

## MEMORANDUM

**TO:** Members of the 105<sup>th</sup> Nebraska Legislature

**FROM:** Sen. Laura Ebke, Chair of the Judiciary Committee

**RE:** AM 2634 – Summary of Amendments to Committee Amendment  
AM 2092 to LB 841

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LB 841 as amended by AM 2092 incorporates a number of legislative bills that improve policies and procedures related to Nebraska’s criminal justice system, focusing on the operation of Department of Correctional Services (hereinafter, the “Department”) and the Board of Parole and Office of Parole Administration (hereinafter, “Parole”). The original bills included in AM 2092 to LB 841 included the following, with relevant amendments:

- LB 841, as amended by AM 2092
- LB 366
- LB 692, as amended
- LB 816
- LB 852, as amended
- LB 853, as amended
- LB 868
- LB 932
- LB 1118

After lengthy discussion with interested parties across all branches of government – from the administration, to the Department, to Parole – the Committee has made further adjustments to the package, and I have offered AM 2634 as a result. AM 2634 removes or amends the following bills included in the original package:

- LB 816 – **REMOVED**
- LB 852 – *Amended*
- LB 853 – **REMOVED**
- LB 868 – **REMOVED**
- LB 1118 – **REMOVED**

What follows is a brief summary of each of the bills originally included in AM 2092 to LB 841, along with explanations of the relevant amendments and explanations as to the reasons certain bills were removed. This Memorandum is submitted in follow-up to the previous memorandum distributed to members of the Legislature. Much of the substance of the memo is unchanged, but the added text regarding the component parts of the bill is stylized in italics for ease of identification.

## **LB 841 Provide duties relating to correctional overcrowding emergencies**

LB 841 is the primary carrier bill for the bills incorporated in the package. The introduced version of LB 841 was a bill that would require the Department to collaborate with Parole to develop policies and procedures that would operate in the event a correctional system overcrowding emergency is ever declared or is determined to exist. A recommendation that such a plan be developed so that the legislature has a complete picture of the process for managing a correctional system overcrowding emergency has been twice made by special committees of the Nebraska legislature – first in the report of the LR 34 Committee,<sup>1</sup> and most recently in the report of the LR 127 Committee<sup>2</sup> – and twice by the legislature’s Inspector General of the Nebraska Correctional System.<sup>3</sup>

The Department and Parole have acknowledged that the two agencies have begun discussions related to this issue, but that they have not yet prepared a plan or proposed rules or regulations. Because the provisions of LB 841 will assist the legislature in understanding the full implications in the event an overcrowding emergency is declared or is determined to exist, the Judiciary Committee included it in its priority bill. As the LR 127 Committee explained:

“[I]t would be prudent planning for the state to be prepared should a number of inmates be considered for parole under this statutory scheme. To grasp the complete scope of such an occurrence requires planning. State leaders should know the cost of an overcrowding emergency, and should know how the Board of Parole might approach administration of an overcrowding emergency, and how that approach might impact public safety and the corrections system.”<sup>4</sup>

LB 841 was introduced by Sen. Pansing Brooks, and was co-sponsored by Sen. Baker, Sen. Brewer, Sen. Ebke, Sen. Morfeld, and Sen. Schumacher. The bill as introduced was amended by the Judiciary Committee in AM 2092 to strike Section 1 of the introduced bill, which included certain legislative findings the Committee believed unnecessary to effectuate the more important policy provisions of the legislation.

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<sup>1</sup> See Department of Correctional Services Special Investigative Committee LR 34 (2015) Report to the Legislature, Recommendation 7, at pg. 15, *available online at* [https://nebraskalegislature.gov/pdf/reports/committee/select\\_special/lr34\\_2015/lr34\\_report.pdf](https://nebraskalegislature.gov/pdf/reports/committee/select_special/lr34_2015/lr34_report.pdf) (hereinafter, the “LR 34 Report”).

<sup>2</sup> See 2017 Report of the Nebraska Justice System Special Oversight Committee of the Legislature, at pgs. 16-18 (outlining the reasons for the recommendation and making the recommendation), *available online at* [https://nebraskalegislature.gov/pdf/reports/committee/select\\_special/cso/2017\\_lr127.pdf](https://nebraskalegislature.gov/pdf/reports/committee/select_special/cso/2017_lr127.pdf) (hereinafter, the “LR 127 Report”).

<sup>3</sup> See Office of Inspector General of the Nebraska Correctional System 2015/2016 Annual Report, at pgs. 21-22, *available online at* [https://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Inspector\\_General\\_of\\_the\\_Nebraska\\_Correctional\\_System/600\\_20160915-141014.pdf](https://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Inspector_General_of_the_Nebraska_Correctional_System/600_20160915-141014.pdf) (hereinafter, the “2016 OIG Report”); *see also* Office of Inspector General of the Nebraska Correctional System 2016/2017 Annual Report, at pgs. 29-30, *available online at* [https://nebraskalegislature.gov/FloorDocs/105/PDF/Agencies/Inspector\\_General\\_of\\_the\\_Nebraska\\_Correctional\\_System/600\\_20170914-152029.pdf](https://nebraskalegislature.gov/FloorDocs/105/PDF/Agencies/Inspector_General_of_the_Nebraska_Correctional_System/600_20170914-152029.pdf) (hereinafter, the “2017 OIG Report”).

<sup>4</sup> LR 127 Report, *supra* note 2, at pg. 17.

*LB 841 is retained in AM 2634. Throughout discussions between representatives of the Governor's office, the Department, and Parole, there has been no objection raised to this portion of the bill.*

### **LB 366      **Change and eliminate provisions relating to parole administration****

LB 366 is a bill brought by Sen. Halloran at the request of Parole to change the name of the Office of Parole Administration to the Division of Parole Supervision, and would place the Division within the Board of Parole. The change has been recommended to align with Parole's mission of continuing to research, understand and implement evidence-based practices and to utilize such approaches in supervision, services, and case management of parolees residing in the community so as to best maintain public safety, reduce recidivism, and address the needs of victims.

A public hearing on LB 366 was held on March 22, 2017, and no opposition testimony was heard, nor any opposition letters received. The bill saw support from the Board of Parole and the Department of Correctional Services.

*All provisions of LB 366 are maintained in AM 2634 to the Committee amendments. No objections or concerns have been raised by the administration, the Department, or Parole with respect to this portion of the bill.*

### **LB 692      **Provide for a staffing analysis of the Department of Correctional Services****

LB 692 as amended would ask the Department to complete a comprehensive analysis of its system-wide staffing needs and provide a report of such analysis to the Legislature by September 15, 2020. LB 692's request of the Department to prepare a system-wide staffing analysis works to place in statute a recommendation made by both the LR 34 Committee<sup>5</sup> and the LR 127 Committee.<sup>6</sup> What is more, the Department itself has acknowledged the need to complete such an analysis, writing in the executive summary of its internal analysis of custody staffing needs completed in 2016 that, "[i]t is recommended that further analysis be performed in other job classifications and departments within each facility, Central Office and Staff Training Academy."<sup>7</sup>

It should be noted that the amended version of LB 692 included in AM 2092 to LB 842 varies from the introduced version of the bill. LB 692 as introduced would have required the Department to complete the staffing analysis by September of 2018, and would have required a new system-wide analysis be completed every two years thereafter. At hearing, and as reflected in the fiscal noted, the Department raised concerns about the 2018 deadline, suggesting that the short time frame would result in the need to hire an outside contractor to complete or assist in

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<sup>5</sup> LB 34 Report, *supra* note 1, at pgs. 8-9.

<sup>6</sup> LR 127 Report, *supra* note 2, at pgs. 23-24.

<sup>7</sup> 2016 OIG Report, *supra* note 3, at pg. 125.

completing the analysis. The Judiciary Committee considered this feedback and found it reasonable to amend the bill to provide more time for the analysis to be completed. Considering the time needed for the Department to complete the previously conducted custody staffing analysis and considering the state's biennial budget calendar, the Committee determined to provide the Department with more time and amended the bill to require the complete analysis by September of 2020, and to ask for a revised analysis at least every 6 years thereafter.

The Judiciary Committee believes this timeline will achieve the policy goal of completing a staffing analysis because, as the LR 127 Committee explained, "having a complete picture of the staffing situation is essential to the Legislature's and the Department's long-term planning efforts. It is difficult to make funding priority decisions, especially when the state faces budget challenges, without knowing the full extent of staffing deficits at all levels in the Department."<sup>8</sup>

LB 692 was introduced by Sen. Blood. Public hearing was held on January 17, 2018. The Department testified in opposition to LB 692 at the public hearing, but the Judiciary Committee is hopeful that the amendments made in AM 2092 to LB 841 by the Committee in adjusting the dates for completion of the analysis will appropriately address the Department's concerns.

*The provisions of LB 692 are retained in AM 2634 to the Committee Amendments. The administration and the Department have made clear that the amended version of the bill included in the Committee amendment was an acceptable compromise.*

**LB 816      *REMOVED* – Designate Nebraska State Patrol as agency to investigate criminal activity within Department of Correctional Services correctional facilities**

LB 816 would transfer the authority to conduct criminal investigations relating to conduct occurring within facilities operated by the Department of Correctional Services from the Department to the Nebraska State Patrol. The bill would transfer employees employed by the Department as correctional investigators to the employment of the Nebraska State Patrol, and the funds appropriated to the Department for their employ would transfer to the State Patrol. The bill would further require that the superintendent of the State Patrol prepare and issue a report by July 1, 2019, as to whether the transferred positions should become sworn positions within the Patrol.

LB 816 was amended by the Judiciary Committee in AM 2092 to LB 841 to address a couple of technical concerns raised by law enforcement. Specifically, the amendment made by the Committee would require the Department to inform the Nebraska State Patrol in the event an assault is committed in a correctional facility against an officer, emergency responder, certain employees, or a healthcare professional. The State Patrol would then be required to respond to the incident and to arrest the person alleged to have committed the offense if probable cause exists. The person alleged to have committed the offense would then be transported from the

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<sup>8</sup> LR 127 Report, *supra* note 2, at pg. 23.

correctional facility to the county correctional facility in the county that will have jurisdiction over the assault. In the event the person alleged to have committed the assault is currently serving a sentence for a Class I or Class IA felony, the person would not be removed from the correctional facility.

LB 816 was introduced by Sen. Chambers. Public hearing on LB 816 was conducted on February 1, 2018. No opposition testimony was heard, nor were any letters in opposition received. Because the bill simply works to transfer employees from one department to another, the fiscal impact of the bill is expected to be minimal.

*Various interested parties raised concerns with the inclusion of LB 816, including the administration, the Department, NACO, and certain counties in which correctional facilities are located. The complexity of the amended version of the bill that required the State Patrol to remove inmates to county jail facilities raised a number of questions and concerns, including questions about the length of time the inmate would remain in a county jail, the cost of housing inmates in county jails, and concerns about how to address situations in which a number of inmates might need to be removed and housed in a jail with no space. After discussing all concerns, it was determined to remove LB 816 from the Committee priority package.*

**LB 852      *AMENDED* – Provide for medical release of and additional rehabilitative options for committed offenders and allow the use of certain funds for peer and family support programs**

LB 852 as amended would make a couple of adjustments to current provisions regarding the ability for the Department and Parole to manage inmates who need certain programming or treatment or who suffer from terminal illness during incarceration.

First, the bill as amended would adjust provisions of statute that currently allow the Department and Parole to allow an inmate to leave a facility for work release, and would allow them authority to allow an inmate, under certain conditions, to leave a facility to participate in substance abuse evaluations or treatment, attend rehabilitative programming or treatment, seek residency or employment, or participate in structured programming and return to the facility.

LB 852 as amended would also make adjustments to the current process in statute for granting medical parole for an inmate diagnosed with a terminal illness. A terminal illness is defined under the bill as an incurable and irreversible illness that will, within the reasonable medical judgment of a qualified medical professional, result in death within six months. The bill would have the medical director of the Department complete or facilitate completion of an application for medical parole upon an inmate being diagnosed with a terminal illness if the inmate is otherwise parole eligible. If the inmate is not otherwise parole eligible, the medical director would complete or facilitate the completion of an application for commutation of sentence by the Board of Pardons and an application for medical parole. The Board of Parole would then consider an inmate who is not otherwise parole eligible for medical parole in the event the Board of Pardons decides to commute the inmate's sentence and therefore render him or her eligible for parole.

The provisions of LB 852 are founded on past recommendations of special committees of the Legislature that have considered the Nebraska adult justice system. Most recently, the LR 127 Committee recommended that, “[t]he Legislature, the Department, and the Board of Parole should work together to explore options for the provision of more community-based domestic violence and substance abuse programming and determine the resources needed to do so to ensure individuals in need of programming receive it.”<sup>9</sup> The first portion of LB 852 that would allow the Department and Parole discretion to authorize inmates to participate in community-based programming furthers this recommendation.

The LR 127 Committee also recommended that the Nebraska continue to make efforts to address overcrowding in the prison system. As the LR 127 Committee noted, “the Legislature, the Board of Parole, and the Department of Corrections should work collaboratively to promote innovation in the use of parole.”<sup>10</sup> LB 852’s adjustments to the medical parole structure in Nebraska works to do just that. Inmates diagnosed with terminal illness are among some of the most expensive inmates to house and care for. By broadening the application of medical parole and allowing the Department, the Board of Parole, and the Board of Pardons to oversee the program, the bill can alleviate costs and overcrowding, while maintaining the involvement of these entities to ensure public safety is the top priority.

LB 852 was sponsored by Sen. Bolz. A public hearing was held on the bill on February 1, 2018, and no opposition testimony was heard and no letters of opposition were presented.

*During conversations about LB 852, concerns were raised about the amended version of LB 852 related to its constitutionality with respect to the separation of powers when the Legislature instructs the Board of Pardons and Board of Parole to act in a certain fashion, and about the cumbersome process as structured in the bill. After these discussions, it was determined that an alternative and more simplified approach to adjusting the medical parole process might be the best way to address the concerns and simplify the process while also ensuring that public safety is prioritized.*

*AM 2634 amends the component parts of LB 852 to provide for medical parole for those limited individuals that meet certain criteria by using the current medical parole structure as already provided in statute. All parties consulted agreed that this approach was less cumbersome and would better effect the intent of the bill.*

### **LB 853      *REMOVED* – Authorize certain Department of Correctional Services contracts**

The Department currently utilizes, and has for a number of years utilized, contracts with counties across the state to house inmates in county jail facilities on a temporary basis. LB 853 simply provides statutory authority for the Department to continue this practice.

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<sup>9</sup> LR 127 Report, *supra* note 2, at pgs. 24-25.

<sup>10</sup> LR 127 Report, *supra* note 2, at pg. 16.

The use of county jails to house certain inmates has been implemented by the Department, in part, to alleviate concerns related to overcrowding in state correctional facilities. Additional benefits from the use of county jail facilities to house inmates on a temporary basis include things such as providing flexibility to house certain inmates closer to their hometowns where they have easier access for family visitation and potential work release or other employment opportunities.

The LR 127 Committee included a recommendation that the Department continue to utilize and expand the county jail program as appropriate in an effort to alleviate overcrowding issues.<sup>11</sup> LB 853 furthers this recommendation.

LB 853 was introduced by Sen. Bolz and saw no opposition at its February 1, 2018, public hearing. The bill would have no fiscal impact on the state.

*LB 853 has been removed from the package in AM 2634. The Department raised a number of concerns about LB 853's amended language, and about the best approach to managing the county jail program moving forward. A number of discussions about the current operation of the county jail program occurred throughout the process, including meetings between the Director of the Department of Corrections, representatives from the Governor's Policy Research Office, Judiciary Committee staff, representatives from the Ombudsman's Office, the Inspector General for Corrections, and Sen. Bolz and her staff. Following those meetings and following consideration of a number of different options for amended language, it was determined that LB 853 should be removed from the package.*

**LB 868      *REMOVED* – Change parole provisions relating to deferment and structured programming**

LB 868 would require the Board of Parole to provide both the Department of Correctional Services and an inmate with notice that the inmate has been deferred parole within ten days of making such a determination. The bill would require the Board to include in the notice the reasons for deferring parole, including any recommended programming or treatment that the inmate should complete to enhance his or her likelihood of release on later consideration by the Board. The Department would have thirty days from the receipt of the notice to provide any recommended treatment or programming to the inmate. If the inmate refuses the programming or treatment, the Department would get such refusal in writing and provide a copy to the Inspector General for Corrections. The Department would also submit an annual report to the Inspector General detailing the inmates deferred parole, the treatment or programming provided as recommended by the Board of Parole, and the reasons why the inmate did not receive the recommended programming or treatment.

LB 868 was introduced by Sen. Pansing Brooks, and was co-sponsored by Sen. Ebke, Sen. Krist, and Sen. Morfeld. A public hearing on LB 868 was conducted on February 1, 2018,

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<sup>11</sup> LR 127 Report, *supra* note 2, at pg. 16.

and had no opposition testimony or opposition letters submitted. The Judiciary Committee determined to include LB 868 in AM 2092 to LB 841 in an effort to ensure that inmates eligible for parole but who receive deferrals are given appropriate notice and adequate opportunity to be granted parole. This not only furthers the state's interest in alleviating overcrowding concerns by making efforts to assist inmates in qualifying for parole,<sup>12</sup> but it also ensures that the safety of the public is protected because the bill would ensure that inmates are offered programming and treatment that will make them active and productive members of the community upon release.

*LB 868 has been removed from the package by AM 2634. During discussions on the bill, the administration and Department raised concerns about the structure of these sections of the package. Notably, concerns were raised about the meaning of the language regarding the 30-day window for the Department to "provide" programming to an inmate deferred parole. Specifically, the question arose as to whether the inclusion of the word "provide" meant that the programming must be "completed," or whether it need only be "begun," or whether it might be sufficient to "enroll" an inmate in required programming. There was additional concern about whether Parole would be required to "recommend" programming every time an inmate is deferred. Finally, a question was raised with regard to an inmate's refusal of additional programming following deferral. For example, it was unclear how the Department would handle an inmate who refuses programming and refuses to sign an acknowledgement that such programming was willfully refused.*

*Although amended language was proffered for consideration, it was determined that LB 868's requirements should not be included in the package.*

### **LB 932      Provide discharge planning duties for the medical director of the Department of Correctional Services**

LB 932 would require the Medical Director for the Department of Correctional Services to establish a protocol to determine whether an inmate soon to be released should be prescribed and dispensed a medication-assisted treatment that could assist in reducing or eliminating the inmate's use of opiates upon release.

LB 932 was introduced by Sen. Howard, and was co-sponsored by Sen. Keuhn and Sen. Lindstrom. The bill was heard by the Judiciary Committee on February 1, 2018, and received no opposition testimony or letters in opposition. The bill will have no fiscal impact on the state.

*No concerns have been raised about LB 932, and it is the Committee's understanding that the administration and the Department are supportive of LB 932 remaining in the package.*

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<sup>12</sup> The LR 127 Committee recently recommended that the Department, Board of Parole, and the Legislature work together to continue to explore and expand programming options to ensure inmates are ready to community reentry upon their becoming parole eligible. See LR 127 Report, *supra* note 2, at pgs. 24-26. The Judiciary Committee believes the provisions of LB 868 further this goal.



## **LB 1118    *REMOVED* – Create the Coordinated Reentry Council**

LB 1118 would create the Coordinated Reentry Council and place it within the Nebraska Commission on Law Enforcement and Criminal Justice. The Council is created for the purpose of furthering the state's efforts to establish a comprehensive and successful system of correction reentry programs throughout the state, and to include an array of interests in the establishment and growth of this system. The Council would be comprised of the executive director of the Commission, the Director of Correctional Services, the Chair of the Board of Parole, the Parole Administrator, the Director of Behavioral Health of the Division of Behavioral Health of the Department of Health and Human Services, and eight members appointed by the Governor and approved by the Legislature, including an executive director of a state community college association, a business owner who employs formerly incarcerated individuals on a regular basis, two individuals who were formerly incarcerated, one mental health and substance abuse professional, one social worker, a researcher in the field of criminal justice in a university or college in Nebraska, and one full-time officer or employee of a law enforcement agency. The probation administrator, two members of the Legislature, and two judges would serve as non-voting members of the Council.

The Council would meet at least three times per year and would be tasked with advising the Department of Correctional Services on the utilization of vocational and life skills funds, developing and implementing a plan to establish the statewide operation and use of a continuum of reentry programs, reviewing effort by individuals and organizations that provide reentry services in Nebraska, reviewing best practices regarding reentry policies and programs in other state, and making recommendations to the Legislature and the Governor regarding reentry policies and programs.

LB 1118 was introduced by Sen. Krist. A public hearing on the bill was held on February 14, 2018, during which no opposition testimony was given. *The Department of Correctional Services and the Department of Health and Human Services did send letters in opposition to the bill.* The Crime Commission did estimate a minimal cost for the establishment of the Commission in an amount of five thousand dollars per year, but the Legislative Fiscal Office believes that no additional appropriation would be required.

*All component portions of LB 1118 have been removed from the package in AM 2634 to the Committee amendments. During discussions with the administration and other interested parties, it became clear that there were concerns about how the bill might impact the separation of powers between the three branches of government. Specifically, questions were raised about how creation of a council that combines the three branches of government to manage functions generally reserved for one branch of government might overstep the role of oversight and enter into the territory of micromanagement or infringe on the concept of separate and distinct government branches. There were also some concerns raised regarding the size of the proposed council and the various interests that would be represented due to the fact that, although they may provide valuable insight into certain aspects of inmate reentry, some are not experts nor are they well versed in the intricacies of a criminal justice system and all aspects of ensuring community safety.*