



# ISSUE BRIEF

Office of Colorado's Child Protection Ombudsman

AUGUST 20, 2019

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## INADEQUATE ACCESS: Improving Transparency and Participation in the Division of Youth Services' Rulemaking Process

### Introduction

In February 2017, a coalition of juvenile advocates published a startling report on the “culture of violence” inside Colorado’s youth correctional facilities.<sup>1</sup> The report detailed the overuse of physical force and solitary confinement to control youth who are acting out. To illustrate the damaging effects of these practices, the report focused on one particularly degrading technique that utilizes a patented device called the WRAP.<sup>2</sup> When the WRAP was applied, youth were placed in a helmet, handcuffs and ankle strap while a mesh restraint was wrapped around their legs. Youth interviewed for the report consistently described the device as frightening, humiliating and painful.<sup>3</sup> The coalition called for the prohibition of “physical management techniques that harm and re-traumatize children,” including the WRAP.<sup>4</sup>

The revelations contained in the coalition’s report made headlines and became the catalyst for a series of reforms targeting Colorado’s juvenile facilities. The most immediate was a bill,

passed within months of the report’s publication, to clarify and codify the “rehabilitative purpose” of Colorado’s juvenile justice system.<sup>5</sup> The bill created an acknowledgment in state law that mechanical restraints like the WRAP are “physically and psychologically harmful” to juveniles and inconsistent with the stated goals of youth corrections.<sup>6</sup>

In response to this scrutiny from lawmakers and the media, the Colorado Department of Human Services (CDHS), which oversees the Division of Youth Services (DYS), announced that it would immediately begin phasing out the use of the WRAP. In a letter sent to members of the Colorado General Assembly, the executive director of CDHS stated that use of the technique would cease altogether by July 2018.<sup>7</sup>

Nearly six months later, in November 2018, the Office of Colorado’s Child Protection Ombudsman (CPO) was contacted by juvenile advocates who believed that youth were once again being subjected to dangerous, violent mechanical restraints in state facilities. These advocates were concerned that, despite the CDHS’ public

<sup>1</sup> *Bound and Broken: How NYC’s Culture of Violence is Hurting Colorado Kids and What We Can Do About It*, Colorado Child Safety Coalition (February 2017): <http://static.aclu-co.org/wp-content/uploads/2017/03/Bound-and-Broken-report-Feb17-complete.pdf>

<sup>2</sup> The WRAP is produced and distributed by Safe Restraints, Inc.: <http://www.saferestraints.com/>

<sup>3</sup> *Bound and Broken*, pgs. 9-11.

<sup>4</sup> *Bound and Broken*, pg. 27.

<sup>5</sup> Act passed as House Bill 17-1329, *Concerning the treatment of youths within the Division of Youth Corrections...*, 2017 Colorado Session Laws Chap. 381.

<sup>6</sup> C.R.S. §19-2-203(4)(X)

<sup>7</sup> April 28, 2017 letter from CDHS director Reggie Bicha (<https://www.denverpost.com/2017/04/28/colorado-youth-corrections-wrap-restraint/>)



disavowal of the WRAP, its internal physical management practices remained largely unchanged.

In reviewing these concerns, the CPO learned that in phasing out the WRAP, the DYS had phased in a new and only slightly-modified technique called the “side hold.” Like the WRAP, the side hold utilizes a helmet, handcuffs and ankle straps to immobilize the limbs. Instead of the patented mesh device, staff members physically restrain a youth’s legs. Among staff and youth inside facilities, this technique is referred to colloquially as a “modified WRAP.”

Through its correspondence with DYS leadership, the CPO learned that use of the side hold technique was authorized in a recent revision to the DYS policy on physical restraints.<sup>8</sup> The new policy was developed internally and implemented in April 2018. There was no opportunity for stakeholders outside of DYS to participate in the development of the policy, nor was there any notice provided to juvenile advocates, lawmakers or the public when it took effect.

In subsequent conversations with the CPO, stakeholders from multiple agencies and juvenile advocacy organizations were surprised to learn that the side hold was an officially sanctioned DYS technique. Though they closely monitor conditions inside DYS facilities, these stakeholders were not familiar with the specific policy nor the larger policymaking process through which it had been created.

Through inquiries from citizens, the CPO has encountered similar surprise, confusion and frustration surrounding revisions to other DYS policies, including:

- Policies addressing the process by which youth, family members and

attorneys access juvenile records that are relevant for treatment planning and defense.<sup>9</sup>

- A policy addressing the use of pat-down and strip searches to prevent contraband in facilities.<sup>10</sup>
- A policy addressing the individuals who can participate in the multi-disciplinary team meetings to develop a youth’s treatment program.<sup>11</sup>
- A policy narrowly specifying the purposes for which youth can consent to be photographed.<sup>12</sup>

In all these cases, stakeholders believed that substantive regulatory changes were implemented suddenly without consultation with, or notification to, parties who would be impacted by the change. Among families, advocates, DYS staff and other members of the public, these experiences contribute to a broader perception that the DYS is secretive and unresponsive to their concerns.

Unlike most state agencies in Colorado, the DYS develops its policies internally among agency leadership with no opportunity for outside entities to participate or observe. This raises questions about whether the DYS is operating in compliance with state laws that require agencies provide notice and accept feedback on proposals for new rules.

Regardless of any possible legal obligations, the DYS should take steps to increase transparency and participation in its rulemaking. There are many examples of notice-and-comment procedures that could serve as a model for a new way of doing things. This brief identifies and recommends several strategies that would constitute positive first steps.

<sup>8</sup> Colorado Department of Human Services, Division of Youth Services, Policy S9.4, “Physical Response, Protective Devices,” (current version effective April 1, 2018).

<sup>9</sup> Colorado Department of Human Services, Division of Youth Services, Policy S6.1, “Content, Use, Transfer, Security and Release of Youth Records,” (current version effective March 31, 2017).

<sup>10</sup> Colorado Department of Human Services, Division of Youth Services, Policy S9.13, “Searches of Youth and Facilities,” (current version effective February 1, 2018).

<sup>11</sup> Colorado Department of Human Services, Division of Youth Services, Policy S17.18, “Multi-Disciplinary Team (MDT),” (current version effective October 1, 2018).

<sup>12</sup> Colorado Department of Human Services, Division of Youth Services, official form, “Special Request To Photograph Youth,” (current version effective February 15, 2019).



### Recommendation and Agency Response Locator

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## Overview of Current Process: Internal Policy Approval

### DYS Structure & Authority

Under state law, the Colorado Department of Human Services (CDHS) is “the single state agency responsible for the oversight of the administration of juvenile programs and the delivery of services for juveniles and their families.”<sup>13</sup> This includes the creation and operation of secure facilities to care for youth at various stages in their juvenile cases.<sup>14</sup> The Division of Youth Services (DYS) is the departmental division created to carry out these responsibilities in accordance with five guiding principles that emphasize safety and rehabilitation:<sup>15</sup>

1. Promoting the safety of youth and staff.
2. Providing rehabilitative treatment to help youth prepare for the transition back to society.
3. Creating a safe, structured environment with well-trained, caring staff.
4. Enabling youth to develop healthy relationships with peers, adults and community members.
5. Providing youth with tools to become contributing members of their communities.

To house the youth in its custody, the DYS maintains 10 secure facilities. The DYS also contracts with approximately 30 community providers across the state to serve youth in a less restrictive setting. (See APPENDIX 1 for the organizational charts of the CDHS and DYS.)

### DYS Rules & Regulations

Under state law, the CDHS is required to “develop such rules and regulations as may be necessary for imparting instruction, preserving health, and enforcing discipline” inside juvenile facilities.<sup>16</sup> Accordingly, the DYS has developed more than 800 pages, referred to as “policies,” that address all aspects

of its administration, programming and practice. The current version of each policy is accessible online on the CDHS website.<sup>17</sup> These 181 individual documents are organized into 23 different chapters of varying lengths.

DYS policies span a wide variety of topics, from matters of fiscal and administrative concern to the fundamental rights of juveniles. Among those of greatest public interest are policies addressing the use of seclusion and restraint, contraband, educational programming, family visitation and communication, medication and behavioral healthcare. For the youth who spend every day locked inside DYS facilities, isolated from the outside world, the practices and procedures laid out in DYS policies impact every aspect of their lives. The content of these policies matters greatly not only to the youth and staff, but also to the families, communities and advocates that care about their health, safety and well-being. (See APPENDIX 2 for a full index of current DYS policies.)

### DYS Rulemaking Process

The current process by which the DYS creates and revises its policies is opaque, inconsistent and inaccessible. Currently, there is no way for outside stakeholders to contribute input to proposed changes, nor is there any way for members of the public to receive notice that a statewide policy has been created or revised. In effect, the only way to learn about a change in DYS policy is to discover it incidentally on the CDHS website or to hear about it directly from youth once it has already been implemented.

While the individual policies themselves are publicly posted on the CDHS website, there is no publicly available description of the process by which new policies are developed, finalized or distributed. According to the DYS, policy revisions are currently developed internally with the oversight of division leadership through

<sup>13</sup> C.R.S. §19-2-202

<sup>14</sup> C.R.S. §19-2-402 (both pre and post-adjudication detention); §19-2-403 (commitment)

<sup>15</sup> See C.R.S. §19-2-203(b) for the five enumerated “purposes of the division”

<sup>16</sup> C.R.S. §19-2-414(1)

<sup>17</sup> See “Policy Index: State Programs” tab on “Policies” page: <https://www.colorado.gov/pacific/cdhs/policies-3>





an 11-member “Policy Review Committee” (PRC) comprised of high level DYS employees. These procedures are laid out in its “Policy Approval Guide.” This document is not currently available to the public, but was provided upon request to the CPO.<sup>18</sup>

According to the Guide, the PRC works with subject matter experts within the DYS to develop ideas for new policies and policy revisions. When permission to draft a revision is granted by DYS executive leadership, the PRC works to draft and refine the actual text of the proposed change in a shared document or over email. Members of the PRC meet monthly to discuss and vote on proposed policies in person.<sup>19</sup>

Once the text of a proposal is finalized by the PRC, it is returned to the DYS director for approval. Depending on the content, the policy may also be submitted to the Colorado Office of the Attorney General and/or the CDHS Director of the Office of Children, Youth and Families for review. Upon final approval, the new or revised policy is disseminated to DYS staff, who have 30 days to review and digest the revision before it becomes effective. It is posted online and becomes available to the public on the day it becomes effective.

In a meeting with the CPO, DYS leadership explained that this flexible and informal process, which can be expedited or drawn out depending on the policy, enables them to respond appropriately when specific incidents highlight a need for change.<sup>20</sup> This high level of discretion is reflected in the Guide, which includes a broad exception that enables the DYS Director to implement a policy unilaterally “when it is deemed to be in the best interest of the

Agency.”<sup>21</sup> The guidelines do not provide additional clarification about when or how such a determination may be made. (See *APPENDIX 3 for full text of DYS Policy Approval Guide.*)

In describing the formation of new policies to the CPO, DYS leaders emphasized their reliance on outside expertise and “best practices” throughout the policy approval process.<sup>22</sup> According to the DYS, commonly consulted sources include the Council of Juvenile Correctional Administrators (CJCA), the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative (JDAI) and the regulatory schemes of other states. Additionally, the DYS indicated that it occasionally contracts with outside experts to develop a tailored policy to address matters of particularly technical and/or urgent concern.<sup>23</sup>

Currently, however, any consultation of outside authorities during the policy approval process is not memorialized or formally documented.<sup>24</sup> Without a record of DYS’ research and/or deliberations, it is difficult for outside entities to trace the history and rationale of any individual policy. When concerns are raised about a policy’s content, members of the public have no way to know which policies are grounded in evidence, research or institutional experience and which are not.

### **Gaps & Weaknesses in Current Process**

Under the DYS’ current rulemaking process the flow of information, feedback and dialogue is confined to a small group of agency leaders. It does not include official access points for other stakeholders, including youth, juvenile advocates or facility staff to participate in any stage of the process.<sup>25</sup> Specifically, the

<sup>18</sup> “Division of Youth Services Policy Approval Guide,” Colorado Office of Children, Youth & Families (Revised November 2017). Document provided electronically to the CPO on 4/19/2019.

<sup>19</sup> Additional information about the policy approval process was provided in meeting between the CPO and DYS leadership held on May 14, 2019 at the DYS Central Office.

<sup>20</sup> Meeting, May 14, 2019.

<sup>21</sup> “Division of Youth Services Policy Approval Guide,” (2017): Page 2.

<sup>22</sup> Meeting, May 14, 2019.

<sup>23</sup> As an example, the DYS cited its recently revised policy on “Suicide Assessment, Monitoring, and Intervention” (Policy S 15.2, current version effective May 1, 2019). This policy was developed in collaboration with a subject matter expert on suicide in secure facilities.

<sup>24</sup> In the past, DYS policies included citations of underlying data and sources. According to leadership, these were removed to create clearer, more consistent formatting. These sources have not been made available elsewhere.

<sup>25</sup> DYS Leadership indicated that advocates and other members of the public could contact them individually to articulate policy recommendations or concerns. Information about how and where to initiate direct contact, however, is not publicly available or otherwise memorialized. Meeting, May 14, 2019.



current guidelines lack elements that are common in the participatory notice-and-comment rulemaking processes of other state agencies.<sup>26</sup> These include:

- No stakeholder process that includes interested parties from outside of the DYS.
- No public notice of proposed changes.
- No public hearing or other opportunity for public input on proposed changes.
- No publication of the underlying research, evidence or rationale that supports a policy change.
- No guidance on the DYS director's authority to override the standard process.

In conversations with the CPO, DYS leadership described internal deliberations that include robust dialogue and rigorous research. Without mechanisms for others to participate in or observe these deliberations, however, there is no way for outside entities to know what was discussed or considered.

### Impact of Current Process

While the current process may enable the DYS to streamline its regulatory agenda, the lack of transparency causes confusion and suspicion about its end results. Under these circumstances, the failure to engage other constituencies in the rulemaking process undermines the DYS' ability to serve youth collaboratively with families and communities.

Youth and their advocates are not the only people who care about the content of policymaking. DYS frontline staff, who work directly with youth, are also dramatically impacted by both the content of these policies and the process by which they are changed. In the past year, the CPO has received inquiries from

staff at multiple facilities who believe that the current policymaking process is not working. In one case, a frontline staff member called to express concern that DYS leadership was ignoring an uptick in violence in response to its new behavior management policies.<sup>27</sup> In another case, a teacher who works in a facility school expressed concern that leadership was resistant to collective feedback from school staff regarding policies impacting youths' access to contraband.<sup>28</sup>

Not only do these cases raise concerns about the content of certain DYS policies; the feelings expressed in conversations with the CPO suggest that aspects of the policymaking process itself leave frontline staff feeling excluded, disrespected and unheard.<sup>29</sup>

The CPO's analysis revealed problems with morale that have been identified by others. An outside performance assessment conducted in 2018 identified similar sentiments across the DYS.<sup>30</sup> The assessment, which was mandated by legislation, was conducted by third-party researchers to study factors that impact the safety in DYS facilities. Based on hundreds of interviews with staff and focus groups, the researchers concluded that the current style of policy change, which is not inclusive or transparent, was a common source of frustration and confusion among facility staff who work directly with youth. The final report found:

"Numerous frontline staff members expressed frustration about the lack of engagement with them by DYS administration. Many of the frontline staff report feelings that they have had no input into the changes and that no one has solicited their feedback, which makes buy-in difficult."<sup>31</sup>

<sup>26</sup> The concept of "notice-and-comment" rulemaking is derived from the Federal Administrative Procedures Act (5 U.S.C. § 551 *et seq.*), which is detailed in the subsequent section of this brief.

<sup>27</sup> CPO case #2018-03413

<sup>28</sup> CPO case #2019-03673

<sup>29</sup> In accordance with its authorizing statute, the CPO keeps identifying information contained in complaints confidential. See C.R.S. § 19-3.3-103(1)(a)(I)(B).

<sup>30</sup> This report, completed by the Development Services Group, Inc., is not currently posted online. Copies of both the Executive Summary (Volume I) and the Main Findings (Volume II) were provided to the CPO upon request by the DYS.

<sup>31</sup> "CDHS, DYS Program Performance Evaluation: Volume II. Main Findings," submitted by Development Services Group, Inc. (June 30, 2018): page 94.



In response to these findings, the researchers recommended that DYS leadership work more collaboratively with staff at all levels “to find out what is working well and not as well, and explore reasons why.”<sup>32</sup> The DYS could mitigate these concerns by developing a more transparent rulemaking process with access points for other stakeholders, including staff, to participate. A more participatory process would provide an opportunity for DYS to put the recommendations of the 2018 independent assessment into action.

### **THE ALTERNATIVE: Notice-and-Comment Rulemaking Procedures**

Frustration with the DYS’ rulemaking is not inevitable. In fact, the procedural gaps identified in the DYS’s current policy approval process are relatively rare among state agencies, most of which conform the requirements of the State Administrative Procedure Act (APA).<sup>33</sup> These agencies vary drastically in size, structure and purpose. Among them, there are many models of public rulemaking that could serve as examples for a more participatory process in the DYS.

For reasons that are not clear, the DYS does not have a process for formulating rules, regulations or policies in accordance with the APA. In its independent review of Colorado law, the CPO was unable to identify any provisions that would exclude the DYS from the Act’s requirements. The applicability of the APA to the DYS presents complex legal questions that are beyond the scope of this brief. The CDHS should consider these questions in consultation with the Colorado Office of the Attorney General.

The benefits of notice-and-comment rulemaking, however, do not depend on the resolution of these questions.

Transparency and collaboration are worth pursuing regardless of any legal obligations.

### **Agency Rulemaking Under the Administrative Procedures Act**

Under state law, most state agencies in Colorado develop the rules that govern their practice through a transparent process in accordance with the state APA.<sup>34</sup> Agencies subject to the Act are required to establish rulemaking procedures that include public notification, distribution and hearings on all proposed changes.

The Colorado Legislature first passed the state APA in 1959 to promote transparency and create an access point for citizens to participate in government.<sup>35</sup> Colorado’s law was closely modeled on the federal Administrative Procedure Act, designed as a check on the growing power of executive branch agencies as a result of the New Deal.<sup>36</sup> The passage of both the state and federal APAs signaled a recognition that rules and regulations are critical in shaping the character and quality of government. The expansion of notice-and-comment rulemaking, which emphasizes transparency, has transformed agency rules and regulations into an important domain for advocacy, litigation and dialogue about public policy.

Today, the central provisions of Colorado’s original APA remain intact and govern “any agency [that] is required or permitted by law to make rules” to establish a public notice-and-comment rulemaking process that allows “interested persons the opportunity to participate therein.”<sup>37</sup> For the purposes of the APA, “rule” and “regulation” are synonymous.<sup>38</sup>

To comply with the APA, a state agency’s rulemaking process must include the following elements:

<sup>32</sup> “DYS Performance Evaluation: Volume II,” (2018): page. 177.

<sup>33</sup> <sup>34</sup> C.R.S. §24-4-101 et seq.

<sup>35</sup> Act passed as HB 59-212, Concerning procedure of state administrative agencies in making rules, licensing and other matters, and review of their determinations; 1959 Colorado Session Laws Chap. 37.

<sup>36</sup> Public Law 79-404 (60 Stat. 237; enacted June 11, 1946)

<sup>37</sup> C.R.S. § 24-4-103(1)

<sup>38</sup> “Rule” is defined as “the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency,” C.R.S. § 24-4-102(15).





- A preliminary process to gather input from “representatives of each of the various stakeholder interests that may be affected positively or negatively” by any change that is being contemplated.<sup>39</sup>
- Public notice and distribution of the proposed changes and underlying rationale to anyone who has signed up to receive notifications through the Department of Regulatory Affairs.<sup>40</sup>
- A public hearing at which members of the public can submit “data, views, or arguments.” Drafts of the proposed changes and agency rationale must be made available to the public at least five days prior to the hearing.<sup>41</sup>
- The publication of underlying data, research, studies or reports that are “used by the agency in the development of the proposed rule.”<sup>42</sup>
- The publication of the agency’s reasoning any time it deems an issue urgent enough to adopt a temporary, emergency rule prior to holding a public hearing.<sup>43</sup>

(See APPENDIX 4 for a visualization of rulemaking in Colorado published by the Secretary of State.)

These provisions apply broadly across the executive branch of state government. The only agencies exempted from its requirements are those for which there a specific statutory exemption that takes precedence.<sup>45</sup> These exemptions are relatively few in Colorado law and do not appear to encompass or otherwise impact the DYS.<sup>46</sup>

Colorado agencies that perform notice-and-comment rulemaking utilize online systems maintained by the Secretary of State and the Department of Regulatory Agencies to disseminate information about proposed rule changes and upcoming hearings to the public.<sup>47</sup> Agencies that utilize these systems include the Colorado Bureau of Investigation (CBI), the state Board of Parole, the Public Employees’ Retirement Association (PERA) and Health First Colorado (Colorado’s Medicaid Program).<sup>48</sup>

### Models for Notice-and-Comment Rulemaking in Other Agencies

There are many examples of notice-and-comment rulemaking processes that could serve as a model for DYS.

#### **EXAMPLE: Colorado State Board of Human Services**

Perhaps the most relevant model of participatory, notice-and-comment rulemaking in Colorado comes from the very agency of which the DYS is a part. The State Board of Human Services (State Board), which is comprised of county officials and members of the public, facilitates rulemaking for the divisions and programs under the CDHS that interface with local government. These include the Division of Child Welfare, the Office of Early Childhood, the Office of Economic Security and the Office of Behavioral Health. The State Board was initially created to ensure coordination and procedural equity among state and local

<sup>39</sup> C.R.S. §24-4-103(2)

<sup>40</sup> C.R.S. §24-4-103(2.5)

<sup>41</sup> C.R.S. §24-4-103(4)(a)

<sup>42</sup> C.R.S. §24-4-103(4)(a.5)

<sup>43</sup> C.R.S. §24-4-103(6)(a)

<sup>44</sup> The State Administrative Procedures Act does not bind the legislative or judicial branches. See C.R.S. § 24-4-107.

<sup>45</sup> C.R.S. § 24-4-103

<sup>46</sup> One notable exception does exist for the Colorado Department of Corrections (DOC), which serves adults and is explicitly exempt from the Act’s requirements in developing rules “relating to the placement, assignment, management, discipline, and classification of inmates” (C.R.S. §17-1-111). This exemption was passed as stand-alone provision in 1983 (HB 83-1422) as part of a broader movement to toughen laws surrounding criminal sentencing and confinement. This exemption does not impact the DYS, which is not part of the DOC.

<sup>47</sup> See the Colorado Register, online eDocket on the Secretary of State’s website: <https://www.sos.state.co.us/>. See Regulatory Notice page on the Department of Regulatory Agencies website: [http://www.dora.state.co.us/pls/real/sb121\\_web.signup\\_form](http://www.dora.state.co.us/pls/real/sb121_web.signup_form).

<sup>48</sup> For a full list, see the table of contents of the Colorado Code of Regulations: <https://www.sos.state.co.us/CCR/NumericalDeptList.do>





officials during the rulemaking process.<sup>49</sup> The DYS does not participate in the proceedings of the State Board.

For participating agencies, the State Board ensures compliance with the notice-and-comment requirements of the state APA. The State Board works in coordination with the Colorado Secretary of State to publish the text, rationale and progression of all proposed changes and distribute notice of upcoming hearings and final rules to anyone who signs up for updates.<sup>50</sup>

The State Board meets monthly to hear testimony and discuss proposed changes to agency rules and regulations. Anyone can sign up to provide testimony at these meetings, which are open to the public and broadcast live. Details and agendas for upcoming meetings are advertised on the CDHS website along with guidelines for citizens who wish to participate in the process.<sup>51</sup> To be finalized, each rule must be approved by a majority vote of its membership. These procedures are laid out in great detail in a procedural rulemaking manual that is also available online.<sup>52</sup>

Meetings of the State Board are closely monitored by stakeholders. Its hearings serve as a venue for dialogue and debate about important public policy questions related to public welfare and service delivery. Documentation of the State Board's activities, including the testimony of dissenting voices, creates a valuable record for those seeking to interpret, implement and improve rules and regulations in the future.

The CPO does not offer this example as a recommendation that the State Board

take over rulemaking for the DYS. The State Board's robust structure, logistics and communications protocols, however, provide a model that is familiar to CDHS leaders and stakeholders. Aspects of this model could be easily replicated, adapted and/or expanded to serve the needs of the DYS.

### ***Other States:***

Because the regulatory powers of state agencies are governed by each state's specific administrative laws, rulemaking for juvenile correctional facilities varies substantially from state to state. Among states that do have a state-level APA, many explicitly exempt their adult corrections agencies from its requirements.<sup>53</sup> Most of these exemptions, however, do not extend to juvenile corrections divisions. As such, most states' juvenile justice agencies are subject to the same general notice-and-comment rulemaking requirements as other state agencies.

To fulfill these requirements, states utilize a variety of procedural mechanisms depending on their unique legal obligations, administrative structures and agency cultures. These boards, commissions, trackers and websites enable transparency and public participation in varying degrees. Any of these could be adapted for use in Colorado.

Across the country, state juvenile justice agencies share a difficult and demanding charge. They are tasked with maintaining facility environments that are rehabilitative and trauma-informed while simultaneously ensuring safety and security for youth and staff. Under these circumstances, there may be a time-limited need for regulatory flexibility and discretion. These emergency

<sup>49</sup> The State Board was created in fulfillment by a 2011 Executive Order from the Governor's office. See E.O. D 2011-005, "Establishing a Policy to Enhance the Relationship between State and Local Government." The mandate was codified in 2012 with the passage of SB 12-26, Concerning a state agency rule that creates a state mandate on a local government," 2012 Colorado Session Laws Chap. 199.

<sup>50</sup> Stakeholders can sign up for rulemaking updates for any agency or issue areas online through the office of the Colorado Secretary of State. See webpage titled "Administrative Rule of State Agencies" for instructions and FAQs: <https://www.sos.state.co.us/pubs/CCR/CCRHome.html>

<sup>51</sup> The CDHS maintains a page on its website dedicated to the work of the State Board. The page includes the Board's bylaws, authorizing statute, operating procedures, information about upcoming meetings and minutes from past meetings: <https://www.colorado.gov/pacific/cdhs-boards-committees-collaboration/state-board-human-services>

<sup>52</sup> See "Standards and Procedures Manual for Rulemaking," developed by the administrator for the State Board of Human Services (Revised March 2017), available online at: <https://drive.google.com/file/d/0B6kUZ5aEpmVCN1didDF6WDNPZU0/view>

<sup>53</sup> Colorado law has an exemption for adult corrections (see C.R.S. § 17-1-111). The CPO was unable to identify a similar exemption for juvenile corrections in Colorado.



concerns must be balanced against the need for transparency and accountability to outside entities. The notice-and-comment procedures and associated tools of other juvenile justice agencies

provide models that can be leveraged to help Colorado find this balance. (See *APPENDIX 5 for a description and example of notice-and-comment rulemaking from the California Division of Juvenile Justice.*)

## Conclusion and Recommendations

The current process by which the DYS creates and revises its policies is not transparent and does not include opportunities for outside entities to monitor or provide input. The exclusion of outside eyes and voices creates confusion and suspicion and results in policies that may not be adequate to protect youth and staff safety.

There are many examples, both in Colorado and in other states, of effective notice-and-comment rulemaking by agencies that address urgent and sensitive issues. These agencies balance the need for procedural efficiency with the benefits of public participation and input.

In order to strengthen and demystify its policies, the CPO recommends that the DYS adopt concrete measures to increase transparency and public participation in its rulemaking process.

### RECOMMENDATION 1

To increase transparency surrounding its rulemaking process the CPO recommends that the DYS:

- a. Publish its Policy Approval Guide online.
- b. Publish any research, data or other rationale on which all future policies and policy revisions are based.
- c. Publish the rationale for any decision to “fast-track” future policies and policy revisions.
- d. Create a notification system by which stakeholders can receive alerts when new DYS policies are finalized.

### CDHS-DYS Response:

- a) AGREE. The Division of Youth Services will post this material on their public facing website by September 2019.
- b) PARTIALLY AGREE. The Division of Youth Services will publish data and/or research on relevant policies.
- c) AGREE. The Division will add into its policy approval guide the definition of a “fast-track” policy revision process and examples of reasoning behind an expedited process. Should a stakeholder have questions regarding the change, they can reach out to the Division and inquire as to why the decision was made. A contact name, email, and phone number will be provided on the policy approval guide should any questions arise.
- d) AGREE. The Division of Youth Services will create a system where stakeholders can sign up to receive alerts on new policies that have been released.



## RECOMMENDATION 2

To expand and increase public participation in its rulemaking process, the CPO recommends that the DYS:

- a. Create an official process by which members of the public can submit feedback and recommendations on existing policies. A description of this process should be posted and easy to locate online and in DYS staff and youth handbooks.
- b. Convene a time-limited working group to identify ways to formally incorporate input from stakeholders at various stages of its regulatory process. The study should consider the role of various constituencies, including youth, families, DYS staff, clinicians, juvenile advocates and members of the public. Documentation of the group's work, including meeting minutes, findings, conclusions and recommendations of the group should be made publicly available and posted online.
- c. Create a notification system by which stakeholders can receive updates about policy revisions as they are being contemplated, developed and finalized. These notifications should include information about how and where stakeholders can participate and/or provide input as determined by the working group.

### **CDHS-DYS Response:**

- a) **PARTIALLY AGREE.** The Division of Youth Services will accomplish this recommendation by posting online and in youth handbooks. There is no staff handbook. The staff already has options to discuss policy related issues and the Division of Youth Services has a plan to expand that process to all staff.
- b) **INAPPLICABLE:** The Division of Youth Services does not conduct a regulatory process. It utilizes a committee to develop policies and procedures for operations.
- c) **PARTIALLY AGREE.** DYS agrees with CPO that stakeholder input is valuable and important. DYS is concerned, however, that allowing every policy proposal and revision to incorporate a stakeholder process will hamstring DYS and potentially create unsafe conditions for staff and youth. DYS believes that the following strikes the proper balance between DYS receiving stakeholder input and DYS conducting its business: under recommendation 1 (c) stakeholders who have signed up will receive notification of finalized policies. Under recommendation 2 (a) members of the community can provide on-going feedback at any time.



### RECOMMENDATION 3

The CDHS should, in consultation with the Office of the Attorney General, determine whether the DYS is in compliance with the State Administrative Procedures Act for the purpose of agency rulemaking. At minimum, such a determination should address:

- a. Whether the DYS is subject to the provisions of the C.R.S. §24-4-103.
- b. Whether the DYS policies that are currently posted online constitute "rules" as defined in C.R.S. §24-4-102.

The outcome of this determination should be provided to the CPO and included in the CDHS annual SMART Act Performance Plan, which is presented to the joint health and human services committee.<sup>54</sup>

#### **CDHS-DYS Response:**

DYS policies currently posted online do not constitute rules as defined by the Administrative Procedure Act.

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<sup>54</sup> House Bill 18-1335, "Concerning the Colorado child care assistance program, and, in connection therewith, establishing eligibility requirements for all counties and creating a new formula to determine the amount of block grants to counties," available at <http://leg.colorado.gov/bills/hb18-1335>.





The CPO would like to thank the CDHS and DYS for sharing their time and expertise. Pursuant to C.R.S. §19-3.3-103(2), the CPO respectfully submits this report to the citizens of Colorado, child protection stakeholders and the Colorado General Assembly.

Caroline Parker  
Policy and Legislative Analyst  
Office of Colorado's Child Protection Ombudsman

Approved By:

Stephanie Villafuerte  
Child Protection Ombudsman  
Office of Colorado's Child Protection Ombudsman

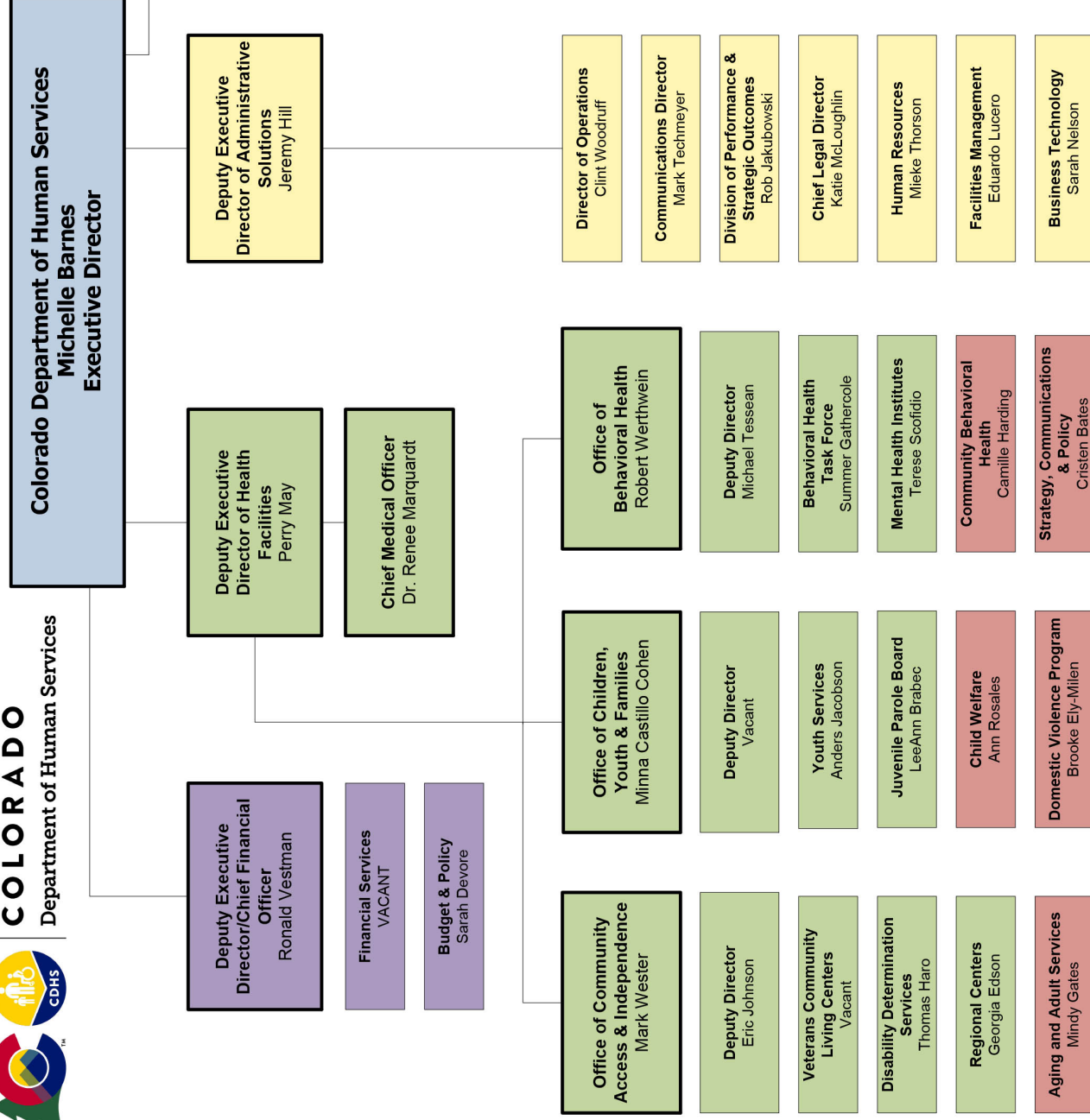
# Appendix 1



**COLORADO**  
Department of Human Services



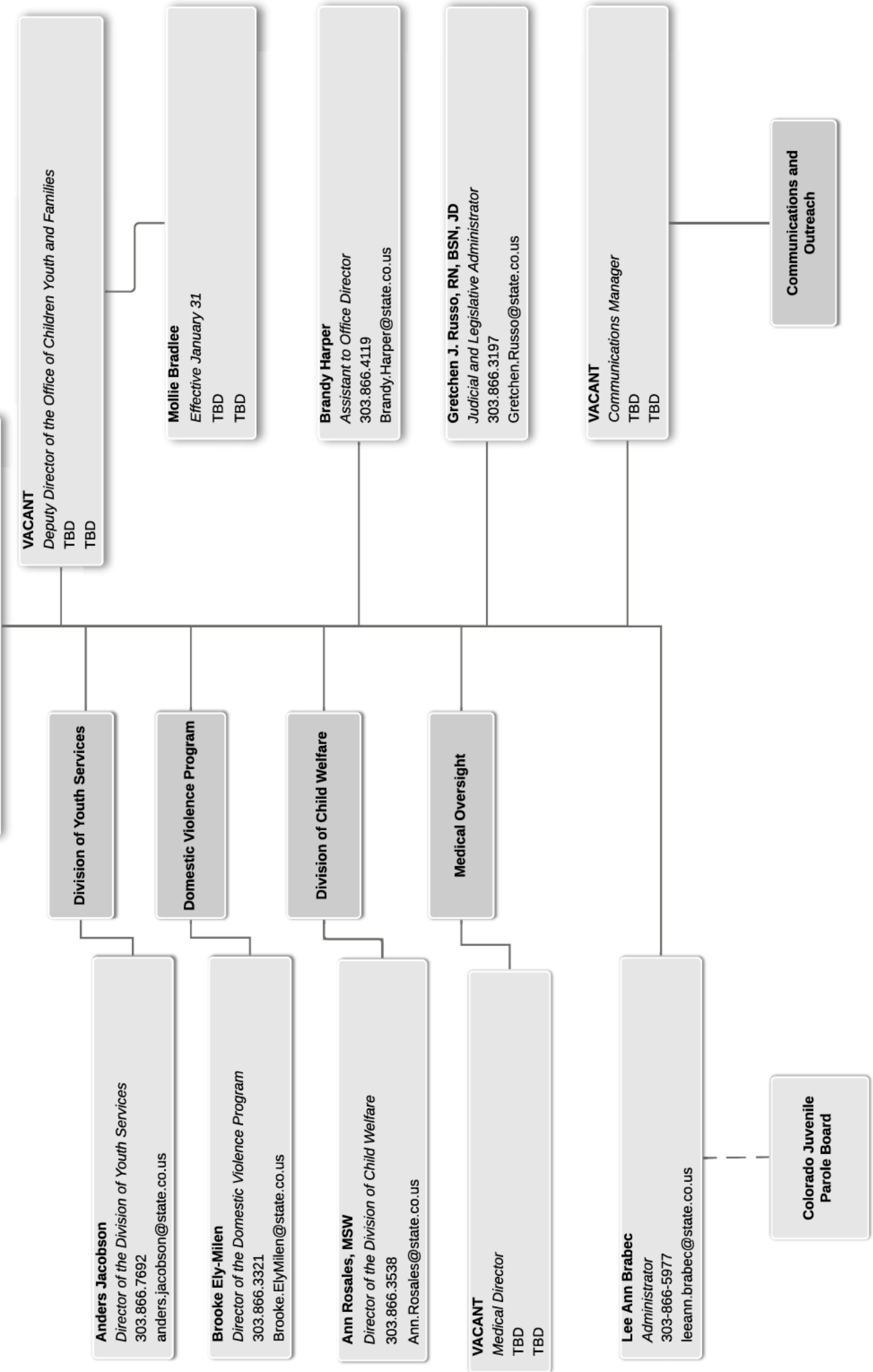
Updated 6.13.2019



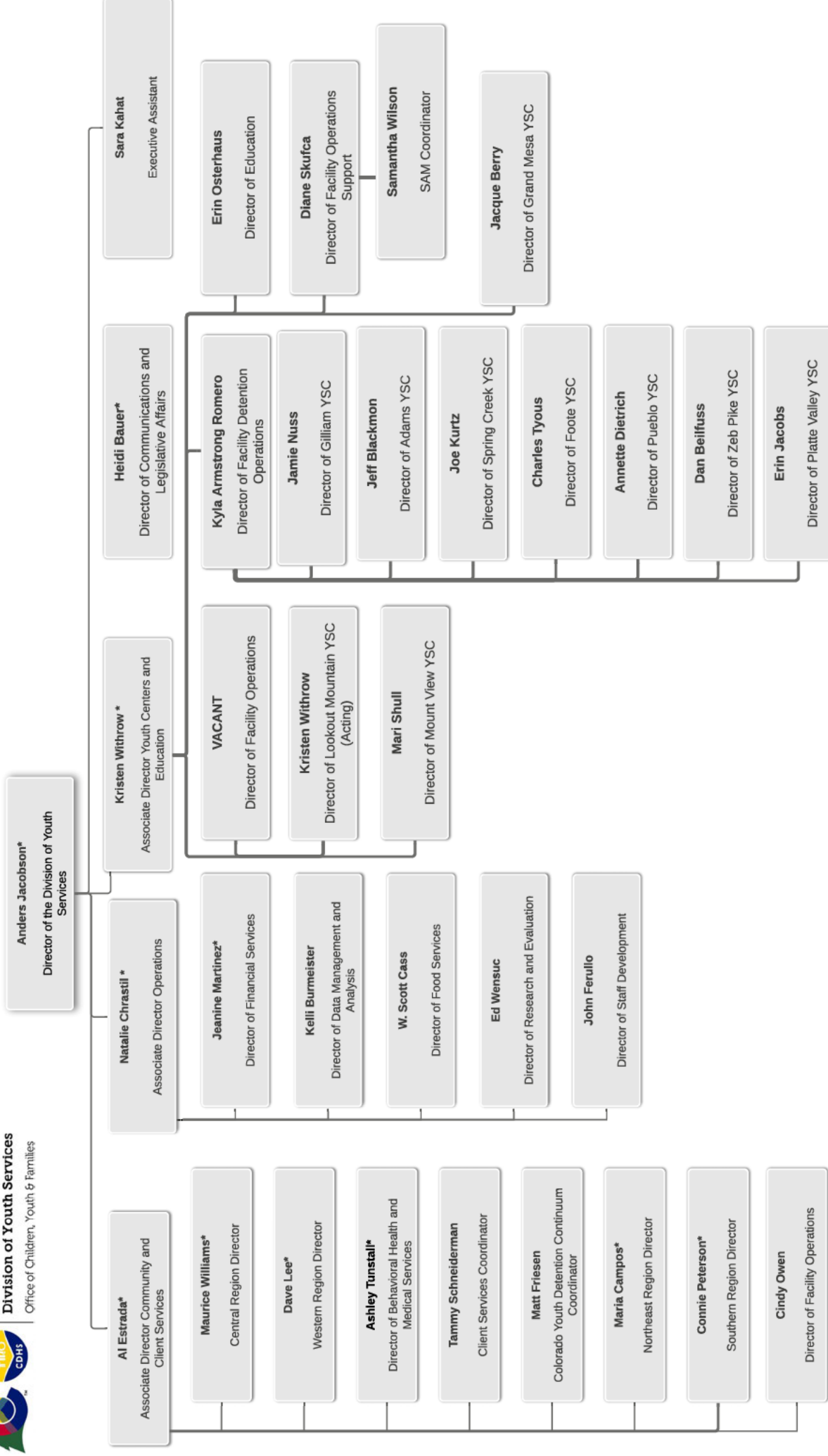


**COLORADO**  
**Office of Children,  
Youth & Families**  
Department of Human Services

**Minna Castillo Cohen**  
*Director of the Office of Children, Youth and Families*  
303.866.4544  
minna.castillocohen@state.co.us







\* Indicates DYS leadership team member.

## Appendix 2

<b>Policy #</b>	<b>Policy Subject</b>
<b>CHAPTER 1</b>	<b>Administration, Organization and Management</b>
1.1	Legal Authority and Division Mission
1.2	Internal and External Communications
1.3	Admission Criteria
1.6	Contract Programs
1.7	Facility Planning, Reporting and Review
1.9	Legal Representation and Assistance
1.11	Public Information/News Media
1.12A	Detention Victim Notification Program
1.12B	Committed Victim Notification Program
1.13	Employee Dress Code
1.14	Facility Administrative and Supervisory Personnel Support
1.15	Waivers
1.16	Detention Capacity
<b>CHAPTER 2</b>	<b>Fiscal Management</b>
2.1	Purchase and Lease of Computer Hardware/Software, Cellular Phones, Pagers and Two-way Radios
2.3	Accounting for Appropriations and Expenditures of Funds
2.4	Youth Trust Funds
2.5	Youth Personal Funds
2.6	Internal Control and Monitoring of Accounting Procedures
2.7	Capital Assets Inventory Control
2.8	Warehouse Inventory and Expendable Program Supplies
2.9	Position Control
2.1	Insurance Coverage
2.12	Contracts and Grants
<b>CHAPTER 3</b>	<b>Personnel</b>
3.1	Employee Grievances
3.2	Membership in Employee Organizations and Employee Representation
3.3	Outside Employment and Conflict of Interest
3.4	Administering Corrective and Disciplinary Actions
3.5	Drug Free Workplace/Substance Abuse and Tobacco Use
3.6	Leave, Timekeeping/KRONOS, Worker's Compensation, FMLA, FLSA, Administrative Leave
3.6A	Youth Center Scheduling
3.8	Appointing Authority
3.9	Certification, Licensure and Letters
3.1	Personnel Records
3.11	Policy Manual Establishment and Maintenance
3.12	Personnel Selection, Retention, Promotion and Layoff, Separation
3.14	Personnel Actions Related to Alleged Child Abuse
3.15	Client Managers/Parole Officers Carrying Badges and Dangerous Weapons
3.18	Employee Assistance Program
3.2	Relationships between Youth and Staff
3.21	Employee Background Search, Employee Reporting Responsibility, Trails Database Checks
3.25	Transitional Duty
3.28	Violence in the Workplace and Sexual Harassment

<b>Policy #</b>	<b>Policy Subject</b>
3.3	Professional Conduct
<b>CHAPTER 4</b>	<b>Training and Staff Development</b>
4.1	Training Requirements-Facility Based
4.2	Training and Training Requirements- Non-Facility Based Employees
<b>CHAPTER 5</b>	<b>Management Information and Research</b>
5.1	Colorado TRAILS Database
5.2	Research and Evaluation
<b>CHAPTER 6</b>	<b>Youth Records</b>
6.1	Content, Use, Transfer, Security and Release of Youth Records
6.2	Closed Youth Records
<b>CHAPTER 7</b>	<b>Physical Plant</b>
7.1	Existing Facility Requirements
7.3	Building and Equipment Maintenance
7.4	Assignment of Space
<b>CHAPTER 8</b>	<b>Safety and Emergency</b>
8.1	Fire Safety Inspections and Prevention
8.2	Risk Management
8.3	Control and Use of Flammable, Toxic and Caustic Materials
8.4	Client Manager/Parole Officer Field Safety
8.5	Inclement Weather
<b>CHAPTER 9</b>	<b>Security and Control</b>
9.1	Perimeter Security and Security Inspections
9.2	Control Center
9.3	Youth Supervision and Movement
9.4	Physical Response and Protective Devices
9.4A	Physical Response Protective Devices
9.5	Count Policies and Procedures
9.6	Shift Assignments and Shift Logs
9.8A	Reporting Critical Incidents
9.8B	Reporting Critical Incidents
9.9	Dangerous Weapons
9.9A	Active Threat Prevention
9.1	Key Control System
9.11	Tools, Culinary and Medical Equipment
9.12	Facility Emergency Plan
9.13	Searches of Youth and Facilities
9.14	Security, Assignment and Use of State Vehicles
9.15	Transportation of Youth Outside of the Facility
9.17	Reporting Child Abuse
9.18	Two-Way Communication
9.19	Sexual Contact Prevention
9.2	Hospital Security
9.22	Use of Personal Electronic Devices in Facilities
9.23	Safe Treatment of Pregnant Females
9.24	Video Monitoring and Surveillance
<b>CHAPTER 10</b>	<b>Food Service</b>
10.2	Facility Food Service Program Management
10.3	Menu Planning and Meal Service



<b>Policy #</b>	<b>Policy Subject</b>
10.4	Work Experience Programs for Committed Youth
10.5	Staff / Guest Meals
10.6	Food from Outside Sources
10.7	Food-Borne Illness Prevention and Control
<b>CHAPTER 11</b>	<b>Sanitation and Hygiene</b>
11.1	Housekeeping Plans and Sanitation Health Inspections
11.2	Waste Disposal and Pest Control
11.3	Personal Hygiene, Clothing, Bedding and Linen Supplies
<b>CHAPTER 12</b>	<b>Medical and Health Care Services</b>
12.1	Medical Program Administration
12.2	Medical Supplies and Equipment
12.3A	Receiving Screening and Mental Health Screening
12.3B	Health Assessments, Physical Examinations, Transfer Screening and Discharge Planning
12.3C	Dental Services
12.4	Medical Records
12.5	Access to Medical Services
12.6	Notification of Serious Illness or Injury
12.7	Medical Emergency Protocol
12.8	Medical Treatment for Injured or Ill Staff Members
12.9	Special Health Care
12.10A	Use and Management of Pharmaceutical Products
12.10B	Medical Experimentation or use of Pharmaceutical for Behavior Management
12.10C	Qualified Medication Administration Personnel
12.11	Nursing Assessment Protocols Continuous Quality Improvement
12.12	Permission or Refusal of Treatment
12.13	Fatality Procedures
12.14	Communicable and Infectious Diseases
12.15	Acquired Immune Deficiency Syndrome
12.17	Panel of Medical Consultants
12.18	Youth Head Trauma Guidelines
12.19	Chronic Disease Services
12.2	Intoxication and Withdrawal
12.21	Protective Devices and Seclusion
<b>CHAPTER 13</b>	<b>Youth Rights</b>
13.1	Basic Rights, Responsibilities, and Access to Services
13.2	Grievance Procedures
13.3	Access to Courts and Council
13.5	Rights, Responsibilities of Youth Regarding Personal Appearance
13.9	Non-Discriminatory Services to Lesbian, Gay, Bisexual, Transgender, Questioning, and Intersex (LGBTQI) Youth
<b>CHAPTER 14</b>	<b>Rules and Discipline</b>
14.3A	Facility Rules
14.3B	Time-out, Seclusion and Program Refusal
<b>CHAPTER 15</b>	<b>Mental Health Services</b>
15.1	Access to Psychiatric Hospitalization
15.2	Suicide Assessment, Monitoring and Intervention NEW Policy to be implemented upon facility training completion but no later than 5/1/19: Suicide Assessment, Monitoring and Intervention

<b>Policy #</b>	<b>Policy Subject</b>
15.3	Access to Services for the Developmentally Disabled
15.4	Psychotropic Emergency Medications
15.5	Substance Abuse Assessment
15.6	Substance Abuse Services
15.7	Substance Use Analysis and Testing
15.7A	Toxicology Screening and Reporting
15.8	Involuntary Medication Administration
15.9	Supervision, Services and Documentation
<b>CHAPTER 16</b>	<b>Admission, Transfer and Release</b>
16.1	Admissions, Reception / Orientation
16.2	Personal Property
16.4	Release from Custody
16.5	Removal From Rolls
16.7	Pre-Parole Planning
16.8	Restitution / Supervision Levels - Parole
16.9	Parole Absconding / Violating / Modification / Rev.
16.1	Transfer & Supervision of Interstate Compact Youth
16.11	Sex Offender Registration
16.12	Parole Release, Discharge
16.13	Apprehension / Field Safety
<b>CHAPTER 17</b>	<b>Programs and Services</b>
17.1	Scope of Programs and Services
17.2	Education Program
17.4	Library Services
17.5	Counseling
17.8	Educational and Career Technical Education Programs
17.1	Recreation
17.11	Faith / Religious Programming
17.12	Temporary Release
17.15	Restitution
17.16	Youth Wellness Policy, Canteen Accounts and Audit of the Canteen Accounts
17.17	Limited English Proficiency
17.18	Multi-Disciplinary Team (MDT)
17.19	Room Time
17.21	Individual Growth and Change Program
<b>CHAPTER 18</b>	<b>Communications: Mail, Visits, and Telephone</b>
18.1	Youth Visiting
18.2	Youth Correspondence
18.3	Telephone
<b>CHAPTER 19</b>	<b>Federal Entitlement Programs</b>
19.1	Judicial Findings Regarding Reasonable Efforts and Eligibility Determination and Re-determination
19.2	Youth Discrete Case Plans
19.3	Administrative Review
<b>CHAPTER 20</b>	<b>Citizen Involvement and Volunteers</b>
20.1	Volunteer / Intern Management
<b>CHAPTER 21</b>	<b>Assessment and Classification</b>
21.1	Risk Assessment, Classification and Reclassification

<b>Policy #</b>	<b>Policy Subject</b>
21.2	Length of Service (LOS) and Reclassification
21.3	Juvenile Photographing and Fingerprinting
21.4	Colorado Juvenile Risk Assessment
<b>CHAPTER 22</b>	<b>Information Technology</b>
22.1	Use of Electronic Mail (E-mail), Use of Support of Hardware and Software, Internet / Intranet Access
22.5	Computer Network and Internet Use in the Classroom
<b>CHAPTER 23</b>	<b>State Owned Privately Operated Secure- Administrative Policies</b>
23.1	Youth Personal Funds (Custodial)
23.2	Certification, Licensure and Letters
23.3	Policy Manuals Establishment And Maintenance
23.4	Training And Training Requirements Contract Program Employees
23.5	Research and Evaluation
23.6	Closed Youth Records
23.7	Control and Use of Flammable, Toxic and Caustic Materials
23.8	Facility Food Service Program Management
23.9	Menu Planning and Meal Service
23.1	Work Experience Program For Committed Youth
23.11	Food From Outside Sources
23.12	Housekeeping Plans and Sanitation Health Inspections

## Appendix 3





**COLORADO**

**Office of Children,  
Youth & Families**

Division of Youth Services

## **Policy Approval Guide**

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**This document serves as a guide for DYS staff in the creation and implementation of DYS Policy.**

# **Division of Youth Services**

## **Policy Approval Guide**

### **Statement of Purpose:**

The purpose of this guide is to outline the procedures for creating a Division of Youth Services policy, gaining approval for the policy and communicating the policy to DYS employees.

A review of the Division of Youth Services Policy shall occur on an on-going basis, or when found otherwise necessary, to provide recommendations and maintain consistency to the current applicable Evidence Based Practices, Division/Department Policy, State Statutes, and Federal Regulations.

### **Scope:**

All DYS employees seeking to create or revise a Division – wide policy must follow these procedures.

The DYS Director may implement a DYS policy without following these procedures when it is deemed to be in the best interest of the Agency.

### **Procedures:**

1. DYS Associate Directors/Director Approves Policy Revision Request. The policy author must gain the approval of a DYS Associate Director/Director to revise a Division Policy. Requests for revisions shall be submitted through one of two different sources:
  - a. Policy revision request for the Division of Youth Services policies shall be submitted to the Associate Directors, or the DYS Director. The approving Director will forward policy revision recommendations to the Policy Coordinator for electronic copies of the policy for revision.
  - b. Policy revisions may be developed within the context of a specific Committee, Sub-Committee, or Work Group. The Committee Chair shall contact the Associate Directors, or the DYS Director for approval to revise the identified policy. The approving Director will assign a lead to draft the DYS Policy revision.
2. The Division of Youth Services Policy Coordinator will provide electronic drafts of the identified policy(s) to the approved lead and initiate tracking the revision on the DYS Policy Tracking Sheet using Smart Sheets.
3. Subject Matter Experts (SME) shall be included in the process of making all applicable revisions. When the revisions are completed and approved by the

receiving Director, or Committee Chair, the revisions shall be forwarded to the DYS Policy Coordinator for further review. (*REVISIONS TO STATE AND CONTRACT POLICIES OCCUR CONCURRENTLY TO MAINTAIN POLICY CONSISTENCY*).

4. When the policy revision vetting, editing and formatting are complete the Policy Coordinator will notify the Policy Review Committee (PRC) that the updated policy draft is available for review on the DYS Policy Tracking Sheet and confirm the date of the committee's Policy Review Meeting and Agenda. Policies placed on the agenda for review will be provided to PRC members in a timely manner, 10 days prior to the monthly PRC meeting.
  - a. In the event that a policy revision requires expedited approval (Priority Fast Track ) the policy may be forwarded to the PRC Committee for electronic review, with a specific deadline for review.
  - b. All initial revisions, in addition to revisions recommended by the PRC, shall be completed on the policy and a fully edited version shall be disseminated back out to all PRC members and SME's for final review.
5. The DYS Policy Coordinator shall provide policy update notifications to the approving Associate Director/ DYS Director for review and approval.
6. Policy review's that are returned with feedback will be forwarded as updates to the policy coordinator to make revisions and a updated notifications will be sent to PRC member's and designated agency directors for final review before final approval and signature.
7. The Division of Youth Services Director shall forward the approved revisions to the Attorney General's Office and to the Director of the Office of Children, Youth and Families. Once the Policy revisions are approved by each agency designee and signed by the DYS Director, the Policy Coordinator shall disseminated the updated policy throughout the Division of Youth Services with a thirty day training period prior to the policy effective date. The policy will be posted to the DYS website on the policy effective date for implementation.
8. Previous versions of the Policy and Procedure shall be removed from use throughout the Division and associated contract programs.

#### Proposed Policy Revision Time Frames:

Recommend: Policy changes/revisions to any specific policy occur on a quarterly basis (changes to same policy), unless revision requires Fast Track Approval.

- Revision Source: Option I (Routine) 5-12 weeks (From the date the Draft is received by the DYS Policy Coordinator).
- Revision Source: Option II (Priority Fast Track) 2-5 weeks (From the date the Draft is received by the DYS Policy Coordinator).

Policy Revision Tracking Systems Utilized:

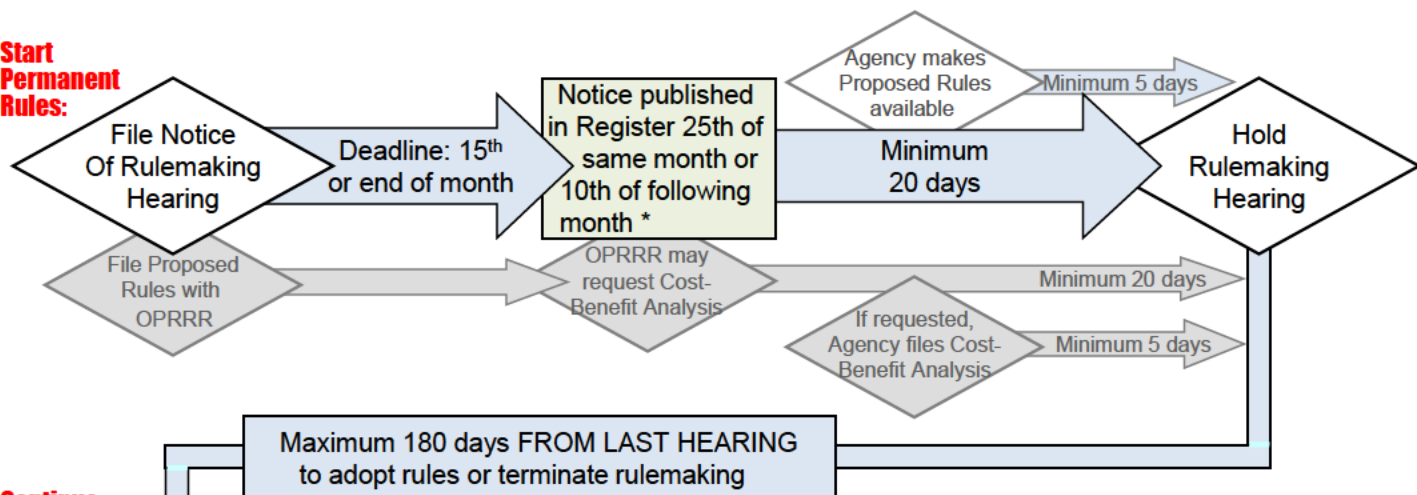
- DYS Policy Tracking Sheet using Smart Sheets (Review, Editing, Tracking, and Archive)
- Updated DYS Key Terms
- DYS Master's (Hardcopy) Forms and Policies
- CDHS/DYS Website

## Appendix 4

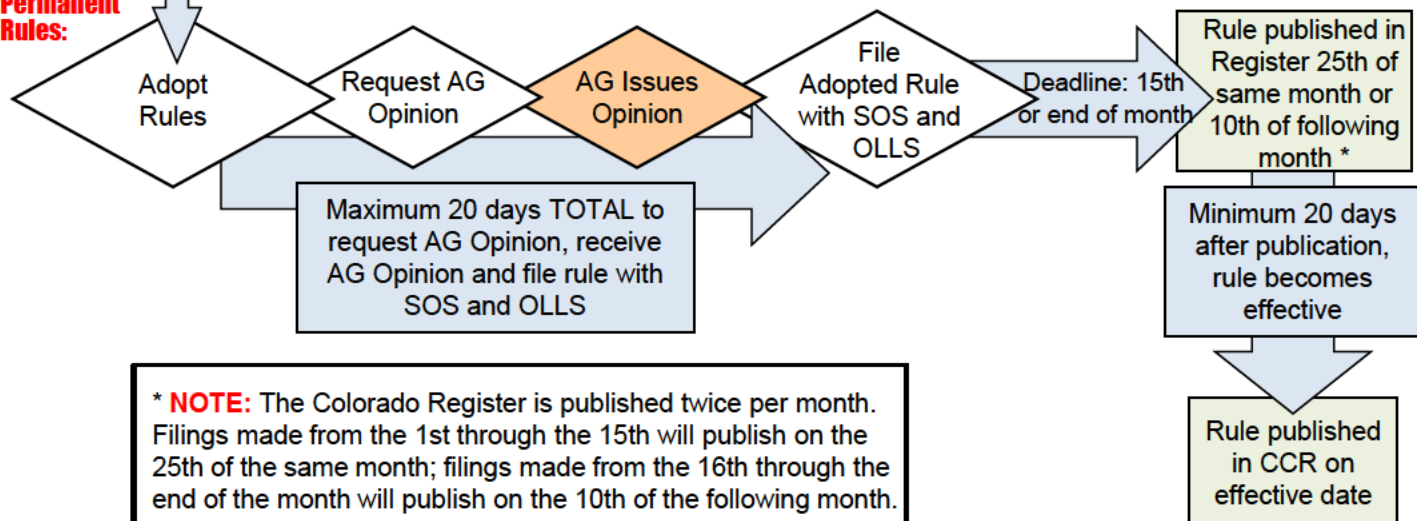


# Colorado Rulemaking Process: Deadlines and Timelines

## Start Permanent Rules:

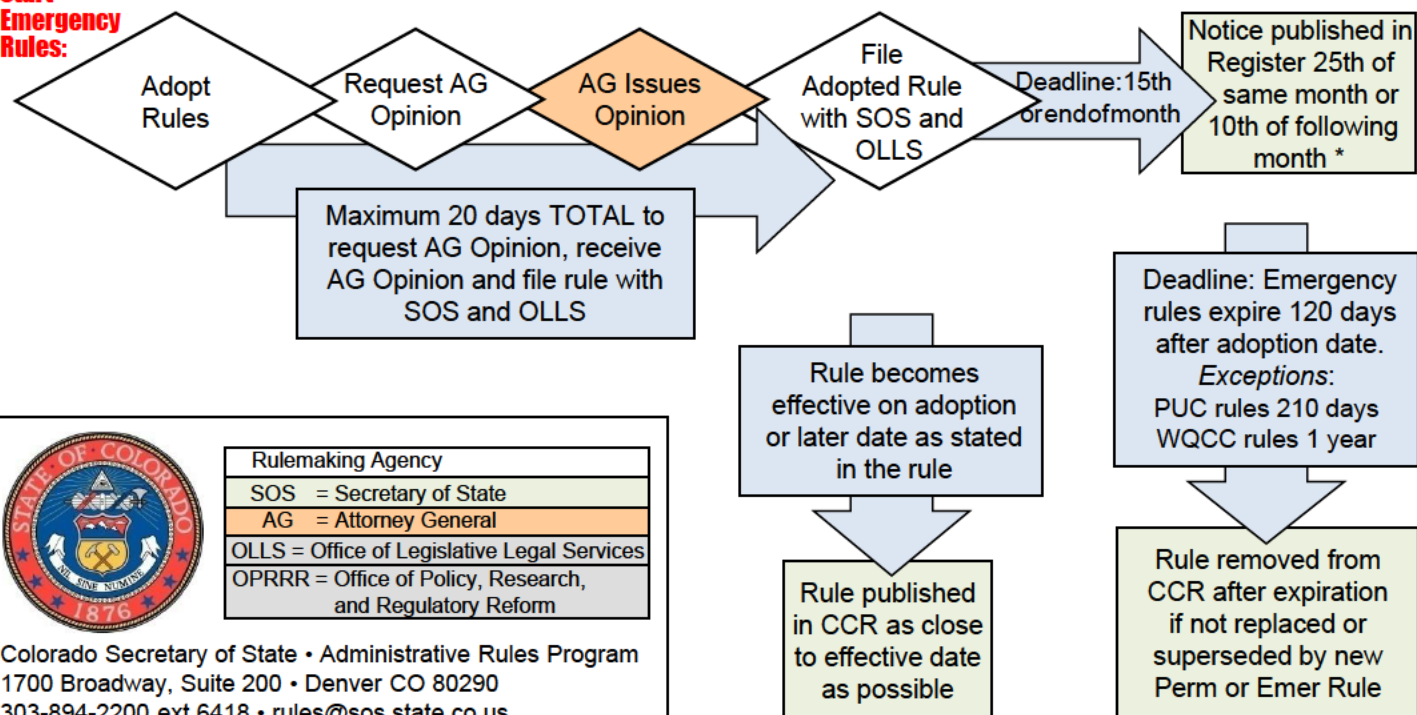


## Continue Permanent Rules:



**\* NOTE:** The Colorado Register is published twice per month. Filings made from the 1st through the 15th will publish on the 25th of the same month; filings made from the 16th through the end of the month will publish on the 10th of the following month.

## Start Emergency Rules:



Rulemaking Agency
SOS = Secretary of State
AG = Attorney General
OLLS = Office of Legislative Legal Services
OPRRR = Office of Policy, Research, and Regulatory Reform

Colorado Secretary of State • Administrative Rules Program  
1700 Broadway, Suite 200 • Denver CO 80290  
303-894-2200 ext 6418 • rules@sos.state.co.us

## Appendix 5

### ***Rulemaking in California Division of Juvenile Justice***

California provides one useful example of notice-and-comment rulemaking within a state juvenile justice system. The California Division of Juvenile Justice (DJJ), which oversees California's juvenile facilities, faces the same exigencies as the DYS. Like DYS' policies, DJJ regulations address those aspects of facility administration, programming and practice, including use of force, mechanical restraints, visitation, contraband and cavity searches.<sup>1</sup> In developing these regulations, the DJJ appears to have developed a process that balances the need for urgency and efficiency in these matters against the need for rigor and transparency. This process was put to use to develop revisions to DJJ use-of-force rules in response to a 2003 lawsuit and subsequent court-ordered monitoring.

Under the California Administrative Procedures Act, the DJJ is required to conduct its rulemaking through a process that includes public notice and an opportunity for public comments prior to the adoption of a new rule or revision.<sup>2</sup> When DJJ determines the need for an emergency rule without holding public hearing it is required to publish a statement of "specific facts demonstrating the existence of an emergency."<sup>3</sup> Unless these rules are subsequently approved through the normal notice-and-comment process, they expire after 180 days. The California Department of Corrections, which oversees the DJJ, maintains a dedicated page on its website that lays out rulemaking authority, process and stakeholder notification information for the DJJ.<sup>4</sup>

Like the State Board of Human Services in Colorado, DJJ rulemaking serves as an important public forum for policy debates. Stakeholders with an interest in California's justice system are able to track and monitor changes to rules for both adult and juvenile facilities. Organizations and interest groups representing a wide range of constituencies participate publicly in the process when urgent and/or controversial issues are addressed.<sup>5</sup> The Prison Law Office, a leading juvenile justice reform organization in California, publishes information explaining the DJJ rulemaking process and its various public access points to youth, families and other advocates who may have concerns about conditions or procedures inside facilities.<sup>6</sup>

The value of the DJJ's process has been demonstrated by the robust public dialogue that has played out surrounding revisions to the DJJ's use of force policies. In 2003 the DJJ began a review of its policies surrounding use of force in response to concerns raised in a lawsuit.<sup>7</sup> To complete this review, the DJJ worked with juvenile justice experts to study and document the issue across its facilities. As issues were identified, the DJJ implemented new policies unilaterally on an emergency basis. Each time, however,

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<sup>1</sup> DJJ rules and regulations comprise Division 4 of Title 15 of the California Code of Regulations. The full Code is accessible online:

<https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?transitionType=Default&contextData=%28sc.Default%29>

<sup>2</sup> For the full text of the California APA, see CA Government Code § 11340 et seq.

<sup>3</sup> CA Government Code § 11346.1(b)(2)

<sup>4</sup> See "DJJ Regulations" CDRC website: [https://www.cdcr.ca.gov/regulations/Juvenile\\_Justice/index.html](https://www.cdcr.ca.gov/regulations/Juvenile_Justice/index.html)

<sup>5</sup> Organizations that monitor and/or participate in DJJ rulemaking include the Prison Law Office, Youth Law Center, California Correctional Peace Officers Association and Children's Advocacy Institute (see Children's Regulatory Law Reporter).

<sup>6</sup> See *The California Prison and Parole Law Handbook*, "Chapter 2: Rights of People in Prison," by Heather MacKay and the Prison Law Office (2019): <https://prisonlaw.com/wp-content/uploads/2019/01/Handbook-Chapter-2.pdf>

<sup>7</sup> See *Farrell v. Allen*, County of Alameda, Case No. RG 03079344 (consent decree).

the DJJ published a lengthy statement that included a “Statement of Emergency Facts” and “Policy Statement Overview.” These documents laid out a clear rationale for the declaration of emergency and a timeline for finalizing a permanent rule.<sup>8</sup> California stakeholders monitoring the rulemaking process received these statements in addition to regular updates for normal hearings. Once a complete set of emergency use of force policies were developed by the DJJ, stakeholders had an opportunity to provide feedback during two subsequent 45-day public comment periods. The DJJ was not procedurally required to modify its final rule according to feedback received during these windows. In both cases, however, it did so voluntarily. The final policy included input from organizations representing court-involved, DJJ staff and vulnerable children.

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<sup>8</sup> For an example of a CDCR emergency statement, see DJJ “Use of Force” timeline: [https://www.cdcr.ca.gov/Regulations/Juvenile\\_Justice/Use\\_of\\_Force.pdf](https://www.cdcr.ca.gov/Regulations/Juvenile_Justice/Use_of_Force.pdf)

## Appendix 6



## COLORADO

Office of Children,  
Youth & Families

Division of Youth Services

Anders Jacobson, Director

Ms. Stephanie Villafuerte  
Office of Colorado's Child Protection  
Ombudsman  
1300 Broadway, Suite 430  
Denver, CO 80203

August 7, 2019

Dear Ms. Villafuerte,

To follow is the response to the Child Protection Ombudsman's (CPO) investigation report [REDACTED].

### General Response to the Report

#### Responses to Recommendations

Recommendation 1	[REDACTED]	Agency: CDHS
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**CPO Recommendation:** To increase transparency surrounding its rulemaking process the CPO recommends that the DYS:

- Publish its Policy Approval Guide online. The Division of Youth Services will develop a system to have the Policy Approval Guide posted online *prior* to August 1, 2019.
- Publish any research, data or other rationale on which all future policies and policy revisions are based.
- Publish the rationale for any decision to "fast-track" future policies and policy revisions.
- Create a notification system by which stakeholders can receive alerts when new DYS policies are finalized.

#### CDHS Response:

- AGREE.** The Division of Youth Services will post this material on their public facing website by September 2019.
- PARTIALLY AGREE.** The Division of Youth Services will publish data and/or research on relevant policies.
- AGREE.** The Division will add into its policy approval guide the definition of a "fast-track" policy revision process and examples of reasoning behind an expedited process. Should a stakeholder have questions regarding the change, they can reach out to the Division and inquire as to why the decision





was made. A contact name, email, and phone number will be provided on the policy approval guide should any questions arise.

d. **AGREE.** The Division of Youth Services will create a system where stakeholders can sign up to receive alerts on new policies that have been released.

Recommendation 2		Agency: CDHS
------------------	--	--------------

**CPO Recommendation:** To expand and increase public participation in its rulemaking process, the CPO recommends that the DYS:

- a. Create an official process by which members of the public can submit feedback and recommendations on existing policies. A description of this process should be posted and easy to locate online and in DYS staff and youth handbooks.
- b. Convene a time-limited working group to identify ways to formally incorporate input from stakeholders at various stages of its regulatory process. The study should consider the role of various constituencies, including youth, families, DYS staff, clinicians, juvenile advocates and members of the public. Documentation of the group's work, including meeting minutes, findings, conclusions and recommendations of the group should be made publicly available and posted online.
- c. Create a notification system by which stakeholders can receive updates about policy revisions as they are being contemplated, developed and finalized. These notifications should include information about how and where stakeholders can participate and/or provide input as determined by the working group.

**CDHS Response:**

- a. **PARTIALLY AGREE.** The Division of Youth Services will accomplish this recommendation by posting online and in youth handbooks. There is no staff handbook. The staff already has options to discuss policy related issues and the Division of Youth Services has a plan to expand that process to all staff.
- b. **INAPPLICABLE:** The Division of Youth Services does not conduct a regulatory process. It utilizes a committee to develop policies and procedures for operations.
- c. **PARTIALLY AGREE.** DYS agrees with CPO that stakeholder input is valuable and important. DYS is concerned, however, that allowing every policy proposal and revision to incorporate a stakeholder process will hamstring DYS and potentially create unsafe conditions for staff and youth. DYS believes that the following strikes the proper balance between DYS receiving stakeholder input and DYS conducting its business: under recommendation 1 (c) stakeholders who have signed up will receive notification of finalized policies. Under recommendation 2 (a) members of the community can provide on-going feedback at any time.

Recommendation 3		Agency: CDHS
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**CPO Recommendation:** The CDHS should, in consultation with the Office of the Attorney General, determine whether the DYS is in compliance with the State Administrative Procedures Act for the purpose of agency rulemaking. At minimum, such a determination should address:



a. Whether the DYS is subject to the provisions of the C.R.S. §24-4-103.

DYS is not subject to the regulatory process when finalizing policies because DYS policies are interpretive and therefore not subject to the Administrative Procedure Act.

b. Whether the DYS policies that are currently posted online constitute “rules” as defined in C.R.S. §24-4-102.

**DYS policies currently posted online do not constitute rules as defined by the Administrative Procedure Act.**

The outcome of this determination should be provided to the CPO and included in the CDHS annual SMART Act Performance Plan, which is presented to the joint health and human services committee.

