


LEGISLATIVE AUDIT DIVISION

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MEMORANDUM

TO: Members of the Legislative Audit Committee
FROM: Deborah F. Butler, Legal Counsel 
DATE: October 2022
RE: Potential Legislative Action Relating to Audit Recommendations

Prior to each legislative session we compile audit recommendations issued since the last session where we recommend legislation or make recommendations to review, revise, or clarify statutory language. For recommendations addressed to agencies, we determine if the agency intends to seek legislation or take corrective action by other means. In this memo we have also included recommendations with which the agency did not concur and/or will not implement, where legislation could be a possible solution for the Legislative Audit Committee (LAC) or individual members to consider.

For recommendations addressed to the legislature, or where an agency has not implemented a recommendation or does not concur with a recommendation to seek legislation, we give the LAC an opportunity to discuss a committee bill. The following table summarizes information from reports where the committee could consider potential legislative actions relating to audit recommendations. For each of the reports/recommendations, the committee could consider the following options:

- A committee bill
- An individual bill
- Remain at status quo

The table also includes disclosure issues we addressed in audit reports where legislative awareness of the specific situations may be important. In addition to consideration of potential legislation by the LAC, at the beginning of the next regular session we will also be providing joint appropriations sub-committees with information on audit recommendations/reports with budgetary impacts.

Report Title	Function	Number	Finding Description
Recommendation to the Legislature or Agency for Statutory Revision – Current Cycle			
Office of the Commissioner of Higher Education	Financial	20-06	Foundation employees allowed to participate in MUS health plan
Public Employees' Retirement System	Financial	20-08B	20-08A Actuarial soundness of 3 plans
Public Health and Human Services	Financial	21-14	Prior Audit Recommendation from 19-14 Remove provider overpayment audit restrictions
Public Defender Workforce Management	Performance	19P-04	Address differences in pay between OPD staff and other attorneys
Professional Development Center	Performance	20P-02	Fund through fixed costs; define role; evaluate effectiveness
Administration of the Petroleum Tank Release Cleanup Fund	Performance	20P-01	Clarify board doesn't approve/reimburse based on cleanup method; develop process for competitive bidding; prepare the fund for eventual closure of historic releases
Recommendation to the Legislature or Agency for Statutory Revision – Previous Cycles			
Community Benefit and Charity Care Obligations at Nonprofit Hospitals	Performance	18P-07	Expectations of detailed reporting/entity responsible
Security and Maintenance of Montana Election Systems	Information Systems	19DP-06	Define election security/mandate assessment
Montana Board of Public Education	Financial	18-22	Clarify statute to reflect board procedures re: license fees
Effectiveness of Community Corrections Programs in Reducing Recidivism	Performance	18P-05	Limit terms of community correction contracts
Tax Increment Financing Administration and Impact	Performance	17P-03	Statutory definitions and performance goals for TIF districts
Management of Montana State Parks	Performance	17P-01	Clarify role/authority of State Parks and Recreation Board
Recommendation Not Concurred			
Office of Public Instruction	Financial	21-19	Compliance with cash management requirements
Brucellosis Management in the State of Montana	Performance	16P-06	Mitigation of brucellosis risk in the elk population
Department of Public Health and Human Services	Financial	17-14	DPHHS statutory exemptions from procurement laws
Recommendation Not Implemented			
Office of Public Instruction	Financial	21-19	Prior audit recommendation (19-19) regarding subrecipient monitoring
Community Benefit and Charity Care Obligations at Nonprofit Hospitals	Performance	18P-07	Expectations of detailed reporting/entity responsible
Department of Public Service Regulation	Financial	18-26	Related to fee charged by the Department of Revenue

Recommendation to the Legislature or Agency for Statutory Revision – Current Cycle

Office of the Commissioner of Higher Education (20-06)

Recommendation #1

We recommend the Office of the Commissioner of Higher Education:

- A. Comply with state law by only allowing MUS employees and their dependents to participate in the Montana University System Insurance Program, or**
- B. Work with the Legislature to update state law to include entities related to the MUS system in state laws related to the administering of the MUS Insurance Plan, and**
- C. Work with the State Auditor and the US Department of Labor to determine if the MUS Insurance Plan is subject to Employee Retirement Income Security Act regulations related to inclusion of private entities.**

The Board of Regent's policy and current practice to allow nonprofit (foundation) employees to participate in the MUS group health insurance program is contrary to state law. Section 20-25-1301 and 2-18-702(5), MCA allow the MUS to develop group benefits for only employees of the MUS and their dependents.

Public Employees' Retirement Board (20-08A)

Recommendation #1

We recommend the Legislature and Public Employees' Retirement Board work together to determine the most equitable path to comply with the Montana Constitution and state law by making the Game Wardens' and Peace Officers' Retirement System, the Highway Patrol Officers' Retirement System, and the Public Employees' Defined Benefit Retirement Plan actuarially sound.

The FY21 audit noted GWOPRS is still not sound but made no further recommendation. HB 44 (2021 Session) failed, and an interim study was formed.

Department of Public Health and Human Services (21-14) prior audit recommendation from (19-14)

Recommendation #3(B)

We recommend the Department of Public Health and Human Services implement changes in department policy and seek changes in legislation to remove restrictions on provider overpayment audits.

Chapter 82, Laws of 2017 Regular Legislative Session established restrictions on Medicaid program overpayment audits including limiting records request to a six-month period within three previous years, restricting follow-up audits to the same billing codes associated with the initial audit, requiring audits be completed in 90 days, and prohibiting projection of overpayments identified in the sample to a larger set of claims. These changes hinder the department's ability to identify and fully investigate provider fraud. The federal grantor agency has not yet issued its management decision on this finding. During the 2019 Legislative Session and in response to our performance audit (17P-02), Senate Bill 235 proposed such changes, but the bill failed. In the department's response to this recommendation, they indicated the responsibility for change lies with the legislature and would not be prudent for the department to seek changes in legislation when that activity is outside the control of the department.

Public Defender Workforce Management (19P-04)

Recommendation #3

We recommend the Office of the State Public Defender investigate and propose methods to the legislature to address excessive differences in pay between OPD staff attorneys and other public attorneys.

OPD attorneys are underpaid relative to other state attorneys despite being part of the same market analysis and pay band. More experienced attorneys in the public defender's office also appear to make less than similar attorneys in county attorney offices despite best practice calling for parity between public defenders and those serving a prosecuting position. OPD has recently made changes to begin to address these issues, but many still exist. OPD has not successfully demonstrated to the legislature the extent of the relative pay disparities of OPD attorneys compared to others in public service to ensure appropriate funding is obtained.

Professional Development Center (20P-02)

Recommendation #1

We recommend the Montana Legislature:

- A. Fund the Professional Development Center through fixed costs.**
- B. Further define the role of the Professional Development Center in state employee professional development and the level of services the Professional Development Center should provide for this purpose.**
- C. On a biennium basis, evaluate the effectiveness of a change in funding for the Professional Development Center by monitoring changes in use of the Professional Development Center and reduction of duplication of training efforts across state government.**

Agencies vary in the extent to which they use the PDC. However, the PDC is a significant source of training across state government and is generally cost-effective compared to the private sector or university system. PDC training is largely considered good quality by recent course participants and agency training coordinators. The landscape of state employee training in other states is similar to that of Montana, with variation in where agencies opt to obtain nontechnical training. However, unlike Montana, other states fund their PDC-equivalents through some portion of fixed-cost funding to ensure enough revenue is generated to cover costs and to incentivize participation. The current, tuition-based funding model of the PDC is currently outmoded and insufficient for supporting PDC services. Changing the funding mechanism of the PDC to fixed-cost funding would likely result in increased use of the PDC and could better position the PDC to provide needed training to state employees, including defining the level of services expected of the PDC. Our work indicates it is in the best interest of the state to fund the PDC through a fixed-cost model. If the legislature were to fund the PDC in this manner, it would be beneficial to establish a biennial mechanism to evaluate the effectiveness of such a change by monitoring increases in PDC participation by agencies and any reduction of duplication of training efforts across state government.

Administration of the Petroleum Tank Release Cleanup Fund (20P-01)

Recommendation #2

We recommend the Montana Legislature clarify statute by making amendments as needed to clarify the Petroleum Tank Release Compensation Board does not have a role in approving or basing reimbursement on the specific methods prescribed within approved corrective action plans that bring an eligible petroleum release to closure.

Based on our review, we believe the Legislature needs to clarify the roles of the department and the board regarding which party determines what remediation actions are necessary to close a site. The legislature is uniquely positioned to clarify the appropriate roles of the department and the board in developing, approving, implementing, and reimbursing corrective action plans. Defining as "necessary" any corrective

action measures included in a department-approved corrective action plan would lend clarity and certainty to the process for all interested parties.

Recommendation #3

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to develop a process, seeking legislation if necessary, whereby remediation projects are competitively bid to bring releases to closure, in accordance with existing state procurement laws.

During the audit we discussed the concept of competitive bidding with board and department staff. They identified a number of areas to address as this change in process is contemplated, including the potential need for statutory change in order to accommodate a new bidding process for fund-eligible projects.

Recommendation #4

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to seek legislation that prepares the fund for the eventual closure of all historic underground storage tank release in Montana.

The future of the Petroleum Tank Release Cleanup Fund is ultimately in the legislature's hands. When the fund was created, a half-century of decrepit and leaking underground storage tanks mandated a strong public response. As that backlog of releases diminishes, the legislature must decide whether it is the role of the taxpayer to continue to fund an ongoing insurance pool for a private industry. The board can provide the legislature with the expertise needed to consider multiple options when weighing the future of the fund. A legislative proposal may present any of several different outcomes, including:

- A sunset review of the fund by the legislature to determine if the fund is still necessary.
- A transition away from mandatory contribution to the fund by all fuel distributors (and tank owners).
- A date after which the fund will no longer provide financial assurance for new underground leaks.
- A transition to mandatory private insurance for underground storage tank owners.

Recommendation to the Legislature or Agency for Statutory Revision – Previous Cycle

Community Benefit and Charity Care Obligations at Montana Nonprofit Hospitals (18P-07)

Recommendation #1

We recommend the Legislature enact law defining:

- A. Expectations regarding detailed reporting of community benefit spending and its impact on community health.**
- B. The state government entity responsible for actively reviewing community benefit spending.**

In Montana there are no laws regarding community benefit spending and reporting and, consequently, there is no regulatory agency responsible for oversight of these issues. There is also no state-level review nor verification of federal tax information regarding community benefit spending hospitals report. Further, there are no reporting requirements in the state related to the taxable benefit hospitals receive in exchange for community benefit spending. Improving oversight of information related of community benefit spending is necessary to increase its transparency to the public and policymakers, as well as ensuring the compilation of accurate and comparable data about impacts of community benefit spending.

No legislation was proposed during the 2021 session. The department is seeking legislation in the 2023 session (LC0281).

Security and Maintenance of Montana Election Systems (19DP-06)

Recommendation #1

We recommend the Montana Legislature:

- A. Clearly defining the scope of election security using federal election security best practices and National Institute of Standards and Technology security controls to ensure all aspects of elections are secure, and**
- B. Mandate the assessment of election security using defined security standards at the local and state levels.**

Our initial audit identified that existing Montana law does not give enough direction for SOS on measures surrounding election security and that consistent assessment of security risks are not mandated. Democracy and public trust depend on accurate and secure elections. By defining the scope of election security and mandating assessments, the State can minimize threats to the election process.

Since the audit, the Montana Legislature has passed House Bill 530 (2021 session) requiring SOS to adopt rules defining and governing election security. The act mandates the annual assessment of election security at the local and state levels, among many other election process changes. HB 530 has been temporarily enjoined due to the other election process changes and continues to undergo litigation. The act does not clearly define security best practices or the security standards to be used, though. SOS has promulgated administrative rules intended to define these security practices and standards required by this recommendation (44.3.2901-.2905).

Montana Board of Public Education (18-22)

Recommendation #2(B)

We recommend the Board of Public Education: B. Seek a change in legislation to more accurately reflect the board's current operating procedures.

Section 20-4-109, MCA states that for every \$6 of teacher licensing fee collected, \$4 shall be for the expenses of the Certification Standards and Practices Advisory Council (CSPAC) and \$2 shall be used to support the activities of both CSPAC and the board. The board lacks procedures to allocate expenditures to the proper funding stream, resulting in each of the funding streams supporting operations of both the CSPAC and the board, which is contrary to state law. In the board's response to the audit, they indicated they were intent on seeking legislation to change §20-4-109, MCA to accurately reflect the current funding for the board and CSPAC.

Effectiveness of Contracted Community Corrections Programs in Reducing Recidivism (18P-05)

Recommendation #3(B)

We recommend the Department of Corrections seek legislation to limit the terms of community corrections contracts.

Our audit found lengthy (20 years) community corrections contracts limits the ability of the department to make changes to the community corrections services. The reasoning for the 20-year contracts was to allow contractors to secure financing to build their facilities, but these contracts are either fully paid or will be complete by 2026. In 2016, the Commission on Sentencing considered legislation to review the limit on contract terms to seven years, in line with most other state contracts, unless the contract funded construction bonds. That legislation was never introduced during the 2017 Legislative Session. In its response to the audit, the department did not concur with this part of the recommendation. They indicated

they do not intend to enter into 20-year contracts in the future but does not intent to seek legislation to revise the statutes.

Tax Increment Financing Administration and Impact (17P-03)

Recommendation #6

We recommend the Montana Legislature:

- A. Define what criteria the Department of Revenue should review to approve qualified tax increment provisions as described in §7-15-4285, MCA, and**
- B. Clarify tax increment financing laws, including statutory goals, state and local administration, monitoring, and how TIF should be evaluated.”**

The audit found no statutes or administrative rules that provide impact or performance requirements for Tax Increment Financing (TIF), even though there are statutory goals for development districts.

Section 7-15-4285, MCA states: “The department of revenue shall, upon receipt of a *qualified* tax increment provision and each succeeding year, calculate and report to the local government and to any other affected taxing body in accordance with Title 15, chapter 10, part 2, the base, actual, and incremental taxable values of the property.” (emphasis added). There is a lack of guidance on what constitutes a “qualified” tax increment provision as required by this statute and no statute or administrative rule defining any criteria that should be considered in determining qualification.

Additionally, there is a lack of clear state goals for performance measures for TIF. To better oversee the TIF provisions clarification of TIF responsibilities, expectations, and processes at both the state and local level are needed.

Management of Montana State Parks (17P-01)

Recommendation #1

We recommend the Department of Fish, Wildlife, and Parks work in consultation with the State Parks and Recreation Board to clarify and document the role, duties, and powers of the State Parks and Recreation Board to ensure a clear delineation of authority between the board and the department, seeking legislation if necessary to better define the board’s authority.

Audit work identified concerns that the State Parks and Recreation Board may be over-stepping its authority, or that its authority was ill-defined, or perhaps overlapped with the role of the department. Unlike the Fish and Wildlife Commission, the board’s governance statute is broad and does not establish, with any specificity, the powers and duties of the board. This lack of specificity can lead to confusion and challenges in authority. The department concurred with this recommendation.

Recommendation not Concurred

Office of Public Instruction (21-19)

Recommendation #12

We recommend the Office of Public Instruction:

- A. Enhance cash management internal controls and monitor their effectiveness to ensure the OPI only requests federal cash for incurred expenditures.**
- B. Comply with cash management requirements.**

When testing cash draws, we did not see expenditures supporting revenues drawn, meaning internal controls were ineffective for ensuring OPI did not have excess cash for two programs. Cash draws are

reviewed by a second person, OPI controls should have caught these errors before requesting reimbursement from the federal program as OPI could owe interest on excess cash. We recommended OPI add cash management controls to their monitoring process to determine a way to improve the current control process, so human error is less likely to occur. OPI acknowledged the secondary review did not identify the error, but compensating controls in the cash ordering process did identify the excess cash resulting in correcting entries for the excess funds.

Brucellosis Management in the State of Montana (16P-06)

Recommendation #5

We recommend the Department of Fish, Wildlife, and Parks seek legislation and adopt administrative rules that:

- A. Clearly define the responsibilities of the department for providing brucellosis mitigation assistance to landowners and the eligibility criteria landowners must meet to receive assistance.**
- B. Define and implement specific program policies that provide guidance on consistently carrying out and documenting brucellosis response actions.**

This recommendation focuses on the role of the Department in responding to the presence of brucellosis in elk populations within the state. Currently, there is not specific delineation of brucellosis prevention in livestock as a responsibility of the Department. The Department's focus is largely on maintaining suitable populations of wildlife and administering hunting regulations. Disease management has been to manage the threat of diseases to wildlife populations. Audit work found that elk brucellosis lacks a major impact on the elk population, so management of brucellosis lies outside of the scope of typical wildlife disease management activities of the department. Rather, the concern is that elk will transmit the disease to cattle and how does the department mitigate that risk.

The Department partially concurred with the recommendation, indicating that legislative change was not required, and that guidance could be implemented through administrative rule changes. The Department has no plans to request legislation. The Department has made some minor changes to their administrative rules, but those changes do not implement the audit recommendation.

Department of Public Health and Human Services (17-14)

Recommendation #3

We recommend the Department of Public Health and Human Services comply with state law and federal regulations by following state procurement policies to obtain services for the Temporary Assistance for Needy Families and Foster Care programs.

During the audit, department staff disclosed approximately \$2.7 million in payments to 91 vendors were paid using state and federal sources without an underlying service contract. We reviewed the information related to the three top paid vendors and found the department used general fund moneys to pay nearly \$700,000 in services where a contract did not exist. These services, as well as an additional \$1.2 million paid to the remaining 88 vendors whose activity we did not review, were also obtained without following the state's procurement laws and policies.

The department did not concur with this recommendation. The department cited §18-4-132(3)(f)(ii), MCA, which exempts services of "health care providers" from the Procurement Act. We determined that the services the department paid for were for one-on-one supervision of youth, chemical dependency evaluations, urine analysis, and support services for child in placement for the Foster Care program, which did not fall under the exception for health care providers. The Federal Administration for Children & Families sustained this finding.

Recommendation not Implemented

Community Benefit and Charity Care Obligations at Montana Nonprofit Hospitals (18P-07)

Recommendation #2

We recommend the Department of Public Health and Human Services should:

- A. Define Spending and eligibility expectations related to charity care.**
- B. Develop an active oversight and review process that will ensure hospitals have charity care policies consistent with industry standards.**

In Montana there are no laws regarding community benefit spending and reporting and, consequently, there is no regulatory agency responsible for oversight of these issues. There is also no state-level review nor verification of federal tax information regarding community benefit spending hospitals report. Further, there are no reporting requirements in the state related to the taxable benefit hospitals receive in exchange for community benefit spending. Improving oversight of information related of community benefit spending is necessary to increase its transparency to the public and policymakers, as well as ensuring the compilation of accurate and comparable data about impacts of community benefit spending. The department is seeking legislation in the 2023 session (LC0281).

Office of Public Instruction (21-19)

Recommendation #1 in (19-19) Report

We recommend the Office of Public Instruction:

- A. Enhance internal controls to ensure compliance with federal subrecipient monitoring requirements.**

Although OPI implemented new procedures in response to our audit finding in the previous audit, we continued to find control and compliance issues related to subrecipient monitoring requirements. OPI did not ensure required disclosures were made to subrecipients. OPI personnel reviewed federal audits and considered financial findings in their risk assessment process but did not consider federal findings. Additionally, there were several issues related to OPI issuances of management decisions on federal findings of subrecipient federal Single Audit reports. Recommendation #2 of the (21-19) report is a continuation of this recommendation not implemented.

Department of Public Service Regulation (18-26)

Recommendation #3

We recommend the Department of Public Service Regulation develop and implement internal controls to ensure the completeness and accuracy of the rate charged and collect on the department's behalf.

The department is primarily funded by a quarterly fee levied on all regulated companies within the state. The fee is based on the percentage of gross operating revenue of all activities regulated by the department and calculated and collected by the Department of Revenue. We determined the department did not have controls in place to ensure the fee calculated and collected by Revenue and the corresponding direct entry to fund equity were accurate. We recommended in a prior audit that the department develop and implement internal controls to ensure the completeness and accuracy of the fee charged by the Department of Revenue on its behalf.