



COUNTY ADVISORY BULLETIN

CAB

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CRIMINAL SENTENCING REFORM AND “JUSTICE REINVESTMENT”

APPLICABLE LEGISLATION: Am. Sub. H.B. 86

REVISED CODE SECTIONS: 307.93, 307.932, 309.18, 341.12, 2301.27, 2301.271, 2301.30, 2929.13, 5120.031, 5120.036, 5120.07, 5120.111, 5120.113, 5120.114, 5120.115, 5120.16, 5120.331, 5120.48, 5120.59, 5120.60, 5120.66, 5139.01, 5139.06, 5139.18, 5139.20, 5139.43, 5139.52, 5149.01, 5149.10, 5149.31, 5149.32, 5149.33, 5149.34, and 5149.36 (and others – see Title of the Act for a complete listing)

SPONSORS: Representatives Blessing and Heard and Senators Seitz and Smith

Reps. Amstutz, Anielski, Antonio, Barnes, Batchelder, Beck, Blair, Boose, Boyd, Brenner, Bubp, Buchy, Carney, Celeste, Clyde, Coley, Combs, Derickson, Dovilla, Driehaus, Duffey, Fedor, Foley, Garland, Gonzales, Grossman, Hackett, Hagan, C., Henne, Luckie, Mallory, Martin, McClain, McGregor, McKenney, Mecklenborg, Milkovich, Murray, Newbold, O'Brien, Okey, Patmon, Peterson, Pillich, Schuring, Sears, Slaby, Sprague, Sykes, Szollosi, Thompson, Uecker, Winburn, Yuko,

Sens. Bacon, Beagle, Brown, Coley, Daniels, Hite, Jones, Kearney, LaRose, Lehner, Manning, Niehaus, Obhof, Sawyer, Schiavoni, Seitz, Smith, Tavares, Turner, Wagoner, Widener, Wilson

EFFECTIVE DATE: September 30, 2011

INTRODUCTION AND OVERVIEW

Am. Sub. H.B. 86 is a major revision of Ohio's criminal sentencing practices, and, as Governor Kasich noted, "a great accomplishment for the state." Moreover, the state's FY 2012/2013 budget factored in the expected cost savings from the enactment of HB 86.

The purpose of sentencing reform is to ease state prison overcrowding and reverse the practice of placing low-level, non-violent offenders with more serious offenders in prison, where their chances of rehabilitation are slim.

Implementation of the sentencing reform provisions is expected to reduce the state's prison costs by about \$78 million a year. Without the reform many believe the state's prison population, which is already at about 135% overcapacity, would continue to grow, costing the state about \$925 million by 2018 and requiring construction of new prisons.

Throughout the debate on sentencing reform, CCAO raised concerns regarding potential burdens reform inadvertently could place upon counties. The proposed elimination of prison sentences for first time non-violent F-4 and F-5 offenders provided a very real possibility that these individuals instead would see time in the county jail at county expense as part of a felony sanction which is the state's responsibility. Judges raised significant concern over this issue since under current law sentencing provisions they already overwhelmingly impose community control sanctions on these offenders. Judges felt the proposed mandatory presumption against a prison sentence would interfere with judicial discretion.

HB 86, as enacted, contains a provision that allows a judge to sentence a felony offender to state prison if an appropriate community sanction can't be found locally, and the Department of Rehabilitation and Correction (DRC) is unable to identify a program which will meet the court's requirements for the offender. This provision should reduce some of the concerns CCAO expressed regarding increasing the county jails' populations.

The bill envisions the development of numerous treatment options as alternatives to mandatory prison time which are to be funded by significantly increased appropriations for community corrections programs (DRC line items 407 and 408) contained in HB 153, the biennial state budget bill. Since the necessary infrastructure is not currently in place and its actual cost is unknown, counties are concerned whether the level of appropriations in HB 153 will be sufficient to meet these new local obligations, and whether counties will have to find funding to meet the obligations of the state. Furthermore, these line items also will be the source of funding to the common pleas courts for the two new probation department grants and the grants to replace state APA staff with county staff to complete presentence investigations and reports.

The bill repositioned the statement found in current law providing that judicial sentencing should not create a burden on local resources to include this as one of the stated overriding purposes of felony sentencing (ORC 2929.11). Only time will tell, however, if the state remains true to its word and sentencing reform does not become another unfunded mandate devolved to the counties.

The bill also included language changing the composition of the corrections commission which governs a multi-jurisdictional correctional center. CCAO had been seeking these changes for several years.

This CAB will highlight several of the critical principals of sentencing reform and will then present issues that could have an impact on a county's management of its criminal justice system.

PRINCIPLES OF SENTENCING REFORM & JUSTICE REINVESTMENT

PRISON POPULATION REDUCTION

HB 86, as enacted, makes changes to Ohio's felony sentencing laws that would reduce the number of offenders in prison for violation of low to moderate level offenses. These offenders are to be directed towards a significantly increased offering of evidence-based community control sanctions. The result is to decrease the demand for prison beds as well as public funds allocated to operate the state prisons. Advocates of reform suggest that the concept of being "tough on crime" thereby has been strengthened to being "smart on crime."

Felony sentencing law changes made by HB 86 include increasing the felony threshold amount for theft-related offenses, vandalism, and engaging in a pattern of corrupt activities; removing the distinction between crack and powder cocaine; expanding the availability of earned credit to reduce an inmate's time in incarceration; and, expanding the opportunities for an inmate to be released early from a sentence. As noted above, the most relevant sentencing change for counties deals with the sentencing of first time non-violent F-4 and F-5 offenders.

A SINGLE VALIDATED RISK ASSESSMENT TOOL

DRC is required to select a "single validated risk assessment tool" for adult offenders to be used by all courts when ordering an assessment for sentencing or another purpose, probation departments, correctional facilities, the Adult Parole Authority (APA), and the Parole Board (ORC 5120.114(A)). The assessment tool is called the Ohio Risk Assessment System (ORAS) and has been in research, development, validation and testing by the state for several years.

The ORAS uses evidence-based analysis to assess the likelihood that the individual to which it was administered will re-offend and identify appropriate programming which should lead to reducing the risk of recidivism. This is a major policy shift that emphasizes reliance upon statistical research and analysis regarding the criminogenic tendencies of offenders and community control sanctions which have been developed through evidence-based research.

PROBATION MANAGEMENT

The sentencing reform legislation also seeks to improve the management of probation departments and apply the concepts of best practices to their operation. HB 86 establishes a hiring process a judge must follow to hire a chief probation officer, requires the Adult Parole Authority of DRC (APA) to develop minimum standards for probation officers in consultation and collaboration with the Ohio Supreme Court, and provides for the state-wide collection of probation department statistics.

HB 86 creates two grant funding programs to aid probation departments in improving their operation and reducing the recidivism of the probationers under their supervision. Funding for these grants is to come from the same line items as funding for community corrections programs.

COMMUNITY CORRECTIONS ACT GRANT PROGRAMS – ORC 5149.31

The Community Corrections Act (CCA) provides state grant funding to local communities for felony prison diversion and misdemeanor jail diversion programs. Program guidelines are contained in ORC Section 5149.31, and funding is from line items 407 and 408 in DRC's

budget. In anticipation of the enactment of sentencing reform, HB 153 - the biennial state budget bill, increased the 407 prison diversion line item from the FY 2011 level of \$22.4 million to \$25.8 million for FY 2012 and FY 2013 and the 408 jail diversion line item from the FY 2011 level of \$11.3 million to \$14.9 million for FY 2012 and FY 2013. This is an increase of about \$7 million a year. According to information from DRC, the 407 line item currently supports 61 programs in 49 counties providing sanctions for nearly 10,800 offenders. The 408 line item funds 121 programs in 82 counties providing alternatives to confinement for around 20,500 offenders.

FUNDING ELIGIBILITY - ORC 5149.32

HB 86 adds an additional requirement for a county to be eligible for CCA funding. The requirements now include:

1. Maintaining programs that meet standards adopted by DRC for CCA grant funding.
2. Demonstrating that the county has made efforts to unify or coordinate its correctional service programs through consolidation, written agreements, purchase of service contracts, or other means.
3. Demonstrating that its comprehensive plan, as adopted under ORC Section 5149.34, has been approved by the director of DRC.
4. If a grant was received in any prior fiscal year, demonstrating that the subsidy was expended in a good faith effort to improve the quality and efficiency of its community corrections programs and to reduce the number of persons committed to state correctional institutions, local jails, or workhouses
5. The NEW requirement: Delivering programming that addresses the assessed needs of high risk offenders as established by the ORAS and that may be delivered through available and acceptable resources within political subdivisions or through DRC.

HB 86 also has placed two new qualifying factors upon the awarding of CCA grant funding:

1. The county applying must satisfy all applicable requirements for establishment and operation of a county probation department (See below: COUNTY PROBATION DEPARTMENT REQUIREMENTS).
2. The court must utilize the ORAS.

DRC, however, is mandated to give a grantee in noncompliance with these two requirements a reasonable period of time to come into compliance. If the noncompliant grantee does not become compliant after such time, the department is required to either reduce or eliminate the grant funding (ORC 5149.31(B)(1) and (2)).

DRC is no longer required to discontinue a grant if the grantee is found to have "supplanted" local or federal funds or used grant funds for capital improvements (ORC 5149.33).

LOCAL CORRECTIONS PLANNING BOARD - ORC 5149.34(A)

In order for a county to receive CCA prison or jail diversion program funding under ORC Section

5149.31, the county must have a local corrections planning board. This board is established by resolution of the board of commissioners. HB 86 requires the expansion of this board.

Current members of the board are:

1. A county commissioner.
2. A judge of the court of common pleas.
3. A judge of a municipal court or county court.
4. A criminal defense attorney.
5. The chief law enforcement officer of the largest municipal corporation.
6. The county sheriff.
7. One or more prosecutors.
8. An administrator of a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse located in the county.
9. One or more representatives of the public, one of whom shall be a victim of crime.
10. One or more additional representatives of the law enforcement community.
11. One or more additional representatives of the judiciary.
12. One or more additional representatives of the field of corrections.
13. Officials from the largest municipal corporation located in the county.

The following members, or their designee, are added to the local corrections planning board by HB 86:

1. The executive director of the board of alcohol, drug addiction, and mental health services serving that county, or the executive directors of both the community mental health board and the alcohol and drug addiction services board, whichever is applicable.
2. The executive director of the county board of developmental disabilities.
3. An administrator of a halfway house serving that county, if any.
4. An administrator of a community-based correctional facility, if any, serving the court of common pleas of the county.
5. An administrator of a community corrections act-funded program in that county, if any.

Further requirements affecting the membership of the local corrections planning board include:

1. A majority of the members of the board are to be employed in the adult criminal justice field.
2. At least two members of the board are to be members of the largest racial minority population, if any, in the county.
3. At least two other members of the board are to be women.

The resolution passed by the commissioners must state the number and nature of the members, the duration of their terms, the manner of filling vacancies on the board, and the compensation, if any, that members are to receive. The commissioners also may specify, as part of the resolution, any other duties the local corrections planning board is to assume.

If, for good cause shown, including, but not limited to, the refusal of a specified individual to serve on a local corrections planning board, a particular county is not able to satisfy the membership requirements for the composition of such a board, the director of DRC may waive the requirements to the extent necessary and approve a composition for the board that otherwise is consistent with the requirements.

COMPREHENSIVE PLAN – Local Corrections Planning Board - ORC 5149.34(B)

Each local corrections planning board is required to adopt a comprehensive plan for development, implementation, and operation of corrections services in the county. An initial plan must be developed within 18 months after the establishment of the board, and it must be revised from time to time thereafter. HB 86 requires that the plan include a description of the offender population's assessed needs as established by the ORAS with particular attention to high risk offenders, and the capacity to deliver services and programs within the county and surrounding region that address the offender population's needs.

The plan shall be adopted and revised after consideration has been given to the impact that it will have or has had on the populations of state correctional institutions and the various jails and workhouses located in the county. The plan also must be designed to unify or coordinate corrections services in the county and to reduce the number of persons committed to state prisons and to jails or workhouses within the county.

The plan and any revisions to the plan must be approved by board of county commissioners.

PROBATION IMPROVEMENT & PROBATION INCENTIVE GRANTS - ORC 5149.311

HB 86 creates two new grant categories for funding to support common pleas courts in their efforts to improve the operation and success of probation departments. DRC is required to establish and administer a Probation Improvement Grant and a Probation Incentive Grant. Funding for these grants comes from the 407 and 408 line items and, thus, will be competing for funding for CCA programs.

PROBATION IMPROVEMENT GRANT

The Probation Improvement Grant is to provide funding to common pleas court probation departments to adopt policies and practices based on the latest research on how to reduce the number of felony offenders on probation supervision who violate the conditions of supervision.

DRC's funding guidelines are to include a formula for the allocation of grants based on the number of felony offenders placed on probation annually in each jurisdiction.

PROBATION INCENTIVE GRANT

The Probation Incentive Grant is to provide a performance-based level of funding to common pleas court probation departments that are successful in reducing the number of felony offenders on probation supervision whose terms of supervision are revoked. DRC is to calculate annually any cost savings realized by the state from a reduction in the percentage of people who are incarcerated because their terms of supervised probation were revoked. The cost savings estimate is calculated for each county and is based on the difference from FY 2010 and the fiscal year under examination. DRC funding guidelines are to include a formula for the allocation of the grants that reflects the success of the reduction in the percentage of people on probation who are incarcerated because their terms of supervision are revoked.

FUNDING STIPULATIONS APPLICABLE TO BOTH GRANT CATEGORIES:

The following stipulations apply to both program improvement grants and program incentive grants:

1. In order to be eligible for grant funding, the court must satisfy all applicable requirements for establishment and operation of a county probation department (See below: PROBATION SYSTEM REFORM), and it must utilize the ORAS.
2. DRC may deny a grant if the court fails to comply with the terms of any agreement entered into as a part of the grant documentation.
3. DRC is to evaluate the policies, practices, and programs the common pleas court probation departments utilize with the grant programs and establish means of measuring their effectiveness.
4. DRC is to specify the policies, practices, and programs for which common pleas court probation departments may use the program grant and must establish minimum standards of quality and efficiency that grantees must follow. DRC also must give priority to supporting evidence-based policies and practices, as defined by the department.

FIRST-TIME FELONY 4 OR FELONY 5 OFFENDER – PRESUMPTION AGAINST PRISON - ORC 2929.13(B) and Section 4 of the Act

HB 86 generally requires a sentence to a community control sanction of at least one year for offenders who are convicted of or plead guilty to an F-4 or F-5 that is not an offense of violence if:

1. The offender previously has not been convicted of or pleaded guilty to a felony offense or to a misdemeanor offense of violence committed within two years prior to the offense for which sentence is being imposed.
2. The most serious charge against the offender at the time of sentencing is an F-4 or F-5.
3. The court found there was no appropriate local community sanction available and notified DRC, and DRC then provided the court with information about one or more

community control sanctions of at least one year that are available for persons sentenced by the court.

The court retains discretion to impose a prison term on the offender, however, if:

1. The offender committed the offense while armed with a firearm.
2. The offender caused physical harm to another person while committing the offense.
3. The offender violated a term of the conditions of bond as set by the court.
4. The court made a request to DRC seeking a placement in an appropriate community sanction and DRC could not provide information on an acceptable program.

A court sentencing an offender for an F-4 or F-5 that is not an offense of violence that believes no community control sanctions are available for its use that, if imposed on the offender, will adequately fulfill the overriding principles and purposes of sentencing, is obligated to contact DRC and request DRC to provide the court with the names, contact information, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court. Not later than 45 days after receipt of the request, DRC must provide the court with the requested information, if any. Upon making such a request that relates to a particular offender, a court must defer sentencing of that offender until it either receives a response from DRC or the 45 day time period expires.

If DRC provides the court with an appropriate community control sanction, the court must sentence the offender to that program. If, however, DRC is unable to provide a community control sanction appropriate for the offender, the court may impose a prison term upon the offender.

PROBATION SYSTEM REFORM

SELECTION OF A CHIEF PROBATION OFFICER

Currently the selection of the chief probation officer is at the discretion of the judge. Under HB 86, when appointing a chief probation officer the court is now required to do all of the following (ORC 2301.27(A)(1)(b)):

1. Publicly advertise the position on the court's web site, including, but not limited to, the job description, qualifications for the position, and the application requirements.
2. Conduct a competitive hiring process that adheres to state and federal equal employment opportunity laws.
3. Review applicants who meet the posted qualifications and comply with the application requirements.

MINIMUM TRAINING STANDARDS FOR PAROLE OFFICERS

While courts currently cannot appoint as probation officer any person who does not possess the training, experience, and other qualifications prescribed by the Adult Parole Authority (APA) of DRC, the responsibility of the APA has been strengthened to require that probation officers are

trained in accordance with a set of minimum standards established by the APA. The APA is to develop these minimum standards in consultation and collaboration with the Ohio Supreme Court and must have them completed within six months after the effective date of HB 86, which would be April 1, 2012 (ORC 2301.271).

DEPARTMENT SUPERVISION RULES

HB 86 also requires a county probation department to expand the scope of its supervision rules to specifically establish policies regarding the supervision of probationers that are to include, but not be limited to (ORC 2301.30):

1. The minimum number of supervision contacts required for probationers, based on each probationer's risk to reoffend as determined by the ORAS under which higher risk probationers receive the greatest amount of supervision.
2. A graduated response policy to govern which types of violations a probation officer may respond to administratively and which type require a violation hearing by the court.

PROBATION DEPARTMENTS STATISTICAL DATA

The Justice Reinvestment Project research discovered that in Ohio there is no centralized data collection from the various probation departments across the state. In order to begin to obtain this information, the General Assembly, in HB 86, asked the Ohio Supreme Court to adopt a Rule of Superintendence that requires courts to report each month on statistical data relating to the operation of probation departments, providing at a minimum the following information:

1. A count of the number of individuals placed on probation.
2. A count of the number of individuals terminated from probation, listed by type of termination, including revocation.
3. The total number of individuals under supervision on probation at the end of the month covered by the report.

TRAINING FOR PERSONS ADMINISTERING OR USING ORAS

Any person that is required to use the ORAS must be trained and certified by a trainer who is certified by DRC. Each entity utilizing the ORAS also must develop policies and protocols regarding application and integration of the assessment tool into operations, supervision, case planning, administrative oversight of the use of the assessment tool, staff training, quality assurance, data collection and sharing (ORC 5120.114(B)). Any authorized user of the ORAS is entitled to have access to all reports generated by and all data stored in the assessment tool. All reports generated by or data collected by the ORAS are confidential information and not a public record (ORC 5120.115).

COMMUNITY BASED CORRECTIONS FACILITIES [CBCFs]

The rule making authority of DRC has been expanded with respect to CBCFs. Currently rules primarily relate to the management of a CBCF facility and regard operating criteria, procedures for the submission of proposals for the establishment of a CBCF, and forms that are to be used by facility governing boards of CBCFs when making application for state financial assistance.

DRC also now will govern the type of individuals who may be admitted to a CBCF. DRC is to develop standards that specify the class of offender that is suitable for admission to a CBCF based upon that individual's degree of felony, community control sanction revocation history, or risk level as assessed by the ORAS. The rules must make the level of state financial assistance provided to every facility contingent upon the number of offenders admitted to the facility each fiscal year who satisfy the admission suitability standards established by DRC (ORC 5120.111(D)).

TRANSFER OF PRISONERS FROM AN OHIO BORDER COUNTY TO A CONTIGUOUS COUNTY IN ANOTHER STATE - ORC 341.12

HB 86 expands the authorization for a sheriff in an Ohio border county to transfer any prisoner who is charged with the commission of an offense, sentenced to imprisonment in the county jail, or in custody upon civil process (contempt proceedings) to a jail in a contiguous county in an adjoining state. Currently these counties may only transfer a prisoner who has been charged with an offense and is being held in the county jail pending trial to a facility in a contiguous county in an adjoining state.

COMMUNITY ALTERNATIVE SENTENCING CENTERS – ORC 307.932

HB 86 creates a new section of law that provides for the establishment and operation by counties of community alternative sentencing centers. These centers are for confining misdemeanants who are sentenced directly to the centers by the court under a community residential sanction imposed under state law or a municipal ordinance not exceeding 30 days or under a term of confinement for an OVI offense (including an OVI offense together with an adjunct offense of driving under an OVI suspension) imposed under state law or a municipal ordinance not exceeding 60 days (ORC 2929.26, and 2929.34).

The board of county commissioners of any county or two or more adjoining or neighboring counties, in consultation with the sheriff of the county or counties, may adopt a resolution/s proposing a community alternative sentencing center. The resolution must include rules for the operation of the center, including criteria to define which offenders are eligible to be sentenced directly to the center and admitted to it. A board of commissioners may either dissolve the center or terminate its involvement with other counties in a center by adopting a resolution stating its intent to do so. No time frame is specified for when the action expressed in the resolution becomes effective.

CORRECTIONS COMMISSIONS - ORC 307.93

Judges will no longer be members of a corrections commission that oversees the administration of a multicounty, municipal-county, or multicounty-municipal correctional center. Also, the requirement that the president of the board of county commissioners be the commissioners' representative has been eliminated. This leaves as correction commission members the sheriff and a member of the board of county commissioners of each participating county, and the chief of police and mayor or city manager of each participating municipal corporation. The law also was changed to require that the standards and procedures formulated by the commission must include the designation of a fiscal agent.

Rather than serving as members of the corrections commission, judges will now form a judicial advisory board for the purpose of making recommendations to the corrections commission regarding issues of bed allocation, expansion of the correctional center, and other issues

concerning the administration of sentences or any other matter determined to be appropriate by the judicial advisory board. The judicial advisory board shall meet with the corrections commission at least once each year. As an interesting note if the number of the judges is even, then county auditor or the county auditor of the most populous county, if the board serves more than one county, becomes a member of the judicial advisory board.

COMMISSIONERS INVOLVEMENT

Because of the significant changes resulting from the enactment of HB 86 commissioners may wish to do several things:

1. Consult with the leadership of your local corrections planning board regarding the board's composition and its efforts to review the current comprehensive plan in light of the sentencing reform provisions. The Board of Commissioners is ultimately responsible for approving this plan.
2. Discuss with your common pleas judges and their court administrator how they anticipate court operations and budgets will be impacted by the provisions of HB 86, specifically in the areas of:
 - a. The presumption that non-violent F4s and F5s are to remain in the community under community sanctions and what changes will be necessary to comply with the new sentencing guidelines.
 - b. Review of current community sanctions/programs and their incorporation of evidence based practices.
 - c. Probation department management, staffing, training, and grant funding.
 - d. Presentence investigation and report writing.
 - e. Use of the ORAS.
 - f. Current CCA funded programs and ideas for future funding requests.
3. Meet with your local CBCF director regarding anticipated changes to the CBCF population and the programs it will be providing
4. For those counties participating in a regional jail designate the commissioner member you wish to serve on the corrections commission and meet with your sheriffs and your multi-county jail director to discuss transition for the commission's reorganization and the formation of the judicial advisory board.