STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COUNTY OF VOLUSIA,

Petitioner,

and

DUVAL COUNTY/CITY OF JACKSONVILLE,

Intervenor,

vs. Case No. 14-2799RP

DEPARTMENT OF JUVENILE JUSTICE,

Respondent.
_____/

BROWARD COUNTY, FLORIDA,

Petitioner,

and

DUVAL COUNTY/CITY OF JACKSONVILLE,

Intervenor,

vs. Case No. 14-2800RP

DEPARTMENT OF JUVENILE JUSTICE,

Respondent.
_____/

FLORIDA ASSOCIATION OF COUNTIES, ALACHUA COUNTY, BAY COUNTY, BREVARD COUNTY, CHARLOTTE COUNTY, COLLIER COUNTY, ESCAMBIA COUNTY, FLAGLER COUNTY, HERNANDO COUNTY, HILLSBOROUGH COUNTY, LAKE COUNTY, LEE COUNTY, LEON COUNTY, MANATEE COUNTEE, ET AL.,

Petitioners,

and

DUVAL COUNTY/CITY OF JACKSONVILLE,

Intervenor,

vs. Case No. 14-2801RP

DEPARTMENT OF JUVENILE JUSTICE,

Respondent.
_____/

ORANGE COUNTY, FLORIDA,

Petitioner,

and

DUVAL COUNTY/CITY OF JACKSONVILLE,

Intervenor,

vs. Case No. 14-4512RP

DEPARTMENT OF JUVENILE JUSTICE,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal administrative hearing was held in this case on November 12 and 13, 2014, in Tallahassee, Florida, before W. David Watkins, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For All Petitioners and Intevenors Except Broward, Orange, and Volusia Counties:

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STATEMENT OF THE ISSUES

This is a rule challenge brought pursuant to section 120.56, Florida Statutes,[1/] to the Proposed Rules of the Department of Juvenile Justice ("Department" or "DJJ") 63G-1.011, 63G-1.013, 63G-1.016, and 63G-1.017 (the "Proposed Rules"). The main issue in this case is whether the Proposed Rules are an invalid exercise of delegated legislative authority in that the Proposed Rules enlarge, modify, or contravene the specific provisions of law implemented, section 985.686, Florida Statutes; are vague; and/or are arbitrary and capricious. Petitioners also argue that the Proposed Rules impose regulatory costs that could be addressed by the adoption of a less costly

alternative. Finally, Petitioners assert that the Proposed Rules apply an invalid interpretation of the General Appropriations Act ("GAA") for Fiscal Year ("FY") 2014-15 by interpreting the GAA as a modification to substantive law, contrary to the Constitution of the State of Florida.

PRELIMINARY STATEMENT

Twenty-seven counties and the Florida Association of Counties (the Challengers) have filed petitions challenging the Proposed Rules. The petitioning counties include: Alachua County; Bay County; Brevard County; Broward County; Charlotte County; Collier County; Escambia County; Flagler County; Hernando County; Hillsborough County; Lake County; Lee County; Leon County; Manatee County; Martin County; Nassau County; Okaloosa County; Orange County; Palm Beach County; Pinellas County; Santa Rosa County; St. Johns County; St. Lucie County; Sarasota County; Walton County; and Volusia County. Duval County/City of Jacksonville filed a Petition to Intervene, which was granted.

At the final hearing, the Challengers' exhibits 1-92 were admitted in evidence, including the deposition transcripts of witnesses Jason Welty, Fred Schuknecht, Vickie Harris, the Honorable Judge Terrill J. LaRue (expert), and Minnora Bishop. Excerpts of the testimony of Mr. Welty and Mr. Schuknecht were published during the hearing. In addition, Petitioners

presented the testimony of James Alexander Kelly, Frank A. Orlando (expert), Richard Edward Herring (expert), and Mark Greenwald. At the outset of the hearing the Challengers' Request for Official Recognition of two Division of Administrative Hearings (DOAH) Orders and two First District Court of Appeal opinions was granted.

Department Exhibits 1 and 3 were admitted, including the deposition of Bonnie Rogers. The Department also presented the testimony of Mr. Schuknecht and Ms. Bishop.

A Joint Pre-Hearing Stipulation of the parties was filed prior to the final hearing, stipulating to certain facts which are admitted and issues of law on which there is agreement. To the extent they are relevant those admitted facts and issues of law have been incorporated herein.

The three-volume Transcript of the final hearing was prepared and filed with DOAH on December 8, 2014. At the request of Petitioners, the time for filing proposed final orders was extended to February 2, 2015. Thereafter, the parties timely submitted Proposed Final Orders, which have been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

I. The Parties

1. The Department is the state agency responsible for administering the cost-sharing requirements in section 985.686, Florida Statutes, for juvenile detention care.

2. The challenging counties are political subdivisions of the State of Florida and are non-fiscally constrained counties subject to the cost-sharing requirements of section 985.686.

3. The challenging counties are substantially affected by the application of Florida Administrative Code Rules 63G-1.010 through 63G-1.018, including the Proposed Rules. It was stipulated that the challenging counties' alleged substantial interests are of the type these proceedings are designed to protect.

4. Petitioner, Florida Association of Counties ("FAC"), is a statewide association and not-for-profit corporation organized and existing under chapter 617, Florida Statutes, for the purpose of representing county government in Florida and protecting, promoting, and improving the mutual interests of all counties in Florida.

5. All of the 67 counties in Florida are members of FAC, and the Proposed Rules regarding Detention Cost Share affect all counties. Of the 67 counties in Florida, 35 are considered non-fiscally constrained, and are billed by the Department for their

respective costs of secure detention care, as determined by the Department; 27 of these counties are participating alongside FAC in these proceedings.

6. The subject matter of these proceedings is clearly within FAC's scope of interest and activity, and a substantial number of FAC's members are adversely affected by the Proposed Rules.

7. The challenging counties, and FAC, participated in the various rulemaking proceedings held by the Department related to the Proposed Rules, including rule hearings held on June 6, 2014, and August 5, 2014.

II. Rule Making

8. The initial version of the Proposed Rules was issued, and a Rule Development Workshop was held on March 28, 2014. Numerous challenging counties submitted comments on the Proposed Rules either prior to, or at the Rule Development Workshop.

9. On May 15, 2014, the Department published Proposed Rules 63G-1.011, 1.013, 1.016, and 1.017 in the Florida Administrative Register. In that Notice, the Department scheduled a hearing on the Proposed Rules for June 6, 2014.

10. On June 6, 2014, a rulemaking hearing was held on the Proposed Rules. Numerous challenging counties submitted comments to the Proposed Rules either prior to, or at the hearing.

11. A supplemental rulemaking hearing was held on August 5, 2014. Again, numerous challenging counties submitted comments regarding the Proposed Rules either prior to, or at the supplemental rulemaking hearing.

12. On September 5, 2014, the Department advertised its Notice of Change as to the Proposed Rules. Thereafter, all parties to this proceeding timely filed petitions challenging the Proposed Rules.

13. A statement of estimated regulatory costs ("SERC") was not originally prepared by the Department.

14. In the rulemaking proceedings before the Department, Bay County submitted a good faith written proposal for a lower cost regulatory alternative. In its proposal, Bay County asserted that the Department's own stipulations signed by the agency are competent substantial evidence that the agency has a "less costly alternative" to the approach taken in the Proposed Rules, by assessing the costs of all detention days for juveniles on probation status to the state, and not the counties.[2/] As Bay County noted in the proposal, the Department previously had agreed to assume all of the cost of detention days occurring after a disposition of probation.

15. Following the June 6, 2014, hearing, the Department issued a SERC for the Proposed Rules. Ultimately, the Department rejected the lower cost regulatory alternative

proposed by the counties "because it is inconsistent with the relevant statute (section 985.686, F.S.), fails to substantially accomplish the statutory objective, and would render the Department unable to continue to operate secure detention."

III. The Implemented Statute

16. The Proposed Rules purport to implement section 985.686, which provides that each county is responsible for paying the costs of providing detention care "for juveniles for the period of time prior to final court disposition." § 985.686(3), Fla. Stat.

17. The statute establishes a cost-sharing system whereby each non-fiscally constrained county is required to be individually provided with an estimate of "its costs of detention care for juveniles who reside in that county for the period of time prior to final court disposition," based on "the prior use of secure detention for juveniles who are residents of that county, as calculated by the department." § 985.686(5), Fla. Stat. (emphasis added).

18. Each county must pay the estimated costs at the beginning of each month. At the end of the state fiscal year, "[a]ny difference between the estimated costs and actual costs shall be reconciled." Id.

19. The Department is responsible for administering the cost-sharing requirements and is authorized to adopt rules as set forth in section 985.686(11).

20. In general, the Proposed Rules provide definitions including for pre and postdisposition, provide for calculating the estimated costs, for monthly reporting, and for annual reconciliation. Specific changes will be discussed in detail below. The complete text of the Challenged Rules, showing the proposed amendments (in strike-through and underlined format) is attached hereto as Appendix A.

IV. The Prior Rule Challenge

21. On July 16, 2006, the Department promulgated Florida Administrative Code Rules 63G-1.002, 63G-1.004, 63G-1.007, and 63G-1.008, among others, setting forth the definitions and procedures for calculating the costs as between the state and the various counties. These rules were repealed as of July 6, 2010, and in their place, the Department adopted rules 63G-1.011, 63G-1.013, 63G-1.016, and 63G-1.017. Although the previous rules defined "final court disposition," for purposes of determining the counties' responsibility for providing the costs of secure detention, the 2010 rules replaced this with a definition of "commitment," so that the state was only responsible for days occurring after a disposition of commitment. This had the effect of transferring the

responsibility for tens of thousands of days of detention from the state to the counties. In addition, the 2010 rules failed to provide a process by which the counties were only charged their respective actual costs of secure detention.

22. In 2012, several counties challenged rules 63G-1.011, 63G-1.013, 63G-1.016, and 63G-1.017 as an invalid exercise of delegated legislative authority because these rules replaced the statutory dividing line for the costs of secure detention with "commitment," and because the rules resulted in the overcharging of counties for their respective actual costs of secure detention. On July 17, 2012, a Final Order was issued by the undersigned which agreed with the counties and found that the rules were an invalid exercise of delegated legislative authority. Okaloosa Cnty., et al. v. Dep't of Juv. Just., DOAH Case No. 12-0891RX (Fla. DOAH July 17, 2012). On June 5, 2013, this ruling was affirmed on appeal. Dep't of Juv. Just. v. Okaloosa Cnty., 113 So. 3d 1074 (Fla. 1st DCA 2013) ("2012 Rule Challenge").

V. The Department's Response to the 2012 Rule Challenge

23. No changes to the Department's practices were made after the Rule Challenge Final Order was released in 2012. Rather, changes were not made until after the Rule Challenge decision was affirmed on appeal in June 2013. Shortly after the opinion was released by the First District Court of Appeal, the

Department modified its policies and practices to conform with its interpretation of the requirements of that opinion, and informed the counties that "all days for youth in detention with a current placement of probation or commitment belong to the state." At this time, the Department determined that "by their nature all VOPs [violations of probation] are attached to charges that have a qualified disposition and thus are a state pay."

24. In response to the appellate court decision, the Department implemented and published to the counties its interpretation that the counties were only responsible for detention days occurring prior to a final court disposition, and were not responsible for detention days occurring after a juvenile has been sentenced to commitment or probation, or is waiting for release after a dismissal of the charge. A statement to this effect was developed by the Department with input from multiple staff, and was to be a "clear bright line" setting "clear parameters" and a "final determination" that the Department could share with those outside the agency. However, no rules were developed by the Department at this time.

25. In July 2013, the Department revised its estimate to the counties for Fiscal Year ("FY") 2013-14 from what had been issued (previously). This revised estimate incorporated the Department's analysis that included in the state's

responsibility any detention days for youth in detention with a current placement of probation or commitment, or where the charges against the youth had been dismissed. The revised estimate also excluded these days from the collective responsibility of the counties, including detention days resulting from a new law violation of probation.

26. At the time of the 2012 Rule Challenge, several counties had pending administrative challenges to the Department's reconciliations for FYs 2009-10, 2010-11, and 2011-12. In September 2013, the Department issued recalculations of its final reconciliation statements to the counties for FYs 2009-10, 2010-11, and 2011-12. The recalculations were based upon the Department's revised policies and practices and included in the state's responsibility any detention days for youths in detention with a current placement of probation or commitment, or where the charges against the youth had been dismissed, and similarly excluded detention days resulting from a new law violation of probation. This resulted in large overpayments from the non-fiscally constrained counties to the state for these fiscal years. These recalculations were not merely an internal exercise, but rather were intended to notify the counties what they had overpaid for the fiscal years at issue, and were published and made available to the counties and public at large on the Department's website.

27. In December 2013, the Department entered into stipulations of facts and procedure to resolve three separate administrative proceedings related to final reconciliation amounts for FYs 2009-10, 2010-11, and 2011-12. Those stipulations of facts and procedure included the following definitions:

> 27. The parties agree that "Final Court Disposition" as contained in section 985.686, Florida Statutes, and based on the decision of the First District Court of Appeal, means a disposition order entered by a court of competent jurisdiction, including an order sentencing a juvenile to commitment to the Department, or other private or public institution as allowed by law, placing the juvenile on probation, or dismissing the charge.
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> 28. The parties further agree that a "Pre-dispositional Day" means any secure detention day occurring prior to the day on which a Final Court Disposition is entered. A pre-dispositional day does not include any secure detention day after a juvenile has been sentenced to commitment or placed on probation, or is waiting for release after dismissal of a charge.

(Petitioner's Ex. 26)

28. In addition to the above stipulations, the Department also stipulated to its recalculated amounts for each of these years, resulting in large overpayments from the counties. However, the Department refused to provide credits for these overpayment amounts.

29. In November and December 2013, the Department issued a final reconciliation statement and revised final reconciliation statement to the counties for FY 2012-13, which included in the state's responsibility any detention days for youth in detention with a current placement of probation or commitment, or where the charges against the youth had been dismissed, and likewise excluded these days from the collective responsibility of the counties, including detention days resulting from a new law violation of probation. Under the Department's reconciliation statement for FY 2012-13, the counties were collectively funding approximately thirty-two percent (32%) of the costs of secure juvenile detention.

30. The Department also submitted its legislative budget request for FY 2014-15 in October 2013. This legislative budget request was based on the Department's independent judgment as required by sections 216.011 and 216.023, Florida Statutes,[3/] and excluded from the counties' collective responsibility all detention days relating to a violation of probation, including for a new substantive law violation. The request provided that "the department may only bill the counties for youth whose cases have not had a disposition either to commitment or probation." The request also notes a shift in the counties' collective obligations from 73 percent of the total costs to 32 percent of

these costs "in order to bring the budget split in line with the June 2013 ruling by the First District Court of Appeal."

31. Under this interpretation, the Department projected a $35.5 million deficiency in its budget for FY 13-14 and requested an $18.4 million appropriation for detention costs from the Legislature. This request was funded in the General Appropriations Act for 2014-15. The Department did not ask for additional funding for past years that had been challenged by the counties. At this same time, a projection for the deficit for FY 2014-15 was developed by the Department staff based on the same interpretation of the state's responsibility for detention days. There was no objection from the Department's Secretary or the Governor's Office to this interpretation of the state's responsibility.

VI. Change in Interpretation Re New Law Violation

32. Fred Schuknecht, then - Chief of Staff of the Department, testified that in response to the opinion of the First District Court of Appeal in June 2013, the Department adopted a broad interpretation of the ruling that final court disposition meant commitment, and also included all secure detention days incurred by probationers as postdisposition days. This included detention days for youths already on probation who committed new offenses and were then detained as a result of the

new offense or because of the violation of probation resulting from the commission of the new offense.

33. During the budgeting process for the 2014-15 Fiscal Year, the Department altered its interpretation of the 2012 Rule Challenge decision, and its newly-established practice relating to payment for all detention days involving probationers. The Department now proposes, through the challenged rules, to shift to the counties the responsibility for detention days occurring after a final court disposition of probation where there is a new law violation. Although the challengers assert that the changed interpretation was driven by the budget proposal submitted by the Governor's Office in January 2014 (which did not utilize the Department's prior interpretation) the Department specifically contends that it did not change its official position on this interpretation until the adoption of the state budget by the General Appropriations Act (GAA) in June 2014.

34. While the Department stated it made its initial broad interpretation because it was "under the gun" to issue its cost sharing billing for FY 2013-2014 within two weeks of the appellate opinion, the Department continued to assert that interpretation in September 2013, when it published recalculations for FYs 2009-2010, 2010-2011, 2011-2012. Further, Mr. Schuknecht conceded that this interpretation had

not changed at the time the Department's legislative budget request was submitted in October 2013, or in November and December 2013, when the Department issued the reconciliation and revised reconciliation for FY 2012-2013. Likewise, this interpretation formed the basis for the stipulations signed by the counties and Department in December 2013. At hearing, testimony established that the Department's interpretation that the state was responsible for all days of detention for probationers was formed after frequent discussions on this topic and with input from multiple staff involved in cost sharing, including Mr. Schuknecht (Director of Administration at that time), Vickie Harris (Budget Director), Mark Greenwald (Director of Research and Planning), the Chief of Staff, Deputy Secretary, the legal team, as well as the Department's Secretary.

35. For FY 2014-15, the Executive Office of the Governor proposed a recommended budget which was contrary to the Department's initial interpretation, and included within the counties' collective responsibility those detention days for a youth on probation charged with a new substantive law violation. This recommended budget proposed that the counties would be responsible for fifty-seven percent (57%) of the shared costs of secure detention, and that the state would be responsible for forty-three percent (43%). This is in contrast to the thirty-two percent (32%) the counties were paying under the

Department's initial interpretation of the Rule Challenge Decision.

36. The Governor's Office then asked the Department to amend its earlier submitted legislative budget request, to reflect the Governor's budget because it wanted the Department's request to match.

37. Although the GAA for FY 2014-15 incorporated a cost-sharing split similar to that included in the Governor's proposal, it differed from the governor's budget recommendation. It was not until June 2014, when the GAA was adopted into law, that the Department asserts it officially changed positions. As stipulated by the parties, there is no language in the GAA for FY 2014-15 setting forth the policy behind the budget split for secure detention.

38. The Proposed Rules differ from the Department's initial interpretation of the requirements of the Rule Challenge decision and its earlier established policies and procedures regarding the same as implemented in June 2013, through at least early 2014. The interpretation set forth in the Proposed Rules results in a lessened budgetary impact on the state by shifting more detention days to the counties.

39. At hearing, Mr. Schuknecht testified as to the rationale for the Department's changed interpretation regarding

the counties' responsibility for detention days for a youth on probation charged with a new substantive law violation:

> Q. If you would, Mr. Schuknecht, please kind of talk about the highlights of that rule, and especially in relationship to the Court's ruling in the previous rule challenge.
>
> A. Basically how we got here is, in June of 2013, the First DCA ruled basically supporting the – DOAH's hearing, the final court disposition prior to that. Basically we determined the final court decision meant commitment. They said it can't be just commitment. So at that time we took the broadest interpretation as well will actually include all probationers as part of the final court disposition and they would be post-disposition days.
>
> Subsequent to that, in effect, through the Governor's Office as well as the Legislature, as well as ourselves, we realized basically by doing that we are including probationers with new offenses as post-disposition cases which, in effect, makes no sense.
>
> It's logical that they be pre-disposition cases because there is no disposition on those cases with new offenses. Plus probationers would only be in detention because they have new cases. They wouldn't be there otherwise. So, in fact, that's how we – so that's the main change in the rule, in effect, defining what pre-disposition means.

40. Mr. Schuknecht's explanation for the Department's changed interpretation is consistent with the explanation given by Jason Welty, the Department's previous Chief of Staff, during

the June 6, 2014, Workshop, that "the Department's original interpretation was, quite frankly, in error."

VII. Cost of Detention Days for Juveniles on Probation

41. The Challengers contend that all days in detention served by a juvenile on probation are the responsibility of the state, and not the counties. Accordingly, the Challengers contest the Department's Proposed Rules which assign responsibility for detention days of juveniles with new law violations to the counties, and not the state.

42. Much of the testimony and argument at the hearing focused on the Department's definitions for predisposition and postdisposition, and how these definitions apply as to youth on probation status with the Department. These definitions are crucial, as they relate to how the costs are split amongst the state and the counties. Only the costs of predisposition detention days may be billed to the counties under section 985.686.

43. Final court disposition is specifically defined by the Proposed Rules as the "decision announced by the court at the disposition hearing" including "commitment, probation, and dismissal of charges." "Predisposition" is further defined as the "period of time a youth is in detention care prior to entry of a final court disposition." Proposed Rule 63G-1.011(14). "Postdisposition" on the other hand, means "the period of time a

youth is in detention care after entry of a final court disposition." Proposed Rule 63G-1.011(15). However, the definitions do not stop with this general language. Proposed Rule sections 63G-1.011(14)(b) and (15)(b) provide that it is the counties' responsibility to fund the costs for days when a youth is on probation and is charged with a new law violation. These definitions are implemented through the Proposed Rules relating to the estimate and reconciliation processes.

44. The Department argues that youth who are on probation and commit new offenses may be held in secure detention for the new offense but cannot be legally held in secure detention on the underlying violation of probation. However, the Department's position would appear to be counter to the express language of several statutory provisions.

45. Section 985.439(4) provides in relevant part:

> (4) Upon the child's admission, or if the court finds after a hearing that the child has violated the conditions of probation or postcommitment probation, the court shall enter an order revoking, modifying, or continuing probation or postcommitment probation. In each such case, the court shall enter a new disposition order and, in addition to the sanctions set forth in this section, may impose any sanction the court could have imposed at the original disposition hearing. If the child is found to have violated the conditions of probation or postcommitment probation, the court may:
>
> (a) Place the child in a consequence unit in that judicial circuit, if available, for

> up to 5 days for a first violation and up to 15 days for a second or subsequent violation.
>
> (b) Place the child in nonsecure detention with electronic monitoring. However, this sanction may be used only if a residential consequence unit is not available.
>
> (c) If the violation of probation is technical in nature and not a new violation of law, place the child in an alternative consequence program designed to provide swift and appropriate consequences to any further violations of probation.

46. Neither statute nor Department rules define what is meant by a "technical" violation of probation. However, retired juvenile court judge Frank A. Orlando, accepted as an expert in juvenile detention issues, explained at hearing that:

> A technical violation in my opinion is something that doesn't involve a law violation. It is a condition of probation. It would be a curfew. It could be going to school. It could be staying away from a family, a victim, or staying away from a place. It could be not obeying the probation officer, him or herself. In that sense they are technical violations of probation, but they are both violation of probation.

47. In addition, section 985.101(1) provides that a juvenile may be "taken into custody" under chapter 985 for, among others, "a delinquent act or violation of law, pursuant to Florida law pertaining to a lawful arrest," and "[b]y a law enforcement officer who has probable cause to believe that the child is in violation of the conditions of the child's

probation, home detention, postcommitment probation, or conditional release supervision; has absconded from nonresidential commitment; or has escaped from residential commitment." § 985.101(1)(b), (d), Fla. Stat. However, this provision also expressly provides that "[N]othing in this subsection shall be construed to allow the detention of a child who does not meet the detention criteria in part V."

48. Part V of the Act includes section 985.255, which sets forth the detention criteria, and provides in pertinent part:

> (1) Subject to s. 985.25(1), a child taken into custody and placed into secure or nonsecure detention care shall be given a hearing within 24 hours after being taken into custody. At the hearing, the court may order continued detention if:
>
> (a) The child is alleged to be an escapee from a residential commitment program; or an absconder from a nonresidential commitment program, a probation program, or conditional release supervision; or is alleged to have escaped while being lawfully transported to or from a residential commitment program.

49. Thus, the undersigned is persuaded that sections 985.439(4), 985.101(1), and 985.255 all support a finding that a violation of probation, not associated with a new violation of law, may under some circumstances result in a new disposition of secure detention. However, pursuant to the Proposed Rules, under these circumstances the state would continue to be responsible for the cost of the secure detention.

50. As explained at hearing, there is an idiosyncrasy in chapter 985 regarding secure detention for juveniles who have been charged with a violation of probation or violating a term of their conditional release. Under chapter 985, a child taken into custody for violating the terms of probation or conditional release supervision shall be held in a consequence unit. If a consequence unit is not available, the child is to be placed on home detention with electronic monitoring. § 985.255(1)(h), Fla. Stat. These consequence units have not been funded by the Florida Legislature for a number of years. However, the juvenile justice system has found a practical method to accommodate the nonexistence of these "consequence units." For technical violations of probation, the courts often convert the violations of probation to a contempt of court, and will hold the juvenile in detention on this basis. This contempt of court procedure may also be used by the courts to detain a juvenile in secure detention for a violation of probation based on a new law violation.

51. Pursuant to section 985.037, a juvenile who has been held in direct or indirect contempt may be placed in secure detention not to exceed five days for the first offense, and not to exceed 15 days for a second or subsequent offense. As noted by Judge Orlando and Seventh Judicial Circuit Judge Terrill J. LaRue, an order to show cause for indirect criminal contempt

is the mechanism used to place a juvenile in secure detention for a violation of probation or conditional release.

52. In addition, the probation is a significant factor that weighs heavily into the Department's decision to securely detain the juvenile, and in large part determines whether the juvenile will be detained. For a youth who is on probation and is charged with a new substantive law offense, the Department, pursuant to its rules and policies, determines whether the youth will be detained in secure detention based on the Department's Detention Risk Assessment Instrument ("DRAI"). § 985.245, Fla. Stat.; rule 63D-9.002. Under the DRAI, if the child scores 0-7 points, the child is not detained; 7-11 points, the child is detained on home detention; for 12 points or more, the child is detained on secure detention.

53. For a youth who is on probation, the underlying charge for which that youth was placed on probation and/or the "legal status" of the youth itself will always be taken into account under the DRAI and will make secure detention significantly more likely than had the youth not been on probation on a number of fronts. This is also true for a youth on commitment status, in the case of conditional release. The highest scoring underlying charge may be used to assess the juvenile for probation if the new law violation does not score enough points for the juvenile to be securely detained. Therefore, there are days served in

secure detention based on the scoring of the underlying charge for which the juvenile is on probation, and not the new law violation.

54. In addition, there are a number of points resulting from the underlying charge for which the juvenile is on probation, regardless of whether the DRAI is scored on the new law violation or the underlying charge. A juvenile on probation will always get points purely for his or her legal status of probation. The number of points depends on the amount of time since the last adjudication or adjudication withheld. Six points is assigned for active probation cases with the last adjudication or adjudication withheld within 90 days. Two points are assigned if the last adjudication or adjudication withheld was more than 90 days ago. Similarly, the legal status of commitment, in the case of conditional release, also results in points towards secure detention. The prior adjudication or adjudication withheld which resulted in the probation or commitment status would also score points under the prior history section of the DRAI.

55. In many cases, the underlying charge for which the youth is on probation will be the deciding factor regarding whether the youth is held in secure detention. Thus, the DRAI is significantly affected by a probationary status which adds additional points, and can trigger secure detention, regardless

of the nature of the new law violation. In addition, a trial judge has the discretion to place a youth in secure detention on a violation of probation for committing a new law offense even when the score on the DRAI does not mandate secure detention.

56. The Juvenile Justice Information System ("JJIS") is an extensive database maintained by the Department, and utilized during the process of billing the counties for secure juvenile detention. The reason for the detention stay can be readily ascertained based on information entered into JJIS at the time a juvenile is assessed and detained. For instance, in the case of a violation of probation, there is always a referral for a violation of probation entered by the probation officer. This is true whether the violation is a new law violation or a technical violation of the terms of the probation. In addition, the Department can also ascertain from JJIS whether the juvenile was scored on the new law violation or, alternatively, the underlying charge which resulted in probation.

57. The Department concedes that it can determine, in any given instance, why a juvenile has been detained. As acknowledged by the Department, the responsibility for days, whether predisposition or postdisposition, should be based on the reason for the detention.

58. Probation is considered a postdisposition status. Likewise, detention days of juveniles on probation are

postdispositional, and the financial responsibility of the State. Under the Proposed Rules, the only exception are those instances in which a youth is on probation and is detained because the youth is charged with a new violation of law, in which case the detention days prior to final court disposition on the new charge are the responsibility of the counties.

59. This finding is further supported by the Department's treatment of juveniles on conditional release, which is also a postdispositional status. When a youth is on conditional release with the Department, the youth is on supervision similar to probation supervision. Conditional release and probation contain the same standard conditions. The only essential difference between a youth on "conditional release" and a youth on probation is that a youth on conditional release has the status of commitment rather than probation. There is no real difference in how a probation officer treats a youth on conditional release or a youth on probation and the DRAI does not provide any distinction for the two legal statuses. The Department considers both probation and conditional release qualified postdispositional statuses.

60. Under the Proposed Rules, the counties pay for detention days for youth on probation who commit a new law violation. This is true regardless of whether the youth would be placed in secure detention but for the probation. However,

detention days incurred by the same youth who commits a technical violation of probation are deemed the responsibility of the state, since, under the Proposed Rules, the youth has not been charged with a new violation of law.

61. Under the Proposed Rules, when a youth on conditional release commits either a new law violation or technical violation of conditional release and is placed in secure detention, those detention days are to be paid by the State.

VIII. The Two Day Rule

62. As part of the Notice of Change, the Department added a provision referred to as "the Two Day Rule" to the definitions for pre and postdisposition. The Two Day Rule provides that detention days where the youth is on probation are the responsibility of the state "unless the youth is charged with a new violation of law that has a referral date between zero and two days prior to the detention admission date, as determined by subtracting the referral date in JJIS from the detention admission date in JJIS." Proposed Rule 63G-1.011(15)(b).

63. Despite conceding that it knows why juveniles are being detained, the Department included the "Two Day Rule" in the Proposed Rule "[b]ecause it is difficult to determine the level of accuracy in the aggregate looking at thousands of cases at once." Thus, the Two Day Rule captures when the Department receives a referral date for a new criminal charge and presumes

that if a juvenile is put in secure detention within two days of that referral date, the detention is for that new charge.

64. In some instances, detention days that should be treated as state days would in fact be treated as county days under the "Two Day Rule." Mark Greenwald, Director of Research and Planning for the Department, testified:

> Q. Well, let's see how factually this would work is that there is a referral for a charge, a new offense, and the youth is detained the next day on a contempt unrelated to that new charge. Isn't that day going to now be--he is going to be detained because of a violation of the law because of your two-day rule?
>
> A. Under the rule, yes, the open charge would count.
>
> Q. But if he was a probationer and it was a contempt, that would not have been a county day. That would be a State day.
>
> A. Yes.
>
> Q. But now because of the two-day rule we will now treat that as a county responsibility and county responsibility for the cost?
>
> A. Yes.

65. Other examples were cited in the testimony, such as where there was a pick-up order for a youth on probation who had absconded. Where there was also a new charge, the detention days would be billed to the county, even if the pick-up order was issued prior to the new law violation.

66. Mr. Greenwald testified that when the Department decided to adopt the Two Day Rule, it had done no analysis to determine whether a One Day Rule or a Three Day Rule would more accurately identify probationary youths placed in detention due to a new law violation.

67. Both Judges Orlando and LaRue expressed uncertainty regarding the applicability and utility of the Two Day Rule, noting that the Two Day Rule does not have any correlation or relationship to when or how juveniles are placed in secure detention for violations of probation.

68. Judge LaRue further indicated that the term "referral date" as referenced in the Two Day Rule has no impact on what he does "whatsoever" and is a term:

> I've never heard before. I don't use that term. I've never heard the term. This is something that, in reviewing this potential rule change here – or the rule change, I should say, that's something I came across and scratched my head a little bit about exactly what it means. I think I know what it means. But it's not a term that I use – it's not a term of art, and it's not a term that I use generally.

69. The evidence adduced at hearing did not establish a rational basis for inclusion of the Two Day Rule provision in the definitions of pre and postdisposition. Notably absent was any credible evidence that use of the Two Day Rule would accurately identify detention days related to new law violations

by probationers. To the contrary, the evidence established that use of a blanket metric, arbitrarily set at two days, would under several scenarios improperly shift responsibility for detention days to the counties. Moreover, given the capabilities of the JJIS, there is simply no reason to "assume" that a detention has resulted from a new law violation if within a given period of time from referral, when the Department has the ability to accurately determine the actual reason for the detention.

IX. Estimates, Reconciliation and Actual Costs

70. At the start of the fiscal year, the Department provides an estimate to the counties of their respective costs of secure detention which is broken down into 12 installments that the counties pay on a monthly basis. At the end of the fiscal year, the Department performs a reconciliation of those costs based on the "actual costs" and sends a statement to each county showing under or overpayment, and providing for debits and credits as appropriate. The credits or debits would be applied to the current year billing, although they would relate to the previous fiscal year.

71. Proposed Rule 63G-1.013 provides the process for calculating the estimate to each county at the beginning of the fiscal year. As part of this process, the Proposed Rule provides that the Department shall estimate "detention costs,

using the current year actual expenditures projected through the end of the fiscal year, with necessary annualized adjustments for any new legislative appropriations within the detention budget entity."

72. The Department has modified its process in the Proposed Rules so that the estimate of costs is based, to a certain extent, on actual expenditures from the prior year, instead of the appropriation. However, the estimate process also takes into account the appropriation for the upcoming fiscal year, and a portion of the estimate of costs is still based on the appropriation. The Department concedes that there is a need for it to calculate the estimate as accurately as possible, and that there have been occasions in the past where the Department has not provided the counties credits owed as part of the reconciliation process. It is also clear from the record that credits for overpayments have not been provided by the Department to the counties for several fiscal years, beginning in FY 2009-10.

73. Proposed Rule 63G-1.017 provides the annual reconciliation process at year end for determining each county's actual costs for secure detention. This process includes the calculation of each county's actual cost which is determined by the number of detention days and a calculation of the actual costs. The total "actual costs" for secure detention are

divided by the "total number of service days" to produce an "actual per diem," which is then applied to each county's detention days to calculate each county's share of the actual costs. Proposed Rule 63G-1.011 provides a definition for "actual costs" as follows:

> [T]he total detention expenditures as reported by the department after the certified forward period has ended, less $2.5 million provided for additional medical and mental health care per section 985.686(3). These costs include expenditures in all fund types and appropriations categories (Salaries & Benefits, Other Personal Services, Expenses, OCO, Food Products, Legislative Initiatives, Fiscally Constrained Counties, Contracted Service, G/A-Contracted Services, Risk Management Insurance, Lease or Lease-Purchase of Equipment, Human Resources Outsourcing, and FCO-Maintenance & Repair).

74. The challengers assert that the proposed rules relating to the reconciliation process are vague, internally inconsistent, and inconsistent with statutory requirements contained in the law implemented. These include, but are not limited to: (1) the definition of actual costs fails to include an exclusion for "the costs of preadjudicatory nonmedical educational or therapeutic services" pursuant to section 985.686(3); (2) the definition of actual costs is over broad by including "expenditures in all fund types and appropriations categories;" and (3) the Proposed Rules fail to provide for input from the counties, as set forth in section 985.686(6).

75. The Proposed Rules do not provide for input from the counties regarding the calculations the Department makes for detention cost share.

CONCLUSIONS OF LAW

76. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to sections 120.56, 120.569, and 120.57(1), Florida Statutes. Jurisdiction attaches when a person who is substantially affected by an agency's rule claims that it is an invalid exercise of delegated legislative authority.

77. The parties stipulated that Petitioners and Intervenor have standing to initiate this proceeding. (Joint Pre-Hearing Stipulation, at 9-10, 16). In addition, Petitioners and Intervenor have demonstrated they meet the "substantial interests" tests for standing established in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). The non-fiscally constrained counties, including Petitioners, Intervenor, and a substantial number of FAC's members, are adversely affected by the Proposed Rules, which result in a negative fiscal impact to these counties.

78. The party challenging a proposed agency rule has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as

to the objections raised. § 120.56(2)(a), Fla. Stat. When any substantially affected person seeks a determination of the invalidity of a proposed rule pursuant to section 120.56(2), the proposed rule is not presumed to be valid or invalid. § 120.56(2)(b), Fla. Stat.

79. Section 120.52(8) defines what constitutes an "invalid exercise of delegated legislative authority":

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which

> could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

80. The Department has no authority as a matter of law to further limit a statutory term beyond its plain meaning. Courts employ a fundamental precept arising from the separation of powers doctrine that an agency may not redefine statutory terms to modify the meaning of a statute. See Campus Commc'ns, Inc. v. Dep't of Rev., 473 So. 2d 1290 (Fla. 1985) (department rule defining "newspaper" for purposes of a statutory sales tax exemption invalid for adding criteria to statute); see also State, Dep't of Bus. Reg. v. Salvation Ltd. Inc., 452 So. 2d 65 (Fla. 1st DCA 1984) (providing that a rule which added a fifth criterion that meals must be prepared and cooked on the premises

to the existing statutory criteria for a special restaurant beverage license "enlarged upon the statutory criteria and, thus, exceeded the 'yardstick' laid down by the legislature"); Pedersen v. Green, 105 So. 2d 1 (Fla. 1958) (where statute excepted "feed" from sales tax, agency cannot adopt rule limiting exemption to feed for animals kept for agricultural purposes thereby excluding feed for zoo animals). Nor may an agency apply a construction which conflicts with the plain language of the statute.

81. In addition, a rule is invalid where it is arbitrary and capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational. § 120.52(8)(e), Fla. Stat.

X. New Law Violations by Probationers

82. In this case, the law implemented, section 985.686, provides that the counties are only responsible for the costs of secure detention for the period of time prior to "final court disposition." As such, the Department may only charge the counties, including Petitioners and Intervenor, the cost of detention days served by a juvenile prior to the entry of a final court disposition. The costs of all other secure detention days are the responsibility of the state, and not the counties.

83. Section 985.686(3) provides as follows:

> (3) Each county shall pay the costs of providing detention care, exclusive of the costs of any preadjudicatory nonmedical educational or therapeutic services and $2.5 million provided for additional medical and mental health care at the detention centers, for juveniles for the period of time prior to final court disposition. The department shall develop an accounts payable system to allocate costs that are payable by the counties.

84. The term "final court disposition" is not defined by statute. This phrase, which establishes the cut-off point between a county's cost and the state's cost, is actually mentioned five times in section 985.686. Aside from section 3, the phrase "final court disposition" is also included twice in section 4(a), once in section 4(b), and once in section 5.

85. When construing a statute, one looks first to the statute's plain meaning. Moonlit Waters Apts., Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996). Furthermore, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (citing A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (1931)).

86. This is not the first time the counties have challenged the Department's rules regarding detention cost

share. Okaloosa Cnty., et al. v. Dep't of Juv. Just., DOAH Case No. 12-0891RX (Final Order, July 17, 2012). The Final Order in the 2012 rule challenge was affirmed by Florida's First District Court of Appeal. Dep't of Juv. Just. v. Okaloosa Cnty., 113 So. 3d 1074 (Fla. 1st DCA 2013).

87. In the 2012 rule challenge, several of the same counties involved in these proceedings challenged the Department's existing rules, implemented in 2010, on the basis that the 2010 rules inappropriately altered the statutory dividing line for detention cost share. Although section 985.686 provides that the non-fiscally constrained counties are only responsible for the costs of detention care prior to "final court disposition," the 2010 rules provided that the counties were responsible for all costs of secure detention unless the youth had been committed to the Department.

88. As part of the decision issued in the prior rule challenge, the Department's use of "commitment" as the line of demarcation for state and county responsibility in its 2010 rules was invalidated. Set forth in that decision are the following Conclusions of Law pertinent here:

> 71. Competent evidence established that there are detention days associated with dispositions other than commitment that are currently being charged to the counties, such as time waiting to be picked up by a parent following a disposition of probation or dismissal of charges. And there are

> other varying secure-detention days which should be post-dispositional, and charged to the state under the statutory dividing line of "final court disposition" which are evidently being charged to the counties under the Department's commitment definition. Examples include days in detention for violations of probation, and contempt of court relating to a charge that has already been disposed . . . .
>
> 72. In the Challenged Rules, the Department limited the statutory term "final court disposition" only to final court disposition orders of commitment to the Department. With the adoption of the Challenged Rules, the Department took the broad category of "final court disposition" and limited it to one type of disposition, i.e. commitment to the Department. Thus, the Challenged Rules enlarge, modify, or contravene the specific provisions of law implemented. Although the Department defends its rule as a clarification of a statutory term, the Department has no authority as a matter of law to further limit a statutory term beyond its plain meaning.

Okaloosa Cnty., et al. v. Dep't of Juv. Just., Case No. 12-0891RX (Fla. DOAH July 17, 2012), aff'd, 113 So. 3d 1074 (Fla. 1st DCA 2013).

89. While the above Final Order did determine that "final court disposition" could not be narrowed to mean only orders of commitment to the Department, it did not distinguish between days in detention based on a new law violation of probation and days based on a technical violation of probation. These days were all treated the same under the analysis.

90. The Department's interpretation of section 985.686, a statute it is charged with administering, is entitled to great deference. Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Bellsouth Telecomms., Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). The deference to an agency interpretation of a statute it is charged with enforcing applies even if other interpretations or alternatives exist. Atl. Shores Resort v. 507 S. St. Corp., 937 So. 2d 1239, 1245 (Fla. 3d DCA 2006); Miles v. Fla. A & M Univ., 813 So. 2d 242, 245 (Fla. 1st DCA 2002); Int. Improv. Tr. Fd. v. Levy, 656 So. 2d 1359, 1364 (Fla. 1st DCA 1995). When an agency committed with authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible or even, in the view of some, preferable. Humhosco, Inc. v. Dep't of Health and Rehab. Svcs., 476 So. 2d 258, 261 (Fla. 1st DCA 1985).

91. Historically, courts have given deference to agencies based on agency expertise in the areas regulated. See, e.g., Wallace Corp. v. City of Miami Beach, 793 So. 2d 1134 (Fla. 1st DCA 2001) (noting that an agency's construction of a statute it is given power to administer will not be overturned unless clearly erroneous). Traditionally, agencies generally have more expertise in a specific area they are charged with overseeing, and courts have noted the benefit of the agency's technical

and/or practical experience in its field. Rizov v. Bd. of Prof'l Eng'rs, 979 So. 2d 979 (Fla. 3d DCA 2008).

92. Stated otherwise, an agency is accorded broad discretion and deference in the interpretation of the statutes which it administers, and an agency's interpretation should be upheld when it is within a range of permissible interpretations and unless it is clearly erroneous. Pan Am. World Airways, Inc. v. Fla. Pub. Serv. Comm'n, 427 So. 2d 716 (Fla. 1983); see also Bd. of Podiatric Med. v. Fla. Med. Ass'n, 779 So. 2d 659, 660 (Fla. 1st DCA 2001). The same principle has been applied "to *rules* which have been in effect over an extended period and to the meaning assigned to them by officials charged with their administration." Pan Am. World Airways, Inc., 427 So. 2d at 719 (italics in original).

93. "On the other hand, 'judicial adherence to the agency's view is not demanded when it is contrary to the statute's plain meaning.'" Sullivan v. Dep't of Envtl. Prot., 890 So. 2d 417, 420 (Fla. 1st DCA 2004) (citations omitted).

94. > Without question, an agency must follow its own rules . . ., but if the rule, as it plainly reads, should prove impractical in operation, the rule can be amended pursuant to established rulemaking procedures. However, "absent such amendment, expedience cannot be permitted to dictate its terms." . . . That is, while an administrative agency "is not necessarily bound of its initial construction of a statute evidenced by the adoption of a rule," the agency may

> implement its changed interpretation only by "validly adopting subsequent rule changes."

Cleveland Clinic Fla. Hosp. v. Ag. for Health Care Admin., 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996) (citations omitted).

95. It has been established that "if an agency changes a non-rule-based policy, it must either explain its reasons for its discretionary action based upon expert testimony, documentary opinions, or other appropriate evidence . . . or it must implement its changed policy or interpretation by formal rule making." Courts v. Agency for Health Care Admin., 965 So. 2d 154, 159 (Fla. 1st DCA 2007) (citations omitted).

96. Notwithstanding the above, statutory changes to laws which authorize rulemaking have in recent years circumscribed the amount of discretion that agencies may employ. S.W. Fla. Water Mgmnt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000); see also Daniel Manry, "Agency Exercise of Legislative Power and ALJ Veto Authority," 28 J. Nat'l Ass'n L. Jud. 421 (Fall 2008).

97. In this instance, the challengers argue that the deference normally accorded to agencies in construing statutes they administer should not attach because the Department did not rely on any agency expertise or practical knowledge. Instead, according to the challengers, the Department changed its interpretation of the applicable statute and decisional

authority interpreting the statute, based solely on the budget decisions of the governor and Legislature, as ultimately adopted in the GAA.

98. To the extent the Department's interpretation of section 985.686, as now codified in the challenged rules, is inconsistent with its prior practice, the reasonableness of the Department's explanation of the inconsistencies is a factual matter for determination based on the evidence.
§ 120.68(7)(e)3., Fla. Stat.

99. In this instance, the Department has met its burden to explain the reason for its changed interpretation of the counties' responsibility under section 985.686 for predisposition detention days. As articulated by Mr. Schuknecht, the Department realized that its (hastily formulated) initial interpretation following the appellate court's decision in June 2013 was overly broad, because it included probationers with new offenses as postdisposition cases. The Department concluded that detained probationers with new offenses should logically be considered predisposition cases, since there is no "final court disposition" as to the new offenses.

100. The undersigned cannot, as a matter of law, conclude that the Department's revised interpretation of section 985.686 is clearly erroneous or contrary to the "plain and obvious

meaning" of the statute. This is because the statute simply does not address the situation where a youth commits multiple substantive law violations over time and thus has the status of both postdisposition (commitment or probation) and predisposition (detained and awaiting final court disposition on a new charge). The Department's interpretation that detention arising from a new law violation by a youth on probation is the responsibility of the counties is certainly one reasonable interpretation of section 985.686, is not clearly erroneous, and is entitled to deference.

101. While the Department's new statutory interpretation was likely influenced by input from the Governor's Office, such fact does not, in and of itself, render the new interpretation "clearly erroneous." Rather, because the new interpretation of section 985.686 is among those that are reasonable and is not clearly erroneous, it is permissible, and therefore does not enlarge, modify, or contravene the statute being implemented.

102. The challengers also assert that the Department changed its interpretation of section 985.686, and decisional authority interpreting the same, based solely on its perception that the Legislature mandated a certain reading of the statute through an appropriations bill. Again, while the evidence established that the Governor's Office encouraged the Department to reconsider its initial interpretation of the state's

responsibility following the appellate court's decision, there is no evidence that the Department was mandated by the Legislature to change its interpretation. Indeed, while the Governor's Office may have urged the Department to change its interpretation, the GAA funding was not the same as what had been recommended in the Governor's budget submittal.

103. Since the Department's new interpretation of section 985.686 is permissible, the challengers' argument that the Department, through its Proposed Rules, has interpreted the GAA as a modification to the substantive law, is rejected.

XI. The "Two Day Rule"

104. At hearing the Department acknowledged that the specific reason a youth has been detained can be determined through its JJIS database. However, because the Two Day Rule does not differentiate between detentions resulting from new law violations and those unrelated to new law violations (e.g., detentions resulting from technical violations of probation and contempt of court), it would improperly pass on detention costs to the counties for days which otherwise would properly be assigned to the state under the Department's new interpretation.

105. The Department's JJIS has the capability to readily and accurately ascertain the reason a youth has been detained. At hearing, the Department did not persuasively explain why, when it has the technical capability to know precisely why a

youth has been detained, it was necessary to presume that if a juvenile is put in secure detention within two days of a referral date, the detention is for a new law violation. The evidence established that the two day presumption would, in some circumstances, improperly attribute detention days to the counties. As such, this provision of the Proposed Rules fails to advance the purposes for which they were purportedly adopted, and contravenes the statute being implemented.

106. Even assuming, arguendo, that the use of some blanket timeframe between referral and detention was justified, the Department's selection of two days, as opposed to some other period of time, is arbitrary, as there was no investigation or analysis underlying the selection of two days.

107. Since the Department, through the Proposed Rules, is seeking to shift the responsibility for probationers who commit a new violation of law to the counties, it is not unreasonable to require the Department to accurately determine in which instances that should occur. The Two Day Rule is counter to this goal, and is therefore invalid, since it would assign to the counties costs for which they are not statutorily responsible.

XII. Estimate, Reconciliation, and Actual Costs

108. Section 985.686 provides in relevant part:

> (3) Each county shall pay the costs of providing detention care, exclusive of the costs of any preadjudicatory nonmedical educational or therapeutic services and $2.5 million provided for additional medical and mental health care at the detention centers, for juveniles for the period of time prior to final court disposition. The department shall develop an accounts payable system to allocate costs that are payable by the counties.
>
> * * *
>
> (5) Each county shall incorporate into its annual county budget sufficient funds to pay its costs of detention care for juveniles who reside in that county for the period of time prior to final court disposition. This amount shall be based upon the prior use of secure detention for juveniles who are residents of that county, as calculated by the department. Each county shall pay the estimated costs at the beginning of each month. Any difference between the estimated costs and actual costs shall be reconciled at the end of the state fiscal year.
>
> (6) Each county shall pay to the department for deposit into the Shared County/State Juvenile Detention Trust Fund its share of the county's total costs for juvenile detention, based upon calculations published by the department with input from the counties.

109. Proposed Rule 63G-1.013's process for calculating the estimate purports to be based on the actual expenditures and

usage of the prior year, yet continues to allow adjustments based on the current year appropriation.

110. Appropriations are not costs. Appropriation means "a legal authorization to make expenditures for specific purposes within the amounts authorized by law." § 216.011, Fla. Stat.

111. As part of the estimate process provided by statute for the funding of secure detention, the Department bills each county prospectively for its respective share of the costs of secure detention. This amount must be based on "prior usage." § 985.686(5), Fla. Stat. However, the estimate process provided by the Proposed Rules overinflates the amounts required to be paid by the counties on a monthly basis by continuing to focus at least a portion of this estimate on the appropriation to the Department, as opposed to the expenditures incurred for the prior year which are based on prior usage.

112. Section 985.686(6) also provides that the calculations of the Department must be made with input from the counties. The estimate process provided by the Proposed Rules fails to comply with the law implemented, and is thus invalid.

113. In terms of the definition of actual costs provided by Proposed Rule 63G-1.011, section 985.686(3) excludes from the counties' funding responsibility the following costs: "the costs of any preadjudicatory nonmedical educational or therapeutic services and $2.5 million provided for additional

medical and mental health care at the detention centers." Although the Proposed Rules incorporate a portion of this exclusion, the Department has inexplicably failed to include "preadjudicatory nonmedical educational or therapeutic services." This language has been a part of the statute since its inception, yet the Department has failed to include any provision in its rule addressing this subject. Further, as in the process for the estimate, the Department does not provide a process for county input into these amounts and calculations before the annual reconciliation statement is finalized and provided to each county, contrary to the requirements of the law implemented. § 985.686(6), Fla. Stat.

XIII. The Statement of Estimated Regulatory Costs (SERC)

114. Pursuant to section 120.52(8)(f), an agency rule is invalid where "[t]he rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives."

115. In addition, a proposed rule is invalid for material failure to follow applicable rulemaking procedures where the agency fails to prepare a proper statement of estimated regulatory costs or to respond to a written lower cost regulatory alternative. § 120.541(1)(f), Fla. Stat.

116. Section 120.541 sets forth the process regarding the statement of estimated regulatory costs ("SERC"):

> (1)(a) Within 21 days after publication of the notice required under s. 120.54(3)(a), a substantially affected person may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. The proposal may include the alternative of not adopting any rule if the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule. If such a proposal is submitted, the 90-day period for filing the rule is extended 21 days. Upon the submission of the lower cost regulatory alternative, the agency shall prepare a statement of estimated regulatory costs as provided in subsection (2), or shall revise its prior statement of estimated regulatory costs, and either adopt the alternative or provide a statement of the reasons for rejecting the alternative in favor of the proposed rule.

117. The Challengers assert that the Department's SERC did not comply with the statutory requirements because it did not address the "regulatory costs" of the Proposed Rule. They further argue that the Department has failed to demonstrate that the regulatory costs to the counties could not be reduced by the adoption of a less costly alternative, to wit, the Department's prior interpretation of section 985.686 and practice in place at the time the Department entered into the joint stipulations. Therefore, the Proposed Rules are an invalid exercise of delegated legislative authority, according to the Challengers.

118. The Challengers' arguments regarding the Department's SERC are rejected. As found, the Department's new interpretation of section 985.686, as codified in the Proposed Rules, is not invalid. Conversely, the alternative advanced by the counties, that the state continue to pay the detention costs for probationers who are charged with a new violation of law, is inconsistent with the Department's valid interpretation of section 985.686.[4/]

XIV. Attorney's Fees and Costs

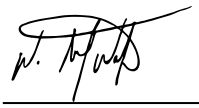
119. Petitioners and Intervenor have requested attorneys' fees and costs pursuant to section 120.595(2). Inasmuch as this Final Order determines that some provisions of the Proposed Rules are an invalid exercise of delegated legislative authority as defined in section 120.52(8)(c), and (e), Petitioners and Intervenor are entitled to a hearing as to entitlement and, if entitled, the amount of any reasonable fees and costs.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the specifically identified provisions of proposed rule 63G-1.011, 63G-1.013 and 63G-1.017 constitute an invalid exercise of legislatively delegated authority. Jurisdiction is retained for the purpose of determining the issue of the award of attorney's fees and costs. Any motion to

determine fees and costs shall be filed within 60 days of the issuance of this Final Order.

DONE AND ORDERED this 22nd day of April, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 2015.

ENDNOTES

[1/] Unless otherwise noted, all statutory references are to the 2014 version of the Florida Statutes.

[2/] The Department noted that "other Counties have advocated a similar position though they have not formally identified it as a lower cost regulatory alternative."

[3/] "Independent Judgment" is defined by section 216.011(1), Florida Statutes, as follows:

> (u) "Independent judgment" means an evaluation of actual needs made separately and apart from the legislative budget request of any other agency or of the judicial branch, or any assessments by the Governor. Such evaluation shall not be limited by revenue estimates of the Revenue Estimating Conference.

[4/] The Department's SERC estimated that the counties would incur certain "transactional costs" under the draft rule, stating:

> Although it is not a mandatory transactional cost "necessary to comply with the rule," non-fiscally constrained (paying) counties might be inclined to implement a process for reviewing their resident probationers' detention stays to ensure the existence of an open charge.
>
> And,
>
> During fiscal year 2012-13, there were 6761 probationers with detention stays on open charges. If counties decided to review these cases to ensure that they were responsible for the stay, it is estimated that a data analyst earning an average of $20 per hour should take no longer than 15 minutes on average to review each case. The total, statewide annual cost would thus be $33,805 ($5 X 6761 = $33,805)."

The abovesigned notes that with the invalidation of the "Two Day Rule" provision, the county audit process referenced by the Department above should not be necessary. Rather, it will be incumbent on the Department to document probationers with a new violation of law in order to properly shift those detention days to the counties.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.

DEPT EX. 1 (REC'D) Post-NOC Text Fully Coded From Current Rule 8/27/14 "63G-1 AMD 14 Post-NOC text

63G-1.010 Scope.

This rule establishes the process by which the funding of detention services is shared by state and county government.

Rulemaking Authority 985.64, 985.686(10) FS. Law Implemented 985.686(1) FS. History–New 7-6-10.

63G-1.011 Definitions.

(1) "Funding of detention services" means the funding required to provide detention services as determined by the General Appropriations Act Implementing Bill and/or General Bills.

(2) "Final Court Disposition" means the decision announced by the court at the disposition hearing determining the most appropriate services for a youth. Final court disposition includes commitment, probation, and dismissal of charges. ~~"Commitment" means the final court disposition of a juvenile delinquency charge through an order placing a youth in the custody of the department for placement in a residential or non-residential program. Commitment to the department is in lieu of a disposition of probation.~~

(3) "Shared County/State Juvenile Detention Trust Fund" means the state trust fund used to capture budget and costs associated with the counties' share of detention funding.

(4) "Fiscally constrained county" means a county which is not required to pay the full costs of its resident juveniles' detention services.

(5) "Juvenile Probation Officer" (JPO) means the primary case manager for the purpose of managing, coordinating, and monitoring the services provided and sanctions ~~snactions~~ required for youth on probation, post-commitment probation or conditional release supervision.

(6) "Juvenile Justice Information System" (JJIS) means the department's electronic information system used to gather and store information on youth having contact with the department.

(7) "County of Residence" means the county where, at the time of referral, a child resides, as determined by a department intake officer pursuant to Rule 63G-1.012, F.A.C., and entered in the Juvenile Justice Information System, except for those youth described in subsection 63G-1.012(2), F.A.C., below.

~~(8) "Pre-commitment" means those days a youth is detained in a detention center prior to being commited to the department.~~

(8)~~(9)~~ "Reconciliation period" means the first through the last day of a month during which reconcilation by the county and the department for the previous month's utilization takes place.

(9)~~(10)~~ "Secure detention," "detention" or "detention care" means a ~~physically~~ state owned and operated physically restricting facility used for the temporary care of children, pending adjudication, disposition, or placement.

(10)~~(11)~~ "Service day" means any day or portion of a day spent by a youth in secure detention.

(11)~~(12)~~ "Utilization" means a summary of service days.

(12) "Estimated per diem" means the per diem calculated for billing purposes prior to the upcoming state fiscal year utilizing an estimate of the total service days and the estimated costs for the detention budget entity for the current fiscal year, with necessary annualized adjustments. The resulting per diem is then used to estimate the cost to a county under the methodology in Rule 63G-1.013, F.A.C.

(13) "Actual per diem" means the per diem calculated utilizing actual service days and the

APPENDIX A RESPONDENTS EXHIBIT 1

actual costs of the completed fiscal year for the purpose of reconciliation.

(14) "Predisposition" means the period of time a youth is in detention care prior to entry of a final court disposition by the court. The counties are responsible for all predisposition days including all service days for youth that are, at the time of the detention:

(a) In detention for contempt of court if the youth is not committed to the department or on department supervised probation.

(b) In detention while on department supervised probation when the youth is charged with a new violation of law that has a referral dated between zero and two days prior to the detention admission date, as determined by subtracting the referral date in JJIS from the detention admission date in JJIS.

(15) "Postdisposition" means the period of time a youth is in detention care after entry of a final court disposition. The State is responsible for all postdisposition days including all service days for youth that are, at the time of the detention:

(a) Committed to the department, including youth on conditional release.

(b) On department supervised probation, unless the youth is charged with a new violation of law that has a referral date between zero and two days prior to the detention admission date, as determined by subtracting the referral date in JJIS from the detention admission date in JJIS.

(c) Without charges, as all charges against the youth have been dismissed or the youth has been found not guilty.

(16) "Actual costs" means the total detention expenditures as reported by the department after the certified forward period has ended, less $2.5 million provided for additional medical and mental health care per section 985.686(3). These costs include expenditures in all fund types and appropriations categories (Salaries & Benefits, Other Personal Services, Expenses, OCO, Food Products, Legislative Initiatives, Fiscally Constrained Counties, Contracted Service, G/A-Contracted Services, Risk Management Insurance, Lease or Lease-Purchase of Equipment, Human Resources Outsourcing, and FCO-Maintenance & Repair).

(17) "Referral date" means the date that the department receives notification and associated documents from law enforcement that the youth has been charged with an offense. The referral date is often the same date as the offense date, but in some cases occurs after the offense date.

Rulemaking Authority 985.64, 985.686(11) ~~985.686(10)~~ FS. Law Implemented 985.686 FS. History–New 7-6-10, Amended _____.

63G-1.012 Determining Residence.

(1) Department of Juvenile Justice (DJJ) JPOs and contracted providers responsible for intake shall utilize the following procedure to determine a referred child's county of residence:

(a) The address provided by the child at intake will initially be checked against the address included in the arrest affidavit and against any existing address for the child already in the JJIS.

(b) In all cases, an effort will be made to verify the address with the child's parent or guardian.

(c) All attempts to contact the parent or guardian, and the results of those attempts, will be noted in the chronological record in the child's case file.

(2) County of residence for children in substitute care placements, such as foster care, will be where the dependency case originated for the youth. Street address information recorded in the JJIS will be that of the Department of Children and Family Services or its contracted agency district office or service center for confidentiality purposes.

(3) Address verification procedures are to be included in the annual refresher training on the JJIS given to departmental JPOs and its contracted providers responsible for intake.

Rulemaking Authority 985.64, 985.686(10) FS. Law Implemented 985.686(5) FS. History–New 7-6-10.

63G-1.013 Calculating Estimated Funding.

(1) Estimates for each county's individual portion of detention funding will be calculated as follows:

(a) The department shall estimate the number of service days for the upcoming fiscal year based upon prior use of secure detention and generally accepted statistical methods. Utilizing previous fiscal year data, the department shall estimate: ~~All youth served in secure detention during the most recently reconciled previous fiscal year as reflected in the JJIS will be identified;~~

1. detention costs, using the current year actual expenditures projected through the end of the fiscal year, with necessary annualized adjustments for any new legislative appropriations within the detention budget entity;

2. The number of predisposition service days for each county; and

3. The total number of service days for secure detention, including both predisposition and postdisposition service days.

(b) The estimated costs shall be divided by the total number of service days estimate, which will produce an estimated per diem. ~~The total number of pre-commitment service days in secure detention is computed by including all days up to but not including the date of commitment to the department.~~

(c) The department shall multiply the estimated per diem by the expected number of predisposition service days for each county to calculate each county's estimated share of detention costs.

~~(2) The total number of pre-commitment service days for each county from the most recently reconciled previous fiscal year utilization data will be divided by the total pre-commitment service days for all counties for that same time period to arrive at each county's percentage of the total.~~

~~(3) Each county's percentage will be multiplied by the total estimated annual appropriation in the shared county/state juvenile detention trust fund for the upcoming fiscal year to determine each county's share of the total budget.~~

(2)~~(4)~~ Each county's ~~The~~ estimated share ~~of the total budget~~ will be billed ~~to the counties~~ in monthly installments.

(3)~~(5)~~ Invoices are to be mailed at the beginning of the month prior to the service period, so that an invoice for the August service period will be mailed in July.

Rulemaking Authority 985.64, 985.686(11) ~~985.686(10)~~ FS. Law Implemented 985.686(3) FS. History–New 7-6-10, Amended _____.

63G-1.014 Fiscally Constrained Counties.

(1) Each fiscally constrained county's estimated share of detention budget is determined in the same manner as those for non-fiscally constrained counties.

(2) For informational purposes, fiscally constrained counties will be invoiced for their estimated monthly share even though they will not be required to remit payment.

(3) Prior to the beginning of each fiscal year the total estimated budget needed for all fiscally constrained counties will be compared to the amount appropriated in General Revenue to the

department for fiscally constrained counties. If the total estimated annual amount for utilization exceeds the appropriated amount, matching funds will be required to make up the shortfall. Fiscally constrained counties will be assessed for the amount of the shortfall under the following methodology:

(a) Each fiscally constrained county's utilization will be compared to the total for all fiscally constrained counties to determine a percentage of the total.

(b) The county's percentage will be multiplied by the shortfall amount computed in subsection (3) above to determine the individual county's amount due.

(4) The department shall determine whether an estimated shortfall is likely by July 31. If a shortfall is expected, the department shall provide fiscally constrained counties information on their share of the expected shortfall on or before August 15.

(5) Fiscally constrained counties will be billed for their share of the shortfall in equal monthly installments beginning November 1 through May 1.

(6) If after the annual reconciliation is complete it is found that there was in fact no shortfall or that the shortfall was overestimated, the fiscally constrained counties will receive a refund. If the shortfall was underestimated, the department may seek matching funds from the counties to make up the difference.

Rulemaking Authority 985.64, 985.686(10) FS. Law Implemented 985.686(4) FS. History–New 7-6-10.

63G-1.015 Receipt of Payment.

(1) Payment is to be made by check or by pre-arranged wire transfer, which is due the first day of the monthly service period, such that the July service period payment is due July 1.

(2) Payment will be deemed in arrears on the second day of the month the payment is due.

Rulemaking Authority 985.64, 985.686(10) FS. Law Implemented 985.686(5), (6) FS. History–New 7-6-10.

63G-1.016 Monthly Reporting.

(1) Each month, the department shall generate a web based on-line utilization report that provides each county's actual usage for the previous service month. The report is to be used by the counties to validate utilization.

(2) The report shall contain the following information:

(a) Youth's name;

(b) Youth's address at the time of the referral;

(c) Sex;

(d) Date of birth;

(e) Name of parent or guardian, if available;

(f) Phone contact, if available;

(g) Charge category;

(h) Admission date;

(i) Final court ~~Commitment~~ disposition date, if available; and

~~(j)~~(g) Number of detention days.

(3) The report will be available electronically on the first day of each month for the previous month's utilization.

(4) The limited release of juvenile identifying information contained in each county's monthly report is confidential. The release will not include treatment or charging information, is limited to the county official(s) designated to receive the report, and is not to be used for any purpose other than that of verifying the provision of detention services.

Rulemaking Authority 985.64, 985.686(11) ~~985.686(10)~~ FS. Law Implemented 985.686(3), (7) FS. History–New 7-6-10, Amended _____.

63G-1.017 Monthly/Annual Reconciliation and Dispute Resolution.

(1) On the first day of each month, the department shall make available to each county a utilization report described in Rule 63G-1.016, F.A.C.

(2) The county shall have from the first to the fourteenth day of the month to review the on-line utilization information reported for the previous month. If the county takes issue with any of the utilization data, it shall mark the record for dispute on-line and provide a reason for the dispute. Disputes involving a detained youth's county of residence or disposition must include one or more of the following indicia of specificity:

(a) Address invalid – not in county;

(b) Address invalid – street number not valid;

(c) Address invalid – not residence of youth;

(d) Address invalid – see text (must enter text);

(e) Detention stay invalid – see text (must enter text);~~.~~

(f) Service day is a postdisposition day – see text (must enter text).

(3) The department will make every effort to review all disputes for the previous month between the fifteenth and twenty-fourth day of each month for the reconciliation period. The department's response, provided on-line, constitutes notice of final action. All pending disputes will be resolved by the department no later than 60 days after the end of the reconciliation period.

(4) In October of each year, the department will perform an annual reconciliation of utilization and costs for the prior fiscal year to calculate the difference between the estimated costs and the actual costs of each county for its share of detention care. The department shall provide: ~~Based on a county's actual utilization, a recalculation of that county's share of the shared county/state juvenile detention trust fund expenditures will be performed.~~

(a) The actual cost to operate detention care based on actual expenditures, detailing expenditures by appropriation category and by detention center.

(b) The number of predisposition service days for each county.

(c) The total number of all service days for secure detention, including both predisposition and postdisposition service days.

(5) In November of each year, the department will provide each county an annual reconcilation statement for the previous fiscal year. The calculation shall be performed as follows: ~~The statement shall reflect the difference between the amount paid by the county based on the estimated utilization and the actual utilization reconciled in subsection (4) above.~~

(a) The actual costs shall be divided by the total number of service days, which will produce an actual per diem.

(b) The actual per diem will be applied to each county's actual predisposition service days to calculate each county's actual costs.

(c) The reconciliation shall reflect the difference between the estimated costs paid by the

county during the fiscal year and the county's actual costs. The statement shall reflect the difference between the amount paid by the county based on the estimated utilization and the actual utilization reconciled in subsection (4) above.

(6) If the total amount paid by a county falls short of the amount owed based on actual utilization, the county will be invoiced for that additional amount. The amount due will be applied to the county's account. An invoice will accompany the reconciliation statement, and shall be payable on or before March 1. If the amount paid by a county exceeds the amount owed based on actual utilization, the county will receive a credit. The credit will be applied to the county's account and be included on the invoice sent in November.

(7) For the purpose of determining the actual utilization and actual per diem, the department is responsible for paying for the cost of detention for all service days for youth that reside out of state or whose addresses cannot be determined.

Rulemaking Authority 985.64, 986.686(11) ~~985.686(10)~~ FS. Law Implemented 985.686(5), (7) FS. History–New 7-6-10, Amended _____.

63G-1.018 Billing.

(1) The monthly reporting marks the point at which a county may take issue with the charges referenced in the report, but it cannot be the basis for withholding payment. Adjustments, including those necessitated by dispute resolution, cannot be made until the annual reconciliation.

(2) Invoices will include the following information:

(a) Invoice date;

(b) Invoice number;

(c) Remittance address;

(d) Payment due date;

(e) Billing Service period;

(f) Total amount billed; and

(g) Department contact information.

Rulemaking Authority 985.64, 985.686(10) FS. Law Implemented 985.686(5), (7) FS. History–New 7-6-10.