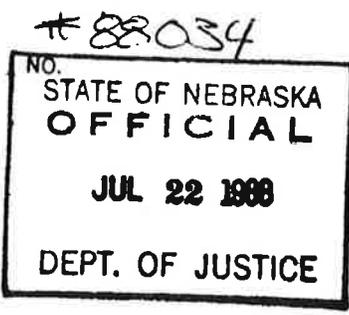


Linda Willard

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 * STATE CAPITOL * LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE
 Attorney General
 A. EUGENE CRUMP
 Deputy Attorney General

DATE: July 22, 1988

SUBJECT: "Safekeeping" and evaluation of juveniles under (3)(a) and (3)(b) of Neb.Rev.Stat. §43-247 at the Youth Development Centers and in adult lockup facilities.

REQUEST BY: Jim Joneson, Executive Director of Nebraska Commission on Law Enforcement and Criminal Justice

WRITTEN BY: Robert M. Spire, Attorney General, William L. Howland, Assistant Attorney General

This letter is in response to your August 12, 1986, inquiry in which you posed two questions:

- I. Can a juvenile adjudicated under 43-247(3)(a) and (3)(b) be admitted to the Youth Development Centers as "safekeepers" or for the purpose of evaluation.
- II. Can a juvenile adjudicated under 43-247(3)(a) and (3)(b) be housed in an adult lockup facility (county jail) while waiting for final disposition or alternative housing?

We note that in your inquiry you refer to 3(a) and (3)(b) as status offenders however, we point out that there is a distinction between (3)(a) and (3)(b). (3)(a) juveniles are those who are homeless, destitute or neglected as defined in subsection (3)(a) of Neb.Rev.Stat. §43-247, through no fault of their own and are therefore non-status offenders; and (3)(b) juveniles are those who are wayward or habitually disobedient, as a result of their actions and thereby status offenders.

I.

Your first question presents four separate issues which we will deal with individually.

- | | | | | |
|--------------------|-----------------------|----------------------|-------------------------|------------------|
| L. Jay Bartel | Royce N. Harper | Charles E. Lowe | Bernard L. Packett | James H. Spears |
| Elaine A. Catlin | William L. Howland | Lisa D. Martin-Price | Marie C. Pawol | Mark D. Starr |
| Dale A. Comer | Marilyn B. Hutchinson | Steven J. Moeller | Douglas J. Peterson | John R. Thompson |
| David Edward Cygan | Donald E. Hyde | Harold I. Mosher | Jill Gradwohl Schroeder | Susan M. Ugai |
| Lynne R. Fritz | Vanessa L. Jones | Fredrick F. Neid | LeRoy W. Sievers | Linda L. Willard |
| Yvonne E. Gates | Mel Kammerlohr | | | |

Mr. Jim Joneson
June 22, 1988
Page -2-

1(a) May a (3)(b) (status offender) be kept at the Youth Developmental Centers for purposes of "safekeeping"?

The answer is no. Neb.Rev.Stat. §43-286 (Reissue 1984) provides for the disposition of an adjudicated (3)(b) offender. Neb.Rev.Stat. §43-287 (Reissue 1984), provides however that no juvenile adjudicated under subsection (3)(b) of §43-247 "shall be committed to the Youth Development Centers at Kearney or Geneva."

The Webster Collegiate Dictionary defines commit as:

a: To put into charge or trust: Entrust b: to put in a prison or mental institution c: to consign or record for preservation < it to memory> d: to put into a place for disposal or safekeeping (Emphasis added) .

syn COMMIT, ENTRUST, CONFIDE, CONSIGN, RELEGATE to assign a person or place esp. for safekeeping COMMIT make express the general idea of delivering into another's charge or the special sense of transferring to a superior power or to a special place of custody; ENTRUST implies committing with trust and confidence; CONFIDE implied and entrusting with assurance or reliance; CONSIGN suggest transferring to remove from one's control with formality or finality; RELEGATE implies a consigning to a particular class or sphere often with suggestion of getting rid of.

From the foregoing it would appear that under no circumstances, may a juvenile adjudicated under §43-247 (3)(b) be kept at the Youth Development Centers.

1(b) May a (3)(b) (status offender) be sent to the Youth Developmental Centers for purposes of evaluation?

The answer to the foregoing question is premised on the proposition that all evaluations are being performed at the Youth Diagnostic and Rehabilitation Center which is located at Geneva. The Diagnostic Center, while located at the Geneva Youth facility, is a separate functional facility. Neb.Rev.Stat. §83-4,101(2) provides that a Juvenile Court "may, without formal commitment, refer any boy or girl" to the Diagnostic Center for observation and testing (evaluation). Based on the foregoing it is our opinion that (3)(b) evaluations may be performed at the Diagnostic Center in Geneva.

Mr. Jim Joneson
June 22, 1988
Page -3-

1(c) May a juvenile adjudged under 43-287(3)(a) be placed at either of the Youth Development Centers for "safekeeping"?

There is no specific statutory authority prohibiting the placement of (3)(a) juveniles in the Youth Development Centers for safekeeping, however for several reasons we are led to the conclusion that (3)(a) juveniles cannot be placed at the Youth Development Centers.

The first reason is that the Nebraska Legislature has shown a clear intent to keep juveniles in the least restrictive environment when juveniles are taken into custody. Neb.Rev.Stat. §43-250 (Reissue 1986).

The second reason is that a juvenile pending adjudication cannot be placed in the Youth Development Centers. Neb.Rev.Stat. §43-258(2) (Reissue 1986). Additionally, the court has a number of choices where it may place juveniles adjudged under subsection three of §43-247 as set out in Neb.Rev.Stat. §43-284:

When any juvenile is adjudged to be under subdivision (3) of section 43-247, the court may permit such juvenile to remain in his or her own home subject to supervision or may make an order committing the juvenile to the (1) care of some suitable institution, (2) care of some reputable citizen of good moral character, (3) care of some association willing to receive the juvenile embracing in its objects the purpose of caring for or obtaining homes for such juveniles, which association shall have been accredited as provided in section 43-296, (4) care of a suitable family, except that under subdivision (1), (2), (3), or (4) of this section upon a determination by the court that there are no private or other public funds available for the care, custody, education, and maintenance of a juvenile, the court may order a reasonable sum for the care, custody, education, and maintenance of the juvenile to be paid out of a fund which shall be appropriated annually by the county where the petition is filed until suitable provisions may be made for the juvenile without such payment, or (5), care and custody of the Department of Social Services . . . Neb.Rev.Stat. §43-284 (Reissue 1986).

It is obvious from the foregoing that each choice is a less restrictive environment than the Youth Development Centers.

Mr. Jim Joneson
June 22, 1988
Page -4-

Another reason is the logical flow of §43-287. If a juvenile adjudged under (3)(b) of §43-247 -- a status offender, who is defined as being wayward, habitually disobedient or uncontrollable cannot be placed at the Youth Development Centers, then it obviously follows that a child adjudged under (3)(a), who is homeless or destitute, without support through no fault of his own should not be placed at the Youth Development Centers. The spirit of the Juvenile Code and the intent of §43-287, make it apparent a homeless or destitute juvenile should not be placed in the Youth Development Centers for "safekeeping".

In 1981 the Nebraska Legislature passed Resolution 11 to comply with federal law under the Juvenile Justice and Delinquency Prevention Act, (JJDPA) 42 USC §§5601, et seq., in order to receive federal funds to help Nebraska achieve compliance. Neb. Res. 11, 87th Leg., 1981 Neb. Leg. Journal. 365.

The JJDPA provides:

(12)(A) [a state must] provide within three years after submission of the initial plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses which do not constitute violations of valid court orders, or such non-offenders as dependent or neglected children, shall not be placed in secure detention facilities or secure correctional facilities; and

The resolution language which adopted the JJDPA makes reference to the fact that the Legislature had appropriated funds in 1978 for the Department of Public Welfare which funds were intended to provide an alternative resource in dealing with status offenders thereby removing them from the Youth Development Centers. The alternative funding was to provide an option for status offender placement.

The language of the resolution is as follows:

WHEREAS, in 1978, the Legislature passed LB 700, removing the State Youth Development Centers in Geneva and Kearney as post-adjudication resources for status offenders and appropriated funds to the Department of Public Welfare for alternative resources; and

We believe that the language of the Resolution clearly indicates an intent to refrain from placing youths at the Youth

Mr. Jim Joneson
June 22, 1988
Page -5-

Development Centers when they find themselves in a position which is not a result of their own actions.

1(d) May a (3)(a) youth be sent to the Youth Development Centers for evaluation.

The answer to this question is similar to the position stated in response to question 1(b) above and is answered in the affirmative. As indicated in the response to question 1(b) it is our analysis that a youth adjudicated under Neb.Rev.Stat. §43-247(3)(a) may be evaluated at the Diagnostic Center located at the Geneva Youth Facility.

II.

The second question asked whether (3)(a) and (3)(b) juveniles could be placed in an adult lockup facility while awaiting final disposition or alternative housing.

Again, there is no specific statutory provision regarding the placement of (3)(a) and (3)(b) juveniles during the period after adjudication and before final disposition. We are led to the conclusion from a reading of related juvenile code provisions and the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§5601 et seq. that subsection three of Neb.Rev.Stat. §43-247(a) and (b) juveniles cannot be placed in adult lockup facilities while awaiting final disposition or alternative housing.

The Legislature has shown a clear intent to keep these juveniles out of adult lockup facilities. According to Neb.Rev.Stat. §43-250 (Reissue 1984), when an officer takes a juvenile into temporary custody pursuant to Neb.Rev.Stat. §43-248, (when a juvenile is endangered by his surroundings or has run away from home) the officer may release the juvenile; prepare a notice to appear; or deliver the juvenile to court or a probation officer.

In the final analysis the officer shall prefer the alternative which is the least restrictive for the child's freedom of movement. Neb.Rev.Stat. §43-250 (Reissue 1984). The foregoing statutes prohibit any juvenile being held in an adult jail prior to adjudication.

The Nebraska law is unequivocal that if a court or magistrate has made a preadjudicated placement of a juvenile 13 or under with "sheriff, police officer, probation officer, or other suitable person, such person shall keep the juvenile in a suitable place outside the enclosure of any jail or police

Mr. Jim Joneson
June 22, 1988
Page -6-

station." Neb.Rev.Stat. §43-251 (Reissue 1984). This statute refers to the period after a juvenile has been brought before a court or magistrate prior to adjudication. The statute, §43-251, prohibits the person who is charged with the care of a juvenile by a court or magistrate from using a jail or police station as a placement pending final disposition. Neb.Rev.Stat. §43-251 appears to permit a preadjudicated juvenile under 13 to be held for a minimum amount of time not to exceed a few hours, at a police station or sheriff's office outside of the jail while suitable placement is located.

Neb.Rev.Stat. §43-251 also provides "[w]hen a juvenile under the age of sixteen years shall be detained in any institution to which adults are sentenced it shall be unlawful to permit such juvenile to have verbal, visual, or physical contact with such adults at any time." (Note, Federal regulations refer to state law for the definition of a juvenile. 42 C.F.R.31.304(f)).

Nebraska law defines a juvenile as being any person under the age of 18. Neb.Rev.Stat. §43-245(5) (Reissue 1984). The Juvenile Justice and Delinquency Prevention Act would require that Nebraska keep any juvenile under 18 who is detained in any institution where adults are sentenced from having verbal, visual, or physical contact with the adults who are sentenced.

When a juvenile who has been taken into custody and brought before the court or probation officer, the court or probation officer may release said juvenile to parents; release on bail; or place the juvenile pursuant to the choices in Neb.Rev.Stat. §43-254. Neb.Rev.Stat. §43-253 (Reissue 1986).

Pending adjudication, the juvenile can be placed for a reasonable period of time in the temporary custody of a suitable person; a suitable place provided by the city or county authorities; in a properly accredited charitable institution, or placed in a state institution except an adult penal institution Neb.Rev.Stat. §43-254 (Reissue 1986).

Also, if a juvenile needs evaluation prior to adjudication he or she cannot be evaluated in an adult penal institution §43-258, supra. More specifically, §43-286 mandates, "no juvenile shall be confined in any jail as a disposition of the court." It is clear that a (3)(a) or (3)(b) juveniles may not be placed in jail as the result of a dispositional order.

Furthermore, in passing Resolution 11 the Legislature has agreed to comply with the JJDPA which, as already stated, provides that non-offenders or dependent and neglected children

Mr. Jim Joneson
June 22, 1988
Page -7-

shall not be placed in secure detention facilities. 42 U.S.C.A. §5633 (12)(A).

(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.

(14) provide that, beginning after the five years period following December 8, 1980, no juvenile shall be detained or confined in any fail or lockup for adults, except that the Administrator shall, through 1989, 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 holidays) provided that such exceptions are limited to areas which:

- (i) are outside a Standard Metropolitan Statistical Area,
- (ii) have no existing acceptable alternative placement available, and
- (iii) are in compliance with the provisions of paragraph (13).

42 U.S.C.A. §5633 (13)(14).

As a result of Resolution 11, Nebraska must significantly reduce the number of status offenders in secured facilities and juveniles held in adult lockup facilities, or risk losing federal funds.

We note two cases that have dealt with these same issues. In D.B. v. Tewksbury, 545 F.Supp. 896 (Oregon 1982). A civil rights action was brought against the Director of Columbia County Juvenile Department challenging the constitutionality of confining children in an adult jail. The court granted a permanent injunction against placing pretrial detainees, run-away children or children out of parental control, and a child pending adjudication of criminal charges in modern adult jails. The court found that the placing of juveniles in jail constituted punishment and violated their due process rights.

Mr. Jim Joneson
June 22, 1988
Page -8-

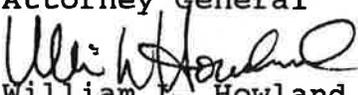
In Hendickson v. Griggs, 672 F.Supp. 1126 (Iowa 1987), the plaintiffs were successful in bringing a §1983 action to redress violations of rights created by the Juvenile Justice and Delinquency Prevention Act. The action was brought against several county and state officials of Iowa to force state compliance with 42 USC §5633, JJDPa, by the end of the year. The court ordered the state defendants to submit a plan for achieving a combination of policy changes and reductions in the rate of juvenile jailing which would place Iowa in compliance with the JJDPa by the end of the year.

In your letter you mentioned that Nebraska had only a 58% reduction of juvenile jailings, but that Nebraska had been in compliance as a result of §43-287. You also noted that your monitoring report revealed that (3)(a) and (3)(b) juveniles are still being held at the Youth Development Centers in violation of §43-287. Nebraska is not only at risk of losing federal funds by not complying with JJDPa, but may also be liable for violating a juvenile's constitutional rights. "No child who is a status offender may be lodged constitutionally in an adult jail." Tewksbury at 906. We also emphasize that 42 §§5633 and 1983 combined in Hendickson to give juveniles a federal cause of action to invoke their rights under the JJDPa and force state officials to comply with the JJDPa.

In conclusion a juvenile adjudged under subsection three of §43-247 must be placed in the least restrictive facility or institution pending final disposition or awaiting alternative housing. If you are in need of any further assistance in regard to this matter, please do not hesitate to contact our office.

Very truly yours,

ROBERT M. SPIRE
Attorney General


William L. Howland
Assistant Attorney General

APPROVED:


Attorney General

6-02-4