

SENATE BILL NO. 145

INTRODUCED BY R. WEBB

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4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS GOVERNING WHEN CERTAIN
5 INDIVIDUALS MAY BE TRANSFERRED TO A CORRECTIONAL FACILITY; ESTABLISHING A REVIEW AND
6 HEARING PROCESS THAT MUST BE COMPLETED BEFORE A PERSON SENTENCED TO THE CUSTODY
7 OF THE DIRECTOR OF THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES MAY BE
8 TRANSFERRED FROM A MENTAL HEALTH, RESIDENTIAL, OR DEVELOPMENTAL DISABILITIES FACILITY
9 TO A CORRECTIONAL FACILITY; REQUIRING A PUBLIC DEFENDER FOR INDIVIDUALS UNABLE TO
10 AFFORD COUNSEL; ALLOWING A PERSON WHO IS TRANSFERRED TO A CORRECTIONAL FACILITY
11 AFTER A REVIEW AND HEARING PROCESS TO APPEAL THE DECISION TO A DISTRICT COURT JUDGE;
12 REQUIRING THAT CERTAIN MENTAL HEALTH TREATMENT BE PROVIDED TO A PERSON TRANSFERRED
13 TO A CORRECTIONAL FACILITY; REQUIRING THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN
14 SERVICES TO TRANSFER A PERSON BACK TO A MENTAL HEALTH, RESIDENTIAL, OR DEVELOPMENTAL
15 DISABILITIES FACILITY IF CERTAIN PROFESSIONALS DETERMINE THAT THE PERSON'S PLACEMENT
16 IN A CORRECTIONAL FACILITY IS NOT BEST MEETING THE PERSON'S CUSTODY, CARE, AND
17 TREATMENT NEEDS; AND AMENDING ~~SECTION~~ SECTIONS 46-14-312 AND 47-1-104, MCA."

18
19 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

20
21 **Section 1.** Section 46-14-312, MCA, is amended to read:

22 **"46-14-312. Sentence to be imposed.** (1) If the court finds that the defendant at the time of the
23 commission of the offense of which the defendant was convicted did not suffer from a mental disease or disorder
24 or developmental disability as described in 46-14-311, the court shall sentence the defendant as provided in Title
25 46, chapter 18.

26 (2) If the court finds that the defendant at the time of the commission of the offense suffered from a
27 mental disease or disorder or developmental disability as described in 46-14-311, any mandatory minimum
28 sentence prescribed by law for the offense need not apply. The court shall sentence the defendant to be
29 committed to the custody of the director of the department of public health and human services to be placed,
30 subject to [section 2] and after consideration of the recommendations of the professionals providing treatment

1 to the defendant and recommendations of the professionals who have evaluated the defendant, in an appropriate
 2 correctional facility, mental health facility, as defined in 53-21-102, residential facility, as defined in 53-20-102,
 3 or developmental disabilities facility, as defined in 53-20-202, for custody, care, and treatment for a definite period
 4 of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The
 5 director may, subject to [section 2] and after considering the recommendations of the professionals providing
 6 treatment to the defendant and recommendations of the professionals who have evaluated the defendant,
 7 subsequently transfer the defendant to another correctional, mental health, residential, or developmental
 8 disabilities facility that ~~will~~ would better serve the defendant's custody, care, and treatment needs. The authority
 9 of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the
 10 individual and the protection of the public are provided for.

11 (3) Either the director or a defendant whose sentence has been imposed under subsection (2) may
 12 petition the sentencing court for review of the sentence if ~~the~~ a professional person certifies that:

13 (a) the defendant no longer suffers from a mental disease or disorder;

14 (b) the defendant's mental disease or disorder no longer renders the defendant unable to appreciate the
 15 criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law;

16 (c) the defendant suffers from a mental disease or disorder or developmental disability but is not a
 17 danger to the defendant or others; or

18 (d) the defendant suffers from a mental disease or disorder that makes the defendant a danger to the
 19 defendant or others, but:

20 (i) there is no treatment available for the mental disease or disorder;

21 (ii) the defendant refuses to cooperate with treatment; or

22 (iii) the defendant ~~will~~ would no longer benefit from active inpatient treatment for the mental disease or
 23 disorder.

24 (4) Upon an appeal pursuant to [section 2] by a defendant whose sentence has been imposed under
 25 subsection (2), the sentencing court shall consider:

26 (a) whether the department's decision to transfer the defendant to a correctional facility followed the
 27 process described in [section 2]; and

28 (b) whether the defendant's placement in a correctional facility ~~best~~ BETTER serves the defendant's
 29 custody, care, and treatment needs.

30 ~~(4)~~(5) The sentencing court may make any order not inconsistent with its original sentencing authority,

1 except that the length of confinement or supervision must be equal to that of the original sentence. ~~The~~ A
 2 professional person shall review the defendant's status each year."

3
 4 NEW SECTION. Section 2. Process to transfer person from mental health, residential, or
 5 developmental disabilities facility to correctional facility. (1) Except as provided in subsection (4), before
 6 transferring a person sentenced to the custody of the director ~~of the department~~ pursuant to 46-14-312(2) to a
 7 correctional facility or program ~~as defined in 50-46-302~~, the department shall:

8 (a) provide the person with at least 30 days' notice of the date, time, and location of a hearing regarding
 9 the proposed transfer and all evidence relied on to establish that a correctional facility would better serve the
 10 person's custody, care, and treatment needs;

11 (b) provide the person with an opportunity to be heard in person, to present testimony of witnesses, and
 12 to confront and cross-examine witnesses, unless good cause is shown by the department for prohibiting the
 13 presentation, confrontation, or cross-examination;

14 (c) provide the person with a hearing presided over by an administrative law judge employed by the
 15 department to determine whether the department has proven that a correctional facility would better serve the
 16 person's custody, care, and treatment needs; AND

17 (d) if the person is financially unable to furnish legal counsel, ~~make legal counsel available to the person.~~
 18 ~~The counsel may not be an advocate from the board~~ REQUEST THE SENTENCING COURT TO APPOINT A PUBLIC
 19 DEFENDER AS PROVIDED IN TITLE 47.

20 ~~(e) provide the person with a written statement from the independent examiner containing the examiner's~~
 21 ~~recommendation and rationale for the recommendation as well as any evidence relied on to establish the~~
 22 ~~recommendation; and~~

23 ~~_____ (f) provide the person with a written statement documenting the department director's acceptance or~~
 24 ~~denial of the independent examiner's recommendation, including the rationale for the director's decision.~~

25 (2) If available, the professional person who determined during the sentencing phase of the underlying
 26 conviction that the person sentenced to the custody of the director ~~of the department~~ pursuant to 46-14-312(2)
 27 suffered from a mental disease or defect or developmental disability as described in 46-14-311 shall testify at the
 28 hearing. If the professional person is unavailable, another professional person designated by the department may
 29 be substituted provided that the designated professional person is not an employee of the department. A
 30 professional person who testifies at the hearing shall meet with the person sentenced to the custody of the

1 director to conduct an in-person evaluation prior to the hearing. THE PROVISIONS OF THIS SUBSECTION DO NOT
 2 PREVENT THE DEPARTMENT FROM CALLING ITS OWN EMPLOYEES AS WITNESSES.

3 (3) A person sentenced to the custody of the director ~~of the department~~ pursuant to 46-14-312(2) may
 4 appeal a decision made by the director to transfer the person to a correctional facility pursuant to the appeal
 5 procedures currently in place for appeals from hearing decisions by administrative law judges employed by the
 6 department.

7 (4) (a) If exigent circumstances require the immediate transfer of a person sentenced to the custody of
 8 the director ~~of the department~~ pursuant to 46-14-312(2) to a correctional facility, the department may transfer the
 9 person without first following the process established in subsection (1). The transfer is an interim placement and
 10 may not last longer than 20 days.

11 (b) If a transfer made pursuant to subsection (4)(a) lasts longer than 20 days, the department shall
 12 provide the person with a hearing under the provisions of subsection (1) within 30 days after the transfer.

13 (c) During an interim placement in a correctional facility, professional persons employed by the
 14 department shall provide the person with continuity of care, including medications, housing, and a minimum of
 15 one in-person interview each week.

16
 17 **NEW SECTION. Section 3. Mental health treatment for person transferred to correctional facility**
 18 **-- procedures for return to mental health, residential, or developmental disabilities facility.** (1) (a) Except
 19 as provided in subsection (1)(b), if a person sentenced to the custody of the director ~~of the department of public~~
 20 ~~health and human services~~ pursuant to 46-14-312(2) is transferred to a correctional facility under the provisions
 21 of [section 2], a professional person employed by the department ~~of public health and human services~~ shall meet
 22 with the person every 6 months.

23 (b) If a person is housed in locked housing or the infirmary of a correctional facility, the professional
 24 person shall meet with the person on a monthly basis.

25 (c) The department of corrections shall inform the professional person of any changes to the person's
 26 diagnosis, medications, or housing.

27 (2) (a) If a THE professional person employed by the department ~~of public health and human services~~
 28 determines that the placement in a correctional facility of a person sentenced to the custody of the director ~~of the~~
 29 ~~department of public health and human services~~ pursuant to 46-14-312(2) is not best meeting the person's
 30 custody, care, and treatment needs, ~~the department of public health and human services shall transfer the person~~

1 ~~back to a mental health, residential, or developmental disabilities facility within 10 days after receiving written~~
 2 ~~notice of the determination~~ THE PROFESSIONAL PERSON SHALL NOTIFY THE DIRECTOR OF THE DEPARTMENT OF PUBLIC
 3 HEALTH AND HUMAN SERVICES. THE DIRECTOR SHALL REVIEW THE REASONS FOR THE RECOMMENDATION BY THE
 4 PROFESSIONAL PERSON AND DETERMINE WITHIN 20 DAYS WHETHER A TRANSFER IS WARRANTED.

5 (b) (i) If a mental health professional employed by the department of corrections or a correctional officer
 6 employed by the department of corrections determines that the placement in a correctional facility of a person
 7 sentenced to the custody of the director ~~of the department of public health and human services~~ pursuant to
 8 46-14-312(2) is not best meeting the person's custody, care, and treatment needs, the individual shall notify the
 9 warden and the superintendent of the MONTANA state hospital. The warden and the superintendent shall review
 10 the reasons for the recommendation by the mental health professional or correctional officer and determine within
 11 20 days whether a transfer is warranted.

12 (ii) The warden and the superintendent shall provide the director ~~of the department of public health and~~
 13 ~~human services~~ and the person sentenced to the director's custody with a written notification of their
 14 determination and the reasons for the determination.

15 (iii) If the warden and the superintendent recommend a transfer from the correctional facility, the
 16 department ~~of public health and human services~~ shall transfer the person back to a mental health, residential,
 17 or developmental disabilities facility within 10 days after receiving written notice from the warden and the
 18 superintendent of the determination.

19 (3) If exigent circumstances require the immediate transfer of a person sentenced to the custody of the
 20 director ~~of the department of public health and human services~~ from a correctional facility to the MONTANA state
 21 hospital, the department of corrections may transfer the person without first following the process established in
 22 subsection (2)(b). The transfer is an interim placement and may last no longer than 20 days unless the
 23 department ~~of public health and human services~~ determines that the person's custody, care, and treatment needs
 24 are best served at ~~the state hospital~~ A MENTAL HEALTH, RESIDENTIAL, OR DEVELOPMENTAL DISABILITIES FACILITY.

25 (4) A person sentenced to the custody of the director ~~of the department of public health and human~~
 26 ~~services~~ pursuant to 46-14-312(2) remains under the authority of the director ~~of the department of public health~~
 27 ~~and human services~~ regardless of the type of facility in which the person is placed.

28
 29 NEW SECTION. SECTION 4. DEFINITIONS. AS USED IN [SECTIONS 2 THROUGH 4], THE FOLLOWING DEFINITIONS
 30 APPLY:

1 (1) "CORRECTIONAL FACILITY OR PROGRAM" MEANS A FACILITY OR PROGRAM THAT IS DESCRIBED IN 53-1-202
 2 AND TO WHICH AN INDIVIDUAL MAY BE ORDERED BY ANY COURT OF COMPETENT JURISDICTION.

3 (2) "DEPARTMENT" MEANS THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES PROVIDED FOR IN
 4 2-15-2201.

5 (3) "DEVELOPMENTAL DISABILITIES FACILITY" HAS THE MEANING PROVIDED IN 53-20-202.

6 (4) "DIRECTOR" MEANS THE DIRECTOR OF THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES.

7 (5) "MENTAL HEALTH FACILITY" HAS THE MEANING PROVIDED IN 53-21-102.

8 (6) "MENTAL HEALTH PROFESSIONAL" HAS THE MEANING PROVIDED IN 53-21-102.

9 (7) "PROFESSIONAL PERSON" HAS THE MEANING PROVIDED IN 53-21-102.

10 (8) "RESIDENTIAL FACILITY" HAS THE MEANING PROVIDED IN 53-20-102.

11

12 **SECTION 5. SECTION 47-1-104, MCA, IS AMENDED TO READ:**

13 **"47-1-104. Statewide system -- structure and scope of services -- assignment of counsel at public**
 14 **expense.** (1) There is a statewide public defender system, which is required to deliver public defender services
 15 in all courts in this state. The system is supervised by the commission and administered by the office.

16 (2) The commission shall approve a strategic plan for service delivery and divide the state into not more
 17 than 11 public defender regions. The commission may establish a regional office to provide public defender
 18 services in each region, as provided in 47-1-215, establish a contracted services program to provide services in
 19 the region, or utilize other service delivery methods as appropriate and consistent with the purposes described
 20 in 47-1-102.

21 (3) When a court orders the office or the office of appellate defender to assign counsel, the appropriate
 22 office shall immediately assign a public defender qualified to provide the required services. The commission shall
 23 establish protocols to ensure that the offices make appropriate assignments in a timely manner.

24 (4) A court may order an office to assign counsel under this chapter in the following cases:

25 (a) in cases in which a person is entitled to assistance of counsel at public expense because of financial
 26 inability to retain private counsel, subject to a determination of indigence pursuant to 47-1-111, as follows:

27 (i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of
 28 incarceration, as provided in 46-8-101;

29 (ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in
 30 40-6-119;

- 1 (iii) for a parent, guardian, or other person with physical or legal custody of a child or youth in any
2 removal, placement, or termination proceeding pursuant to 41-3-422 and as required under the federal Indian
3 Child Welfare Act, as provided in 41-3-425;
- 4 (iv) for an applicant for sentence review pursuant to Title 46, chapter 18, part 9;
- 5 (v) for a petitioner in a proceeding for postconviction relief, as provided in 46-21-201;
- 6 (vi) for a petitioner in a habeas corpus proceeding pursuant to Title 46, chapter 22;
- 7 (vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally
8 disabled person to a residential facility, as provided in 53-20-112;
- 9 (viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in
10 53-21-116;
- 11 (ix) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as
12 provided in 53-24-302; ~~and~~
- 13 (x) for a witness in a criminal grand jury proceeding, as provided in 46-4-304; and
- 14 (xi) for a person entitled to a transfer hearing as provided in [section 2];
- 15 (b) in cases in which a person is entitled by law to the assistance of counsel at public expense regardless
16 of the person's financial ability to retain private counsel, as follows:
- 17 (i) as provided for in 41-3-425;
- 18 (ii) for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in
19 need of intervention, as provided in 41-5-1413, and in a prosecution under the Extended Jurisdiction Prosecution
20 Act, as provided in 41-5-1607;
- 21 (iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles,
22 as provided in 41-6-101;
- 23 (iv) for a minor who petitions for a waiver of parental consent requirements under the Parental Consent
24 for Abortion Act of 2013, as provided in 50-20-509;
- 25 (v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled
26 person to a residential facility, as provided in 53-20-112;
- 27 (vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;
- 28 (vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a
29 proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;
- 30 (viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental

1 disorder of the ward, as provided in 72-5-322; and

2 (c) for an eligible appellant in an appeal of a proceeding listed in this subsection (4).

3 (5) (a) Except as provided in subsection (5)(b), a public defender may not be assigned to act as a
4 court-appointed special advocate or guardian ad litem in a proceeding under the Montana Youth Court Act, Title
5 41, chapter 5, or in an abuse and neglect proceeding under Title 41, chapter 3.

6 (b) A private attorney who is contracted with under the provisions of 47-1-216 to provide public defender
7 services under this chapter may be appointed as a court-appointed special advocate or guardian ad litem in a
8 proceeding described in subsection (5)(a) if the appointment is separate from the attorney's service for the
9 statewide public defender system and does not result in a conflict of interest."

10
11 NEW SECTION. SECTION 6. IMPLEMENTATION. THE DEPARTMENT SHALL IMPLEMENT [THIS ACT] WITHIN
12 EXISTING RESOURCES.

13
14 NEW SECTION. Section 7. Codification instruction. [Sections 2 and 3 THROUGH 4] are intended to
15 be codified as an integral part of ~~Title 53, chapter 21, part 1~~ TITLE 46, CHAPTER 14, and the provisions of ~~Title 53,~~
16 ~~chapter 21, part 1~~ TITLE 46, CHAPTER 14, apply to [sections 2 and 3 THROUGH 4].

17 - END -