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To: Honorable Supervisors of the County Board

Cc: County Executive Chris Abele
County Clerk George Christensen (c/o Janelle Jensen)
Interested Parties and Stakeholders

From: Margaret Daun, Corporation Counsel

Re: Execution of Legislative Policies

Date: November 1, 2017

This memo answers questions posed to the Office of Corporation Counsel (OCC) in response to an opinion issued on October 30, 2017 related to the above-noted topic. This memorandum incorporates all of the information and analysis in the October 30 memorandum, but expands upon a number of issues discussed therein.

Background: In File 17-563, the Board made the following request:

> From the Milwaukee County Board of Supervisors (County Board) requesting a written informational report from the Interim Director, Department of Health and Human Services, providing an update from the Administration on their execution of policies adopted by the County as local alternative placements to Lincoln Hills and Copper Lake, including presenting the Board with the 365 day option,[1] permitted by Wisconsin Statutes; expanding the Milwaukee County Accountability Program (MCAP) from 22 to 68 beds; and implementing a female specific MCAP program for youth.

Many other files relate to juvenile justice issues, including files 17-482, 17-585, 15-587, 16-129, and 16-110 (resolutions), 16-135 (request for informational report from DHHS), 16-101 (Chief Judge verbal report), and 15-754 (DHHS request for contract authorization). Those files are summarized in the attached Legistar document titled, "Adopted Policies: Local Alternatives to Lincoln Hills and Copper Lake."

On July 19, 2017, in partial response to File 17-563, the Interim DHHS Director and the Delinquency and Court Services Division (DCSD) Administrator Mark Mertens appeared before

[1] Per Wis. Stat. § 938.34(3)(f), the court shall designate the juvenile's placement. Included in the list of approved placement facilities is a juvenile detention facility that meets DOC standards for any combination of single or consecutive days totaling not more than 365.

the HHN committee and provided a verbal informational report on the status of the stated directives. The committee then voted 4-0 for a resolution to receive and place on file a request for a written informational report from the Interim DHHS Director. In response to that request, on August 24, 2017, the Interim Director filed a report in related file 17-585 that recommended against expansion of MCAP beds, including the 365-day option, recommended against female-specific MCAP programming, and alternatively recommended continued pursuit of legislative changes for the development of a secure residential treatment program.

Later, on September 20, 2017, DHHS Interim Director Jeanne Dorff and DCSD Deputy Administrator Kelly Pethke testified as to that written report before the HHN committee. Generally, they testified to their commitment to working with the Board to address shared juvenile justice concerns. Specifically, they stated that "things have changed" since the underlying resolution enacted in December of 2015, and describing the current status of youth detention in Milwaukee County. DHHS Interim Director Dorff concluded by stating: "We intend to work with the Chair and Committee to see if we can come up with an amendment to the resolution that fits where we are today" in terms of innovation and changes.

The committee then concluded the discussion and took no action on the item. As noted above, the Board referred the file to the OCC, which has previously opined that the administration must implement policies articulated by the County Board. This opinion mirrors earlier circulated opinions[2] on this subject.

Overview: Milwaukee County policies are established through legislative action by the County Board and later consideration by the County Executive (whether the resolution takes effect by signature, veto and subsequent override, or by no action). *See* § 59.02, Stats. ("The powers of a county as a body corporate can only be exercised by the board, or in pursuance of a resolution adopted or ordinance enacted by the board"); § 59.17(6), Stats.

Once the policy of the County formally takes effect (see OCC Opinion dated June 23, 2017 addressing the effective dates of ordinances and resolutions), it must be administered or executed by the County Executive and the administrative departments that report to the Executive. By statute: "[T]he county executive shall be the chief executive officer of the county. The county executive shall take care that every county ordinance[3] and state or federal law is observed, enforced and administered within his or her county if the ordinance or law is subject to

[2] Former Corporation Counsel Paul Bargren issued an August 25, 2015 opinion concerning the execution of legislative policies in file 15-526, which authorized the transfer of $1.5 million from the Debt Service Reserve to implement Transit Signal Priority, $5 million for Parks infrastructure projects ineligible for bonding, and a 1.5% cost of living pay increase for employees.

[3] In other jurisdictions, resolutions are considered "less solemn or formal than, or not arising to the dignity of, an ordinance." *See Cross v. Soderbeck*, 94 Wis. 2d331, 338, 288 N.W.2d 779, 782 (1980), citing 5 McQuillin § 15.02. McQuillan states that "a common distinction between a resolution and an ordinance is that only the latter need be signed by, or passed over the veto of, the [executive]." *Id.* Resolutions in Milwaukee County *are* subject to County Executive review, including the full veto and override process. *See* MCGO 1.04(d)(4). Thus, for Milwaukee County, resolutions and ordinances are equivalent statements of county policy. *See, e.g.*, 80 Op. Atty Gen. 49 (1991).

enforcement by the county executive or any person supervised by the county executive." Wis. Stat. §59.17(2).

Policy versus Administration: Policy has been defined as "a high-level overall plan embracing the general goals and acceptable procedures esp. of a governmental body." *Webster's New Collegiate Dictionary* 890 (1977). "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them, or appoint the agents charged with the duty of such enforcement." *See* 2A McQuillin, Municipal Corporations § 10.06 at 311 (3d ed. 1996). "The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence." *Id.*

The County Board's function is primarily policy making and legislative, while the county executive functions as an administrator and manager. *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996). A county executive is charged with "[c]oordinat[ing] and direct[ing] all administrative and management functions of the county government not otherwise vested by law in other elected officers." § 59.17(2)(a), Stats. In Milwaukee County, the Executive is specifically designated to "administer, supervise, and direct all county departments." Wis. Stat. § 59.17(2)(b)1, Stats.

The standard treatise on the operation of local government has a succinct answer to what it means to "administer county government." McQuillan states that administrative and executive functions are designed to **carry out and effectuate the provisions of the laws**. 2A McQuillin Municipal Corporations § 10.44 (3d ed.) (emphasis added). Absent a legal challenge to Board action, the administration should execute the "provisions of the laws" of the County as set out in Board resolutions.

Importantly, where the performance of a County official's duties require some exercise of discretion, the official is not required to execute a Board policy if the official feels it is illegal or invalid. *See State ex rel. Roelvink v. Zeidler*, 268 Wis. 34, 41 (1954) (city mayor not required to sign a deed when he viewed as illegal the legislative body's directive to do so). Here, as to this particular file, there has been no suggestion of illegality about the juvenile justice resolution, nor has the Interim DHHS Director expressly asserted that the directives are illegal or invalid.

However, DHHS's report regarding File 17-563 recommended against some of those directives and provided detailed explanations of DHHS's alternate recommendations. *See* File 17-585. Most importantly, to date, DHHS has not fully implemented *all* of the directives contained in File 17-563. *See also* p. 10 (potentially some confusion over what has and has not been implemented).

Therefore, the question here is whether the subject resolution puts forward policies or whether it concerns itself with day-to-day management, the purview of the administration.

Acts 14 and 55: Beyond the basic concepts addressed above, and complicating this analysis, Acts 14 and 55 also substantially altered the fundamental balance of power between the legislative and executive branches in Milwaukee County and created irreconcilable conflicts between those branches as set forth in detail in the OCC's March 3, 2017 report in file 17-274.

Most importantly here, Act 14 substantially decreased the Board's powers and increased the Executive's powers, especially regarding control of County departments. After Act 14, Wis. Stat. §59.794(3) for instance states:

(3) Limitations on board authority.

(a) Notwithstanding the provisions of s. 59.51, the board may not exercise day-to-day control of any county department or subunit of a department. Such control may be exercised only by the county executive as described in s. 59.17.

(b) A board may require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions. Except as provided in par. (d), for the purpose of inquiry, or to refer a specific constituent concern, **the board and its members may deal with county departments and subunits of departments solely through the county executive, and no supervisor may give instructions or orders to any subordinate of the county executive that would conflict with this section.**

Further complicating matters, both of the above-noted subsections of 59.794(3), are directly implicated by the ongoing *Lipscomb v. Abele* lawsuit.[4] There can be no question that these new subsections were intended by the state legislature to limit the County Board's ability to direct day-to-day or administrative matters.

Thus, as noted above, the question here is whether the subject resolution(s) involve a policy matter or day-to-day administration. Of course, simply because a directive appears in a resolution does not definitively resolve this question, particularly in light of both Acts 14 and 55.[5] Instead, a deeper analysis that considers the specificity of the directive, the expertise necessary to provide the directive in the first place, the technical knowledge required to identify the object of the directive as a priority versus other similar objectives, among other factors, is required to determine whether the resolutions at issue comprise a statement of general policy/law or an attempt to direct day-to-day management of juvenile justice in the County. To simplify, the OCC has been asked to opine regarding whether the resolutions seek to direct a specific mode, manner or method of implementing and administering existing laws or policies. *See* 2A McQuillin, Municipal Corporations § 10.06 at 311 (3d ed. 1996). If so, then the resolution may violate Act 14.

Conclusion and Rationale: After a thorough review of the caselaw, we conclude that there is insufficient law to reach a definitive determination as to the particular directives provided in

[4] *Lipscomb and Milwaukee County Board of Supervisors v. Abele*, Case numbers: 2016CV2888/17AP1023.

[5] For example, a Board resolution that mandates that the County operate buses every 15 minutes on routes 6, 7, 8, 24, 25, 26, and 27, but operate buses every 5 minutes on routes 1-5, and only every hour on routes 9-23, is not a statement of policy, but is rather an attempt to direct day-to-day management of the Department of Transportation, which Act 14 prohibits.

these related resolutions.[6] On the one hand, it can be argued that the County Board is setting forth juvenile justice policy. For example, consider some of the comments made by a County Supervisor on July 19, 2017, during the Committee hearing on this issue:

- "We have to come up with some strategic ways that we are able to assist [female youth] and that we don't throw them by the side . . ."
- "We need to come up with something together . . . We need to come up with ideas about what do we need to do to make it work."

Consider also many of the general, higher-level statements set forth in the resolutions at issue (see pink highlighting in attached), including:

- "adopts [the judiciary's recommendations] in their entirety as the juvenile justice policy for the County"
- "the County Board agrees with the judiciary's suggested change"
- "authorized to implement this policy in the County and to seek changes at the State level to effectuate these recommendations"
- "the County should develop alternative options"
- "seek immediate remedies to improve the situation for Milwaukee County youth currently placed at Lincoln Hills, the State Juvenile Justice Facility"
- "is authorized to analyze alternatives for the placement of juveniles in secure detention, i.e., Lincoln Hills, including a review of the LaCrosse CORE Academy and possible alternative locations for secure detention such as the House of Correction that are also consistent with State and federal law"
- "DHHS shall present all secure detention alternatives"

These statements support the view that these resolutions merely set forth policy, and do not seek to direct the implementation of the policy. Under this view, the department has no choice but to implement the resolutions' directives.

However, on the other hand, it could also be argued that the Board is directing DHHS on the day-to-day operations of its juvenile justice facilities. The directives suggest answers to a host of highly technical, operational questions, such as: What environment is most appropriate for male and female youths (secure versus unsecure; large or small group home community settings; best rehabilitative step-down environment, etc.)? Is a local facility capable of year-round detention in terms of pure space issues and greatest number served? What is the precise number of beds required locally? What, if any, is the difference between a "secure treatment center," a "secure detention" facility, and a "secure residential" facility? How many beds of each does the County have now? How many more of each type of bed does the County need? For girls and for boys? What are the recommendations of relevant stakeholders in the justice system? These questions are highly specific, technical/operational decisions that require expertise, as well as detailed data specific to Milwaukee County's needs and population.

[6] Furthermore, while not relevant here, it is important to note that there is no bright line regarding timeframe or parameters for the administration's execution of legislative enactments. How, when, and in what manner the executive branch implements legislative policy is currently undefined in the law.

Committee testimony from DHHS Interim Director Jeanne Dorff, DCSD Administrator Mark Mertens, and DCSD Deputy Administrator Kelly Pethke on July 19 and September 20 (excerpts included below) indicate the operational and industry expertise related to make the determinations set forth in the relevant resolutions:

- "Our numbers at Lincoln Hills are down since the first resolution [in March of 2016]"
- "The thinking at [the time of the first resolution] was that we needed a literal alternative to corrections … that we needed secured beds strictly as an alternative and that's where the idea for 44 additional MCAP beds came from … but over time we have been expanding our ability to serve youth in a secured manner but they don't have to be secure beds"
- "My recommendation is that we look at better alternatives that are not just detention beds that can treat youth (such as the Type II residential program that we're developing now that will be an additional 24 beds of capacity of the 44 that were talked about back in March of 2016)"
- "work with the state around the potential to license and create secure residential beds – locked treatment beds … certainly some youth would benefit more from [locked treatment beds] than they would than from detention or correctional type of placement. So MCAP has its place … it is the right program for some youth but it is not the right program for that full range of capacity that we are looking to build, that we need to have some other alternatives for youths."
- "My suggestion would be that over time to have some dialogue … on perhaps changing the language of that resolution so it is not so focused on just secure detention beds. That we look at and recognize the need for a full capacity of other types of programs. There is even the possibility of expanding for an additional 12 beds of MCAP within our current 120 bed detention center. That would take a great deal of time … we would have to see our general population reduced in detention significantly from roughly 90 that we average now to 66, so that we would have the space to create those 12 additional long term MCAP beds … so that we wouldn't be in the situation we were in last spring with serious overcrowding…in hindsight, that first MCAP expansion from 12 to 24 happened without a thoughtful process about how to reduce that general population and it took us a long time to recover from that."
- "There are options there are things that we will continue to pursue, it's just that an additional 44 secure detention MCAP beds is not desired by the community, it is not indicated according to our current need, and is not feasible given the capacity – the building capacity – we looked at CATC, we looked at House of Corrections. The type of expense to handle deferred maintenance, retrofitting and so on, would be quite large. Probably untenable around our budget. And only to create something that we do not really have a need for. That we can address the issue in other ways. I recommend that we have a conversation about the wording of the [resolution] … to expand our continuum of care for youth and that it not be so strictly pigeon-holed around MCAP and detention.
- DCSD currently runs a "365-day plan, but for clarity, youth typically only spend 5 months in detention." Youths receive an array of programming inclusive of juvenile detention cognitive intervention programs, AODA education and treatment, individual counseling, and "Express Yourself Milwaukee", and "Restorative Justice" exposure and participation, individual and family therapy, plus general education. The other critical piece is the community element (GPS monitoring, "Running Rebels"). By extending the

length of stay in detention will diminish the amount of time [of the 365] for the community piece.

- Summary points from the balance of the testimony on those dates include:
    - Research shows that longer detention is not beneficial to youth or the community.
    - Expansion of youth detention time decreases by half the number of youth served and longer detention increases overcrowding and safety concerns.
    - Expansion of MCAP from 24 to 68 beds reduces pre-dispositional treatment and is opposed by stakeholders, including judges, attorneys, and community members.
    - DCSD lacks adequate space for MCAP bed expansion.
    - Female-specific detention units are contrary to best practices. It can further traumatize female youth and … serving them in an inappropriate setting given their risk level to the community.

Consider also many of the very specific directives set forth in the resolutions at issue (see yellow highlighting in attached), including:

- "renovate the Child and Adolescent Treatment Center into a Type II secure residential facility"
- "expand the MCAP program from 28 beds to 66 beds, including a female specific MCAP program"
- "present the County Board with a full 365-day option for the [MCAP] program, as well as a female MCAP program"

Notably, and as the resolutions themselves state expressly in numerous places, the directives in the resolutions mirror written recommendations made by the Chief Judge, presumably reflecting the views of Milwaukee County juvenile court judges. Clearly then, the specific directives in the resolution required direct knowledge of the intricacies of juvenile sentencing.[7] Other than relying on the expertise provided by the courts, how else would the Board direct that 66 beds is the so-called magic number? Why not 70? Or 75 beds? Or, rather, why not 30 secure "detention" beds, 40 secure "treatment" beds, and 10 secure "residential" beds?

This, as well as the specificity of many of the directives, support the view that at least some of the directives contained in the relevant resolutions go beyond setting County policy and cross the line into the details of day-to-day management. In fact, during questioning, Administrator Mertens discussed DCSD's collaboration and coordination efforts with various stakeholders, particularly as to licensing. He explained that the requisite licenses for new secured facilities may not be obtainable in the near term. Furthermore, Director Dorff explained negotiations and

[7] In addition, while there is no question that the court system is a crucial stakeholder on juvenile justice issues and programming – and should, of course, be part of the dialogue on all of these critical issues – it is not likely that the courts have the same (a) exposure to the day-to-day operations and management of juvenile corrections programming, (b) understanding of County and DCSD budgetary constraints, (c) knowledge of the County's facilities and land stock available for potential youth justice programming/facilities, (d) volume and types of formal and informal contacts with community organizations and concerned citizens on juvenile justice issues, nor (e) access to the same data and information that the relevant County departments do (as well as state agencies). This may explain some of the divergence between the court system's recommendations (which were then put forward in Board resolutions) and the different approaches suggested by DCSD/DHHS.

interactions with the relevant state agencies, as well as the source of the confusion or disagreement between the judiciary's view of required licensures and the departments' related to secured residential facilities (which gets into a great historical detail regarding the view of Secretary Anderson and the State Department of Corrections that despite statutory language discussing, "secured residential facilities," these never actually existed in the past and that DCSD is endeavoring to work with the state – both DOC and the Department of Children and Families – to potentially newly establish such a facility in Milwaukee County).

In addition, at one point during the committee hearing on July 19, a committee member states, "we are talking about more rehabilitation and not jail or detention … we want [the youth] to come back into our communities." Puzzingly, this statement seems to support what Administrator Mertens recommended – a rewording of the resolution to broaden its scope to go beyond detention/jail youth justice programming.

To simplify and summarize then, the resolutions appear to include both statements of policy, the proper purview of the County Board, as well as attempts to specifically direct day-to-day management. As a result, the OCC cannot conclude in this instance that the administration must implement all directives contained in the specific resolutions at issue since it is unclear, as a matter of law, whether some of the directives comprise an attempt to control day-to-day management.

Although the OCC cannot decide in this instance whether all of these particular directives are policy or day-to-day management *as a matter of law*, going forward, if the law is indisputably clear in a particular area, then the OCC can and will opine, if asked, regarding whether a directive is policy (and thus, must be implemented) or day-to-day administration.[8] The directives at issue in this memorandum cannot be said to be indefatigably policy as a matter of law.

Remedies: The legal avenue pursued in the *Lipscomb v. Abele* matter – a writ for mandamus – is the method for addressing balance of power disputes, since the OCC may have a conflict of interest if a department refuses to or fails to implement a directive from the Board for any reason. Where Board policies are not being properly executed by the administration, the only direct formal remedy is a court action for mandamus. "Mandamus is an 'extraordinary writ' that may be employed to compel public officers to perform a duty that they are legally obligated to perform." *In re Doe*, 2009 WI 46, ¶ 10, 317 Wis. 2d 364, 372, 766 N.W.2d 542, 546. As in the current lawsuit, to pursue a mandamus action, one or more supervisors or other interested parties would file an action in Circuit Court, naming the County Executive or an administrator as defendant, and ask the Court to order that the policies described in the Board resolution be

[8] For example, in the past, the OCC concluded that the following were "policy" directives and/or were otherwise proper mandates of the Board: the creation of the free GoPass for seniors, requests for reports or other information, fund transfers "to implement Transit Signal Priority along the Wisconsin Avenue corridor" (but note that prior Corporation Counsel Bargren referred to this as a "close call" regarding whether it is policy or day-to-day administration), authorization to spend $5million in park infrastructure projects, fund transfers "to decrease the amount of sales tax," and a 1.5% COLA, along with the associated fund transfers.

carried out as stated. Outside counsel would be required, given the OCC's inherent conflict of interest on this issue noted above.

Perhaps more practically, the following informal remedies are also available:

- Requesting administrators to attend *further* follow up committee meetings to "to provide information and answer questions" about the issue, *see* § 59.794(3)(b), Stats.;
- Requiring written progress reports (*see* MCO 1.25(3) ("County officers, department heads or boards or commissions shall from time to time report to the county executive and county board the steps that have been taken in carrying out any directive"); Attorney General Opinion OAG-06-13 (August 14, 2013) ("[a] county board lawfully may require county department heads to submit periodic reports as to steps taken in carrying out any directive");
- Imposing budget restrictions or similar controls as a way to indirectly compel compliance; and
- Discussing with administrators how to best achieve desired results.

Alternate directives: Notwithstanding the foregoing, the verbiage listed below indisputably sets forth policies.[9] If adopted by the County Board in a new resolution, it is the opinion of the OCC that the administration would have no choice but to implement these directives. In addition, the OCC also recommends including, if this is the Board's goal, a whereas clause that states plainly: "WHEREAS, the County wishes to reduce the number of Milwaukee County youths residing at either Lincoln Hills or Copper Lake to zero as soon as practicable."

1. Analyze and make recommendations regarding local alternatives to Lincoln Hills and Copper Lake, which may include both secure detention and other types of facilities, and any step-down, hybrid formulas, including a timeline, budget, and process outline for potential implementation of alternate solutions;

2. Analyze and make recommendations regarding the risks and benefits of increasing or decreasing the capacity of the Milwaukee County Accountability Program (MCAP) and/or other juvenile justice detention facilities, inclusive of secure and non-secure placements/treatment methods;

3. Analyze and explain the two phases of MCAP, including an assessment and explanation of the pros and cons of year-long youth secured detention (versus other types of programming).

4. Analyze and make recommendations regarding the County's need for year-round detention, whether secure or unsecured; and

5. Analyze and make recommendations regarding facility/treatment/programming distinctions based on gender.

[9] The OCC reviewed the relevant resolutions and attempted here to include all of the policy objectives set forth therein.

Conclusion: The executive branch is required to implement legislative actions on policy matters, including policies expressed in resolutions in Milwaukee County. Nonetheless, Act 14 limits the Board's authority to exercise day-day control over a County department. If the Board feels that a department is improperly refusing to implement a valid policy set forth by the Board, and if the department continues to refuse to implement the policy directive, the Board would need to pursue a mandamus action to compel the administration to implement the policy. Act 14 would be the gravamen of the administration's defense. Informal remedies are available as noted.

As to the specific directives at issue here, it appears that the facts may have changed substantially from the time when the judiciary made recommendations to the Board and when the Board originally adopted the relevant resolutions. It also appears that there may be some confusion over the ultimate objective – is the policy objective the expansion of *only* MCAP/fully-secured detention youth facilities/beds OR is the policy objective the expansion of youth justice facilities/beds *of all types,* including *but not limited to fully-secured detention*. If the Board is open to the latter, then it appears from the testimony and reports from DCDS/DHHS that there is complete agreement between the administration and the Board. Also, it seems that at least some of the directives may have been implemented in full or part by the administration (or implementation has gotten underway). Thus, there appears to be an opportunity for the administration to again provide a comprehensive status report to the Board regarding these issues and a list of possible recommendations for the Board to consider. Alternately, as noted above, the Board could adopt a new resolution with "be it resolved" clauses mirroring those noted above (or otherwise carefully crafted to set forth only clear policy directives), which the administration would then be compelled to implement.

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