

**OFFICE OF POLICY AND LEGAL ANALYSIS  
BILL ANALYSIS**

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**TO:** Members, Joint Standing Committee on Criminal Justice and Public Safety

**FROM:** Jane Orbeton, Legislative Analyst

**DATE:** February 13, 2022

**LD:** 696 An Act To Prohibit Solitary Confinement in Maine's Corrections System

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**Summary**

This bill prohibits solitary confinement in jails and prisons in the State. It defines "solitary confinement" to mean that a prisoner is segregated and has contact with another person less than 3 times a day. This bill was heard and worked in 2021 and heard again, with a proposed amendment to replace the bill, presented by Rep Lookner on February 9, 2022.

**Testimony**

The names of persons who registered online to testify and persons who submitted testimony electronically, along with copies of the submissions, are posted on the committee webpage, under Criminal Justice Committee, in "committee materials," by LD number at this web address: <https://legislature.maine.gov/cjps-meeting-materials-130th-legislature>.

**Proponents:**

Rep Lookner presented a proposed amendment to replace the bill and provided written testimony. A copy of the proposed amendment appears below. Rep Lookner testified against the imposition of solitary confinement in jails and prisons.

- The proposed amendment defines solitary confinement and prohibits its use in prisons and jails.
- The amendment defines segregated confinement and residential rehabilitation and limit the use of both. The amendment prohibits the use of segregated confinement for persons in protective custody and certain defined populations, including persons 65 or older, persons who are pregnant or up to 8 weeks postpartum, a resident who is caring for children in the facility, a resident less than 21 years old and a resident who has a disability, including but not limited to mental illness.
- The amendment establishes a state position of "confinement ombudsman" to be employed by the Governor, outside the control of the Department of Corrections, to ensure compliance and oversee segregated confinement and residential rehabilitation.
- The amendment requires the Commissioner of Corrections to adopt mandatory standards prohibiting solitary confinement and limiting the use of segregated confinement and residential rehabilitation in the jails, holding facilities and short-term detention areas.

Issues raised by proponents for the bill include: ending the practice of solitary confinement by whatever name in prisons and jails; the irreparable damage caused by solitary confinement; using the ADA definitions for disabilities; defining vulnerable populations, including people with disabilities and serious mental illness and substance use disorder and prohibiting the use of restrictive segregated prison environments for them; and using intentional peer support programs in prisons and jails.

Several people testified about excluding persons with disabilities from being assigned to segregated confinement. Dr. Edward Pontius suggested excluding people with serious mental illness and substance use disorder. The ADA definition of “disability,” which was proposed for use in the amendment by Kevin Voyvodich, Disability Rights Maine, is: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 US Code section 12102. For the purposes of this definition “major life activities” are defined as including but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working; and the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

### **Opponents:**

Commissioner of Corrections Randall Liberty testified and submitted testimony against the amendment, agreeing that solitary confinement leads to long term psychological and physiological distress and does not support recovery or balanced wellness but stressing that the Department of Corrections does not use solitary confinement. Commissioner Liberty described the use of the Administrative Control Unit at the Maine State Prison, which houses only 7 residents at this time, and described its operations, due process protections for prison residents and opportunities for programming, recreation time and education and behavioral health. Commissioner Liberty stated that his opposition to the amendment is based on its reach into prison management, that it will risk lives, reduce programming and services and create chaos.

Franklin County Sheriff Scott Nichols presented testimony and testified against the bill for the Maine Sheriffs Association. Sheriff Nichols stressed: (1) that the association had not had sufficient time to review the proposed amendment and invited legislators to tour the jails; (2) that disciplinary segregation is by definition punishment by removal; (3) that separation is sometimes necessary for safety, with the inmate earning back privileges but still having access to bedding, personal hygiene, clothing, exercise outside, medical and mental health treatment and access to the courts.

### **Information requested**

1. Commissioner Liberty agreed to provide information on the establishment and naming of the Administrative Control Unit, data on its use, and when the department last paid a settlement because of the use of solitary confinement.
2. Sheriff Nichols agreed to submit corrected testimony clarifying that Rep Warren was not involved in the preparation of the amendment.

Sponsor: Rep Lookner  
Drafter: JO  
Date: Jan 29, 2022  
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**Proposed Amendment to LD 696**  
**An Act to Prohibit Solitary Confinement in Maine's Corrections System**  
**Proposed by the Sponsor, Rep Lookner**

Amend the bill by deleting the title and inserting a new title to read: "An Act to Restrict the Use of Solitary Confinement, Segregated Confinement and Residential Rehabilitation in Maine's Prisons and Jails."

Amend the bill by striking everything after the enacting clause and by inserting the following:

**PART A**

**Sec. A-1. 34-A MRSA §15-B is enacted to read:**

**15-B. Residential rehabilitation.** "Residential rehabilitation" means assignment for residential placement in a separate housing unit for the purpose of therapy, treatment and rehabilitative programming to address a resident's individual treatment and rehabilitation needs and the underlying causes of the person's problematic behavior.

**Sec. A-2. 34-A MRSA §1001, subsection 16-A is enacted to read:**

**16-A. Segregated confinement.** "Segregated confinement" means confinement in a cell for more than 17 hours, but not more than 20 hours, per 24-hour day.

**Sec. A-3. 34-A MRSA §1001, subsection 17-A is enacted to read:**

**17-A. Solitary confinement.** "Solitary confinement" means confinement in a cell for more than 20 hours per 24-hour day, with less than 4 hours per day out of the cell in congregate programming and recreation.

**Sec. A-4. 34-A MRSA §3050 is enacted to read:**

**§3050. Solitary, segregated and residential rehabilitation confinement**

**1. Restrictions on the use of solitary, segregated and residential rehabilitation.** The provisions of this section apply with regard to the use of solitary confinement, segregated confinement and residential rehabilitation of a resident of a correctional or detention facility.

**2. Solitary confinement.** The use of solitary confinement is prohibited in a correctional or detention facility.

**3. Segregated confinement.** The use of segregated confinement is limited and subject to requirements as provided in this subsection.

**A.** Prior to assignment to segregated confinement a resident must be provided access to counsel and the warden or warden's designee must conduct a disciplinary hearing at which segregated confinement is determined to be appropriate for the resident.

**B.** Assignment to segregated confinement is prohibited for persons in protective custody and residents who are special populations, including, but not limited to:

**(1)** A resident 65 years of age or older;

(2) A resident with a disability, including, but not limited to a mental illness, as provided in rules adopted by the Commissioner of Health and Human Services after consultation with a representative of an organization specializing in disability rights and an organization advocating for persons with mental illness. Rules adopted pursuant to this subparagraph are routine technical rules as defined by Title 5, chapter 375, subchapter 4-A;

(3) A resident who is pregnant or up to 8 weeks postpartum;

(4) A resident who is caring for children in the facility; and

(5) A resident who is less than 21 years of age.

C. Assignment to segregated confinement is limited to 3 24-hour days in succession and not more than 9 of the previous 60 days.

D. A resident may not be assigned to segregated confinement more than once for the same reason or because of the same conduct.

E. A resident may not be assigned to segregated confinement for the purpose of punishment.

F. A resident assigned to segregated confinement must be offered out-of-cell programming at least 4 hours per day, including at least one hour of recreation.

G. Assignment to segregated confinement may only be used for safety reasons, including because the resident:

(1) Has caused or is causing or attempting to cause serious physical injury or death to another person, or is threatening imminent physical injury or death to another person, if the resident has a history of causing serious physical injury or death and the commissioner or the commissioner's designee has determined that there is a strong likelihood that the resident will carry out the threat. If the resident has been receiving mental health services or appears to require psychiatric treatment, the commissioner or the commissioner's designee shall consult with the director of the Department of Health and Human Services, Office of Behavioral Health, or the director's designee who must agree with the commissioner or the commissioner's designee that there is a strong likelihood that the resident will carry out the threat on the need for segregated confinement;

(2) Has compelled or is attempting to compel another person, by force or threat of force, to engage in a sexual act;

(3) Is extorting or attempting to extort, by force or threat of force, property or money from another person;

(4) Is coercing or attempting to coerce another person, by force or threat of force, to violate a rule of the correctional or detention facility;

(5) Is leading, organizing, inciting or attempting to cause a riot, insurrection or other similarly serious disturbance that will result or has resulted in taking another person hostage, or causing major property damage or physical harm to another person. A finding of attempting to cause a serious disturbance requires a clear finding that the resident intended to cause a serious disturbance. Evidence of withdrawal or abandonment of a plan to cause a serious disturbance negates a finding of intent; or

(6) Has procured or is procuring deadly weapons or other dangerous contraband that poses a serious threat to the security of the correctional or detention facility, including, but not limited to, escaping, attempting to escape, facilitating escape from the facility or from supervision while

outside the facility. Evidence of withdrawal or abandonment of a plan to escape negates a finding of intent.

H. A resident who has been assigned to segregated confinement may not be denied services, treatment or basic needs, including, but not limited to, clothing, food and bedding.

I. A resident of segregated confinement has the same rights as other residents to the following humane conditions:

(1) A balanced diet that meets established requirements for nutrition and conforms to medical, religious and ethical needs;

(2) Personal hygiene and menstrual items, at no cost;

(3) Gender parity;

(4) All personal property unless a determination has been made that the resident's possession of a specific item would pose a significant and unreasonable risk to the safety of other residents or unit staff;

(5) Access to technology, education and programming;

(6) Access to contact visits and electronic means of communications and interaction with families and loved ones at least weekly;

(7) Access to health care, including documented assessments and interventions that meet accepted standards of medical care and that include assessment by a medical professional immediately and not later than 2 hours after assignment and a mental health assessment within 24 hours by a qualified health clinician and daily thereafter;

(8) Opportunities to participate in structured enrichment activities and the development and implementation of success plans, with choices in programming and increased support from facility staff and peer mentor programs, including trauma-informed health care; and

(9) Access to additional out-of-cell, trauma-informed therapeutic programming, promoting personal development, addressing underlying causes of behaviors, and helping prepare for release to the general population and, ultimately, the community.

J. A resident has a right to notice of and free written copies of any reports filed regarding the resident.

K. Lights in the segregated confinement unit must be operated on the same lighting schedule as in other units of the facility and may not be on at full illumination 24 hours per day. If a physician believes that a resident is at risk of suicide or self-harm, the lights in the cell must be adjusted with a dimmer to protect the resident's safety while promoting sleep and mental and physical wellness.

L. If a resident has completed 3 days in segregated confinement, the resident may be returned to the general population of the facility or, if it is determined that the resident requires additional placement away from the general population of the facility, the resident may be assigned to residential rehabilitation or to the intensive mental health unit of the Maine State Prison.

M. De-escalation, intervention and restorative justice practices are the preferred methods of responding to misbehavior by a resident assigned to segregated confinement.

N. A staff member of the facility must complete 40 hours of training prior to working on the segregated confinement unit and an additional 21 hours annually after the completion of the first year of working on the segregated confinement.

**4. Residential rehabilitation.** The use of residential rehabilitation is limited and subject to requirements as provided in this subsection.

A. A resident may be assigned to residential rehabilitation if the resident has been assigned to segregated confinement for 3 days and has been determined by the procedure adopted by the commissioner to require additional time separated from the general population.

B. A resident assigned to residential rehabilitation must be offered at least 6 hours per day of out-of-cell congregate programming, services, treatment and meals and an additional one hour of recreation.

C. A resident assigned to residential rehabilitation must have an individual rehabilitation plan with programming and timelines developed by facility staff and the resident together.

D. Upon admission of a resident to residential rehabilitation, facility staff shall administer assessments and, together with the resident, develop an individual rehabilitation plan that is based on the resident's medical, mental health and programming needs. The rehabilitation plan must identify specific goals and programs, treatment and services to be offered to the resident, with projected timeframes for completion and discharge from residential rehabilitation.

E. A resident assigned to residential rehabilitation must have access to programs and work assignments comparable to core programs and work assignments in general population.

F. A resident assigned to residential rehabilitation must have access to additional out-of-cell trauma-informed therapeutic programming aimed at promoting personal development, addressing the underlying causes of problematic behaviors that resulted in assignment to residential rehabilitation and helping prepare for discharge from residential rehabilitation and to the community.

G. Restraints may not be used in a residential rehabilitation unit.

H. Staff of the residential rehabilitation unit shall perform a meaningful periodic review of each resident assigned to residential rehabilitation at least every 30 days to assess the resident's progress and whether the resident should be discharged. If following a review, the resident is not discharged, program and mental health staff shall specify in writing the reasons for the determination and the program, treatment, service or corrective action required before discharge. The resident must be given access to those programs, treatments or services and has the right to discharge from residential rehabilitation upon fulfillment of those requirements.

I. Weekly progress of a resident assigned to residential rehabilitation must be summarized and entered into the resident's record and the resident must be discharged from residential rehabilitation when the resident has fulfilled the individual rehabilitation plan.

J. If a resident assigned to residential rehabilitation has not been discharged from residential rehabilitation within one year of initial assignment or is within 60 days of a fixed or tentatively approved date for release from a correctional facility, the resident has a right to be discharged from residential rehabilitation unless the resident has committed an act that would otherwise place the resident in segregated confinement and that poses a significant and unreasonable risk to the safety or security of other residents or staff.

K. When a resident is discharged from residential rehabilitation, any remaining time to serve on any previous disciplinary sanction must be dismissed.

L. If a resident assigned to residential rehabilitation substantially completes the resident's rehabilitation plan, any associated loss of good time must be restored to the resident upon discharge from residential rehabilitation.

M. De-escalation, intervention and restorative justice practices are the preferred methods of responding to misbehavior by a resident assigned to residential rehabilitation.

N. All staff assigned to residential rehabilitation or special housing and their supervisors must complete 40 hours of training prior to working on the residential rehabilitation unit and an additional 21 hours annually after the completion of the first year of working on the residential rehabilitation unit. The training must be developed in consultation with relevant experts and must include, but is not limited to, the purpose and goals of the non-punitive therapeutic environment, trauma-informed care, de-escalation training, restorative justice and dispute resolution methods.

**5. Hearing officers.** Prior to presiding over any hearings, all hearing officers shall complete a minimum of 40 hours of training, with one additional day of training annually thereafter, on relevant topics, including, but not limited to, the physical and psychological effects of segregated confinement, procedural and due process rights of the accused and restorative justice remedies.

**6. Monthly reports.** The department shall publish monthly reports on its website and semi-annual and annual cumulative reports of the totals of residents assigned to segregated confinement and residential rehabilitation on the first day of each month. The reports shall breakdown the numbers of residents by: age; gender; mental health treatment level; special health accommodations or needs; need for and participation in substance use disorder programs; pregnancy status; cumulative reporting for each individual assigned to segregated confinement and residential rehabilitation as well as length of stay in the past 60 days; number of days assigned to segregated confinement; list of all incidents resulting in sanctions of segregated confinement by facility and date of occurrence; the number of incarcerated persons in segregated confinement by facility; and the number of persons in residential rehabilitation by facility.

**7. Annual report.** The department shall publish an annual public report regarding all aspects of segregated confinement and residential rehabilitation and shall include recommendations to local correctional facilities, the Governor, the joint standing committee of the Legislature having jurisdiction over criminal justice and public safety. The report must cover policies and practices regarding placement of persons, special populations, cumulative length of time spent in segregated confinement and residential rehabilitation, hearings and procedures, conditions, programs, services, care and treatment, and assessments, rehabilitation plans and discharge procedures.

**8. Individual relief.** In addition to any relief provided to an individual adversely affected by any action, rule, regulation of the department or an officer or employee of the department or a department correctional or detention facility as it relates to assignment to or the use of segregated confinement or residential rehabilitation in violation of this section, a person who is adversely affected may seek declarative and injunctive relief and actual damages attributable to the violation in an appropriate court of jurisdiction. The court shall award reasonable expenses to an individual adversely affected if the action results in a final determination by a court in favor of the individual adversely affected.

**9. Confinement ombudsman.** The Governor shall employ one person full-time to act as a confinement ombudsman and to ensure compliance with this section and Title 34-A, section 1208, subsection 8. The confinement ombudsman shall oversee the assignment to and use of segregated confinement and residential rehabilitation in department correctional facilities and county, regional and municipal jails, holding facilities and short-term detention areas. The confinement ombudsman shall work independently of the department.

## **PART B**

**Sec. B-1. 34-A MRSA §1208, subsection 8** is enacted to read:

**8. Assignment to solitary confinement, segregated confinement and residential rehabilitation.** The commissioner shall adopt mandatory standards for county, regional and municipal jails, holding facilities and short-term detention areas that will prohibit the use of solitary confinement and limit and impose requirements for assignment to segregated confinement and residential rehabilitation. The standards must be identical to the requirements and limitations applicable to department correctional and detention facilities pursuant to Title 34-

A, section 3050, adapted as needed to apply to county and regional and municipal jails, holding facilities and short-term detention areas. The standards must use definitions for solitary confinement, segregated confinement and residential rehabilitation that are identical to the definitions applicable to the Department of Corrections pursuant to Title 34-A, section 1001.

### SUMMARY

This amendment replaces the bill. The amendment provides a new title, “An Act to Restrict the Use of Solitary Confinement, Segregated Confinement and Residential Rehabilitation in Maine’s Prisons and Jails.” The amendment enacts law in Title 34-A to restrict and provide requirements for the assignment of residents of correctional facilities, detention facilities, jails, holding facilities and short-term detention areas. The amendment requires the Governor to employ one person full-time to act as a confinement ombudsman, to ensure compliance with the law and to oversee the assignment to and use of segregated confinement and residential rehabilitation in department correctional facilities and county, regional and municipal jails, holding facilities and short-term detention areas. The confinement ombudsman works independently of the Department of Corrections.