



## OFFICE OF THE CORPORATION COUNSEL

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October 4, 2021

### VIA EMAIL

Mr. John Bauman  
Dane County Juvenile Court Administrator  
210 Martin Luther King Jr. Blvd., Rm. 200  
Madison, WI 53703

RE: Detention of Juveniles Subject to Criminal Jurisdiction

### Assistant Corporation Counsels

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Dear Mr. Bauman:

You have requested an opinion as to whether individuals under the age of 18 who are subject to jurisdiction of adult criminal court may be detained at a juvenile detention facility. In my opinion, 17 year olds who are being prosecuted in criminal court or who have been convicted in criminal court are not by statutory definition a “juvenile” and may not be incarcerated at a juvenile detention facility. It is further my opinion that there is discretion to detain juveniles under the age of 17 in juvenile detention facilities even if subject to the jurisdiction of criminal court.

As part of the Juvenile Justice Code, Wis. Stat. Ch. 938, the legislature has granted counties the authority to establish juvenile detention facilities. Wis. Stat. § 938.22(1). Counties operating a juvenile detention facility are required to submit an operational plan to the Department of Corrections and obtain approval. The legislature directed the Department of Corrections to “promulgate rules establishing minimum requirements for approval and operation of juvenile detention facilities.” Wis. Stat. § 938.22(2). For purposes of Chapter 938, the legislature specifically defined the terms “adult,” and “juvenile.” An adult is defined as “a person who is 18 years of age or older, except that for purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance, ‘adult’ means a person who has attained 17 years of age.” Wis. Stat. § 938.02(1). Likewise, Wis. Stat. § 938.02(10m) defines “juvenile” as “a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, “juvenile” does not include a person who has attained 17 years of age.” Therefore, a 17 year old being prosecuted for a criminal offense is considered an adult and not a juvenile.

As required by statute, the Department of Corrections has promulgated rules for operation of juvenile detention facilities. Wis. Admin. Code Ch. DOC 346. Wisconsin Admin. Code DOC § 346.09(1) provides that “No juvenile may be placed in a juvenile detention facility unless the facility meets the requirements of this chapter and is approved by the department.” Wisconsin Admin. Code DOC § 346.04(1) states that before a facility may hold juveniles in secure custody it must have a written

operational plan that is approved by the department. Subsection (2)(c) requires that one of the components of the plan shall be “policies and procedures to ensure against any contact between juveniles and adult inmates in all areas of the facility.” More specifically, DOC § 346.11 provides: “(1) There may be no physical or visual contact between juveniles and adult inmates in a juvenile detention facility. (2) There may be no sustained sound contact between juveniles and adult inmates in a juvenile detention facility.”

A 17 year old subject to prosecution for a criminal law is by definition an “adult” and not a “juvenile”, and is subject to the jurisdiction of criminal court and not juvenile court. Pursuant to DOC regulations, there can be no contact between an adult inmate and juveniles in any area of a juvenile detention facility. Therefore, as a practical matter a 17 year old cannot be incarcerated at a juvenile detention facility.

Juveniles under the age of 17 that are subject to the jurisdiction of criminal court are subject to a patchwork of statutory provisions.... In some instances, these juveniles are specifically authorized to be detained in a juvenile detention facility, and there is no statutory or regulatory provision specifically prohibiting it. Furthermore, effective December 21, 2021 federal law prohibits pre-trial detention of a juvenile under the age of 17 in an adult facility unless the court makes specific findings.<sup>1</sup> Therefore, it is my opinion that there is discretion to detain juveniles subject to criminal court jurisdiction in juvenile detention facilities.

Juveniles under the age of 17 may be subject to criminal jurisdiction under three statutes: Wis. Stat. § 938.17 (traffic, boating, snowmobile and all-terrain vehicle violations resulting in death or injury); Wis. Stat. § 938.18 (waiver of juvenile jurisdiction for certain offenses for juveniles 14 or older); and Wis. Stat. § 938.183 (original adult jurisdiction for certain serious criminal offenses.) Construing these statutes together, it is my opinion that detention of juveniles under 17 in a juvenile detention facility rather than an adult facility is authorized.

Wisconsin Stat. § 938.17(1)(b) specifically authorizes a juvenile to serve a period of incarceration of less than 6 months in a juvenile detention facility. Subsection (c) provides that if the court orders a juvenile to serve a period of incarceration in excess of 6 months the criminal court shall petition the juvenile court to exercise jurisdiction and order one or more of the dispositions under Wis. Stat. § 938.34. This includes potential placement in a juvenile detention facility.

Wisconsin Stat. § 938.183(1m) provides criminal penalties for juveniles subject to original adult criminal court jurisdiction for certain serious offenses, including first degree intentional homicide. It provides that such juvenile is subject to the criminal penalties for the crime the juvenile is alleged to have committed, except: “(a) If the juvenile is under 15 years of age, the juvenile may be held in secure custody **only** in a juvenile detention facility or in the juvenile portion of a county jail.” (emphasis added) Statutory language must be interpreted in the context in which it is used, and is read where possible to give reasonable effect to every word, in order to avoid surplusage. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. In that context, by stating that a

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<sup>1</sup> Sec. 223(a)(11)(B) of the Juvenile Justice and Delinquency Prevention Act of 2018, 34 USC §11133(a)(11)(B), provides that juveniles awaiting trial on criminal charges may not be detained in an adult jail unless after a hearing and in writing the court makes findings that it is in the interest of justice based on 7 factors. Such findings must be reviewed every 30 days.

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juvenile under 15 may “only” be held in a juvenile detention facility, leads to the conclusion that a 15 or 16 year old may be held in a juvenile detention facility or an adult facility.

Wisconsin Stat. § 938.18, regarding waiver to adult court, does not have a provision regarding applicable criminal penalties. However, statutes are not construed in isolation, “but as part of a whole, in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results.” *Kalal*, 2004 WI 58, ¶ 46. A reasonable construction is that the penalties in a waiver case under § 938.18 would be no more severe than those in an original jurisdiction case under § 938.183 (where the offenses are generally more serious). There is one conflicting provision of § 938.18. Subsection (8) provides that “when waiver is granted, the juvenile, if held in secure custody, shall be transferred to an appropriate officer or adult facility and shall be eligible for bail in accordance with chs. 968 and 969.” It would be an absurd result to conclude that a juvenile waived to adult court must be held in pre-trial confinement in an adult facility, when placement in a juvenile detention facility is authorized by Wis. Stat. § 938.183(1m) after conviction. Therefore, I conclude that in the case of waiver, Wis. Stat. § 938.18(8) requires transfer of the juvenile to an “appropriate officer or adult facility” for purposes of consideration of bail. If bail is denied, it is my conclusion that the juvenile may be transferred to a juvenile detention facility for pretrial confinement.

In conclusion, 17 year olds accused of violating a criminal law are expressly considered adults, and may not be incarcerated in a juvenile detention facility. That conclusion is based upon my construction of DOC regulations. It is my understanding that an opinion on this issue has also been sought from DOC Legal Counsel. Deference should be given to DOC’s interpretation of its own regulations. *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶ 11, 299 Wis. 2d 1. Additionally, it is my opinion that there is discretion under Wis. Stat. Ch. 938 to detain juveniles under the age of 17 that are subject to criminal court jurisdiction in a juvenile detention facility. Finally, effective December 21, 2021, the federal Juvenile Justice and Delinquency Prevention Act prohibits detention of juveniles under 17 in an adult facility unless the court makes specific findings that it is in the interest of justice.

Please contact me if I can provide additional assistance regarding this matter.

Sincerely,

*David R. Gault*

David R. Gault  
Assistant Corporation Counsel