



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 3

TO: MEMBERS OF THE SPECIAL COMMITTEE ON RECODIFICATION OF CH. 938,
THE JUVENILE JUSTICE CODE

FROM: Don Salm and Anne Sappenfield, Senior Staff Attorneys

RE: Summary of WLC: 0081/2, Relating to the Recodification of Ch. 938, Stats., as Developed
by the Drafting Subcommittee of the Special Committee

DATE: March 21, 2005

This Memo describes the changes to ch. 938, the Juvenile Justice Code, proposed by the drafting subcommittee appointed by the full Special Committee on Recodification of Ch. 938, the Juvenile Justice Code. The study committee's charge from the Legislative Council is as follows:

The special committee is directed to recodify ch. 938, stats., relating to the juvenile justice code. The special committee is instructed that the recodification may include a study of the possible reorganization of certain parts of the chapter to fit in a logical manner with the rest of the chapter, renumbering and retitling of certain sections and subsections, consolidating related provisions, modernizing language, resolving ambiguities in language, codifying court decisions, and making minor substantive changes.

In addition to this Memo, committee members may wish to review Memo No. 1 to the Special Committee (dated September 3, 2004) which: (1) provides brief background information on current ch. 938, Stats.; and (2) discusses the recodification process and the general scope of questions for consideration in recodifying ch. 938, Stats. That document can be found at www.legis.state.wi.us/lc.

DRAFTING SUBCOMMITTEE IN GENERAL

Reflecting the technical nature of much of the recodification, the chair of the Special Committee, Representative Scott Suder, appointed a drafting subcommittee in order to expedite the deliberations of the full committee. The subcommittee consisted of the four public members of the Special Committee and any legislator member of the full committee who wished to attend and participate. The drafting

subcommittee was: (1) directed to prepare draft legislation, consistent with the committee's assignment; and (2) encouraged to work on a consensus basis to identify those areas where consensus could not be reached and to identify any policy decisions made by the subcommittee for review by the Special Committee.

The drafting subcommittee held two meetings in Madison on September 23 and November 4, 2004. During the course of the two meetings, the drafting subcommittee developed a draft proposal (WLC: 0081/2) recodifying ch. 938, Stats., for consideration by the Special Committee. The subcommittee worked from drafts prepared by the staff for the committee proposing technical changes for each subchapter of ch. 938 and also worked from drafts addressing specific issues, such as reorganizing and clarifying provisions relating to juvenile records and repealing language permitting the Department of Corrections (DOC) to place juveniles who have been adjudicated delinquent in adult prisons because that language has been held to be unconstitutional by the Wisconsin Supreme Court. The drafting committee was assisted by interested persons in its deliberations, including Robert Margolies, DOC, and Nancy Rottier, Office of the Director of State Courts, who served as legislative liaisons for those agencies.

DESCRIPTION OF WLC: 0081/2

Generally

The draft:

1. Reorganizes individual sections, or portions of sections, by combining them with other sections, dividing single sections into two or more sections, and internally reorganizing single sections.
2. Makes nonsubstantive editorial changes to modernize language and for consistency with current drafting style.
3. Revises section and subsection titles, where appropriate, and provides subsection titles throughout the chapter.
4. Clarifies ambiguous language.
5. Repeals several provisions considered no longer necessary.
6. Makes substantive changes the drafting subcommittee concluded were relatively noncontroversial.

As the Legislative Council Staff prefatory note in the draft specifies, it is intended that, unless expressly noted, the draft makes no substantive changes in the statutory provisions treated by the draft. Substantive changes in the draft are identified in NOTES to the provisions substantively affected. If a question arises about the effect of any modification made by the draft, it is intended that the revisions in the draft be construed to have the same effect as the prior statutes.

OVERVIEW OF SPECIFIC CHANGES SUGGESTED IN THE DRAFT

Summarized below are the substantive revisions and selected clarifications contained in the draft.

Definitions and Terminology

1. Modifies the definition of “residential care center for children and youth” to add “treatment” to the list of services provided by these facilities because they provide treatment as well as “care and maintenance.” [s. 938.02 (15d).]
2. Changes the term “secure child caring institution” to “secured residential care center for children and youth.” The subcommittee determined that “secured residential care center for children and youth” is a more appropriate term for these facilities. This change is made, where appropriate, throughout the statutes. [s. 938.02 (15g).]
3. Changes the term “secured correctional facility” to “juvenile correctional facility.” The subcommittee determined that “juvenile correctional facility” is a more descriptive term for a facility that deals solely with juvenile offenders. The term “secured correctional facility” does not indicate that the correctional facility is for juvenile offenders. The same change was made to the defined terms of “secure detention facility,” “Type 1 secured correctional facility,” and “Type 2 secured correctional facility.” These terms are also revised to use “juvenile” instead of “secure” or “secured.” The draft replaces the terms throughout the statutes. [s. 938.02 (15m) (renumbered (10p) in the draft), (16) (renumbered (10r)), (19), and (20).]
4. Repeals the definition of “secured group home.” The subcommittee determined that no secured group homes have been established since the concept was first recognized in the statutes and that the concept is unnecessary and unworkable. [s. 938.02 (15p).]
5. Provides that intake workers must have the qualifications required to perform entry level “case work” instead of “social work.” The subcommittee found that this provision is sometimes interpreted to mean that an intake worker must have a degree in social work and be licensed as a social worker, but that the intent of the provision is to also permit persons who have degrees from four-year accredited colleges in other human service-related fields such as criminal justice, sociology, and psychology and are trained upon hire to perform in accordance with state law and practice standards to be intake workers. [s. 938.06 (1) (am) 1.]
6. Makes consistent language requiring an intake worker to request, instead of recommend, that the district attorney file a petition under ch. 938. [s. 938.06 (2) (a).]

Procedure

1. Clarifies that a delinquency proceeding is commenced when a delinquency petition is filed. [s. 938.12 (2); see *D.W.B. v. State*, 158 Wis. 2d 398, 462 N.W.2d 520, 521 (1990).]
2. Clarifies that the juvenile court must deny a petition for waiver if the court determines that the matter does not have prosecutive merit. [s. 938.18 (4) (a).]

3. Provides that a request for a change in placement, a request for a revision of a dispositional order, or a request for an extension of a dispositional order may be filed instead of a delinquency or a juvenile in need of protection or services (JIPS) petition at a temporary custody hearing. [s. 938.21 (1) (a).]

4. Specifies that the five-day time limit to make a finding following the temporary custody hearing as to whether reasonable efforts were made to prevent removal of the juvenile from the home excludes Saturdays, Sundays, and legal holidays. [s. 938.21 (5) (b) 1.]

5. Codifies *In re Lindsey A.F.* in which the Wisconsin Supreme Court held that s. 938.21 (7), which allows the court to dismiss a petition and refer a matter to the intake worker for deferred prosecution at the temporary custody hearing, is ambiguous and interpreted the provision to mean that the court has the authority to dismiss a petition and refer the matter to the intake worker for deferred prosecution even when the juvenile is not in custody. [262 Wis. 2d 200, 663 N.W.2d 757, 763 (2003).] The bill draft moves the provision permitting the court to dismiss a petition to s. 938.363, which currently governs amendments to petitions.

Dispositions and Dispositional Orders

1. Eliminates the authority of DOC to transfer a juvenile who has been adjudicated delinquent to an adult prison, including the Intensive Sanctions Program (ISP), which is defined in the statutes as a state prison. In *State of Wisconsin v. Hezzie R.*, 219 Wis. 2d 849 (1998), the Wisconsin Supreme Court held that subjecting a juvenile who has no right to a trial by jury under the Juvenile Justice Code to placement in an adult prison violates the juvenile's constitutional right to a trial by jury because placement in an adult prison constitutes criminal punishment rather than juvenile rehabilitation. This change is reflected: (1) in various provisions in the Juvenile Justice Code [ss. 938.183 (3), 938.357 (4) (d), 938.538 (3) (a) 1., 1m., and 2., (4) (a), (5) (c), and (6), and 938.992 (3)]; and (2) in other provisions affected by this change that are outside of the Juvenile Justice Code.

2. Clarifies that the maximum amount of restitution in terms of monetary amount or hours of services applies to all of the damages or injuries resulting from the act (or acts) that are the basis for a deferred prosecution agreement (i.e., the amount does not apply per charge or per petition, but is the total amount that can be required under the agreement). [s. 938.245 (2) (a) 5. c.]

3. Clarifies that a juvenile under 14 years of age may not make more than \$250 in restitution or perform more than 40 hours of services for the victim in total restitution under a consent decree. [s. 938.32 (1t) 3.]

4. Clarifies that a juvenile under 14 years of age may not participate in more than 40 hours in a supervised work program or perform more than 40 hours of community service work in total under a consent decree. [s. 938.32 (1x).]

5. Adds attempted armed robbery and second-degree reckless homicide as serious juvenile offender offenses. Also clarifies this provision by specifying that conspiracy to commit an offense [s. 939.31] means conspiracy to commit an offense listed as a serious juvenile offender offense. [s. 938.34 (4h) (a).]

6. Permits a court ordering a disposition of secure placement to place a juvenile in either a juvenile correctional facility or a secure residential care center for children and youth. [s. 938.34 (4m) (intro).]

7. Clarifies that a juvenile under 14 years of age may not make more than \$250 in restitution or perform more than 40 hours of services under a dispositional order. [s. 938.34 (5) (c).]

8. Provides that the district attorney and corporation counsel, in addition to the agency supervising the juvenile, may notify the court of a violation of a dispositional order that stays the imposition of another dispositional order. [s. 938.34 (16).]

9. Removes revocation of a juvenile's driving privileges as a JIPS disposition to be consistent with the parallel delinquency disposition under s. 938.34 (14m). [s. 938.345 (1) (d).]

10. Requires the district attorney or corporation counsel to provide notice to a victim of how to request testing for communicable diseases of a juvenile who is alleged to have thrown or expelled a bodily substance at the victim. Current law does not specify who must provide this notice. [s. 938.346 (1m).]

11. Provides that the statement of income, assets, debts, and living expenses required to be given by a parent whose child is placed in an out-of-home placement must state those of the parent and the juvenile. [See, e.g., s. 983.355 (2) (b) 4m.]

12. Provides that an order placing a juvenile in secure placement may apply for one year or until the juvenile's 18th birthday, whichever is earlier, unless the court specifies a shorter or longer period of time. Under current law, a dispositional order placing a juvenile in a Type 2 residential care center for children and youth or in a juvenile correctional facility may apply for up to two years or until the juvenile's 18th birthday, whichever is earlier, unless the court specifies a shorter period of time. [s. 938.355 (4) (b).]

13. Provides that a person who was adjudicated delinquent for an offense committed before July 1, 1996, may request to have his or her record expunged. The current provision only applies to persons who were adjudicated delinquent on or after the effective date of ch. 938 (July 1, 1996). [s. 938.355 (4m); see *State v. Jason*, 216 Wis. 2d 12, 573 N.W.2d 564 (1997).]

Sanctions for Violations of Dispositional Orders

1. Clarifies that a reasonable efforts findings need not be made when a juvenile is placed in nonsecure custody as a sanction if the finding has already been made in the dispositional order. According to DOC and the Department of Health and Family Services (DHFS), a subsequent finding is not required. [s. 938.355 (6) (cm).]

2. Permits the supervisor of a caseworker who has placed a juvenile in custody for not more than 72 hours as a consequence for a violation of a dispositional order to modify the terms of the placement. Under current law, the supervisor may approve the placement or release the juvenile from custody. This change is also made for juveniles placed in custody under the ISP. [ss. 938.355 (6d) (a) 2. and 938.534 (1) (b) 2.]

3. Provides that an extension of a dispositional order expires one year after the court orally makes, or grants, its order instead of one year after the order is filed with the clerk of court. [s. 938.365 (5).]

4. Clarifies that the “one face-to-face contact per day” requirement for caseworkers supervising juveniles placed in the ISP does not apply: (a) during a period that a youth is placed in shelter care or a secure facility for a violation of program rules for a 72-hour hold; or (b) during a period that a youth is placed in non-secure custody for not more than 30 days as crisis intervention. The subcommittee determined that under current practice, assigned caseworkers do not have daily contact with youth when they are being held in detention or in shelter care. [s. 938.534 (1) (a).]

Juvenile Records

Clarifies that, with specified exceptions, the rule that agency records relating to a juvenile are confidential applies to the contents of any record kept or information received about an individual who is or was (i.e., currently or in the past) in the agency’s care or legal custody. [s. 938.78 (2) (a).]

DLS:AS:jal