised, as eligibility would only be extended to those prisoners posing a minimal, or nonexistent, threat to others with placement in a facility that also would pose a minimal risk to society. For instance, some prisoners are currently in comas, others on ventilators. Many others are in the final months of life due to a terminal illness and are bed-ridden. Many can no longer walk, feed themselves, or lift a small object, let alone mastermind or execute another crime. For those with severe mental illnesses who pose a danger to themselves or others, private and state residential psychiatric hospitals can provide appropriate treatments in a secure setting that would protect the prisoner from doing self-harm or harm to others and that would minimize, if not prevent, escape from the facility.

Further, the court order could require the prisoner to wear a tether and to be regularly re-examined. If he or she no longer met the bill's physical or mental illness criteria for a medical conditional release, or posed a security risk to others, the prisoner would be returned to prison to finish serving his or her sentence minus the time served while under the medical conditional release.

For:

Without the bill, the only option for inmates suffering from terminal illnesses or needing specialized care that cannot be adequately provided within the prison system is to petition the parole board for medical commutation. A medical commutation can only be granted by the governor, and it is a very long process, typically taking more than a year to complete. All too often, a prisoner dies before a decision is finalized. Though an expedited commutation option for prisoners with serious medical conditions took effect in late June of 2017 and is expected to shave several months off the process, it is too early to tell how effective the new law will be.[1] Further, a commutation shortens a sentence so that the prisoner is released as if they had served their maximum sentence. By comparison, under House Bill 5245, the person receiving a medical conditional release would still be a prisoner subject to oversight by the DOC. The benefit would be that medical care could be provided in a setting that would allow coverage under Medicaid or Medicare, or by personal insurance or be paid privately. In addition, unlike a medical commutation, should the prisoner's condition improve or the prisoner pose a safety risk, he or she could be returned to a DOC facility to serve the remainder of the sentence.

For:

According to the DOC, though the prison population is decreasing, the number of high needs prisoners is increasing, both in percentage of the population and in raw numbers. Currently, about 850 prisoners are considered medically fragile and suffer from such diseases as late-stage cancers and kidney disease, dementia, Alzheimer's disease, and diabetes. The DOC does work with an outside contractor to develop parole plans and services for some of the medically fragile prisoners; the DOC estimates the expenditures for this program to be about $9.0 million per year. However, certain trends are alarming, and the bill could help address the economic challenges they present. For instance, 49% of the intake population (new offenses or former prisoners reoffending) are now being called back for medical follow-ups due to coming to prison with various health or mental health issues. Further, about 25 offenders a month processed through intake are being immediately placed in crisis stabilization or in a specialized residential treatment program. Establishing medical conditional release as an option for some prisoners could help mitigate future health care costs.

For:

The bill's provisions reflect findings and recommendations from the House C.A.R.E.S. Task Force, which promotes expanding custody options for prisoners with severe mental health and physical illnesses and asking Congress to allow Medicaid coverage during incarceration, as well as the Safe and Secure Rehabilitation initiative of the House Law and Justice Committee, which also looked at ways to improve mental health treatment to prisoners and other incarceration reforms that would be smart on crime and soft on taxpayers.

For:

According to the DOC, the bill could also be useful for certain prisoners who are approaching, or have approached, parole eligibility but whose medical or mental condition

[1] Public Act 8 of 2017 (Enrolled Senate Bill 12)

is such that there is no appropriate placement for them in the community. Yet, a prisoner's medical or mental health condition makes him or her vulnerable to abuse or assault by other prisoners, and thus prison becomes the least effective or safe place for medical or mental health treatment. The DOC, and the House C.A.R.E.S. final report, agree that lack of suitable placements for certain offenders results in release delays (and therefore increased costs to the state).

House Bill 5245 would address this concern by enabling more of these medically fragile prisoners to be successfully released into the community without negatively impacting public safety. Under the bill, those who are too ill or with certain developmental disabilities that preclude living on their own could be placed in adult foster care homes, assisted living, or nursing homes. Prisoners who may pose a danger to themselves or others may be able to be placed in a private or state-operated residential psychiatric hospital that has a secure floor for patients with severe mental illnesses.

Against:

No formal arguments were offered in opposition to the bill.

POSITIONS:

Representatives of the Alliance for Safety and Justice testified in support of the bill. (11-28-17)

The West Michigan Policy Forum indicated support for the bill. (11-28-17)

The Michigan Council on Crime and Delinquency indicated support for the bill. (11-28-17)

The Michigan Department of Corrections indicated a neutral position on the bill. (12-5-17)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.