

**Montana Supreme Court
Office of the Court Administrator
Juvenile Delinquency Intervention Program (JDIP)
Comments on Proposed Administrative Rules
May 12, 2006**

Office of the Court Administrator's (OCA) Position. The OCA:

- concurs with the concerns raised by the Law and Justice Interim Committee's legal counsel regarding the proposed rules . The OCA appeared at the Department of Corrections (DOC) rules hearing opposing adoption of the rules. (Testimony attached).
- believes that the proposed rules are legally flawed in some cases and difficult to implement in other cases;
- requests that the Law and Justice Interim Committee exercise its statutory authority to delay implementation of the rules as provided in 2-4-305, which allows the committee to object to the rules and delay implementation; and
- pledges to continue its efforts to work with the Department of Corrections in developing a legislative solution regarding administration of JDIP.

Issues Regarding the Proposed Rules.

- Separation of powers issues.
 - The Committee's legal counsel acknowledges that the JDIP statutes and proposed rules involve "a serious policy question of separation of powers" between the Judicial and Executive Branches.
 - The proposed rules violate the separation of powers doctrine by giving authority to the DOC to make decisions about the effectiveness of programs and the appropriateness of spending and placement decisions by the Youth Courts.
- Conflicts with statutes. Several proposed rules conflict with existing law:
 - An amendment limiting the use of funds for people over age 18 is inconsistent with the Extended Jurisdiction Prosecution Act, which gives the Youth Court jurisdiction until age 21.
 - Several amendments require DOC access to Youth Court records, which likely conflicts with 41-5-125 and 41-5-215, MCA, requiring confidentiality of these records.
 - One amendment gives the DOC authority to approve decisions made by the Cost Containment Review Panel, which conflicts with 41-5-131(4), MCA.
 - Another amendment seems to limit access to cost containment funds to districts with unusual circumstances. The statute does not contain similar restraints.

(Over, please)

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Exhibit 13

- One rule prohibits JDIP funds from being used for transportation costs even though 52-5-109(2), MCA, allows for this usage.
- Onerous requirements. The OCA was not consulted or otherwise involved in the DOC's rule development process; the office had no opportunity to discuss the impact of the rules on Youth Court operations. The rules require production of data that is onerous and will be impossible for the Youth Courts to comply with unless additional funding is provided.
 - Under new rule VII (8) and (9), the Youth Court must collect and present data in a specific manner. This will require programming changes, which are not funded. Subsection 9(c), which requires the reporting of an assessment of risk factors related to preventive services for youth not referred to probation, is simply impossible to understand.
 - New rule VIII requires a similar level of data production that will require funding increases in order to add that type of reporting to the current Youth Court assessment and case tracking system.
- Violations of the Montana Administrative Procedure Act (MAPA). The proposed rules do not comply with MAPA requirements.
 - A statement of reasonable necessity does not accompany each new rule.
 - A statement would assist the OCA in understanding the need for and rationale behind the proposed requirements.

Future Action by OCA.

- Because JDIP is an enormously important program to the Montana Youth Courts and Montana kids, the OCA wants to develop a legislative solution in partnership with the Department of Corrections (DOC).
 - During the 2005 session, the Judicial and Executive Branches signed an agreement providing that the Branches would explore legislation for the 2007 session that may result in transferring JDIP to the Judicial Branch. (Agreement attached)
 - In March, the Legislative Audit Committee requested that the Judicial Branch report at its June meeting on coordination efforts between the Branches on proposed legislation related to JDIP.
 - Despite repeated requests to meet to negotiate a mutually agreeable legislative solution, the OCA has been unable to engage the DOC in a discussion on JDIP.
 - The Office of Budget and Program Planning has committed to providing a letter to the Judicial Branch defining its position by mid-May.
- The OCA's draft legislation transfers the funding and administration of JDIP to the Judicial Branch where the spending decisions are made and where the Branch can be held fully accountable for management of the program.

**BEFORE THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA**

In the matter of the proposed)
amendment of ARM 20.9.101, 20.9.106,)
20.9.113, and 20.9.122, involving youth) **COMMENTS AND OBJECTIONS**
placement committees, and proposed adoption) **OF THE OFFICE OF COURT**
of NEW RULES 1 through VIII, and repeal) **ADMINISTRATION, MONTANA**
of ARM 20.9.123, 20.9.124, 20.9.128, 20.9.129,) **SUPREME COURT**
20.9.134, 20.9.135, 20.9.140, and 20.9.141)
involving the juvenile detention intervention)
program (JDIP)

My name is Steve Brown. My law office is located at 1313 Eleventh Avenue, Helena, Montana 59601. I represent the Office of Court Administration, Montana Supreme Court, which the Department has defined in proposed rule ARM 20.9.101(8) as the "Court Administrator" referred to in Section 41-5-2011, MCA. The Court Administrator opposes the rules proposed in the March 27, 2006 MAR Notice No. 20-7-37 (hereinafter "Notice") and urges the Department of Corrections to withdraw and not adopt the rules as proposed.

It is my understanding that the Department and the Hearing Examiner have received a copy of the April 18, 2006 Memorandum prepared by Valencia Lane, Staff Attorney for the Law and Justice Interim Committee, describing her concerns about the adequacy of the Notice and the proposed rules at issue today. The Court Administrator concurs in virtually all of Ms. Lane's comments and concerns. To avoid repetition, Ms. Lane's Memorandum is appended to these comments and objections as Attachment A, and where specifically referenced in this testimony, Ms. Lane's comments and concerns are incorporated into these comments and objections.

**I. DEFECTIVE STATEMENT OF REASONABLE
NECESSITY UNDER MAPA**

The Court Administrator concurs with Ms. Lane's conclusion that the "statement of reasonable necessity" in the Notice is inadequate under M.C.A. §§ 2-4-302, 2-4-305, and 2-4-306 of the Montana Administrative Procedure Act ("MAPA"). Attachment A, ¶ 1, pp. 2-3. Ms. Lane correctly notes that the Department cannot use a notice adopting the rules to correct a deficient statement of reasonable necessity. M.C.A. § 2-4-305(8).

II. SEPARATION OF POWERS

The Department's Notice indicates that the rules at issue in this proceeding "are primarily recommended by the Legislative Audit Division's Performance Audit of the Juvenile Delinquency Intervention Program (JDIP), October 2005, as necessary to clarify allowable expenditures and establish standards for program monitoring and oversight consistent with legislative intent" (hereinafter "2005 Performance Audit"). The Court Administrator understands that the Department's proposed rules are a response to the criticism in the 2005 Performance

Audit and that much of that criticism is based on the Department's alleged failure to implement "legislative intent" and/or statutory directives from the Montana Legislature.

Noticeably missing from the 2005 Performance Audit is any discussion of whether the Legislature's statutory directives in the Youth Court Act can pass constitutional muster under the separation of powers doctrine. The Audit concludes that the "Youth Court Act and JDIP statutes are outdated due to state-assumption of district courts" (at p. 47) and recommends that the statutes be "updated to reflect the current state-funded district court system" (at p. 48). The Audit urges the Department and the Judicial Branch to "cooperatively seek legislation updating the Youth Court Act" (at p. 49). Other than acknowledging that "the Legislature may have to address whether youth court programmatic and administrative activities should be administered by district court judges ... or be administered through the Supreme Court's Office of the Court Administrator" (*Id.*), the 2005 Performance Audit provides no analysis of how the audit issues can be resolved under Montana's constitutional separation of powers doctrine.

The Department's Notice is also silent on the separation of powers issue. Only Valencia Lane's Memorandum (Attachment 1) indicates that the proposed rules, even if based on statutory directives, involve serious separation of powers issues. Attachment A, ¶¶ 11 & 13, pp. 7-8. The Court Administrator firmly believes that future legislative and MAPA rule-making actions addressing the issues discussed in the 2005 Performance Audit must involve a careful consideration of Montana's constitutional commitment to the separation of powers doctrine.

The separation of powers doctrine is a bedrock principle of this Nation's and Montana's republican forms of government. The separation of powers principle "was not simply an abstract generalization in the minds of the Framers [of the U.S. Constitution]: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124, 96 S. Ct. 612 (1976). James Madison, writing in Federalist Paper No. 47, warned that combining legislative and executive functions in the same person or body would mean there would be "no liberty" because it would be too easy to enact and enforce "tyrannical laws." *Id.*, p. 120. If the power of "judging" was joined with legislative powers, Madison warned that "life and liberty" would be exposed to arbitrary control, "for the judge would then be the legislator." *Id.* If judicial and executive functions were joined, then the judge might behave "with all the violence of an oppressor" according to Madison. *Id.* The separation of powers doctrine was adopted in 1787 "to preclude the exercise of arbitrary power" and in the "inevitable friction incident to the distribution of powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160, 242 (1926); *see also State ex rel. Judge v. Legislative Finance Committee* (hereinafter "*Judge v. LFA*"), (1975)168 Mont. 470, 479, 543 P 2d 1317; and *Buckley, supra*, at pp. 118-137.

Montana's 1889 Constitution (Article IV, § 4) embraced the separation of powers doctrine. Article III, § 1 of Montana's 1972 Constitution reaffirmed the separation of powers principle and reads as follows:

"Separation of powers. The power of the government of this state is divided into three distinct branches - legislative, executive, and judicial. No person or persons charged with the

exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Montana's new constitution reaffirmed the separation of powers doctrine because it "is essential to any Constitution" and acts "as a check on an overly ambitious branch of government." 1971-72 Constitutional Convention Committee Reports, Committee on General Government, Vol. II, p. 818.

Although the separation of powers doctrine makes "each branch of government ... equal, coordinate, and independent," it does "not mean absolute independence because 'absolute independence' cannot exist in our form of government." *Coate v. Omholt*, (1983) 203 Mont. 488, 492, 662 P.2d 591; *see also Buckley, supra*, at pp. 121-124. The doctrine does not require a "hermetic sealing off of the three branches of Government from one another" (*Buckley, supra*, at 121) or prohibit a "common link of connection, or dependence" (*Judge v. LFA, supra*, at p. 479). Montana's constitutional separation of powers does mean, however, "that the powers properly belonging to one ... [branch] shall not be exercised by either of the other ... [branches]." *Seubert v. Seubert*, (2000) 301 Mont. 382, 391, 13 P.3d 365; *see also Coate, supra*, at p. 462.

Montana's Supreme Court has not hesitated to invalidate legislative enactments that violate Montana's constitutional separation of powers doctrine. *See, e.g., Judge v. LFA, supra*, at pp. 477-478 (an interim legislative committee cannot be delegated authority to approve Executive Branch budget amendments because such power resides only in the legislature as a whole while it is in session or in an executive officer or agency if properly delegated); *Coate, supra*, at 497-498 (only the Judicial Branch and not the Legislature or the State Auditor can impose and enforce time limits and a mandatory statutory penalty if a judge fails to issue a judicial decision in a specified period and recognizing that it would be similarly unlawful for the Judicial Branch to dictate how the Legislative Branch conducts its internal operations); *Seubert, supra*, at pp. 390-396 (the Child Support Enforcement Division, an Executive Branch agency, cannot modify District Court child support orders without automatic and mandatory judicial review); and *Board of Regents v. Judge* (hereinafter "*Regents v. Judge*"), (1975) 168 Mont. 433, 450-454, 543 P. 2d 1323 (the Legislature's authority to condition appropriations to the Board of Regents does not include the power to impose conditions that prevent the Regents from exercising full power and authority to "supervise, coordinate, manage and control the Montana university system" under Article X, § 9 of the Montana Constitution).

The Separation of powers cases and Article III, § 1 of Montana's Constitution clearly establish boundaries for the sharing of powers among the three branches. The first test in Montana is whether powers "properly belonging to one branch" can by legislative authorization or some other act be shared because such an admixture is "expressly directed or permitted" in the Montana Constitution. Article III, § 1, 1972 Montana Constitution. For example, Montana's Governor is constitutionally authorized to participate in the Legislative Branch's law making process via the signing of bills and the exercise of veto powers under Article VI, § 10. Similarly, the Governor's constitutional executive powers include not only the power to appoint department directors but also to appoint individuals to fill Supreme Court and District Court vacancies. Article VI, §§ 4, 6, & 8; and Article VII, § 8, 1972 Montana Constitution. A Legislative Branch

entity, the Montana Senate, has constitutional authority to confirm the Governor's executive and judicial appointments. *Id.*

Assuming the Article III, § 1 test is satisfied, the second separation of powers test is whether the admixture or sharing of powers affects the essential nature, functional integrity, or inherent or fundamental exercise of the constitutional powers properly belonging to a branch of government. *See, e.g., Coate, supra*, at pp. 492-498; *Seubert, supra*, at pp. 390-396; and *Regents v. Judge, supra*, at p. 450-454.

The Court Administrator submits that most of the Department's proposed rules, and many of the statutes which the rules are intended to implement, violate the separation of powers doctrine set forth in Article III, § 1 of the Montana Constitution and controlling case law. The judicial power of Montana is "vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law." Article VII, § 1, 1972 Montana Constitution. The Montana Supreme Court has "general supervisory control over all other courts." Article VII, § 2(2), 1972 Montana Constitution. Montana's District Courts have "original jurisdiction in all criminal cases amounting to a felony and all civil matters and cases at law and equity." Article VII, § 4, 1972 Montana Constitution. District Courts also serve as the Youth Court in Montana and the 2005 Performance Audit recognizes that the 2001 Legislature created a state-funded District Court system under the "general administrative umbrella of the Judicial Branch." 2005 Performance Audit, p.S-2. Nothing in Montana's Constitution or controlling case law suggests that the Department, the Panel it appoints, or any other Executive Branch agency can control or dictate Youth Court funding decisions, impose and approve specific assessment tools for Youth Court programs, or conduct financial and performance audits of District Judges or Youth Court programs. All of those functions, including the monitoring and financial accountability functions, can and should be performed by the Judicial Branch subject to the same oversight historically provided by the Legislative Auditor and the Legislative Fiscal Analyst.

The Court Administrator stands ready to resume negotiations with the Department on legislation that will resolve the 2005 Performance Audit issues within the confines of the separation of powers doctrine and the significant issues identified in Ms. Valencia Lane's Memorandum.

III. PROPOSED AMENDMENTS TO RULE 20.9.101, DEFINITIONS

1. **Proposed deletion of existing rule 20.9.101(9).** The definition of "community alternatives" in the existing rules should be retained rather than deleted. This definition has relevance in the distribution of "prevention incentive funds" ("PIF").

2. **20.9.101(22).** An executive branch agency does not have authority to define the term "recidivism" for the Judicial Branch. See the discussion of the separation of powers issue in Part II of this testimony. The Judicial Branch has already defined recidivism to mean a new offense committed by a youth when the youth is under supervision.

3. **20.9.101(28).** An executive branch agency does not have authority to mandate the use of forms approved by the Department when the Judicial Branch orders risk assessments pursuant to

M.C.A. §§ 41-5-1512 and 41-5-1513. See the discussion of the separation of powers issue in Part II of this testimony.

4. 20.9.101(29). A youth may receive services without being adjudicated under M.C.A. §§ 41-5-1512 and 41-5-1513, which means that a risk assessment may not have been completed. The proposed definition of "services" exceeds the Department's authority and is a matter of policy for the Judicial Branch.

5. 20.9.101(30). This proposed definition impermissibly grants the Department, not the cost containment review panel, the authority to allocate funds from the cost containment fund. See M.C.A. § 41-5-131(6). In addition, there is a separation of powers issue regardless of which entity has statutory authority to allocate cost containment funds for Youth Court services. See the discussion of the separation of powers issue in Part II of this testimony.

6. 20.9.101(31). The Court Administrator concurs with Ms. Lane's conclusion that the proposed definition of "youth" impermissibly restricts the term to include only individuals under the age of 18. Attachment A, ¶ 3, p. 3. The Youth Court has statutory authority to retain jurisdiction until an individual reaches the age of 21 under M.C.A. § 41-5-203.

7. Proposed deletion of existing rule 20.9.101(24). The Court Administrator concurs with Ms. Lane's conclusion about the inadequacy of the statement of reasonable necessity for the proposed deletion of the "surplus funds" definition and substitution of the "PIF" definition. Attachment A, ¶ 3, p. 3.

IV. PROPOSED AMENDMENTS TO RULE 20.9.106

1. General Comments and Objections. The Court Administrator concurs with Ms. Lane's conclusion that the rule as proposed is inconsistent with the statement of reasonable necessity. Attachment A, ¶ 4, p. 3. The proposed amended rule language says a referral must include "a completed risk assessment approved by the department." The statement of reasonable necessity says that the Department must only approve the risk assessment form "in order to ensure consistency." Regardless of which alternative is intended, both provisions create serious separation of powers issues. See the discussion of the separation of powers issue in Part II of this testimony. An Executive Branch agency does not have legal authority to mandate that the Judicial Branch use a specific assessment tool approved by the Department or that referrals under the rule must include a completed risk assessment approved by the Department.

2. 20.9.106(3)(h). Rule 20.9.106 also creates practical problems because the Department's intent is unclear. If the rule mandates the use of a specific assessment tool, the Department has no authority to impose such a mandate.

V. PROPOSED AMENDMENTS TO RULE 20.9.113

1. General Comments and Objections. The Court Administrator concurs with Ms. Lane's conclusion that the Department has no statutory authorization to impose mandatory and accessible automated record keeping requirements on the Judicial Branch. Attachment A, ¶ 5, p.

3. But even if such statutory authority existed, the Department has no constitutional authority to impose such requirements under the separation of powers doctrine. See the separation of powers discussion in Part II of this testimony.

2. 20.9.113(10). The Court Administrator has serious practical and public policy concerns about this proposed amendment. The Judicial Branch shares the Department's concern about the need for efficiency in moving youth in the system. However, the Department has no authority or procedures for determining whether a Youth Courts has complied with "entry requirements" established by the treatment facilities. Although the Department holds the purse under the existing statutory scheme, the Youth Court makes the contacts and arrangements with the treatment facilities. If the Department has had problems with the Youth Court's placement of youth at Pine Hills, then that specific issue should be discussed with the Judicial Branch and resolved.

VI. PROPOSED AMENDMENTS TO RULE 20.9.122

The Court Administrator concurs with Ms. Lane's concerns about disclosure of records by "operation of law." Attachment A, ¶ 6, p. 3. The Court Administrator urges the Department to identify the other provisions of law that it believes may authorize the public disclosure of Youth Court records without the necessity of a court order.

VII. PROPOSED NEW RULE I

1. NEW RULE 1(2). The Court Administrator concurs with Ms. Lane's objections to the rule proposal that the chair and vice chair of the cost containment review panel be elected by a super majority of the panel (at least seven of nine members). Attachment A, ¶ 7, pp. 3-4. As Ms. Lane points out, the majority vote requirement of M.C.A. § 41-5-131(3) is susceptible to different interpretations. *See also* M.C.A. §2-15-124(8), which specifies that a majority vote of "all members" of a quasi-judicial board is needed to take action unless otherwise specified by law. The Department has no authority to impose a super majority vote requirement for electing the panel's chair and vice chair or for taking official action on any other issue before the panel.

2. NEW RULE 1(5). The Court Administrator concurs with Ms. Lane's objections and concerns about the Department's statutory authority to propose and allocate powers in subsection 5. Attachment A, ¶ 7, p. 4. This rule proposal illustrates the need for legislation in 2007 to complete the transfer of Youth Court functions to the Judicial Branch and that simply adopting rules under the existing Youth Court statutes will not resolve the serious separation of powers issues discussed in Part II of this testimony. The Court Administrator reaffirms that the Judicial Branch is ready and willing to resume negotiations with the Department and the Executive Branch to resolve all remaining Youth Court issues pursuant to the 2005 Agreement appended to this testimony as Attachment B.

3. No Statement of Reasonable Necessity. The Department's failure to include a statement of reasonable necessity for proposed NEW RULE I violates MAPA. *See* Part I of this testimony.

VIII. PROPOSED NEW RULE II

1. **NEW RULE II(1)(d)**. The Court Administrator suggests that the Department must give more than notice of five business days before it conducts an inspection of records for the purpose of monitoring JDIP program expenditures or the development of programs. It will be difficult, if not impossible, to make all necessary records available on just five days notice.
2. **No Statement of Reasonable Necessity**. The Department's failure to include a statement of reasonable necessity for proposed NEW RULE II violates MAPA. *See* Part I of this testimony.

IX. PROPOSED NEW RULE III

1. **General Comments and Objections**. The Court Administrator concurs with Ms. Lane's objections and concerns about NEW RULE III(3). Attachment A, ¶ 8, pp. 4-5. The Department does not have the statutory or constitutional authority to determine or limit the use of funds under M.C.A. §§ 41-5-131 and 41-5-132. See the discussion of the separation of powers issue in Part II of this testimony.
2. **No Statement of Reasonable Necessity**. The Department's failure to include a statement of reasonable necessity for proposed NEW RULE III violates MAPA. *See* Part I of this testimony.

X. PROPOSED NEW RULE IV

1. **NEW RULE IV(2)**. The Court Administrator urges the Department to reconsider the funding restrictions placed on youth residing with a parent or legal guardian. The expenditure limitations proposed for youth residing with a parent or legal guardian will significantly increase the risk that these young people will ultimately be placed out of the home at a much higher cost.
2. **NEW RULE IV(3)**. The Court Administrator concurs with Ms. Lane's objections and concerns about this subsection of NEW RULE IV. Attachment A, ¶ 9, p. 5. But even if the panel had statutory authority to make the percentage allocations in the proposed rule, the panel, as an Executive Branch entity, has no constitutional authority to impose such requirements on the Judicial Branch under the separation of powers doctrine. See the separation of powers discussion in Part II of this testimony.
3. **No Statement of Reasonable Necessity**. The Department's failure to include a statement of reasonable necessity for proposed NEW RULE IV violates MAPA. *See* Part I of this testimony.

XI. PROPOSED NEW RULE V

1. **General Comments and Objections**. The Court Administrator concurs with all of Ms. Lane's objections and concerns about NEW RULE V. Attachment A, ¶ 10, pp. 5-6. As

proposed, NEW RULE V: (a) grants decision-making authority to both the Department and the panel that conflicts with the controlling statutes; (b) is internally inconsistent (compare subsections 6 and 7); (c) unlawfully restricts and freezes the expenditure of available funds; and (d) modifies existing appeal rights to the Department's director contained in current contracts (subsection 7). Furthermore, proposed NEW RULE V and the controlling statutes violate the separation of powers doctrine discussed in Part II of this testimony.

2. **No Statement of Reasonable Necessity.** The Department's failure to include a statement of reasonable necessity for proposed NEW RULE V violates MAPA. *See* Part I of this testimony.

XII. PROPOSED NEW RULE VI

1. **General Comments and Objections.** The Court Administrator concurs with all of Ms. Lane's objections and concerns about NEW RULE VI. Attachment A, ¶ 11, p. 7. This proposed rule and the controlling statutes wreak the greatest havoc with the separation of powers doctrine discussed in Part II of this testimony. For example, M.C.A. § 41-5-2011 statutorily appropriates funding for the youth intervention and prevention account to the Judicial Branch but then requires the Court Administrator to "administer the account in accordance with rules adopted by the department." The separation of powers doctrine prohibits the Legislature from delegating to an Executive Branch agency the authority to adopt rules controlling the expenditure of funds appropriated to the Judicial Branch.

2. **No Statement of Reasonable Necessity.** The Department's failure to include a statement of reasonable necessity for proposed NEW RULE VI violates MAPA. *See* Part I of this testimony.

XIII. PROPOSED NEW RULE VII

1. **General Comments and Objections.** The Court Administrator concurs with all of Ms. Lane's objections and concerns about NEW RULE VII. Attachment A, ¶ 12, pp. 7-8. NEW RULE VII, as proposed, is unlawful because it: (a) restricts the use of JDIP funds to youth under 18 years of age; (b) grants the Department access to all records, not just accounting records; and (c) contravenes applicable statutes governing the payment of transportation costs out of JDIP or county funds. To the extent that proposed NEW RULE VII indicates that the Department intends to conduct performance audits of the Youth Court and its Judges, performance of such functions by an Executive Branch agency violates the separation of powers doctrine discussed in Part II of this testimony.

2. **NEW RULE VII(9)(c).** This proposed new subsection will require additional custom reporting and modifications to existing data collection ("JCATS") in order to aggregate the data for each Youth Court district. The Court Administrator does not have funding for this significant change in data collection and reporting. In addition, the Youth Court would not have assessments for youth that have not been referred to the Youth Court. This absence of data would make it impossible for the Court Administrator to comply with this subsection.

3. **No Statement of Reasonable Necessity.** The Department's failure to include a statement of reasonable necessity for proposed NEW RULE VII violates MAPA. *See* Part I of this testimony.

XIV. PROPOSED NEW RULE VIII

1. **General Comments and Objections.** The Court Administrator concurs with all of Ms. Lane's objections and concerns about NEW RULE VIII. Attachment A, ¶ 13, p.8. This proposed rule and proposed NEW RULE VII suggest that the Department intends to perform fiscal and performance audits of the Judicial Branch and Youth Court Judges, functions the Department cannot perform under the separation of powers doctrine discussed in Part II of this testimony.

2. **No Statement of Reasonable Necessity.** The Department's failure to include a statement of reasonable necessity for proposed NEW RULE VIII violates MAPA. *See* Part I of this testimony.

XV. CONCLUSION AND RECOMMENDATIONS

The Court Administrator respectfully requests that the Department:

1. Withdraw and not adopt the pending rules; and
2. Delay proposing any new or amended rules for at least 120 days while the Department and the Judicial Branch attempt to negotiate mutually-acceptable legislation resolving the issues raised in the Department's pending rules, the comments and objections of the Court Administrator in this testimony, and the 2005 Performance Audit by the Legislative Auditor.

If mutually-acceptable legislation cannot be negotiated under the 120 day time frame proposed in paragraph 2, or under an extended time frame agreed to by the Department and the Court Administrator, then it is understood that the Department and the Court Administrator may pursue any rule, legislative, or legal remedy deemed necessary.

Thank you for your consideration of this testimony. The OCA reserves the right to submit additional written testimony concerning the proposed rules on or before 5 p.m., May 16, 2006.

DATED this 8th day of May, 2006.

G. STEVEN BROWN

G. Steven Brown
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Agreement Between the Judicial and Executive Branch Related to the Juvenile Delinquency Incentive Program

February 11, 2005

With respect to the Juvenile Delinquency Intervention Program, the Judicial Branch agrees to:

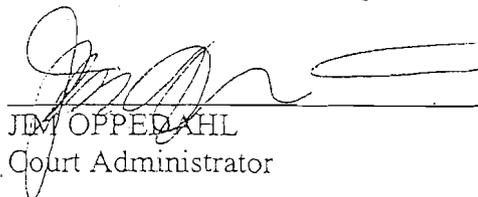
- Withdraw its request for legislation to move the Juvenile Delinquency Intervention Program in the 59th Legislature; and

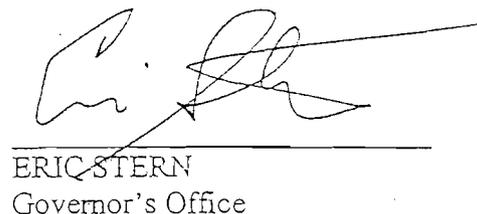
During the FY 2006/07 biennium, the Department of Corrections agrees to:

- Restrict funds in both the initial allocation to districts and the cost containment fund to expenditures in the Judicial Branch for out-of-home placements of youth and other services in accordance with the intent of JDIP;
- Faithfully advocate for not less than the \$6,218,775 million in Juvenile Placement funds proposal submitted as part of the Governor's budget proposal;
- Allocate 10% of the Juvenile Placement appropriation (not including the cost containment funds) to the Department of Corrections for juvenile parole placements in FY 2006 and FY 2007, with the goal of an additional reduction of the allocation from 10% to 7½% in FY 2007 dependent upon overcrowding at youth correctional facilities, availability of Federal funding, and mental health placement needs; and
- Work with the Judiciary to explore legislation for the 2007 Legislative Session that may result in transfer of placement and administration of the JDIP Program to the Judicial Branch.

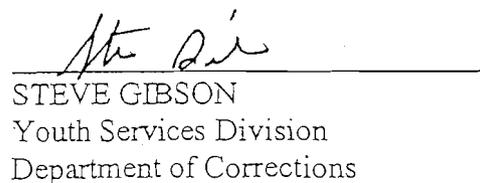
Signatures:


KARLA M. GRAY
Chief Justice


JIM OPPELAHL
Court Administrator


ERIC STERN
Governor's Office


BILL SLAUGHTER, Director
Department of Corrections


STEVE GIBSON
Youth Services Division
Department of Corrections

Attachment B