

Youth in Jails: A Growing Issue

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November, 1996

Note: This paper was originally prepared at the request of the Washington State Governor's Juvenile Justice Advisory Committee. While it is written specifically around Washington State statutes, much of its content is generally relevant for jail managers.

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7-2-1999

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Introduction²

A yet small, unintended, but growing challenge for Washington state jails is a byproduct of the trend of getting tougher on youthful offenders: holding persons under the age of 18 and perhaps as young as 13 or 14 in adult jails. Young persons charged with felonies and for whom the Juvenile Court has declined jurisdiction comprises the bulk of this group of inmates housed in facilities neither designed, staffed, nor operated with teen-agers in mind.

The challenges presented by this group are not limited to jails - they probably extend to local school districts as well.

Housing this group of persons in adult jails presents both legal and operational concerns for the jails, which were built under the assumption that they would very rarely have to house a person under 18 for more than a very short period of time.

In identifying and discussing both legal and operational problems around housing this group of inmates, this paper hopes to accomplish two goals:

1. Alert legislators to the problems, in the hopes that at least some of them can be readily resolved through new legislation and that legislative actions which may increase the numbers of teenagers in jails will be taken with a thorough understanding of the implications of such actions for Washington State jails.

² - The information in this paper is drawn from a number of sources, including the personal knowledge and experience of the author. Much of the information about problems attendant to housing this group of youth in a custodial setting is drawn from a meeting held in April of 1996 with a small group of jail administrators from both large and medium size jails, juvenile detention center administrators, a representative of the Department of Corrections, and other persons knowledgeable in the area. References throughout the paper to "the meeting" refer to this day long discussion.

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2. Alert jails administrators to the areas of concern so that they may be able to address as many of these areas as possible through additional policy development.

Summary

The increase in violent crime by young people, discomfort with the juvenile justice system, and the public's general desire to get tough on crime are creating increasing pressure to treat more and more youthful offenders as adults for purposes of criminal prosecution: "do the crime, do the time." Under present law and practice in Washington, most of such youth now are housed in adult jails pending trial and sentencing, not in juvenile detention facilities.

Several operational and legal concerns accompany the trend. These include such things as providing educational services mandated by state and federal law, protection of youth from other inmates, protection of other inmates from some of the youth, mental health services and suicide protection, and medical consent, among others. This paper does not propose solutions to the issues it raises but the author encourages policy makers to consider these issues and ways of addressing them. A list of policy issues which should be addressed appears at page 26.

The Issue: Kids in Adult Jails

For years, public policy in Washington and across the country has discouraged, if not banned, housing juveniles in adult jails. This policy is reflected in RCW 13.04.116, which prohibits housing juveniles in adult jails except in very limited circumstances and for very short periods of time. Even then, there must be sight and sound separation between the young person and adult inmates. At a federal level, the "no juveniles in jails" policy is reflected in the Juvenile Justice Delinquency Prevention Act, passed by Congress in the early 1970s. 42 USC §5602, et seq. The implementing regulations of this Act forbid states which receive funding under the Act from putting juveniles in jails, 28 CLR, part 31. Juveniles housed in violation of the Act and its regulations can sue to correct the violation.³

³ - *Doe v. Borough of Clifton Heights*, 719 F.Supp. 382 (E.D.Pa., 1989), aff'd, 902 F.2d 1558 (3d Cir., 1990), cert denied, 111 S.Ct. 349 (1990). *Horn by Parks v. Madison County Fiscal Court*, 22 F.3d 673 (6th Cir., 1994)

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Some courts have held separation of adults and juveniles is constitutionally mandated. These decisions are relatively old and changes in case law makes it questionable whether the Constitution mandates separation in all cases.⁴

Standards adopted by the American Correctional Association for jails ("Adult Local Detention Facilities") prohibit the confinement of "juveniles under the age of 18 within" the jail. Standards for Adult Local Detention Facilities 3rd ed., §4B-04. Procedural guidelines recommended by ACA to implement the Standards permit the housing of juveniles awaiting trial as adults in jails so long as they are separated by sight and sound from adult offenders.

Why then is there concern about juveniles in jails – isn't it against the law? It is against the law to house a "Juvenile" in jail. It is not, however, necessarily against the law to house a young person under the age of 18 in an adult jail. The difference is one perhaps only a lawyer could love - the difference is one of definition.

A small number of youths - persons under the age of 18 – are housed in county jails.⁵ This group is currently comprised of youths facing charges so serious that they have been remanded from juvenile court to superior court, to be tried as an adult. This relatively small population (many jails may have no such inmates much of the time) is not defined as "juveniles." Under Washington state law, the definition of "juvenile" excludes persons under 18 "previously transferred to adult court . . . or who is otherwise under adult court jurisdiction," RCW 13.04.020(14). Federal regulations adopted by the Department of Justice under the Juvenile Justice and Delinquency Prevention Act include a similar distinction, 28 CFR 31.400.

Therefore, despite the strong public policy against putting youth in jails with adults, neither state nor federal law prohibit putting youth awaiting trial as adults in adult jails nor impose any limitations on housing those teen-agers with adult inmates.

⁴ - *Reece v. Gragg*, 650 F.Supp. 1297 (D.Kan., 1986) (failure to separate juveniles contributes to finding of unconstitutional conditions); *Ahrens v. Thomas*, 434 F.Supp. 873 (W.D.Mo., 1977), aff'd in pertinent part, 570 F.2d 286 (8th Cir., 1978) (juveniles barred from jail except for short periods)

⁵ - To clarify that this paper is not focused on young persons still under the jurisdiction of the juvenile court, references will be to "youths." If "juveniles" is used, it is intended to refer to persons still under the juvenile court's jurisdiction.

Are More On the Way? Probably.

While relatively few in number today, the number of such "youth" is likely to become considerably larger in the near future. In 1994, the Legislature passed the Violence Reduction Act which, in part, transferred jurisdiction of 16 and 17 year old youth charged with certain violent felonies to the Superior Court, to be tried as adults, RCW 13.40.110(1)(iv).

The Washington State Institute for Public Policy reports that while the number of youth convicted of non-violent offenses in adult court remained at about 80 per year between 1988 and 1995, the number of youth convicted of violent crimes in adult court increased from 33 in 1988 to 136 in 1995.⁶ Presumably a substantial number of these youth were held in jails pending trial.

The 1996 Legislature directed the Sentencing Guidelines Commission to consider whether "juveniles prosecuted under the juvenile justice system for committing violent, sex, or repeated property offenses should be automatically prosecuted as adults when their term of confinement under the adult sentencing system is longer than their term of confinement under the juvenile system." Sec. 2 (9), Ch. 232, Washington Laws 1996.

That such a change, if adopted, would have a substantial impact on the numbers of juveniles facing charges as adults (and hence likely to be held in jails, not juvenile detention facilities) is shown by the 165% increase in the juvenile arrest rate for violent offenses between 1983 and 1994.⁷

Another indicator that the number of youth in jails is going to continue to increase is the increase in youth under age 18 in adult correctional systems. A survey done at the behest of the Prisons Division of the National Institute of Corrections noted significant increases in violent crime committed by youth across the country and a 68% increase in the number of

⁶ - *Juvenile Offenders Under the Department of Correction's Jurisdiction*, Changing Trends, August, 1996.

⁷ - *Trends in At-Risk Behaviors of Youth in Washington*, p. 9, Washington State Institute for Public Policy, January, 1996

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youth transferred to adult court between 1988 and 1992.⁸ The survey also notes increased legislation which increases the circumstances in which youth charged with crimes may – or sometimes must – be tried in adult court. In April of 1996, the Washington Department of Corrections held 73 offenders under the age of 18. All but three of these had been committed to DOC as adults.⁹ Another 12 were being held by DSHS pursuant to an inter-agency transfer. In the meeting (see fn. 1), the Director of the Division of Prisons informally estimated that 10 years ago the Department held perhaps less than 10 such youth. According to the NIC study, Washington projects a 370% increase in the number of youth committed to it over the next five years.¹⁰

Since one can assume that the substantial majority of the youthful offenders committed to the Department of Corrections were held in county jails pending trial and sentencing, not in juvenile detention facilities, it is easy to see the increasing impact this population is beginning to have on jails.

The concern about an explosion of violent crime committed by young persons is certainly supported by the data cited in prior paragraphs. However, the Institute for Public Policy notes that the rate of juvenile violence committed by juveniles “declined in 1995, but remains high by historical standards.”¹¹ Should this decrease continue the problems discussed in this paper should become less frequent. It is too early to tell if the recent downturn in violent juvenile crime represents the beginning of a long term decline in the amount of violent youth crime, or whether the longer trend of increasing crimes will resume.

The numbers of youth in jails could be increased by another, somewhat surprising source: courts of limited jurisdiction. These court, not juvenile courts, have jurisdiction over fish, boating, or game offenses and certain traffic offenses. RCW 13.04.030 (1)(e)(iii) provides that youth confined for such offenses “may” be placed in juvenile detention facilities under an agreement between the court and detention facility officials. In the absence

⁸ - *Offenders Under Age 18 In State Adult Correctional Systems: A National Picture*, Special Issues in Corrections, No. 1, February, 1995

⁹ - Memorandum from Tom Rolfs, Director, Division of Prisons.

¹⁰ - *Offenders*, p. 3

¹¹ - Letter of WSIPP, October 2, 1996

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of such an agreement, presumably such youth could be sent to adult jails. This does not appear to be occurring at present.

What Are They Like?

What is this group of young inmates like? Are there common characteristics about the group? Obviously, not all members of this group, ranging potentially from middle school age to age of majority, are alike. However input from a number of DOC prisons regarding their populations of youthful inmates plus observations volunteered at the meeting suggest a number of common characteristics.

Impulsive. These young men (in excess of 90% of the group is young males) are teen-agers. That fact alone should suggest they are impulsive. This trait was the one probably noted most frequently both at the meeting and from comments received from several DOC institutions. This impulsivity leads to poor decision making and a quick resort to violence as a means of dealing with problems. Other similar adjectives offered include "low frustration tolerance," "temper," and "gut reactors" who don't consider the consequences of their actions.

Immature. Closely related to the lack of impulse control is immaturity. One observer suggested this immaturity makes it difficult for youth to participate in school programs.

Predator and victim. The group runs the gamut from predators to potential victims. Some may be both. Some youth were described as being very tough, and generally able to take care of themselves. If anything, this sub-group is more dangerous to others than in danger of being victimized. Yet others are potential victims, at risk in some cases for sexual favors they can give to older inmates, in other cases just for their property.

Learning and social disabilities. Attention deficit disorder (ADD) is associated with (or suspected of) many in this group. Others suffer from fetal alcohol syndrome or other types of learning disabilities.

Chemical dependency. Many bring chemical dependency problems to the jail.

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Gangs. Some belong to, or will look to join, gangs.

Segregated. The behavior problems associated with many of the youth (impulsivity, violence as a first response, predator, victim) often result in individuals being placed in segregated confinement as a means of either protecting others from them or vice-versa.

Long termers. Because serious criminal charges are what get them into jail in the first place, it is not uncommon for members of the group to remain in jail awaiting trial and sentencing for long periods of time compared to other jail inmates, most of whom will be in and out of jail in a month or less.

Don't mix well with adults. At least one observer commented that youth in this group often do not mix well with adults, especially in programming settings. For example, while adult offenders participating in educational programs may be highly motivated because they have recognized the value of education, young persons often lack that motivation and/or may have short attention spans making participation difficult for them and those around them. More generally, how many adult males (mostly 18 - 25) choose to hang out with 16 year olds?

Difficult to "program." Delivering programs (especially educational programs, which are generally required for this group, see below) is often difficult in the jail setting. As noted elsewhere in these pages, there is typically very limited programming space in the jail. There still is, in any Washington jail, typically very few inmates under the age of 18, making program planning difficult. Members of the group are often locked in segregation. If not in segregation, they may not mix well with other inmates in group programming contexts.

Operational and Legal Problems Created

Putting youth, perhaps barely in their teens, in adult jails presents a variety of operational problems for jails as well as several potential legal concerns. Some of these are unique to the youth, others are not, but may differ in degree from concerns which have developed around adult inmates, e.g., the jail's duty to protect inmates or to provide some level of mental health treatment.

Jails Not Designed For Youth

At the root of many of the operational concerns is the fact that Washington's jails were intended to house adults, not youth. This is shown by the definitions of the various categories of jails which appear in RCW 70.48.020. The definition of "detention facility" provides an example:

"Detention facility" means a facility operated by a governing unit primarily designed, staffed, and used for the temporary housing of *adult persons* charged with a criminal offense prior to trial or sentencing . . ." (emphasis added.).

The italicized phrase appears in the definitions of holding facility and correctional facility as well.

As noted above, the general policy has been to keep "juveniles" out of jails, except in exceptional cases. RCW 13.04.116.

Washington jails, mostly constructed or remodeled during the early 1980s, typically were built with a minimum of program space. What program space there is may have to serve multiple groups, "in short bursts," as one jail administrator puts it. Jails were designed to be places in which inmates would be held pending trial and sentencing and held for relatively short sentences. While felons may be sentenced to up to one year in jail, the average length of stay for sentenced felons (including pre-trial time, was only 42.5 days in 1995.¹²

Given the relatively short stay of even "long term" jail inmates, program space was not given a priority in the design and funding of Washington State jails. The lack of program space becomes problematic for youth since there apparently is a duty under state, if not also federal statute, to provide educational programs to the youth in question. This issue is discussed in greater detail below.

Exercise space in jails was generally designed to be out of doors, in recognition of court decisions which mandated *outdoor* exercise several times

¹² - *Jail Information Program, 1995 Annual Report*, Washington Association of Sheriffs and Police Chiefs, p. vii. The 42.5 day LOS figure for 1995 is down from 53.5 days in 1991.

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per week.¹³ Standards adopted by the State Jail Commission (later the Corrections Standards Board) required inmates to have three hours of exercise per week, outdoors if feasible, WAC 289-22-210. These Standards are no longer effective, the Corrections Board having been "sunsetting" out of existence several years ago. The practice in jails regarding providing exercise has generally not expanded in the intervening years, so many jails may provide inmates with access to an exercise yard no more than two or three hours per week. These exercise "yards" (often no more than concrete cubes open to the sky) may or may not have much equipment available. Often they may offer little more than a large open space with room to walk around. Day rooms also often offer little more than space to move around or a place to sit to watch TV or play a board game.

In contrast to the limited opportunities for large muscle exercise in jails, physical activity is typically programmed into every day's activity in juvenile detention facilities, in recognition of a teenager's high energy levels. Permitting youth to burn off that energy in some type of supervised exercise activity helps defuse tensions which would otherwise grow and potentially manifest themselves in ways dangerous to both staff and inmates. As one juvenile administrator in the meeting put it, without this activity, the kids "go nuts."

Response to Behavior

The group of youth under discussion tend to be impulsive, "gut reactors" who often use violence as a response to problems. They may have low frustration levels. Their problems may be exacerbated by Attention Deficiency Disorder or other disabilities. Many of them are, in short, very difficult to control. Juvenile detention staff tend to be more used to responding to such behavior because they see it more. Operating policies and philosophies anticipate it, and training may address ways to respond to it. Addressing such problems by a personal, "staff" response rather than a lock-up response is also easier for detention facilities because of high staffing ratios compared to jails. In the meeting, comparisons were offered between a 10 person living unit in a juvenile detention facility monitored by one staff

¹³ - *Jones v. Wittenberg*, 330 F.Supp. 707 (N.D. Ohio, 1971) (Lucas County Jail, requiring indoor and outdoor exercise); *Rhem v. Malcolm*, 432 F.Supp. 769 (S.D.N.Y. 1977) (Manhattan House of Detention, pretrial detainees entitled to one hour of outdoor exercise daily, five days per week); *Hutchings v. Corum*, 501 F.Supp. 1276 (W.D. Missouri, 1980) (failing to provide one hour per day of outside exercise was unconstitutional.)

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member and a 64 inmate pod in a jail, also monitored by one person. Staff attitudes may be different, with detention workers more focused on helping and jail staff more focused on control and security.

Even assuming no difference in staff attitudes, the greater numbers of staff in the detention setting allow staff a much greater opportunity to respond to troubled youth on a one to one basis than is available to jail staff. Time and pressure of other duties typically does not permit this in the jail. So to the extent a youth's behavior problems may be controllable to some degree through staff interaction, the jail does not have this luxury and therefore typically falls back on segregation as the primary means of responding to threats of impulsive, violent behavior.

Detention facilities may segregate inmates as well, through "time-out" periods. Even here the differences between detention and jail are dramatic. Even extended time-outs will typically include frequent staff-inmate contact, with direct verbal interaction intended to determine if the youth has calmed down enough to be released back into a more open living situation. In the jail, contact between staff and inmates in segregation may come on only an hourly basis, and then often involves no more than a quick, visual check to determine if the inmate is breathing. Segregation in the jail setting is usually measured in days or weeks, not hours. Staff are not generally expected to evaluate an inmate several times a day to facilitate release from segregation. There is almost no source of stimulation for someone in segregated confinement in the jail. Staff interaction is minimal, conversation with other inmates is difficult, if not impossible because of facility design.

The heightened levels of attention given juveniles in a time-out or lock-up situation in a detention facility is not just a pleasant by-product of high levels of staffing. Depending on the individual and the reason for the lock-up, very high levels of scrutiny reflect the level of concern and risk that the juvenile may harm him/herself. Short of putting a youth on a suicide watch, jails generally cannot meet the need for this high level of supervision.

The processes by which disciplinary rules are enforced also differ between detention facility and adult jail. Discipline in detention tends to be graduated, with reinforcement for positive behavior while jail discipline tends to be much more black and white: violate the rule, pay the penalty, with the most common penalty for any sort of serious misbehavior being placement in segregation.

Some youth may see doing time in segregation as a badge of honor, an affirmation of how tough they are. For others, segregation increases the possibility of depression. Some at the meeting noted that self-mutilation is not uncommon among a younger population and its chances are increased by isolating someone in a segregation unit.

Why Not Juvenile Detention Facilities?

Why are these youth not housed in juvenile detention facilities to await trial? In the meeting, several participants indicated that juvenile court judges in their counties would sometimes order a youth remanded to be tried as an adult held in the juvenile detention center, sometimes in the county jail. A representative from one county indicated that because this group is typically charged with a violent offense, the prosecutor commonly recommends they be housed in the jail. Others suggested that concerns overcrowding in the detention facility may influence a judge to order a jail placement.

Current statutes do not clearly address the question of where a youth, facing trial in adult court is to be housed. RCW 13.40.110 deals with the hearings required when the juvenile court declines jurisdiction but says nothing about where a youth is to be held once the juvenile court declines jurisdiction.

If anything, current statutes may imply that such youth *must* be sent to jail. The definition of "detention facility" in RCW 13.40.020 (the Juvenile Justice Act of 1977) refers to a county facility "for the physical confinement of a *juvenile* alleged to have committed an offense or an adjudicated offender subject to a disposition or modification order." (Emphasis added.) Later, the same section defines "juvenile" as a youth under 18 "and who has not been previously transferred to adult court . . . or who is otherwise under adult court supervision." Do these two definitions combine to say that a youth facing charges in adult court is no long a "juvenile" and hence cannot be held in detention facilities, since they are limited to holding "juveniles?"

Another portion of RCW 13.04.030 is noteworthy, albeit unclear. Section (3) of the statute provides that youth subject to adult superior court jurisdiction "who is detained pending trial, may be detained in a county

(juvenile) detention facility . . . *pending sentencing or dismissal.*" (Emphasis added). The last phrase appears to limit applicability of the statute to post-trial situations, although the language which precedes it, standing alone, would authorize holding "youth" as that term is used in this paper in detention facilities.

Mandatory Education Under State and Federal Law

Perhaps the most significant legal problem concerning youth held in adult jails relates to education. This concern impacts both school districts and jails because the obligation to provide educational services to probably the great majority of youth in jails falls on the school district.

Jails may have GED programs available for inmates, but rarely offer any more than that. Most of these programs put primary responsibility on the inmate to learn the necessary material and require relatively minimal amounts of teacher time. Organized classes in various subjects (English, math, etc.) are very rare. This reflects the traditional assumptions that jails are intended to house adults and that there is no constitutional obligation that this group be provided any particular type of rehabilitative programming.¹⁴ A right to rehabilitative treatment or special education programs may be conferred by statute,¹⁵ although such rights generally do not exist under Washington law for adults awaiting criminal trial in Superior Court.

Assumptions regarding the lack of legal obligation for education break down for youth. The Basic Education Act mandates each school district's "kindergarten through twelfth grade basic educational program shall be accessible to all students who are five years of age . . . and less than twenty-one years of age." RCW 28A.150.220. The mandatory attendance statute requires children between eight and eighteen to attend school, with certain exceptions (one of which is not "being held in an adult jail awaiting trial on serious felony charge").

Questions about the right of detained youth to educational services reached the state supreme court over 15 years ago in *Tommy P. v. Board of*

¹⁴ - *Hoptown v. Ray*, 682 F.2d 1237 (9th Cir., 1982)

¹⁵ - *Bresolin v. Morris*, 88 Wash.2d 176 (1977)

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Commissioners, 97 Wn.2d 385, 645 P.2d 697 (1982). At issue in *Tommy P.* was whether youth in juvenile detention facilities had a right to education under Washington State law. The court said that they did. Looking at the general legislative policy of the Basic Education Act (Title 28A RCW) and sections in the Act, the court said "[T]he broad import of these provisions is that all children in the state are required to attend a school maintained at public expense unless they choose to attend a private school." Turning to the mandatory school attendance law, the court found no exemption for juveniles held in detention centers. The court went on to hold:

We hold, therefore, that the compulsory education law requires the provision of a program of education in juvenile detention centers . . . (which) should reasonably address the special needs of juvenile offenders and the policy of the Legislature of rehabilitating such offenders into productive members of society.

The court went on in *Tommy P.* to hold that the counties had the duty to fund education provided in detention facilities, since counties had the general duty to provide funding for these facilities.

The core holding of *Tommy P.*, that *some* agency of state or local government has the duty to provide educational services for youth held in custody, would appear to apply to youth held in jail as well as in detention. There may be room to argue that the duty to tailor education programs to the special needs of youth held in detention facilities would not apply to youth held in jails pending felony charges. However, since the *Tommy P.* holding rests on language in the Basic Education Act, the general requirements of that law relating to curriculum would appear to apply, see generally RCW 28A.150.220, 28A.190.030-060, (educational programs in state residential schools) 13.04.145 (educational programs for juveniles in juvenile detention facilities).

Without going into the specifics of school curricula, suffice to say that the typical largely self-taught GED program which characterizes jail education programs (if such programs exist at all) is not going to be enough.

Contrary to the *Tommy P.* holding that counties had to the duty to fund education in detention centers as part of their duties to fund operation of these facilities, the general thrust of Title 28A appears to be that provision

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of educational services rests with the school districts. For instance, RCW 28A.190.030 states "each school district within which there is located a residential school shall, singly or in concern with another school district . . . conduct a program of education . . . for residents of the residential school." The Department of Social and Health Services, generally responsible for operation of the residential schools, is mandated to provide buildings, grounds, equipment, etc. to allow the education to take place.

If *Tommy P.* were litigated today for youth held in adult jails, the basic result would probably be unchanged: a comprehensive education program must be provided for these youth. It is very probable that the duty to provide the educational program would fall on school districts, with the jail required to provide space, equipment, custodial supervision, etc.

Special Education

The legal mandate for education does not stop with the *Tommy P.* requirements regarding a general program for education. There is an additional mandate that special educational programs be developed for youth with some type of handicapping condition. The purpose of Ch. 28A.155 RCW is "to ensure that all handicapped children . . . shall have the opportunity for an appropriate education at public expense as guaranteed by the Constitution of this state, RCW 28A.155.010.

The phrase "handicapped children" is defined as

"those children in school or out of school who are temporarily or permanently handicapped in normal educational processes by reason of physical or mental handicap, or by reason of emotional maladjustment, or by reasons of other handicap, and those children who have specific learning and language disabilities results from perceptual-motor handicaps, including problems in visual and auditory perception and integration." RCW 28A.155.020, emphasis added.

This broad definition certainly includes a considerable portion of the youth who find themselves in jail.

The duties to provide special educational services to youth with physical or mental disabilities is also supported in federal law and

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regulation. Assuring that "all children with disabilities" receive an appropriate public education is the goal of the Individuals with Disabilities Education Act ("IDEA"), 20 USC §1400 *et seq.* The Act has been interpreted to give children with disabilities an enforceable right to public education in those state which receive funds under the Act. The Department of Education (charged with implementing the Act) and at least one federal court believe the Act's provisions protect pretrial detainees.¹⁶

IDEA imposes rigorous requirements, including development of "individual education programs" for persons falling within the Act's protections. The law also sets expectations for parental involvement in development of these programs. Responsibility for implementing IDEA rests with the state educational establishment, not the jail. However, jails would certainly be expected to cooperate in making space and custodial supervision available to permit the Act's mandates to be implemented in the jail.

The *Donnell* case (see previous footnote) was a class action brought by school age inmates in the Cook County, Illinois jail. At the time of the suit, the jail held approximately 9,500 inmates. The complaint alleged that in 1991 there were nearly 1,500 school age detainees in the jail, of which 39% were in need of special educational services.

Inmates in a state's juvenile system filed another IDEA case. There, the court found that perhaps as many as 50% of the incarcerated youth had some form of disability which qualified them for treatment under IDEA.¹⁷

The message from these two cases is that a substantial percentage of youth who wind up facing adult criminal charges have some form of disability which probably qualifies them for the protection of IDEA as well as the requirements of Ch. 28A.155 RCW.

Provision of a comprehensive educational program in the jail setting for this group of youth will be very difficult, for several reasons.

- Most jails will only have one or two youth at one time, and often will have none. The average county jail in Washington holds about 220 inmates. If the two largest jails in the state, in King and Pierce

¹⁶ - 34 CFR §300.2(b)(94), *Donnell v. Illinois Board of Education*, 829 F.Supp. 1016 (N.D. Ill., 1993)

¹⁷ - *Alexander v. Boyd*, 876 F.Supp. 773 (D.S.C., 1995)

County, are removed, the average drops to about 140. The average daily population of twenty of the 38 county jails in the state was less than 100 inmates. At the April, 1996 meeting, a representative of King County reported that only eight of their 2300+ inmates were youth.

What this means is that most jails and school districts would be trying to develop programs for one or two persons at a time, programs which may in some cases last only a few days but in others would last for months, perhaps even more than a year. This means programs will have to be developed on virtually an individual, ad hoc basis for every youth entering the jail who had a qualifying disability.

- **Segregation.** The impulsive, violent behavior which characterizes many youth in this group results in their being held in segregated confinement in the jail. Others find themselves in protective custody, a status which may be functionally virtually identical to segregation. Normally, this means the person is released from his or her cell for perhaps an hour a day for shower and exercise. To release the person outside the segregation unit to a common program area would be a breach of security unless perhaps the person were closely supervised by an officer and perhaps shackled. Developing an education program for this type of individual becomes even more difficult. Not only will the program probably have to be tailored around the particular educational needs of the child (grade level, etc.), but it may have to be delivered in a cell or require extraordinary security measures.
- **Program space.** To be generally consistent with educational curriculum requirements, several hours per day will need to be devoted to education. Given the very limited program space available to the typical jail and its multi-purpose nature, finding a place to deliver hours of education per day becomes very difficult, unless the program space is to be lost to the rest (and vast majority) of the population.

There are also questions of whether the funding duty should remain with counties, or rests with school districts and the state.

No Right To Rehabilitative Treatment Under Constitution

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Might the youth in question also have a constitutional right to rehabilitative treatment, which in turn could compel drug rehabilitation or other remedial programs? The answer, while not totally clear, is "probably not."

There is no constitutional right to rehabilitative treatment for adult felons committed to prison.¹⁸

While several courts in the 1970s found a constitutional basis for a right to treatment for juveniles committed to state custody under the Juvenile Court system, the results and the reasoning of these cases was flatly rejected in *Santana v. Collazo* in 1983.¹⁹ There appear to be very few, if any federal court decisions which have even considered the question since *Santana*. Therefore, while discussion about constitutional right to treatment for juveniles continues, there appears to be little, if any current support for the concept among federal courts. Moreover, the courts which found a right to treatment (see citations in *Santana*) did so in the context of juveniles committed as juveniles, not juveniles tried, convicted, and committed to state custody as adults. The rationale for the juvenile right to treatment depended on the commitment through the juvenile court. Therefore, there appears to be virtually no support for a constitutional right to rehabilitative treatment for the youth who are the subject of this paper.

Statutory claims for a right to rehabilitative treatment for persons under the age of 21, with the exception of the education issues described above, typically would relate to juveniles committed by the Juvenile Court and not to youth awaiting trial as an adult.

Medical Consent

Under Washington state law, minors cannot give consent for medical services, RCW 13.64.060(1)(h) (emancipation confers power to give informed consent for medical services); RCW 26.28.010, .015 (age of majority). In recognition of this, the legislature created an exception for juveniles in detention facilities (not jails), which empowers the "administrator of the juvenile court or authorized staff" to consent for health and dental exams and "care, and necessary treatment for medical and dental conditions requiring

¹⁸ - *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir., 1982)

¹⁹ - 714 F.2d 1172 (1st Cir., 1983)

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prompt attention." This section also expects reasonable attempts to be made to contact the parents of the youth to obtain their consent for medical care. RCW 13.04.047.

No such exception exists for minors held in jails. Based on information from the Department of Corrections and jail administrators at the meeting, the consent issue does not appear to be one which is of concern – youth facing trial or having been committed as adults tend to be treated as adults by custodians for purposes of medical consent.

Given the strong statutory provisions regarding a minor's ability to give consent, this lack of concern may be potentially problematic since there is no exception in state law which allows minors in adult jails or prisons to consent to their own medical care.

This is a potential problem area which is best remedied by the Legislature by passage of a statute which either gives the minor the power to consent to medical treatment or bestows that power on someone else, see RCW 13.04.047.

Protection

The jail's duty to protect inmates is not unique to youth - it extends to all inmates. Generally stated, officials shown to be deliberately indifferent to a "substantial risk of serious harm" to a pretrial detainee violate that detainee's rights under the Fourteenth Amendment.²⁰ In addition to a remedy under the U.S. Constitution, failure to protect claims may also be brought as tort actions, where the plaintiff's burden is to show officials failed to use ordinary care (i.e., were negligent) in failing to protect the inmate from injury.²¹ This is a lower legal standard than that of the Fourteenth Amendment.

The protection needs of a person in his early or mid-teens housed in an adult jail should be obvious. While the overall group of youth under consideration includes many predators and violent youth (who present other types of protection problems), the group also includes persons who are potential targets for sexual advances by older male inmates. The youth who

²⁰ - *Anderson v. Gutschenritter*, 836 F.2d 346 (7th Cir., 1988)

²¹ - *Prisoners' Self-Help Litigation Manual*, Boston and Manville, Oceans Publications, 1995, p. 96

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resists those advances may simply be raped. Vulnerable inmates may be forced to give up property to other inmates, to help conceal drugs or weapons, or perform other "favors."

The inmate who feels vulnerable to assault or other pressure from inmates may seek shelter in protective custody or may choose to arm himself and try to fight back, thus further adding to the security problems of the institution.

The inmate who tells staff that other inmates are pressuring him may find himself labeled as a snitch, and thereby increasing the risk of assault from still other inmates.

Even the tough, predatory youth, who expresses fear of no-one, may find that bravado is not always accepted by older inmates. A prison official from Ohio discussed a recent murder of a youthful prison inmate with the author of this paper. The official ascribed the cause of the brutal stabbing death at the hands older inmates to those inmates becoming fed up with the threats of the young man, who refused to fit in the traditional inmate society.

For practical purposes, the jail has but one response to the vulnerable inmate: protective custody. In most situations, this means locking up the at-risk inmate with limitations on privileges and under conditions which are often hard to distinguish from lock-up imposed for disciplinary rule violations or because an inmate is seen as a threat to others. As with any type of segregated lock-up status, placing an inmate in protective custody (which may occur over the inmate's objection) increases the difficulty of providing any sort of programming for the inmate, since he may not participate in most group activities.

Segregating the inmate may also increase the risk of depression or other mental illness.

Even the limited exercise and normal out of cell time in a day room available to protective custody inmates may have to be restricted, depending on who else is held in the protective custody unit. Many jails have but one segregation unit, which must house inmates serving disciplinary penalties, inmates seen as threats to others, and inmates needing protection. This may demand that virtually all out of cell activities for the vulnerable youth must take place alone.

Conditions of Confinement

Youth could challenge the conditions of confinement in a jail as being unconstitutional. Such a challenge could argue that given the differing needs of the youth, conditions which might be constitutional as applied to adults still are unconstitutional when visited upon youth. There is at least one such reported decision, *Swansey v. Elrod*,²² which involved youth held in the Cook County (Chicago) jail. While *Swansey* provides a model for this type of claim, it today provides little or no precedential value, having been decided under a legal test which is no longer used to evaluate conditions of confinement.

Some of the facts from *Swansey* still may be important. The plaintiffs showed the normal jail diet was inadequate for growing adolescents. While in the jail, the youth had only a fraction of the visiting opportunities they would have had if they had remained in the juvenile detention facility. (Maintaining family ties is often a priority in juvenile detention facilities. It is not in the jail.) Jail staff did not have training in dealing with juveniles, although the jail administration conceded the youth presented special problems in the jail, school facilities in the jail were grossly inadequate. Experts testified that association with adult offenders would convey very destructive values to the youth. There were few counseling or psychiatric services available in the jail, in contrast to the juvenile detention facility.

Youth held in Washington jails probably could show many of these same conditions: inadequate diet, very limited mental health assistance, reduced opportunity for contact with family, inadequate school resources, and the psychological problems created by exposure to an adult offender population. Whether these sorts of conditions would be found to be unconstitutional under prevailing legal tests today is speculative.

Access to the Courts

All inmates have a right of access to the courts, which permits them to challenge the legality of their convictions as well as conditions and practices

²² - 386 F.Supp. 1138 (N.D. Ill., 1973)

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of the facility in which they are housed. The Supreme Court interprets this right as including an affirmative duty upon institution officials to provide assistance to inmates in the form of law libraries or persons trained in the law.²³ Virtually all jails attempt to meet this mandate through the provision of some form of law library, as opposed to providing assistance from persons trained in the law (lawyers, law students, legal paraprofessionals, possibly even inmates with a modicum of training in inmate rights and legal research).

In the experience of the author, the legal resources provided by many, if not most, jails are probably legally insufficient for adult inmates, let alone teen-agers. For various reasons, jail inmates do not often raise access to the courts issues.

It is doubtful that counsel appointed to represent the inmate in the criminal matter which is the basis of the inmate's incarceration provides the inmate with adequate access to the courts. While presumably the lawyer is adequate for purposes of the criminal case, appointed counsel are unlikely to represent the inmate in civil matters (which the right of access to the courts protects), since there is no way to compensate the lawyer for such work.

There is a continuing legal question whether a law library can suffice for inmates who are unable to use the library for such reasons as illiteracy, educational deficiencies, the lack of physical access to the materials. The Supreme Court's decision in mid-1996 in the *Lewis* case (see fn. 20), while making it somewhat more difficult for inmates to bring successful access to the courts claims, appears to recognize that law libraries may not be enough in some circumstances.

Prior to *Lewis*, at least one federal court has suggested that incarcerated juveniles cannot be expected to be able to use a law library and therefore must have assistance from persons trained in the law.²⁴

Whether courts would take such an all or nothing stance after *Lewis* is perhaps debatable. However, there is certainly a good argument to be made than an immature, poorly educated 15 year old with a learning disability is not likely to be able to learn how to use a sophisticated law library. If the

²³ - *Bounds v. Smith*, 430 U.S. 817 (1977); *Lewis v. Casey*, 65 USLW 4587(1996)

²⁴ - *John L. v. Adams*, 969 F.2d 228 (6th Cir., 1992)

inmate is housed in some kind of segregated status, the problem only gets worse.

Other Issues of Concern

Youth present other issues of concern which differ from those presented by adult offenders only as a matter of degree.

Diet. The dietary needs of adolescents differ from those of adults. Whether these differences are so significant as to raise a serious constitutional issue is questionable. However, proper housing of any inmate should include providing the inmate with a generally appropriate diet.

Mental Health. Jail administrators in recent years have expressed serious concern about their ability to provide or access mental health treatment for a growing number of mentally ill adult inmates. This continues to be a problem in many jurisdictions. Some persons in the meeting expressed concern that the risk of psychotic break or increased depressions may be higher with youth (especially when placed in the non-supportive, sometimes threatening environment of the adult jail, facing a potentially very long prison term). In a similar vein, these same concerns may create a greater risk of suicide attempts by young persons.

Keeping youth in jails rather than in detention facilities may dramatically increase the risk of a successful suicide. A 1980 study found the rate of suicide among children in adult jails in 1978 to be over 7½ times higher than the suicide rate for children held in juvenile detention facilities (which was actually lower than the overall rate of suicide among children in the general population of the United States in 1977).²⁵ While this study is relatively old, it apparently remains the leading work on the subject. There is little reason to believe that its basic conclusion, that the suicide rate for youth is far higher in jails than in detention centers, is not true today.

Concern over suicides in jails has led to substantial improvements in jails' ability to identify potentially suicidal inmates and to protect those inmates, once identified. However, the very limited level of direct

²⁵ - *An assessment of the national incidence of juvenile suicide in adult jails, lockups, and juvenile detention centers*, Office of Juvenile Justice and Delinquency Prevention, 1980

observation of inmates by jail staff makes it relatively easy for someone not already placed on some form of suicide watch to take their own life.

Responding to mental health problems often is exacerbated because the individual's mental health problems are tied inextricably to substance abuse problems. Entry into the jail typically cancels any eligibility for treatment programs the person may have had while on the street.

Conclusion

The problems discussed in this paper have existed to at least some degree for as long as young persons facing adult criminal charges have been held in jail awaiting trial and sentencing. What pushes the issues to the forefront today is the increasing numbers of youth entering jails. While the numbers are still not large, jail administrators still recognize that this group presents a wide array of both legal and operational problems which in some cases may be very expensive to remedy and in other cases may be impossible to remedy without legislative action.

By highlighting at least the major issues and problems around housing young persons in adult jails while numbers of such youth remain fairly small, this paper may help foster the development of at least some potential problems before they reach the stage of crisis, litigation, and potential court intervention.



Policy Issues To Be Addressed

Based on the discussion in the preceding pages, here are major policy issues which could be addressed either at a legislative or operational level.

- Should the question of where youth facing adult criminal charges are housed pending trial be addressed by the legislature so as to
 1. Clarify that placement in either jail or juvenile detention center is a matter for the sound discretion of either the Juvenile Court judge or a judge of the Superior Court? OR
 2. State a clear preference for housing in one place or the other, but subject to exceptions? OR
 3. Impose a requirement that all youth awaiting trial as adults be housed in (a) juvenile detention or (b) an adult jail?
- Should legislation be adopted which would provide that consent for medical care could be given by a person acting in the best interests of the youth in jail?
- Should any special restrictions be adopted regarding the housing of youth in adult jails, such as the sight - sound separation requirement of RCW 13.04.116 which applies to juveniles not remanded to adult courts. Consideration of this option should include consideration of the cost of adoption of such restrictions.
- Should mandatory education laws be amended in any way in regard to youth in jails? (Note that federal laws regarding educational services for persons with disabilities are beyond the reach of legislative action.)
- Should efforts to develop centralized units for housing youthful inmates be encouraged which could be better able to address the operational and legal concerns (mental health, exercise, protection, diet, etc.) presented by this group of inmates? Could such units be developed without compromising the inmates' access to their lawyers in their pending criminal cases?
- Should additional study be given to the issue of youth in jails with the goal of further identifying problems and potential responses at the

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management/operational level, including identifying bureaucratic or other removable barriers to the safe housing of such persons?

- Should jail staff receive more training in dealing with youthful inmates?
- Should more alternatives be explored regarding providing adequate access to the courts for youthful inmates?
- Should recommended policies and procedures be developed for jails to use in dealing with youthful inmates?

