



STATE OF KANSAS

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November 10, 1983

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ATTORNEY GENERAL OPINION NO. 83- 163

Robert E. Davis  
Leavenworth County Attorney  
County Courthouse  
Fourth and Walnut  
Leavenworth, Kansas 66048

Re: Infants -- Juvenile Offenders Code -- Diversion;  
Necessity of Complaint Being Filed Prior to  
Diversion

Synopsis: K.S.A. 1982 Supp. 38-1635 provides that a district court may adopt policies and establish guidelines for diversion of those juveniles who have not previously been adjudged to be juvenile offenders under the Juvenile Offenders Code, K.S.A. 1982 Supp. 38-1601, et seq. Before a juvenile comes before the court for the purposes of obtaining diversion, he or she must first be named as respondent in a complaint. However, a county or district attorney may enter into an informal agreement with a juvenile in lieu of filing a complaint. Such an agreement would not be considered as diversion and would not come before the court. Cited herein: K.S.A. 22-2907, K.S.A. 1982 Supp. 22-2908, 38-1601, 38-1622, 38-1635.

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Dear Mr. Davis:

As County Attorney for Leavenworth County, Kansas, you request our opinion on a question concerning the offering of diversion under the Kansas Juvenile Offenders Code, K.S.A. 1982 Supp. 38-1636, et seq. Specifically, you inquire whether the district court has the authority to establish a policy of diverting first time offenders prior to the filing of charges. At present, the court has taken the view that charges must

be formally brought before diversion can be offered. You also inquire concerning the supervision of a juvenile diversion program, i.e., should it be done by your office or court services personnel?

K.S.A. 1982 Supp. 38-1635 is contained in the new Juvenile Offenders Code, which became effective on January 1, 1983. The statute reads as follows:

"Each court may adopt a policy and establish guidelines for a diversion program by which a respondent who has not been previously adjudged to be a juvenile offender may avoid such an adjudication."

It can initially be observed that diversion for juveniles does not follow the procedure set by other Kansas statutes for diversion of adult offenders. K.S.A. 22-2907, which is contained in the Code of Criminal Procedure, provides that the offering of diversion to adult defendants is a determination made by the district or county attorney, while the above statute reserves control over such decisions with the district court. This is in keeping with the concept of the Juvenile Offenders Code, as expressed by K.S.A. 1982 Supp. 38-1601, whereby juvenile proceedings are an extension of the parental power of the state, and are not criminal actions.

While K.S.A. 22-2907(1) makes it clear that diversion is to be offered "[a]fter a complaint has been filed charging a defendant with commission of a crime and prior to conviction thereof," the corresponding section in the Juvenile Offenders Code does not set forth such a timetable. However, in our opinion the same procedure can be inferred from the wording of the statute, which must be read in pari materia with the rest of the Code. A juvenile becomes a "respondent" for the purposes of the Code after a complaint is filed pursuant to K.S.A. 1982 Supp. 28-1622. Therefore, when K.S.A. 1982 Supp. 38-1635 speaks of a respondent being able to avoid adjudication as a juvenile offender through a diversion agreement, it must be concluded that charges have previously been filed.

Furthermore, given the vesting of authority in the court, rather than the prosecuting attorney, to draw diversion guidelines, it is necessary that charges be filed, so that the power of the court may initially be invoked. Unlike a county attorney, who may arrive at an informal agreement with a juvenile and his counsel in lieu of filing a complaint, in juvenile matters a court acts as a trier of fact and then imposes sentence based on its findings. While diversion eliminates the need to take these steps, a juvenile will never come before the court initially without a complaint being filed by someone other than the court. Accordingly, while

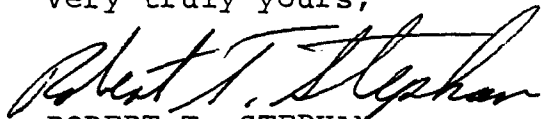
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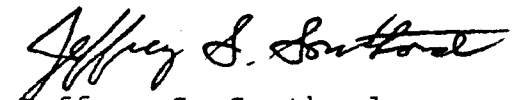
informal agreements may continue to be used by prosecutors, formal diversion agreements involving a juvenile before the court can only be done after the juvenile becomes a respondent through the filing of the complaint.

It is also our opinion that the district court may, at its discretion, determine whether a juvenile making a diversion agreement would be subject to the supervision of court services personnel or the county attorney. The statutes are silent as to whether one office should be preferred over the other, and as arguments can be made for either, the legislature has apparently left matters open for determination by the court. In that failure to comply with the diversion agreement would lead to the reopening of charges by the county or district attorney's office, at the very least that office should be kept informed of the juvenile's progress.

In conclusion, K.S.A. 1982 Supp. 38-1635 provides that a district court may adopt policies and establish guidelines for diversion of those juveniles who have not previously been adjudged to be juvenile offenders under the Juvenile Offenders Code, K.S.A. 1982 Supp. 38-1601, et seq. Before a juvenile comes before the court for the purposes of obtaining diversion, he or she must first be named as respondent in a complaint. However, a county or district attorney may enter into an informal agreement with a juvenile in lieu of filing a complaint. Such an agreement would not be considered as diversion and would not come before the court.

Very truly yours,

  
ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

  
Jeffrey S. Southard  
Assistant Attorney General

RTS:BJS:JSS:hle