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Montana Legislative Services Division

Legal Services Office

TO: Members of the Law and Justice Interim Committee

FROM: Valencia Lane, Staff Attorney

DATE: April 18, 2006

RE: Dept. of Corrections Rule Submissions -- Rule Review
Licensure of youth detention facilities
Juvenile Delinquency Intervention Program (JDIP)

The Department of Corrections has filed the following rule notice with the Secretary of State's office for publication in the Montana Administrative Register (MAR):

I.

MAR 2006 Issue No. 5 (March 9, 2006) -- CORRECTED NOTICE OF AMENDMENT -- the Department has filed a CORRECTED NOTICE OF AMENDMENT indicating its amendment of its final notice of amendment to rules pertaining to licensure of youth detention facilities as published on page 2665 of the 2005 MAR, Issue No. 24. The corrected notice of amendment was required to conform internal subsection references within the amended rules.

TECHNICAL NOTE: The proposed rules were reviewed by Legislative Services Division staff and no technical problems were noted.

II.

MAR 2006 Issue No. 7 (April 6, 2006), MAR Notice No. 20-7-37, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL-- the Department has filed a NOTICE OF HEARING in the matter of the proposed amendment of four rules involving youth placement committees and the proposed repeal of eight rules and the adoption of eight new rules pertaining to the juvenile delinquency intervention program (JDIP). A hearing is set for May 8, 2006, at 10:00 a.m., in Room 24 of the Department of Corrections Annex at 1539 11th Ave., Helena. The public comment period runs to May 16, 2006. The rules establish procedures for administration of JDIP, including activities by the cost containment review panel, the department, the youth courts, and the Supreme Court administrator's office. The stated purpose of the rules is to implement the audit recommendations made by the Legislative Audit Division's performance audit of JDIP dated December 2005. The legislative audit specifically recommended that the department, in conjunction with the cost containment review panel,

modify its administrative rules to clarify allowable expenditures and establish program standards in accordance with state law and legislative intent. In addition, the audit recommended that the Department of Corrections and the Judicial Branch cooperatively seek legislation to update the Youth Court Act, including JDIP, to reflect the current structure of and funding for Montana's youth courts. The audit further stated that updating the Youth Court Act should also include examining the organizational location of, or need for, JDIP and that since Youth Courts are now under the administrative umbrella of the Judicial Branch, JDIP may no longer be needed in its current structure to fund youth court placements and services. The audit presented four alternatives, with no preference order, for legislative consideration: Alternative A--maintain JDIP in its current structure and location; Alternative B--transfer JDIP administration and appropriations to the Judicial Branch; Alternative C--create a separate administrative entity to administer the program; and Alternative D-- eliminate the program and transfer youth court placement funding to the Judicial Branch.

TECHNICAL NOTE: This review is based on existing statutes, which give the Department of Corrections broad and sole rulemaking authority over this program. It is clear from this review that regardless of which of the audit report's four alternatives is chosen, the statutes pertaining to this program require significant revision. Revision is particularly necessary in light of state assumption of district courts and is needed, in addition, to clarify the roles of the cost containment review panel, the department, and the Supreme Court Administrator's office. It appears that some roles that have been adopted by the panel and the department over the life of this program do not necessarily have a basis in statute. After reviewing the proposed rules, I have the following technical and substantive concerns.

1. The statement of reasonable necessity is entirely inadequate under the requirements of MAPA. The notice contains a general, catchall statement for the new rules that pertain to JDIP at the beginning of the notice, that the "changes in these rules are primarily recommended by the Legislative Audit Division's Performance Audit of the Juvenile Delinquency Intervention Program (JDIP), October 2005 (sic), as necessary to clarify allowable expenditures and establish standards for program monitoring and oversight consistent with legislative intent". Other than this one general statement pertaining to the rules related to JDIP, there is no other indication of the reasonable necessity for any of the changes. Each change should indicate how it meets the audit recommendation. MAPA requires that prior to agency action, its notice of intended action must include a statement of the reasonable necessity for the intended action (2-4-302(1)). MAPA further requires that in order to be valid or effective, the rules must be consistent and not in conflict with the statute and must be reasonably necessary to effectuate the purpose of the statute. Subsection (6)(b) of 2-4-305 specifically provides that the statement of reasonable necessity must state the principal reasons and the rationale for its intended action and for the particular approach that it takes in complying with the mandate to adopt rules. That subsection further provides that reasonable necessity must be clearly and thoroughly demonstrated for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking and in the written and oral data, views, comments, or testimony submitted by the public or the agency and considered by the

agency and specifically states that "a statement that merely explains what the rule provides is not a statement of the reasonable necessity for the rule". Subsection (8) of 2-4-305 provides that an agency may not use the adoption notice to correct deficiencies in a statement of reasonable necessity.

2. Several of the rules are outside the scope of the authority conferred by statute or are not consistent with, or are in conflict with, statute. These inconsistencies and conflicts are discussed below.

3. Amendment of 20.9.101 Definitions.
   * The new subsection (31) defines youth to mean only individuals under 18 years of age. The Youth Court can retain jurisdiction of youth under the Extended Jurisdiction Prosecution Act to age 21. This definition would apparently limit the use of funds that are now available for these youth. There is nothing in statute that specifically says that JDIP funds may not be spent on these youth.
   * The department is dropping the definition of "surplus funds" and substituting the term "prevention incentive funds" for the stated purpose of indicating that a restriction exists on spending these moneys. This gives no indication of the intended restriction or the basis in law for the restriction.

4. Amendment of 20.9.106 Referrals to the committee. Subsection (3)(h) requires a referral to include a "completed risk assessment approved by the department". Supposedly this means a risk assessment on a form approved by the department. This could be clarified.

5. Amendment of 20.9.113 Placement recommendation procedures. The rule is changed to require that the youth court enter placement and service information into an automated system that is "approved by and accessible by the department". The department cites 53-1-203 for its authority for this rule and 41-5-123, 41-5-124, and 41-5-125 as statutes to be implemented by this provision. I do not find anything in the statute for this authority asserted over the Judicial Branch.

6. Amendment of 20.9.122 Confidentiality of committee meeting and records. The proposed change allows disclosure of records not only by a district court or youth court but by "operation of law". I am not sure how this conforms to confidentiality requirements of the Youth Court Act, 41-5-125 and 41-5-215.

7. NEW RULE I Cost containment review panel -- operational procedures and duties.
   * Subsection (2) provides that at least 7 members (of 9 statutory members) are required to conduct an election of chair and vice chair. This is inconsistent with 41-5-131(3) that specifically provides that decisions of the panel must be by majority vote (5 members). The department cannot change this by rule. It is not clear whether the rule contemplates allowing this vote with a quorum of 7 (and majority of 4) or is intended to restrict the ability of 5 members to meet and elect a chair and vice chair (which they could do under the statute if they act

unanimously).

* Subsection (4) sets aside $5,000 from the cost containment fund for panel members' travel expenses. The rules simply cites "as provided by state law and administrative rule". There is no indication of the necessity for this amount or the authority to take the money out of this particular fund.
* Subsection (5)(a) provides that the panel shall determine the distribution to districts of juvenile placement funds. While this is apparently the role traditionally played by the panel, there is no authority under the statutes for this role. The panel's statutory authority is limited to the contingency fund money under 41-5-131 and 41-5-132, not the other funds appropriated to the department for juvenile placement and services under the Juvenile Delinquency Intervention Act, Title 41, chapter 5, part 20. This is an issue that should be addressed by the Legislature in future legislation.
* Subsection (5)(c) provides that the department shall make the final decision regarding a district's request for a supplemental allocation from the contingency funds (cost containment funds). There is no statutory authority for this role for the department. The panel has the statutory authority to determine the distribution of the cost containment funds. See 41-5-131(4) and 41-5-132.
* Subsection (5)(d) provides that the department shall make the final decision on a participating judicial district's "plan to spend prevention incentive funds". There is no statutory authority for this role for the department. The prevention incentive funds are statutorily appropriated to the Supreme Court Administrator to administer the account in accordance with "rules adopted by the department". See 41-5-2011. While the department has rulemaking authority under this section, it does not have final decision authority over these funds. Further, there is no statutory authority for the department to require a "plan" for spending these funds as is discussed later.

8. NEW RULE III Allocation of juvenile placement funds to judicial districts.
   * Subsection (1) provides that the department will transfer $1 million from the "juvenile placement fund" into the cost containment fund. It is not clear what "fund" this is. Apparently it refers to the total funds appropriated to the department for the juvenile placement budget. This could be clarified. The rule requires the panel to make its recommendation for the final amount to be allocated to the cost containment fund under 41-5-132 ($1 million each fiscal year is the minimum required under statute) by April 30 each year. This conflicts with the statute, which provides that the panel's recommendation be made by June 1.
   * Subsection (2) requires the panel to establish a formula for determining the amount to be allocated to each participating district by April 30 of each year. There is no statutory authority for this role for the panel, although the panel has traditionally been given this role under the department's rules.
   * Subsection (3) puts a limitation on the use of cost containment funds by providing that a district may apply for a supplemental allocation from the fund "in the event of unusual circumstances such as a youth requiring specialized mental health or

sex offender treatment". There are no limitations contained in the statutes (41-5-131 and 41-5-132) for the use of these funds. The only provision is in 41-5-131(4), which provides that the panel shall determine the distribution of the cost containment funds. The department does not have statutory authority to determine or limit the use of these funds.

* As a matter of drafting style, I would suggest that the department have at least two separate rules addressing the different funds that are a part of this program. There should be one rule on the cost containment fund administered by the panel. This rule should address the allocation of funds by the department to that fund and the panel's recommendation on the amount available in that fund. There should be a separate rule related to the funds allocated to each participating district (separate and apart from the cost containment funds) and the excess in those funds (which become the youth court intervention and prevention account statutorily appropriated to the Supreme Court Administrator's office). The rules as a whole would be easier to understand and administer if this distinction is made. The following comments will show the confusion created by combining the accounts in one rule.

9. NEW RULE IV Participating districts -- distinguished.

* This rule requires participating districts to reserve 80% of their allocation accounts for placements (20% for placement alternatives or early intervention alternatives) but allows them to allocate up to 50% for "panel-approved" placement and intervention alternatives. These percentage amounts are not provided for or prohibited in statutes; however, there is not statement of why these percentages are reasonably necessary. Also, there is no statutory authority for this role for the panel, although it may have been given this role in the department's past rules.

10. NEW RULE V Supplemental allocation from cost containment fund.

* Subsection (1) provides that a district that has spent at least 80% of its allocation and projects a deficit in its allocation in a fiscal year shall "upon request of the department and on a form provided by the department" submit a written application for a supplemental allocation from the cost containment fund. The provision for "upon request of the department" perhaps means that the district must apply for a supplemental allocation if the department requests that it do so; however, it sounds like a district may not make a supplemental request unless essentially "invited" to do so by the department. This should be clarified. Further, there should be a statement of reasonable necessity for the 80% requirement. This subsection further provides that the district's remaining 20% allocation must be frozen and cannot be spent until the department approves a supplemental allocation. There is no statutory authority for the freezing of the unspent allocation and no authority for the department (rather than the panel) to make the supplemental decision.
* Subsection (2) limits supplemental allocations to "unexpected placement or

emergent (sic) service and not for ongoing program expenditures such as community-based services". The subsection further provides that placement for mentally ill youth or youth in need of sexual offender treatment will receive priority consideration for supplemental allocations. There is no statutory authority for this limitation or for the department (rather than the panel) to make this limitation.

* Subsection (4) requires a district, in a supplemental application, to document its prior placement expenditures for the past 3 years and a "plan to mitigate the current expenditures". There is no specific statutory authority for this requirement and no statement of reasonable necessity for the requirement. I am not sure what "mitigate the current expenditures" means.
* Subsection (5) provides that the panel may consider a district's historic use of high-cost placements, unusual expenditures that caused the district to exceed its budget, or whether the district has implemented previous panel recommendations for controlling JDIP expenditures. There is no specific statutory authority for this requirement and no statement of reasonable necessity for the requirement.
* Subsection (6) provides that the department may approve or deny a supplemental request in whole or in part and place conditions on any supplemental allocation. There is no statutory authority for this role for the department. The department's role with respect to the cost containment fund is limited to determining the amount available in the fund at the beginning of a fiscal year. See 41-5-132(2). The panel has sole statutory authority to determine distribution of the cost containment funds. See 41-5-131(4). Subsection (6) clearly exceeds the department's statutory authority.
* Subsection (7) is internally inconsistent with the prior subsections of the rule because it states that the panel shall issue a written decision on the supplemental application. This is in direct conflict with subsection (6) discussed above that states the department will make the determination.
* Subsection (8) states that the panel will recommend to the department the use of unallocated cost containment funds by one or more districts "or the department". I do not know what the statutory authority for this is or the reasonable necessity for this. There is no specific statutory direction for the use of excess funds in this account. According to the audit report, in the past, excess funds have been used to help the Judicial Branch purchase a risk assessment system for evaluating at-risk youth and to fund Department of Corrections budgetary shortfalls in adult corrections. Since 2005, there has been a Memorandum of Understanding between the Governor's Office and the Judicial Branch that requires that unexpended funds in the cost containment fund be transferred to the Supreme Court Administrator's office to be included in the PIF funds administered by the Court Administrator under 41-5-2011.

11. NEW RULE VI Prevention incentive funds.

* Subsection (1) is not clearly written. It allows the department to establish accruals for unexpended funds in districts' allocation accounts and to "nominate all

unexpended funds as "prevention incentive funds"" to be transferred to the Supreme Court administrator under 41-5-2011. Perhaps this "works" but it seems that the rule should refer to "unencumbered" funds rather than "unexpended" funds; although the statute does refer to "unexpended" funds. I would defer to an accounting person for direction on this question.

* Subsections (4) and (5) require each participating district by April 1 of each year to "submit a tentative plan to use prevention incentive funds regardless of whether the participating district projects unused funds in its allocation account at fiscal year end". The proposed rule provides that the panel shall review the plan and advise the department on the plan and that the department shall have final decisionmaking authority over the use of money in the Court Administrator's account (PIF account under 41-5-2011). There is no statutory authority for requirement of a plan. There is no statutory authority for the panel over these funds. There is no statutory authority for the department over these funds. However, 41-5-2011 does say that the department can make rules for the administration of these funds by the Court Administrator's office. This is a major problem in the statute. It involves a serious policy question of separation of powers, as do several provisions in the statutory scheme. Regardless of the rulemaking authority for the department's role, the funds are statutorily appropriated to the Supreme Court Administrator's office and the proposed rule exceeds the statutory authority of the department and the panel.
* Subsection (6) places further restrictions on the use of PIF funds (excess funds left over from each district's allocation--apart from cost containment funds--that are statutorily appropriated to the Court Administrator's office). I do not understand what the limiting factors mean and there is no statutory authority for or reasonable necessity indicated for the limiting factors.

12. NEW RULE VII District operating standards -- limits on expenditures.

* Subsection (2) refers to JDIP funds as "allocated funds", "cost containment funds", "supplemental allocation funds" or "prevention incentive funds". I think "cost containment funds" and "supplemental allocation funds" are the same. This could use clarification, particularly if the intent is to refer to two different types of funds. Among other things, the rule would prohibit use of any JDIP funds for placement or services for individuals aged 18 or older or for transportation costs. As discussed earlier, youth courts can retain jurisdiction of youths over 18 under the Extended Jurisdiction Prosecution Act. The age 18 restriction would prohibit use of JDIP funds for these individuals. There is no specific statutory authority for this limitation. As to transportation costs, 52-5-109(2) specifically requires the youth court to pay transportation costs out of JDIP funds that are allocated under 41-5-130 (JDIP funds allocated to each district) or out of county funds. The rule appears to conflict with this statutory provision.
* Subsection (3) requires that the youth court enter placement and service information into an automated system that is "approved by and accessible by the department". I'm not sure what the statutory authority is for this requirement. The

subsection also refers to the CAPS system. A similar reference was deleted from rule 21.9.113.

* Subsection (4) refers to subsection (1). This maybe should be a reference to subsection (3).
* Subsection (7) requires each district to allow the department access to "all district records". This should probably read "all district accounting records".
* I do not understand the meaning of subsection (9)(c).

13. NEW RULE VIII Evaluation of districts by department.
    * This rule raises an issue of separation of powers between the judicial branch and the executive branch. This issue is inherent in the statutes that create this program. This statutory scheme should be reviewed by the Legislature as is recommended in the audit report.

14. General note: The department's notice catchline refers to the "juvenile detention intervention program". This is apparently an oversight and should read "juvenile delinquency intervention program".

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