

LAW AND PUBLIC SAFETY

JUVENILE JUSTICE COMMISSION

Detention of Juveniles in Municipal and Other Adult Facilities

Proposed Readoption with Amendments: N.J.A.C. 13:94

Proposed New Rule: N.J.A.C. 13:94-2.7

Authorized By: Executive Board of the Juvenile Justice Commission, by the Honorable Paula T. Dow, Attorney General and Chair, Carolyn Murray, Attorney General's Designee.

Authority: N.J.S.A. 2A:4A-31; 2A:4A-32; 2A:4A-37; 2A:4A-60; 2A:4A-88; 47:1A-1 et seq.; 52:17B-170e(6), (13), (14), (17), (21) and (22); and 52:17B-171a(5).

Calendar Reference: See Summary below for explanation of exception to calendar requirements.

Proposal Number: PRN 2011-019.

Submit written comments by March 19, 2011 to:

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New Jersey Juvenile Justice Commission
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The agency proposal follows:

Summary

N.J.A.C. 13:94 establishes rules governing the custody, care and supervision of juveniles in short-term custody at a county jail, local lockup or other similar facility used for the detention of adults and which in the ordinary course of business may be used to hold juveniles (adult facilities), and provides for limited oversight of those facilities by the Juvenile Justice Commission. Chapter 94 is scheduled to expire on February 6, 2011 pursuant to N.J.S.A. 52:14B-5.1. The Commission is proposing to readopt N.J.A.C. 13:94 with a number of amendments; pursuant to N.J.S.A. 52:14B-5.1c, the filing of this notice of proposal with the Office of Administrative Law has extended the scheduled expiration date 180 days, to August 5, 2011.

The Commission has reviewed these rules and determined them to be necessary, reasonable and proper for the purpose for which they were originally promulgated.

N.J.A.C. 13:94 was promulgated in 2006 to implement the Commission's authority under its enabling legislation, N.J.S.A. 52:17B-169 et seq., and the New Jersey Code of Juvenile Justice, N.J.S.A. 2A:4A-20 et seq., to specify the circumstances and conditions under which juveniles may be detained in short-term custody, and, importantly, to promulgate into rule requirements under the Federal Juvenile Justice and Delinquency Prevention Act of 2002, P.L. 107-273, 42 U.S.C. §§5601 et seq., (the JJDP Act), that are conditions attaching to the receipt of certain Federal funds.

Pursuant to the JJDP Act, the State receives and administers annual grants from the U.S. Department of Justice, dedicated to funding both State and local delinquency prevention and intervention strategies. These strategies include programs

to reduce truancy, discourage gang affiliation and violence, provide youth and family case management and provide after-school recreational and other youth services. In Federal Fiscal Year 2009, grants under the JJDP Act amounted to approximately \$1.7 Million. The Commission is the administrative entity that receives and manages these grants on behalf of the State.

As a condition of these grants, the Commission is required to monitor jail and other lockup facilities for compliance with three “core protections” for juveniles. Those core protections are:

1. The deinstitutionalization of juveniles detained for conduct that does not constitute criminal behavior (for example, truants and runaways);
2. The maintenance of sight and sound separation between juveniles and adults being held in secure custody; and
3. A six-hour limitation on the length of time that a juvenile may be held in secure custody.

The rules at N.J.A.C. 13:94 codify procedures for monitoring compliance with these “core protections” at affected facilities.

N.J.A.C. 13:94 contains two subchapters. A description of these subchapters and proposed amendments follows.

Subchapter 1 sets out general provisions, including purpose, scope, definitions, applicable legal authorities, the Commission’s oversight authority and confidentiality. More specifically:

N.J.A.C. 13:94-1.1 provides that the purposes of the chapter are to:

- Define the conditions and restrictions that apply when juveniles are detained in adult facilities;
- Provide a basis for monitoring such facilities under the Federal JJDP Act;
- Provide a regulatory framework for enforcing applicable requirements of the New Jersey Code of Juvenile Justice, N.J.S.A. 2A:4A-20 et seq., and
- Promote the health and safety of juveniles detained in adult facilities.

In the remaining sections of the subchapter, N.J.A.C. 13:94-1.2 provides a list of relevant definitions; N.J.A.C. 13:94-1.3 sets forth a short list of legal authorities that govern the detention of juveniles in adult facilities; N.J.A.C. 13:94-1.4 explains the Commission's oversight role; and N.J.A.C. 13:94-1.5 sets out requirements for the confidentiality of juvenile information.

The Commission is proposing a number of amendments to Subchapter 1.

At N.J.A.C. 13:94-1.1, the Commission proposes to clarify that a purpose of the rule is to "ensure compliance with" provisions of the JJDP Act, rather than providing a "basis" for monitoring under that Act.

The Commission next proposes to add to N.J.A.C. 13:94-1.2 a definition for "juvenile," specifying that for purposes of Chapter 94 a juvenile is any person under the age of 18.

At N.J.A.C. 13:94-1.3, the Commission proposes to add the Federal Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§15601 et seq., to the list of legal

authorities contained in that section. This is in anticipation of Federal regulations that currently are in the promulgation process, and which enact national standards for enhancing the prevention, detection and response to sexual abuse in confinement settings, that were prepared by the National Prison Rape Elimination Commission pursuant to PREA, and which would expressly apply to state and local correctional and detention facilities. See Advance Notice of Proposed Rulemaking issued by the U.S. Department of Justice and published in the Federal Register on March 10, 2010 at 75 FR 11077.

The Commission next proposes to amend N.J.A.C. 13:94-1.4 to more clearly set out the subject matter of Commission oversight under N.J.A.C. 13:94. These include the core requirements of the JJDP Act, including the deinstitutionalization of status offenders, separation of juveniles from adult offenders and removal of juveniles from adult facilities and concerns with the physical design and layout of facilities, operational and recordkeeping procedures and staffing levels. The provisions on N.J.A.C. 13:94-1.4(b) relating to Commission access to facility records are proposed to be relocated to a new N.J.A.C. 13:94-2.7 (see below). The Commission also proposes to change the heading of N.J.A.C. 13:94-1.4 from “Commission oversight authority and responsibility” to the more precise and accurate “Oversight authority of the Commission.”

Subchapter 2 contains six sections, N.J.A.C. 13:94-2.1 through 2.6, which detail the special operational requirements applicable to the detention of juveniles in adult facilities. As is explained below, the Commission is proposing to add new N.J.A.C. 13:94-2.7, formalizing into rule the Commission’s inspection responsibilities with respect to adult facilities that may come to hold juveniles.

N.J.A.C. 13:94-2.1 sets forth the requirement for sight and sound separation between juveniles and adults held in secure custody.

N.J.A.C. 13:94-2.2 sets out number of restrictions applicable to the detention of juveniles, including that a juvenile held in secure custody must be a room, cell or other area determined by the Commission to conform to prevailing safety standards for the detention of juveniles; that status-offenders and non-offenders cannot be held in secure custody and cannot be held for more than six hours; and that in general a juvenile held on a charge of delinquency may be held in secure custody, but not for more than six hours.

N.J.A.C. 13:94-2.3 requires immediate parental notification of where and why a juvenile is being held.

N.J.A.C. 13:94-2.4 provides that in the event of an extraordinary circumstance, defined as one threatening the safety and security of individuals or the secure operation of the facility, the highest-ranking facility staff member on duty may determine that a juvenile should be held in conditions that deviate from the restrictions otherwise imposed by this chapter, but only to the extent and duration necessary to address the specific extraordinary circumstance. The determination must be explained in a detailed written report that includes an explanation why the deviations were necessary to address the extraordinary circumstance.

N.J.A.C. 13:94-2.5 sets out requirements for the supervision of juveniles when detained in adult facilities. The level of supervision must be that necessary to ensure the safety and well being of the juvenile, facility staff and the public at large. Several factors are to be considered when determining what is the appropriate level, which

include, without limitation, the juvenile's mental and physical health, the nature of any charged offense and the physical environment of the area where the juvenile will be held. A juvenile held in a secure holding room or cell must be checked at least every 15 minutes, or continuously if the room or cell contains suicide hazards. Other juveniles cannot be left unattended at any time, and continuous face-to-face visual supervision is required for any juvenile who appears intoxicated or under the influence of drugs, who shows signs of emotional disturbance or risk of self-injury, or who is detained in a secure holding room or cell in which there is a suicide or safety hazard.

N.J.A.C. 13:94-2.6 sets out requirements for admissions and secure custody logs, including requirements for the information to be recorded in those logs.

The Commission is proposing to make three amendments to Subchapter 2.

At N.J.A.C. 13:94-2.5, the Commission proposes that when there is concern that the juvenile may be the victim of sexual or other abuse, or pose a risk of suicide or self-injury be added to the list of factors to be weighed when determining the appropriate level of supervision for a juvenile. This reflects both concerns under PREA and the Commission's focus on suicide risk and suicide prevention among juveniles interacting with the juvenile justice system.

Next, the Commission seeks to exempt court holding facilities from the requirement to maintain a juvenile admissions log contained in N.J.A.C. 13:94-2.6(a). Such an exemption reflects actual practice, as admissions logs are contextually inapplicable to court holding facilities; the absence of the exemption in the existing rule reflects an oversight.

Lastly, the Commission proposes to add a new N.J.A.C. 13:94-2.7, Inspection by Commission, review of construction plans and enforcement. The new provision for the first time formalizes the Commission's role in inspecting facilities and in overseeing implantation of the operational requirements of the Chapter.

Under N.J.A.C. 13:94-2.7, the Commission is required to undertake such inspections of facilities as are necessary and appropriate to determine compliance with Chapter 94, including observation of the physical condition in areas where juveniles are held and review of the practices and procedures relevant to the detention of juveniles. Prior to undertaking any construction or renovation that may affect areas used to hold juveniles, a facility is required to submit a written construction plan to the Commission for its review and approval. This is intended to assist municipalities by avoiding situations where changes have be made retroactively to recent renovations in order to mitigate suicide risks and other issues. While local governments have consistently been cooperative in such situations, the proposed rule is designed to both better protect juveniles and to avoid the costs and time associated with making retroactive changes by assuring that relevant issues are raised and discussed prior to construction.

The Commission also proposes to include reasonable enforcement procedures in the new N.J.A.C. 13:94-2.7. If, upon completion of an inspection, a facility is found to be in material violation of Chapter 94, the Commission shall give the facility notice of the violation and allow 45 days to demonstrate that the violation will be remedied. If a facility fails to remedy the violation, the Commission is authorized to institute necessary and appropriate proceedings authorized under N.J.S.A. 52:17B-170e(16).

In a non-substantive amendment, the Commission proposes to relocate to new N.J.A.C. 13:94-2.7, the requirements currently located at N.J.A.C. 13:94-1.4(b), relating to Commission access to records, reports and information reasonably necessary to verifying compliance with the provisions of Chapter 94.

This notice of proposal is not subject to the rulemaking calendar requirements of N.J.S.A. 52:14B-3(4) because the agency is providing a 60-day comment period, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

Arrested and detained juveniles are children. In recognition of this fact, both Federal and State law place a number of restrictions on the custody, care and supervision of juveniles detained by police. They include maintaining strict sight and sound separation between detained juveniles and securely held adults, limiting how long a juvenile may be detained before being processed either to release or to county juvenile detention facilities and requiring that detained juveniles be under observation for their own protection. The rules proposed to be readopted have a positive social impact, both by setting out a regulatory scheme that captures all applicable restrictions in one place, and by formalizing State monitoring of lock-up facilities for compliance with those restrictions, so that juveniles will have some safeguards and protections as children within the juvenile justice system.

The proposed substantive amendments will have no negative social impacts, and will enhance the rule's positive social impact in two significant ways. The amendments add, to N.J.A.C. 13:94-2.5, a new factor to be weighed when determining

appropriate supervision levels, namely concern that the juvenile may be the victim of sexual or other abuse, or pose a risk of suicide or self-injury, will enhance the ability to identify and serve juveniles in need of protection from abuse, and will enhance the ability to protect juveniles at-risk for suicide. In addition, the new inspection and enforcement provisions at proposed N.J.A.C. 13:94-2.7 will have a positive social impact by enhancing the Commission's ability to enforce Chapter 94 in a consistent and timely fashion.

Economic Impact

The rules proposed to be readopted have had and will continue to have a positive economic impact, by helping to ensure funding to the State by the Federal government, under the Juvenile Justice and Delinquency Prevention Act of 2002, P.L. 107-273, 42 U.S.C. §§5601 et seq. The rules have not and will not result in any negative economic impact, because additional funding is not necessary to implement these rules. The proposed requirement for advanced notification of planned construction or renovation will have an added positive economic impact, by avoiding the costs and time associated with having to make changes to correct problems identified only after construction has been completed. The cost of meeting and maintaining the oversight requirements of the Commission established by these rules will be met through the routine budgetary process, with monies allocated by the State.

Finally, the Commission is required by statute to oversee the holding of juveniles in adult facilities. In the course of that oversight Commission rules may create mandates that are ordinary and normal in the context of juvenile corrections, and that

are, in any event, outweighed by the need to protect the health and safety of juveniles detained in adult facilities.

Federal Standards Statement

The rules proposed for readoption comply with 28 CFR 31.303 and do not exceed the standards or requirements imposed by Federal law, including the Juvenile Justice and Delinquency Prevention Act of 2002, P.L. 107-273, 42 U.S.C. §§5601 et seq., and the Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§15601 et seq. Therefore, a Federal standards analysis is not required.

Jobs Impact

The Commission does not anticipate that any jobs in New Jersey either will be generated or lost if the rules are readopted with amendments and a new rule.

Agriculture Industry Impact

The rules proposed for readoption with amendments and a new rule will have no impact on the agriculture industry in New Jersey.

Regulatory Flexibility Analysis

The rules proposed for readoption with amendments and a new rule apply to facilities used for detention of adults and which may be used for detention of juveniles. Detention means holding of any person in police custody. Such adult facilities, as defined in N.J.A.C. 13:94-1.2, are primarily operated by government entities. However,

a facility operated by a private university, arena, amusement park or other similar institution is also included in the definition and is also subject to the chapter. It is unlikely that any such private institution would be considered a small business as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. If, however, a private institution is considered a small business, the following analysis applies. The facility would be required to maintain records specified in N.J.A.C. 13:94-2.6 and to comply with the reporting requirement of N.J.A.C. 13:94-2.7 in the event of construction or renovation of a holding area as discussed in the Summary above. Because these rules concern the safety of juveniles no lesser compliance requirements for small business is appropriate. Any burden on a small business would be more than outweighed by the public safety requirement to protect the health and safety of juveniles detained in adult facilities. Professional services are not required for compliance.

Smart Growth Impact

The rules proposed for readoption with amendments and a new rule will have no impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The rules proposed for readoption with amendments and a new rule will have an insignificant impact on affordable housing in New Jersey, and there is an extreme unlikelihood that the rules would evoke a change in the average costs associated with housing, because the proposed rules concern only juveniles detained in adult facilities.

Smart Growth Development Impact

The rules proposed for readoption with amendments and a new rule will have an insignificant impact on smart growth, and there is an extreme unlikelihood that the rules would evoke a change in housing production in Planning areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey, because the proposed rules concern only juveniles detained in adult facilities.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 13:94.

Full text of the proposed amendments and new rule follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 1. GENERAL REQUIREMENTS

13:94-1.1 Purpose and scope

(a) The purposes of this chapter are:

1. (No change.)
2. To [provide a basis for monitoring such facilities under] **ensure compliance**

with provisions of the Federal Juvenile Justice and Delinquency Prevention Act of 2002, P.L. 107-273, 42 U.S.C. §§5601 et seq.;

- 3.- 4. (No change.)

(b) (No change.)

13:94-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

...

"Juvenile" means an individual who is under the age of 18 years.

...

13:94-1.3 Legal requirements

(a) The detention of a juvenile in a facility is subject to the requirements of:

1. – 3. (No change.)

4. All other applicable laws, regulations and other authorities related to the confinement of juveniles, including, but not limited to, requirements addressing the deinstitutionalization of status offenders and non-offenders, sight and sound separation of juveniles and adults[,] and timely removal of juveniles from adult secure facilities;
[and]

5. All applicable public health, safety, construction, building, fire and other codes, laws and regulations promulgated either by the State of New Jersey or by the county, township or municipality in which the facility is located[.]; **and**

6. The Prison Rape Elimination Act of 2003, 42 U.S.C. §§15601 et seq.

13:94-1.4 **Oversight authority of the Commission** [oversight authority and responsibility]

(a) The Commission is authorized to [issue advisory recommendations appropriate to assisting facilities to comply with the provisions of this chapter. Such recommendations may address] **ensure compliance with the core requirements of the JJDP Act including:**

- 1. Deinstitutionalization of status offenders;**
- 2. Separation of juveniles from adult offenders; and**
- 3. Removal of juveniles from adult facilities.**

(b) The Commission is also authorized to monitor facilities for compliance with the provisions of this chapter including, but not limited to:

1. – 4. (No change.)

[(b) A facility shall grant the Commission access to staffing and other records, and shall comply with Commission requests for reports and information, reasonably necessary to verifying the facility's compliance with the provisions of this chapter.]

SUBCHAPTER 2.

OPERATIONAL REQUIREMENTS

13:94-2.5 Supervision of juveniles

(a) Facility staff shall provide supervision for all detained juveniles. The level of supervision shall be that necessary to ensure the safety and well-being of the juvenile, facility staff and the public at large. Factors to be considered when determining the appropriate level of supervision shall include, but shall not necessarily be limited to:

1. (No change.)

2. The nature of the offense charged, if any; [and]

3. The physical environment of the area where the juvenile will be held, including any objects or architectural elements that could facilitate self-injury or injury to others[.]; **and**

4. A reasonable concern that a juvenile may be the victim of sexual or other abuse, or pose a risk of suicide or injury to self.

(b) – (f) (No change.)

13:94-2. 6 Juvenile admissions and secure custody logs

(a) Each facility, **other than a court holding facility**, shall maintain a juvenile admissions log that documents all juveniles detained at the facility.

(b) –(c) (No change.)

13:94-2.7 Inspection by Commission, review of construction plans and enforcement

(a) **The Commission shall undertake such inspection of facilities as necessary and appropriate to determine compliance with this chapter.**

1. **Such inspections shall include observation of the physical condition in areas where juveniles are held, and review of the practices and procedures relevant to the detention of juveniles.**

2. **Prior to undertaking any construction or renovation that may affect areas used to hold juveniles, a facility shall submit a written construction plan for review by and approval of the Commission.**

3. The Commission shall approve any plan for construction or renovation consistent with the purposes of this chapter.

(b) A facility shall grant the Commission access to such records, reports and information reasonably necessary to verifying the facility's compliance with the provisions of this chapter.

(c) If, upon completion of an inspection, the facility is found to be in material violation of this chapter, the Commission shall give the facility notice of the violation and 45 days to demonstrate that the violation will be remedied to the satisfaction of the Commission.

(d) If, upon notice, a facility fails to remedy a violation, the Commission may institute such proceedings authorized under N.J.S.A. 52:17B-170e(16), as may be necessary and appropriate.