

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

### Minutes of the

## INCARCERATION ISSUES COMMITTEE

Monday, July 25, 2016  
Harvest Room, State Capitol  
Bismarck, North Dakota

Senator Ron Carlisle, Chairman, called the meeting to order at 8:35 a.m.

**Members present:** Senators Ron Carlisle, John Grabinger; Representatives Kim Koppelman, Jon O. Nelson; Citizen Members Leann K. Bertsch, Thomas Erhardt, Rozanna Larson, Judge Douglas Mattson, Justice Lisa K. Fair McEvers, designee of the Chief Justice, Presiding Judge Frank Racek, Aaron Roseland, Scott Steele, Attorney General Wayne Stenehjem

**Members absent:** Senator Terry M. Wanzek; Representative Ron Guggisberg; Citizen Member Randy Ziegler

**Others present:** Senator Rich Wardner, Dickinson, member of the Legislative Management  
See [Appendix A](#) for additional persons present.

**It was moved by Representative Nelson, seconded by Senator Grabinger, and carried on a voice vote that the minutes of the June 7, 2016, meeting be approved as distributed.**

### COUNCIL OF STATE GOVERNMENTS

Chairman Carlisle called on Mr. Steve Allen, Senior Policy Advisor, Council of State Governments Justice Center, for information ([Appendix B](#)) relating to behavioral health system trends in North Dakota.

Mr. Allen said the Council of State Governments (CSG) recommendations would seek to leverage the state's Medicaid expansion status.

Presiding Judge Racek said a critical element is identifying the high-risk and high-need individuals because until those individuals are identified, the state cannot focus on their needs.

Mr. Allen said the individual entering prison has Medicaid benefits terminated at the moment of incarceration. He said CSG recommends the suspension rather than termination of benefits to expedite the reinstatement upon release. He said the federal government is working to implement the policy needed to support the suspension of benefits. Due to the financial picture in the state, he said, using federal dollars to maximize benefits would offset the cost of enrollment activities through Medicaid administrative claiming. He said Medicaid administrative claiming can pay up to 50 percent for some activities, such as outreach, application assistance, and staff development and training.

Mr. Allen said CSG suggests creating an array of community interventions for higher-risk individuals. He said the first step would involve bringing the Department of Human Services (DHS) and the Department of Corrections and Rehabilitation (DOCR) together to develop and adopt standards for the implementation of community behavioral health services tailored for moderate and high-risk offenders with serious behavioral health disorders. He said requiring Medicaid to create enhanced rates with performance-based incentives to adequately support enhanced services and increasing access to risk-reducing cognitive behavioral interventions for offenders on probation and parole would further meet the needs of the state.

In response to a question from Representative Koppelman, Mr. Allen said specific curriculum would be designed to help change an individual's thinking. He said the curriculum would be delivered through a number of different community and behavioral health providers.

Ms. Bertsch said although the curriculum is already used by DOCR and many probation officers are trained to use it, the caseloads are overwhelming.

Mr. Allen said CSG recommends establishing specialized positions to provide needed community supports and services. He said the state could require DHS and DOCR to collaborate to establish training and certification

processes for both mental health and substance abuse peer support specialist positions to work in criminal justice settings. He said the state could require Medicaid to recognize peer support specialists as a Medicaid-billable service. The state also could require DHS and DOCR to establish parameters of a community engagement specialist position, he said, and determine how many positions are needed to meet current and future system needs. He said DOCR could be required to use specialized community supervision agents to manage and improve outcomes for higher-risk individuals with serious behavioral health disorders.

In response to a question from Representative Nelson, Mr. Allen said the human service centers offer a good place to start. Although there is room for discussion as to whether the positions would be part of the public or private systems, he said, paraprofessional positions are more easily obtained than the professional positions in some communities.

Mr. Allen said CSG also recommends that the state create an alternative sentencing option to deliver treatment and supervision. He said the state could do so by establishing a sentencing option for higher-risk offenders who have serious behavioral health disorders with exceptions for violent and dangerous individuals while also requiring participation in community behavioral health services.

In response to a question from Chairman Carlisle, Mr. Allen said CSG did not include the cost of benefits in the estimated \$50,000 cost of employment for each additional behavioral health position.

Mr. Allen said the proposed policies create a package of changes that work together to decrease incarceration and improve behavioral health outcomes for individuals. He said the state also could consider adopting approaches to services and supports across all of the human service centers, streamline interstate transfers, expand existing rural healthcare workforce initiatives to include behavioral health workers, and encourage the utilization of behavioral health assessments across agencies.

Presiding Judge Racek said the state needs to focus on the higher-risk individuals and not entangle others because doing so creates more issues. He said the response must be quick for public safety while remaining flexible enough to implement a change in treatment when necessary.

Ms. Bertsch said she cannot stress the effectiveness of treatment programs enough. She said the problem is trying to get an appropriation for a full-time equivalent position. The state has high-functioning institutions of education, she said, but getting original research done is very costly.

## BEHAVIORAL HEALTH SERVICES

Chairman Carlisle called on Dr. Lisa A. Peterson, Clinical Director, Department of Corrections and Rehabilitation and Ms. Pamela Sagness, Director, Behavioral Health Services Division, Department of Human Services, for recommendations (Appendices [C](#) and [D](#)) in response to data from the Justice Center.

Ms. Sagness said the state had a reduction in the number of treatment providers over the last year. She said the system in the state is acute, as an individual is diagnosed then sent to treatment for a specific period of time and considered fixed. She said the practices used in the state are no longer the best practices. Because addiction is a chronic treatment, she said, chronic-based treatment needs to be used. She said a continuum of care covers everything from promotion to aftercare in recovery. Although there is always a discussion about needing more beds, she said, treatment beds have a much higher cost than beds in a sober living environment. If the state does not focus on the needs, she said, the state will continue to undertreat individuals.

In response to a question from Chairman Carlisle, Major Steven Hall, Assistant Jail Administrator, Burleigh County, said administration of the new Burleigh and Morton County Jail is in charge of developing new programs to aid in the initial screening of each inmate and matching that inmate with the appropriate services.

In response to a question from Chairman Carlisle, Dr. Peterson said an adult cannot be forced to take a medication; however, probation may be used to inspire that adult to continue taking necessary medication.

Presiding Judge Racek said the mentally ill are particularly well suited in some cases for guardianship. The system is stalled, he said, because either the individual has to be bad enough to be involuntarily committed or the court has to intervene.

In response to a question from Judge Mattson, Ms. Sagness said sober-living environments are self-sustaining after the initial start-up costs.

In response to a question from Representative Nelson, Dr. Peterson said probation officers use prison as a last resort and make every effort to help individuals access services.

Judge Mattson said an individual on probation generally has many violations prior to the revocation of probation because prison is a last resort.

Mr. Erhardt said DOCR has moved away from counting violations to determine revocation and instead looks at the severity of a violation to ensure public safety.

Representative Nelson said economics play a part at some point and legislators must be aware of the effectiveness of different treatment options.

Ms. Sagness said treatment for addiction works the same way. She said individuals likely will fail at treatment several times resulting in a constant balance of resources.

Presiding Judge Racek said to be successful, the ability to be flexible and change an individual's course of treatment is necessary.

### **COMMUNITY RESOURCES TO REDUCE RECIDIVISM**

Chairman Carlisle called on Mr. Jason Suthmeier, Recruitment Manager, Department of Transportation, and Ms. Krista Harju, Program Coordinator, City of Mandan, for presentation ([Appendix E](#)) of information relating to community resources to reduce recidivism.

### **NORTH DAKOTA COMMUNITY CORRECTIONS ASSOCIATION**

Chairman Carlisle called on Ms. Chelsey Williams, President, North Dakota Community Corrections Association, for information (Appendices [E](#) and [G](#)) regarding community resources to reduce recidivism.

Judge Mattson said although the programs work well, he has not used them recently.

Presiding Judge Racek said the programs are used in his district; however, he does not use them. He said the people are skilled, but he fears the programs are a place to collect individuals who do not need services and result in more work for court staff.

Mr. Roseland said he cannot recall any use of community service in his area since 2012.

### **INDIAN AFFAIRS COMMISSION**

Chairman Carlisle called on Mr. Scott J. Davis, Executive Director, Indian Affairs Commission, for information ([Appendix H](#)) relating to the incarceration rates of the Native American population.

Mr. Davis said Native Americans represent 25 percent of inmates in the state. He said the rate of revocation of parole for the Native American population is 21 percent.

In response to a question from Justice McEvers, Mr. Davis said federal charges allow the federal government to use a warrant to arrest an individual on the reservation whereas state law enforcement cannot access the reservation.

Mr. Davis said creating a higher level misdemeanor offense would be helpful as individuals with a felony conviction face challenges in almost every aspect of life.

Representative Nelson said a representative from the Native American community should have been included on the committee.

### **Committee Discussion**

Ms. Bertsch said she has several bill drafts to present to the committee for consideration. She said the first bill draft ([Appendix I](#)) repeals North Dakota Century Code Section 12.1-32-09.1, which is the 85 percent truth-in-sentencing statute.

Ms. Bertsch said another bill draft ([Appendix J](#)) would amend Section 19-03.4-03 relating to the possession of drug paraphernalia. She said the bill draft would modify the penalties associated with possession while maintaining the felony offense for trafficking.

Ms. Bertsch said a third bill draft ([Appendix K](#)) would amend Sections 19-03.1-22.3 and 19-03.1-22.5 by changing the penalty for ingestion of a controlled substance from a misdemeanor to an infraction. She said the second option ([Appendix L](#)) repeals Sections 19-03.1-22.3 and 19-03.1-22.5.

Ms. Bertsch said another bill draft ([Appendix M](#)) amends Sections 19-03.1-23 and 19-03.1-23.1 by removing the mandatory minimum sentences for drug crimes while allowing judges to impose a full range of penalties. She said the changes would place the discretion with the judge rather than the prosecutor. The bill draft also amends the enhancement for a sale within 1,000 feet of a school to allow an enhancement only if the individual physically possesses the substance on school property.

In response to a question from Attorney General Stenehjem, Ms. Bertsch said the repeal of Section 12.1-32-09.1 would not be retroactive. She said the bill draft would not legalize use.

Chairman Carlisle requested the Legislative Council staff include the drafts in a comprehensive bill draft for consideration at the next meeting.

### **COUNCIL OF STATE GOVERNMENTS**

Chairman Carlisle called on Ms. Katie Mosehauer, Project Manager, Council of State Governments Justice Center, for information ([Appendices N](#) and [O](#)) relating to the Justice Center's policy recommendations.

In response to a question from Representative Koppelman, Ms. Mosehauer said the best way to look at the recommendations is in relation to how many people are coming into the system together with supervision data. She said CSG does not intend to project rates of recidivism.

In response to a question from Representative Nelson, Ms. Mosehauer said the preferred approach is to address everything at the same time.

Ms. Grace Call, Senior Policy Analyst, Council of State Governments Justice Center, said between 1992 and 2014, 136 individuals were murdered in the state during incidents of domestic violence. She said the state should ensure supervision for individuals who committed crimes against others and establish state standards of treatment and oversight for batterers treatment programming.

Presiding Judge Racek said anytime something is applied across the board to a group of people, you are probably messing up something. He said it is necessary to identify who would benefit before moving forward with implementation.

Ms. Bertsch said Medicaid does not pay for batterer treatment. As a result, she said, lower income individuals are revoked from probation because of an inability to pay for the treatment.

Mr. Roseland said to require participation in a program like this would require travel because several areas of the state do not have treatment programs. He said to require mandatory participation would essentially be another unfunded mandate.

Presiding Judge Racek said to consider a required batterers treatment program, there has to be consideration as to what is done when an individual does not comply. He said when an individual fails to comply, the burden shifts to the sheriff to arrest the individual. Ultimately, he said, the state would start penalizing individuals for what they did not do rather than what they did do.

Ms. Bertsch said she is not aware of any issues with batterers treatment. She said she would hate to see the Century Code cluttered with mandates that ultimately limit flexibility.

Ms. Mosehauer said to avert growth in jail and prison populations, CSG recommends sentencing low-level offenders to probation while tailoring responses to supervision based on risk and seriousness.

Presiding Judge Racek said he is not aware of any debate in the state regarding the use of prison over probation. He said the state has room for improvement in initial pretrial and preprobation programs. It is extremely rare to send an individual to prison without that individual first failing on probation, he said, unless there was a mandatory sentence.

Ms. Mosehauer said CSG attempted to put presumptive sentencing in place to avoid the issue of placing more pressure on the counties.

Ms. Bertsch said reclassifying crimes should not be done without further study.

Presiding Judge Racek said the bigger issue is how the state will respond to failure. He said it is contrary to evidence-based practice to alter an entire class of offenses and doing so will limit the flexibility that already exists.

Mr. Roseland said the use of a Class A misdemeanor for a first-time personal drug use offense would be helpful.

Representative Nelson said the committee needs to know what an effective program would look like and what resources already exist for those on probation.

Mr. Marc Pelka, Deputy Director, State Division, Council of State Governments Justice Center, said a number of states have set standards for programs that are funded by the state. He said some states have funds that are built into budgets for minimum standards in terms of recidivism reductions.

### **Committee Discussion**

Presiding Judge Racek said the committee should state exactly what it wants in a bill. He said there must be trust that the agencies will work together.

Ms. Bertsch said a number of the things the committee has discussed will require an investment and agency directors have been directed to prepare a 90 percent budget for the 2017-19 biennium. She said there are some pieces that may have to be viewed as optional packages.

Chairman Carlisle said the committee needs to put forward recommendations and stress the cost of doing nothing.

Representative Nelson said the flexibility piece cannot be lost.

Senator Grabinger said the committee will need to have recommendations to give agencies and the Governor about implementation.

No further business appearing, Chairman Carlisle adjourned the meeting at 3:15 p.m.

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Samantha E. Kramer  
Counsel

ATTACH:15