



Children, Families, Health, and Human Services Interim Committee

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58th Montana Legislature

SENATE MEMBERS

JOHN ESP
JERRY O'NEIL
GERALD PEASE
TRUDI SCHMIDT

HOUSE MEMBERS

EVE FRANKLIN--Vice Chair
DON ROBERTS--Chair
EDITH CLARK
CAROL GIBSON

COMMITTEE STAFF

SUSAN FOX, Research Analyst
GREG PETESCH, Staff Attorney
DAWN FIELD, Secretary

MINUTES

June 30, 2004

Room 152, State Capitol
Helena, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

COMMITTEE MEMBERS PRESENT

Rep. Don Roberts, Chair
Rep. Eve Franklin, Vice Chair
Sen. John Esp
Sen. Jerry O'Neil
Sen. Gerald Pease
Sen. Trudi Schmidt
Rep. Edith Clark
Rep. Carol Gibson

STAFF PRESENT

Susan Fox, Research Analyst
Greg Petesch, Staff Attorney
Dawn Field, Secretary

Visitors

Visitors' list, Attachment #1.
Agenda Attachment #2

COMMITTEE ACTION

- Requested bill draft resolutions urging either the Department to study the AMDD facilities and the Department delivery systems or for a legislative interim study on the issue
- Approved draft legislation for consideration that includes a chief prevention officer as a cabinet-level officer not attached to the Board of Crime Control and that a resolution communicating to the next Governor that the Committee and Legislature believe that drug prevention and treatment are priorities and current efforts by DPHHS and DOC should be continued

CALL TO ORDER AND ROLL CALL

The meeting was called to order at 8:30 a.m. by Rep. Roberts, Chair. Attendance was noted; all Committee members were present.

LEGISLATIVE ANALYSTS' REPORTS

Greg Petesch, Legal Director, Legislative Services Division provided a synopsis of a letter that he wrote to Rep. Clark in response to questions asked about the Travis D. Settlement Agreement and its impacts, if any, on the administration of the developmental disability (DD) system and the administration of other system. The synopsis is as follows:

- The Travis D. Settlement Agreement is not binding on the Legislature.
 - The Legislature may chose to impose developmental disability services provided under Medicaid. However, if the Legislature changed the statutes in such a way that the Department was unable to implement changes suggested in the Travis D. Agreement, then it would have to analyze the legal statute changes and how they would affect the Department's ability to fulfill the terms of the Agreement and its potential liability to the state.
- The Travis D. Agreement specifically applies to individuals who have resided at the Eastmont Developmental Center, and the Department agreed to provide certain things to that group of individuals.
 - The big issue is what implications those provision of services have for other individuals who might be similarly situated. If the Legislature and the Department is bound by the Agreement, unless the fundamental underlying law changes, the Department is required to follow the law.
 - The Legislature must keep these budget and policy issues in mind in the event of a budget shortfall and the Department would have to develop a rational basis for its decisionmaking.
 - Under equal protection, a rational basis is the lowest standard required to meet for an action. There are three levels of equal protection scrutiny: (1) rational basis, (2) a middle tier analysis, which is constitutionally based, and the strict scrutiny analysis that applies when the Legislature classifies people based on a fundamental constitutional right. Strict scrutiny most always means that the state loses.
- Social services were constitutionally recognized in the 1972 Constitution through an amendment. The effect of that change was that a rational-basis standard applied to the provision of all of those types of social services for the disadvantaged. The Department, in implementing the policy choices, would have to meet that rational basis standard.
- The Department is required by the settlement to change its system of delivery for developmental disabilities.
 - The primary impetuous for the Travis D. litigation was that individuals were committed to the developmental center; and when service providers determined that individuals no longer needed the level of treatment provided by the developmental center and that the individuals could be better served in community placement, they were being retained at the developmental center because there were inadequate community facilities available to move them into.
 - Under the settlement agreement, the department is committed to providing community placements for these individuals.

- Each client will receive an individualized cost plan and allocated a pool of money for their plans. Within that cost plan, the client, along with their service provider, will be able to make personal choices for the services that are received.
- The settlement agreement imposes large challenges on the developmental disabilities system and how the Department applies the terms of the settlement will raise additional legal issues because the issues cannot be anticipated based on the settlement agreement alone, it has to be applied to each individual client or applied to the group as additional issues arise.

Lois Steinbeck, Legislative Analysts, Legislative Services Division, provided an update on the "Travis D. Settlement Agreement: Potential Cross System Impacts and Implications" and an up date on "Developmental Disabilities Program: Update on Emerging Issues". (EXHIBITS #1 and #2) respectively)

Sen. O'Neil asked if legislation could be passed stating that services would be provided to individuals who were institutionalized but once they are not institutionalized, the state would no longer provide services, such as dental services, and would it conform to the provisions of the Travis D. litigation. Mr. Petesch said that the Travis D. Agreement requires the Department to provide certain services, such as dental services, to the group covered by the settlement agreement. The group covered by the agreement must be moved out of the institution to community-based settings on the time frame contained in the agreement. As a result, the Department is obligated to provide dental services to those individuals. If the Legislature statutorily prohibits the Department from providing dental services to those individuals, then the group covered by the agreement could sue the Department for breach. Whether there would be damages involved is unknown at this point.

Sen. O'Neil asked if individuals in the institutions and the Travis D. plaintiffs received dental care, could they not receive dental care after they were out of the institutions. Mr. Petesch said that dental care is an optional service provided under Medicaid. Most people in state facilities are eligible for Medicaid and the state is obligated to provide those services. The Legislature would need a rational basis for providing dental care to one group of Medicaid-eligible individuals and not all Medicaid-eligible individuals. Sen. O'Neil asked if there were other Medicaid-eligible individuals who were not institutionalized and not provided dental services. Mr. Petesch said yes, that the vast majority of Medicaid-eligible individuals are not institutionalized. He said that Medicaid provides that dental services may be provided but the state is not required to do so. Medicaid has a series of services that are required to be provided and a number of services that are optional. Dental services are optional. **Lois Steinbeck, Senior Fiscal Analyst, Legislative Fiscal Division**, added that optional services are only optional if they are provided in an out-patient setting. Hospital services are mandated services so dental services would be provided in a hospital setting.

Rep. Roberts said that hospitalization depends on what level of dental care is needed. For example, a developmentally disabled child could require general anesthetic and that could get expensive. The parents would also need to sign appropriate release forms that would allow the state to be protected. Ms. Steinbeck said that Medicaid provides for the early and periodic screening, diagnosis, and treatment program (EPSDT) for children. If a child needs a service that is covered by Medicaid according to federal standards and even if the state does not allow

for that service in its Medicaid plan, if that service is medically necessary, children are entitled to it.

Ms. Steinbeck provided an update on the "Travis D. Settlement Agreement: Potential Cross System Impacts and Implications". (EXHIBIT #1)

Pat Gervais, Senior Fiscal Analyst, Legislative Fiscal Division, provided updates on the "Developmental Disabilities Program: Update on Emerging Issues" and "Selected Medicaid and MHSP Issues". (EXHIBITS #2 and #3 respectively)

Sen. O'Neil asked as individuals come off of Medicaid, would Medicaid expenses decrease. Ms. Gervais said no, that if people continue to reside at an institution, the state will continue to support them in their institutional residence or in a community setting. The bigger issue is that if individuals lose Medicaid eligibility in an institution, there is the potential for them to lose Medicaid eligibility in community services. She said that in order to be eligible for the Medicaid waiver, individuals must be at risk of or needing institutional care that is Medicaid reimbursed. If the individual is no longer eligible for Medicaid reimbursement in the institution, the next question that arises at the federal level is, is the individual eligible for Medicaid-waivered services eligible for those services in the community? These individuals are all people who have been committed to the institution under statute who are developmentally disabled and a danger to themselves or others. She said that these individuals have severe behavioral issues but may be capable of some activities of daily living. Therefore, the federal government is now asking whether these individuals need institutional-level care.

Ms. Steinbeck added that if Medicaid guides were strictly applied, the Legislature then faces a choice of whether to serve these individuals in the community, giving them supported living, jobs, and transportation at \$150,000 a year which comes straight from the general fund every year if there is not some nationwide compromise reached.

Rep. Roberts asked about the cost differences between small and large towns to implement the program and were smaller communities more vulnerable because of its greater drawing area. Ms. Gervais said that if there is a near-total care population moving to a community that has intensive medical needs, it seems logical that the client would choose a situation that allows the client the best access for its medical need. That could potentially create some difficulty for the smaller communities. Geographic adjustments in the rates and the possibility of small providers becoming providers of different services are being reviewed. Rep. Roberts asked if there was any incentive for parents to become more participatory in the process and act in the best way for their children. Ms. Gervais said that the DD system is an all-or-none system. An individual is either in the system where the care is taken care of or an individual is out of the systems and receives nothing. Medicaid has not pushed this issue to date because its concern is that individuals under the waiver receive all of the services identified in its plan of care. If individuals are under the waiver and all services identified in its plan of care are not being provided, is the state at risk and is there a problem with federal compliance? If the federal government pushes the issue, the state could be put in the position of in order to meet all of the requirements under a personal plan of care, the state may serve fewer people.

Ms. Steinbeck said that an issue that she will be bringing to the Legislature is to ensure that Medicaid-program administration does not create barriers for the development of private

markets. Currently, there is virtually no private market in DD services, partly because of the expense.

Sen. Schmidt asked how far reaching this decision may be to other divisions of the Department. Ms. Steinbeck said that it all depends on if the state has a court action that uses this as a basis to compel or as a threat. She believed, however, that it could be very far reaching.

Mr. Petesch added that many people who have watched these systems over a long period of time are surprised that some of the challenges came in the DD system. However, the changes in the DD system are going to force scrutiny of all of the other systems and divisions. The Travis D. decision is a clear implementation of the Olmstead Decision even though the Olmstead Decision dealt with mental health, and the state has not moved to implement the Olmstead decision on the mental health side which it applied to. Implications from other litigation that are ongoing will cause more ripples throughout the entire system.

Susan Fox, Research Analyst, Legislative Services Division, said that she was disappointed that the Department withdrew its interim study on AMDD facilities because it is all interrelated. The Montana State Hospital and MDC are currently receiving a more forensic population (criminal commitment) and co-occurring disorders. Even though the state began with separate and distinct institutions and programs, currently the populations are all mixed because the state is deinstitutionalizing everyone. Ms. Fox asked that the Committee begin to think across systems.

Sen. Schmidt **moved** that the Committee recommend an interim study on AMDD facilities and Department delivery systems. **Joyce DeCunzo, DPHHS**, said that if changes are needed in those facilities, the Department's plan is to have recommendations ready to present to the 2007 Legislature. She was unsure how an interim committee would work since any recommendation would have to be a part of the Department's EPP process.

Rep. Roberts asked if the Committee could be informed every six months on the progress of the study instead of having an interim committee request. Ms. DeCunzo said yes and that the Department is moving forward with the proposed AMDD study.

Mr. Petesch suggested that the Committee request a bill draft resolution urging the Department to review the issue and that the Committee monitor the Department's implementation of the directive of the resolution.

Sen. Esp made a **substitute motion** requesting a bill draft resolution urging the Department to study the AMDD facilities and the Department delivery systems and a resolution for an interim study for the Committee's consideration at its next meeting. Sen. Schmidt withdrew her motion and Sen. Esp's substitute motion passed unanimously.

SJR 11 STUDY ON DRUG AND ALCOHOL POLICY

Report from EQC on Meth Clean-up Standards

Larry Mitchell, Legislative Environmental Policy Office, provided an overview of the "EQC Efforts -- Issue: Methamphetamine Cleanup "Standards" and provided a summary of its methamphetamine standards bill request. (EXHIBITS #4, #5 and #6 respectively)

Sen. Schmidt asked how much funding would the methamphetamine bill request. Mr. Mitchell said that the cost of these programs can be very expensive and the Department cannot provide a cost estimate to date.

Rep. Roberts said that the problem with methamphetamine is that it permeates the whole structure rather than just its surface. He asked if the proposed legislation limited the ability to cleanup the whole structure. Mr. Mitchell was unsure about the steps in the cleanup process. Rep. Roberts asked if insurance covered the cleanup costs. Mr. Mitchell said that some insurance companies do, some do not, and many are trying not to.

Sen. Schmidt asked for comments on the manufacturing of cold methamphetamine rather than cooked methamphetamine. **Jim Kimble, Montana Police Protective Association** said that cold methamphetamine is harder to detect, nonexplosive, and very easily moved.

Report from Department of Corrections Treatment Proposals

Bill Slaughter, Director, Department of Corrections provided an overview of a fact sheet regarding adult male and female institutional populations and an overview of the Corrections and Mental Health Community Supervision Team. (EXHIBITS #7 and #8 respectively)

Mr. Slaughter said that the Department will be moving approximately 40 DUI offenders, most of whom come from eastern Montana, to Eastmont. Many of them will be women, and he believes that the therapeutic-community model will work very well for this type of population. The Department is also "building bridges" with DPHHS in the areas of health and mental health. He said that when individuals go to prison, they become ineligible to receive federal benefits (Medicare or Medicaid). The Department and DPHHS are exploring the possibility of suspending the application process rather than having the individuals go through the whole application process again once they are released.

Mr. Slaughter added that the Department is also proposing a 40-bed methamphetamine treatment center modeled after the WATCH program (a therapeutic community). He provided an excerpt from Practitioner Perspectives regarding "Wyoming's Methamphetamine Initiative: The Power of Informed Process". (EXHIBIT #9)

Sen. Schmidt asked about the capacity at Eastmont. Mr. Slaughter said that the capacity could be 100. Sen. Schmidt asked about the outside medical costs at the Montana State Prison (MSP). Mr. Slaughter said that MSP is under federal oversight. There were 18 things under the agreement that had to be done and MSP accomplished 17 of them. The thing that could not be accomplished is initial medical review and followup nursing and doctor care. Mr. Slaughter hopes to report to the 2005 Legislature that this problem has been solved and that there is a system in place.

Rep. Franklin asked what costs and services does the Department see shifting to the 40-bed methamphetamine program. Mr. Slaughter said that because the Department is taking the 40 beds from the WATCH program at Warm Springs, the same contractor would provide the 40 beds in another location. Those costs would shift. It also allows the Department to shift those beds and contract-bed dollars to Eastmont which leaves a 40-bed hole in the WATCH program. That hole will be backfilled by individuals on the waiting list for Connections Corrections (a drug

treatment program in Butte). The Department is not requesting additional dollars for the 40-bed methamphetamine program.

Rep. Franklin said that she was concerned about what she sees as a very thin infrastructure in health care administration to do the types of things that the Department is going to have to do to make quality programs. Mr. Slaughter agreed and said that the Department had plans to reorganize again.

Methamphetamine Summit Recap

Jean Branscum, Governor's Office, provided an overview of the "Montana Methamphetamine Summit--Legislative Draft Recommendations" and a copy of "Cracking Down on Meth Summit Recommendations". (EXHIBITS #10 and #11 respectively)

Sen. Schmidt asked about the funding source for some of the summit recommendations. Ms. Branscum said that the Governor's Office will wait until July 15 to hear the Council's final report and to see where their priority recommendations are. Sen. Schmidt requested further information on the summit recommendation to regulate the sale of pseudoephedrine in the state. Ms. Branscum said that some states, such as Kansas, put the products behind the counter so that they cannot be bought off of the shelf. The retail methamphetamine-watch program was implemented, not to regulate products, but to tag those products that people purchase to make methamphetamine.

Coordinated Statewide Leadership:

Roland Mena, Executive Director, Board of Crime Control, stated the following:

- The idea of a local-community team, such as the drug task force located in Washington, should be pursued.
- There was not much support for the proposed legislation but the ICC came up with five suggestions. They are as follows:
 - The elimination of the ICC by the 2005 Legislature or the elimination of the unified budget requirement;
 - Look at public and private entities currently involved in the ICC writing of an end report on existing prevention activities and annually commit to specific steps to improve prevention activities;
 - Statewide-elected officials from the Executive Branch and representatives from the Montana Supreme Court should participate in an annual event to listen to and comment on the existing prevention activities reports;
 - DPHHS commits to the ongoing support of the prevention resource center; and
 - The continuation of the departmental work group that supports the ICC.

Ms. Fox provided a recap of her June 14, 2004, letter regarding the status of the coordinated statewide leadership proposal.(EXHIBIT #12) Ms. Fox said that her proposal was not well received by the ICC or the Board because the concept was much too holistic and there were multiple elected officials involved. When all things are easy and there is lots of money available, coordination is easy; but when these variables change, it is not something that can be relied on. Members also felt that it would add another layer of bureaucracy. However, the discussions did reveal that the ICC had to be dealt with and the Committee needed to understand how to deal with all of the limitations, such as multiple-elected officials. Ms. Fox requested that the

Committee appoint a representative to attend the July 15, Governor's Office, Methamphetamine Summit to hear more of its final report proposals.

Ms. Fox also provided an overview of a proposed bill draft providing for a chief prevention and treatment officer and a statewide coordination of prevention and treatment programs which would be attached to the Board of Crime Control. (EXHIBIT #13) Ms. Fox said that the proposed position could be a Cabinet-level position. The Board of Crime Control is attached to the Department of Justice with all members appointed by the Governor. The Committee may want to consider attaching the Board of Crime Control to the Governor's Office or keeping the chief prevention officer position attached to the Governor's Office. The proposal is a beginning and contains some of the basic elements of discussion. Some discussion points not included in the draft are education, memorandums of understanding, cross training, and accountability. She requested that the Committee consider discussing these issue to decide whether it would want them reflected more clearly within the bill draft.

Ms. Fox said that another issue is how to relay the fact to the Executive Branch that the ICC recommendations are good-effort recommendations in between a new Governor and new Department Directors. She said that a resolution does not carry the weight of law, but they are a formal way that a branch of government can communicate with another branch of government about its desires and expectations.

Sen. Schmidt asked if the Committee could request both the proposed bill draft and the resolution. Ms. Fox said yes but that the proposed legislation has not received the level of scrutiny that she would want to be confident that it was the Committee's wishes.

Although he felt that the Committee could continue with the draft legislation, Sen. Esp was unsure whether there was a great deal of Committee consensus on it. He felt that a resolution would be a better alternative and that the funding resources would be better used by training local people and public awareness.

Rep. Gibson said that her focus was on prevention and treatment and that her idea of a chief prevention and treatment officer would be a person who presents a statewide effort to coordinate small entities with small pockets of money and programs that attempt to go after all of these problems.

Ms. Fox felt that the Committee had the consensus that something was needed. It is just putting a name to it. There is no one person charged to coordinate all statewide prevention and treatment programs, and if the Committee wants it to happen, it needs legislation to tell someone to do that function.

Sen. Franklin said that there seemed to be some discomfort on the part of the Board of Crime Control being altered. She **moved** that the proposed legislation included a chief prevention officer as a cabinet-level officer not attached to the Board of Crime Control and that a resolution communicating to the next Governor that the Committee and Legislature believe that drug prevention and treatment are priorities and should be addressed.

Following a brief discussion, Sen. Franklin's motion passed on a 7 to 1 vote with Sen. Esp voting no.

PUBLIC COMMENT

Maggie Bullock, Public Health and Safety Division, DPHHS, stated the following:

- The minimalist approach to methamphetamine cleanup is the approach that has been emphasized because individuals do not seem to be interested in putting money toward this effort.
- DEQ needs to have an involvement in the cleanup process, and it offered to train local sanitarians, such as Kleen King, on methamphetamine cleanup.
- One discussion point between DEQ and the Department was the creation of a loan pool for business owners to be used for cleanup efforts. They would then pay the loan pool back along with a small assessment fee.
- There is no medical evidence that proves that anyone has been affected by methamphetamine cleanup properties once the methamphetamine dissipates.

Randy Gray, Mayor, Great Falls, stated the following:

- The state must wrestle with the issue of funding because the state cannot afford not to address the methamphetamine problem.
- Dollars could be leveraged through new taxes, expanding the gaming tax, an employer and employee tax, and the revisitation of the relationship of substance co-occurrence, such as the alcohol and tobacco taxes.
- DPHHS could earmark those dollars and leverage them on a 5-to-1 ratio through the federal government to establish a treatment proposal.
- The treatment proposal needs to be spread throughout the state, locally based, and it needs to have quality assurance.
- The private sector also needs to be involved.

Jim Kembel, MPPA, said that the frustrating problem is finding a snapshot of the statistics related to methamphetamine use and manufacturing. He suggested conducting surveys, such as what is happening with children, K through 12, and depositing the statistics in a central depository.

OTHER BUSINESS

Mr. Petesch said that the Department appropriately responded to all of his comments made on its emergency administrative rule adoption notices.

The Committee's final meeting was set for August 27, 2004.

There being no further business, the meeting was adjourned at 12.40 p.m.

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