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ATTORNEY GENERAL OPINION NO. 90- 63

The Honorable Theodore B. Ice
District Court Judge
Harvey County Courthouse
Newton, Kansas 67114

Re: Minors -- Kansas Juvenile Offenders Code -- Confinement of Juveniles in Adult Jails; Potential Liability of Local Officials

Synopsis: A sheriff may incur liability for confining a juvenile offender in jail, even when juvenile detention facilities are not available. However, local units of government may be held liable for releasing a juvenile offender who then proceeds to commit subsequent crimes. Cited herein: K.S.A. 1989 Supp. 38-1632; 42 USC § 5601, 42 USC § 5633.

* * *

Dear Judge Ice:

As Judge of the ninth judicial district you request our opinion regarding the liability which could be incurred by a sheriff for confining a juvenile offender in an adult jail when other facilities are not available.

The question you pose must be addressed in terms of the effect of the 1988 amendment to the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), 42 U.S.C. § 5601 et seq., which has as one of its purposes the assistance of state and

local governments in removing juveniles from adult jails. 42 U.S.C.A. § 5602(a)(8). 42 U.S.C.A. § 5631 (West Supp. 1989) authorizes the administrator of the federal program to make grants to the states. To be eligible for such grant monies, the state is required to formulate and submit a plan to carry out the purposes of the program. 42 U.S.S.C. § 5633(a) (West Supp. 1989). The Kansas Department of Social and Rehabilitation Services (SRS), with the Governor's consent, entered into this program and began receiving grant monies in 1978. While specific provisions of the act have been amended from time to time, it appears that the removal of juveniles from adult jails has been one of the goals of the program from its inception.

42 U.S.C.A. § 5633 sets forth the provisions required to be contained in each participating state's plan. Of particular relevance to the inquiry addressed herein are subsections (a)(13) and (a)(14) which state:

> "(a) In accordance with regulations which the administrator shall prescribe, such plan shall --
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> . . . .
>
> "(13) provide that juveniles alleged to be or found to be delinquent and youths within the purview of paragraph (12) shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges;
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> "(14) provide that, beginning after the five-year period following December 8, 1980, no juvenile shall be detained or confined in any jail or lock-up for adults, except that the administrator shall, through 1993, promulgate regulations which make exceptions with regard to the detention of juveniles accused of non-status offenses who are awaiting an initial court appearance pursuant to an enforceable State law requiring such appearances within twenty-four hours after being taken into

> custody (excluding weekends and the holidays) provided that such exceptions are limited to areas which --
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> "(A) are outside a Standard Metropolitan Statistical Area,
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> "(B) have no existing acceptable alternative placement available, and
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> "(C) are in compliance with the provisions of paragraph (13). . . ." (West Supp. 1989).

Thus, in order to be eligible for grant monies, SRS has agreed that no juveniles shall be detained or confined in adult jails. (Note: 28 C.F.R. § 31.303(e)(3)(i) acknowledges that juvenile detention facilities may be located in the same building or on the same grounds as adult jail facilities as long as the criteria for separateness of the two facilities are met. If the criteria are met, the placement of juveniles in such detention facilities is not deemed to be placement in an adult jail.) While there is an exception for certain states in 42 U.S.C.A. § 5633(a)(14), Kansas is not eligible for the exception because we do not have a law requiring an initial court appearance for juvenile offenders within 24 hours of being taken into custody. K.S.A. 1989 Supp. 38-1632(a) provides for forty-eight hours of detention before an initial hearing. Even if K.S.A. 1989 Supp. 38-1632 were amended to allow Kansas to make use of the exception, the exception itself expires in 1993.

Having concluded that Kansas, by virtue of the agreement to accept JJDPA funds under specified circumstances, is currently precluded from detaining juvenile offenders in adult jails, we now turn to the question of possible consequences for violation of this prohibition. Aside from possible monetary consequences as a result of action taken by the office of juvenile justice and delinquency prevention, local units of government, particularly sheriffs and chiefs of police, may be held liable in private causes of action brought by juveniles "wrongfully" incarcerated under the JJDPA.

In Hendrickson v. Griggs, 672 F.Supp. 1126 (N.D. Iowa 1987), the court found that subsections 13 and 14 of 42 U.S.C. § 5633 created mandatory funding eligibility conditions to which states subject themselves by receiving JJDPA funds; and that those subsections were more than funding conditions -

they gave rise to duties. The court held that under those subsections juveniles could assert a section 1983 action to seek redress for violations of rights created by the JJDPA and that juveniles were entitled to relief for the state's noncompliance with the requirement for removal of juvenile offenders from adult jails. On appeal in Hendrickson v. Griggs, 856 F.2d 1041 (8th Cir. 1988), the United States Circuit Court, in finding unappealable an interlocutory order requiring the State of Iowa to submit a plan in substantial compliance with the JJDPA, indicated that a private cause of action may be brought to enforce the requirements of the JJDPA. The case has since been dismissed as moot because of Iowa's compliance with the requirements of the JJDPA.

While Hendrickson recognized a cause of action under the JJDPA, two other federal courts have found to the contrary [Doe V. McFall, 599 F.Supp. 1421 (D. Ohio 1984) (no express private right of action established by state's incarceration of juveniles at adult facilities); Cruz v. Collazo, 84 F.R.D. 307 (D. Puerto Rico 1979) (private cause of action not established under JJDPA for state's violation of placement in least restrictive alternative)].

In the 1989 Kansas legislative session, an act concerning juveniles relating to the length of detention, prohibiting detention in adult jails, and developing alternatives to detention was introduced. (House Bill No. 3041). This bill, if passed, would bring Kansas into compliance with the requirements of the JJDPA. The bill specifically provides that no juvenile shall be detained or placed in any jail pursuant to the Kansas juvenile offenders code, with a limited 24 hour exception in some circumstances. Although the bill did not pass, interim study of the issue has been requested which is indicative of some legislative intent to insure that Kansas is in compliance with the JJDPA by prohibiting incarceration of juveniles in adult jails.

Although there is some case law to the contrary, we must consider a private cause of action brought by a juvenile against a sheriff for violating provisions of the JJDPA a possibility. See Soler, Dale and Flake, "Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails," 1980 B.Y.U.L. Rev. 1, 12 (1980); Dale, "Detaining Juveniles in Adult Jails and Lock-ups: An Analysis of Rights and Liabilities," Am. Jails, Spring, 1988, at 46; "Hendrickson v. Griggs - Juvenile Justice Act Creates Rights for Detainees," Detention Reporter,

August, 1987, at 3. On the other hand, local units of government may be held liable for releasing a juvenile offender who then proceeds to commit subsequent crimes. Thus, local units of government are placed in a delicate and untenable situation and may be well advised to consider each case individually with these possibilities in mind.

In conclusion, because Kansas is a party to the JJDPA due to the commitment and receipt of funds by SRS, there is the distinct possibility of a sheriff incurring liability for confining a juvenile in jail, even when juvenile detention facilities are not available.

Very truly yours,

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