

NEW MEXICO JUVENILE JUSTICE HANDBOOK

April 2011



A Legal Manual on Delinquency

Corinne Wolfe
Children's Law Center
New Mexico
Judicial Education Center

First place winner, 2010 Youth Art Contest
How I Want the World to See Me
State Bar of New Mexico Children's Law Section

 **UNM** SCHOOL of LAW
Institute of Public Law

Annual Art Contest

The Children's Law Section of the State Bar of New Mexico sponsors an annual art and writing contest for youth who are involved in New Mexico's juvenile justice system. The contest allows court-involved youth to communicate ideas and emotions through art and writing, fosters thought and discussion among youth on how to change their lives for the better, and provides a positive opportunity to express their struggles, look toward the future, and celebrate artistic effort. In 2010, youth were asked to create canvas banners based on the theme *How I Want the World to See Me*.

NEW MEXICO JUVENILE JUSTICE HANDBOOK

A LEGAL MANUAL ON DELINQUENCY

APRIL 2011

WITH SELECTED UPDATES THROUGH JULY 2011

A PROJECT OF
THE CORINNE WOLFE CHILDREN'S LAW CENTER AND THE NEW MEXICO JUDICIAL
EDUCATION CENTER AT THE INSTITUTE OF PUBLIC LAW, UNIVERSITY OF NEW MEXICO
SCHOOL OF LAW



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New Mexico Juvenile Justice Handbook
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This handbook is intended for educational and informational purposes only. The book is not intended to provide legal advice and readers are responsible for consulting the statutes, rules and cases pertinent to the proceeding in which they are involved or the issue they are addressing. Readers must also keep in mind that recent years have seen substantial changes in the laws and procedures governing proceedings under the New Mexico Children's Code and that both law and procedure continue to change.

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The Handbook is a joint publication of the Corinne Wolfe Children's Law Center and the Rozier E. Sanchez Judicial Education Center, both centers within the Institute of Public Law at the University of New Mexico School of Law. Most importantly, it is the first project sponsored by the new Children's Court Judges Association. The initial directors of the Association, Judges Abigail Aragon, Gary Clingman, Camille Martinez Olguin, Henry Quintero, Freddie Romero, John J. Romero, and Monica Zamora, have all been tremendously supportive of the Handbook and its development.

Intended originally as a judicial benchbook, the judges themselves requested that the book be called a Handbook and made available to attorneys, probation officers and other members of the juvenile justice community as well as to the judiciary. This approach, indeed, the entire effort to develop a juvenile justice handbook, has been supported fully by Supreme Court Justice Petra Jimenez Maes, who has made publication of the Handbook a priority.

Funding for the Handbook was provided by the Children's Law Center, the Judicial Education Center and, through CYFD, the Juvenile Justice Advisory Committee. The Handbook will be available on the website of the Children's Law Center:
<http://childlaw.unm.edu/>.

The Handbook was developed under the supervision of Judy Flynn-O'Brien, director of the Corinne Wolfe Children's Law Center until her retirement from UNM in 2011. Leigh Brunner, Hon. Michael Martinez, and Lisa Abeyta served as lead writers, editors and reviewers, together with Ms. Flynn-O'Brien. Ms. Brunner is an on-call senior attorney with the Institute of Public Law, Judge Michael Martinez (ret.) was a long time Children's Court Judge in the Second Judicial District and more recently a juvenile prosecutor in the Thirteenth, and Ms. Abeyta was a juvenile defender for several years.

A number of judges, prosecutors, public defenders, probation officials, other juvenile justice professionals and law students have given generously of their time in reviewing the public review draft, making comments, suggestions and corrections, and contributing further information. In addition to the directors of the judges' association, these individuals include:

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Last but not least, two individuals who provided leadership for the project were David Schmidt, who as chair of JJAC provided encouragement and support to the Judges Association and the Children's Law Center as they developed the Handbook, and Gerri Dupree, Juvenile Justice Specialist with Youth and Family Services, who served as the CYFD project manager.

INTRODUCTION TO THE HANDBOOK

Purpose of the Handbook

The purpose of the New Mexico Juvenile Justice Handbook is to provide the judiciary and members of the juvenile justice community with a comprehensive resource guide to juvenile justice proceedings in New Mexico's Children's Court. While designed and written primarily for judges, the Handbook can be used by other participants in the legal system.

The Handbook incorporates the applicable requirements of the Delinquency Act and related articles of the Children's Code, the Children's Court rules, court cases and federal laws. It describes the judicial process, describes the roles and responsibilities of certain key participants, explains the hearings that may take place in a case, and addresses related topics, such as evidence, defenses, competency, and confidentiality.

The Handbook is intended to serve as a current, convenient secondary source of law, policy and practice for juvenile justice cases in the legal system. Do not rely on the Handbook as legal authority; instead, consult primary sources for specific legal language and requirements.

Organization

The Handbook is organized into eight general parts, each divided into chapters addressing the following topics:

Part A: Overview

- Overview of the juvenile justice legal process.
- Substantive and procedural rights of respondent children.
- Key concepts involved in the process.

Part B: Roles and Responsibilities

- Roles and responsibilities of certain participants, including the children's court attorney, defense counsel, the child's parents, and the juvenile probation office.
- Note that judges and children are the subject of the entire Handbook and hence are not the subject of individual chapters in this part.

Part C: Proceedings under the Delinquency Act

- Proceedings are in sequential order of their occurrence, from commencement of a case through appeal.
- Chapters cover issues such as custody, petitions, timelines, jury trials, standard of proof, and other substantive and procedural matters.

- Delinquency and youthful offender cases will be described and distinguished. In the case of youthful offender proceedings, the notice of intent to seek adult sanctions and the procedures triggered by the notice of intent are covered.
- Covered in a limited way are serious youthful offender proceedings, that is, first degree murder cases against children age 15 – 17, the only cases in New Mexico in which children are tried as adults.

Part D: Evidentiary and Procedural Issues

- Intervention, discovery and evidence.
- Raising defenses such as insanity and specific intent, as well as alibi and entrapment.

Part E: Competency and Mental Health Issues

- Competency to stand trial.
- Children’s Mental Health and Developmental Disabilities Act.

Part F: Confidentiality and Sealing

- Confidentiality and disclosure in delinquency cases.
- Sealing of records.

Part G: Related Proceedings and Matters

- Problem-solving courts and court programs.
- Status offenses in New Mexico.
- Sex offender registration.
- Interstate Compact on Juveniles.

Part H: Federal and Tribal Considerations

- Federal laws affecting state proceedings, including the Juvenile Justice and Delinquency Prevention Act.
- Federal offenses and how children are handled in the federal system.
- Tribal jurisdiction and tribal-state relations.

In addition, the Handbook contains appendices which include common acronyms, a glossary of terms used in the Children’s Code, and lists of statutes and cases cited in the text. Also important is the Resource Directory, which contains lists of probation offices, county juvenile detention centers, community corrections, juvenile justice continuum sites, and other resources.

Style and Format

The Handbook is written in narrative form, with every effort being made to achieve a balance between readability and accuracy in areas that are complex and governed by detailed statutes, rules and cases. Abbreviations are used but should be readily recognizable when encountered.

Citations to statutes, rules and cases use the most concise style possible while still providing adequate reference information. Full citations can be found in the statute and case lists in the appendices. In general, citations in the text use the following style:

- Statutes: New Mexico statutes are cited as §__-__-__, such as §32A-4-1, without “NMSA 1978.” Federal laws are cited as __ U.S.C. §__, such as 25 U.S.C. §1901.
- Rules: New Mexico judicial rules are cited as Rule __-__, such as Rule 10-201, without the addition of “NMRA.”
- Cases: New Mexico cases are cited using the vendor-neutral citation adopted in 1998, such as 2004-NMCA-039, if available, or the New Mexico and regional reporter citations, such as 116 N.M. 793, 867 P.2d 1175 (1994) if the case predates the use of vendor-neutral citations. Complete citations may be found in Appendix D, the Table of Cases.

It is important for attorneys to note that the form of citation in this Handbook is for the sake of brevity and formatting and is not necessarily appropriate for formal citations in briefs. Refer to the Supreme Court General Rules, specifically Rule 23-112 NMRA, for the proper form of citation for pleadings and papers filed with the courts.

Availability of Laws and Cases

While the Handbook contains citations to numerous state and federal statutes, rules and cases, it does not provide their full text. You can find these legal materials in law libraries and through the Internet. Some examples of no-cost electronic sources are listed below.

Statutes and Court Rules and Forms

- New Mexico statutes/court rules/forms: <http://www.nmcompcomm.us>
- Federal statutes: <http://www.gpoaccess.gov/uscode>

Agency Rules

- New Mexico Administrative Code: <http://www.nmcpr.state.nm.us/nmac/>
- Federal regulations: <http://www.gpoaccess.gov/cfr/>

Cases

- New Mexico appellate cases: <http://www.nmcompcomm.us>
- Federal cases: <http://www.findlaw.com/cascode/>

Effective Date

The Handbook is generally current through April 2011. As funds and staffing allow, the Handbook will be updated periodically. Please contact us at the address below for information about the status and availability of updates.

Additional Copies

For information on purchasing copies of the Handbook, please contact the Corinne Wolfe Children's Law Center at the address below. The Handbook is also available free of charge on the Center's website, <http://childlaw.unm.edu>. Users are welcome to print a copy of the Handbook for their convenience.

Permission to Reproduce

For information on the permission and acknowledgements necessary for reproducing portions of the Handbook, please contact the Corinne Wolfe Children's Law Center at the address below.

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CHAPTER 1

OVERVIEW OF THE JUVENILE DELINQUENCY LEGAL SYSTEM

This chapter covers:

- The Children's Code and Delinquency Act
- Children's court in New Mexico
- Brief history of delinquency law
- Anatomy of a delinquency case
- Terminology
- Timeline

1.1 The Children's Code and Delinquency Act

The primary purpose of the Children's Code is to provide for the care, protection, and wholesome mental and physical development of children coming within its provisions, preserving the unity of the family whenever possible. The child's health and safety is the Code's paramount concern. §32A-1-3(A).

Other purposes of the Children's Code that are particularly relevant to delinquency proceedings include:

- providing judicial and other procedures through which the provisions of the Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced;
- providing a continuum of services for children and their families;
- providing children with services that are sensitive to their cultural needs; and
- providing for cooperation and coordination between the civil and criminal systems for the investigation, intervention, and disposition of cases. §32A-1-3.

In 2009, the Legislature added the additional purpose of reducing overrepresentation of minority children and families in the juvenile justice, family services and abuse and neglect systems through early intervention, linkages to community support services and the elimination of discrimination. §32A-1-3(E).

The Legislature also included a definition of “disproportionate minority contact” in Subsection G of §32A-1-4. “Disproportionate minority contact” is defined as “the involvement of a racial or ethnic group with the criminal or juvenile justice system at a proportion either higher or lower than that group’s proportion in the general population.” However, the term “disproportionate minority contact” is not used in either the general provisions of the Children’s Code or the Delinquency Act so there is no explicit statutory mandate associated with it.

The Delinquency Act, §§32A-2-1 through 32A-2-33, is a chapter within the Children’s Code. An act committed by a child that would be designated a crime if committed by an adult is considered a “delinquent act” and addressed under the Delinquency Act. The Act is intended to spare children the stigma of the criminal label and remove from children the adult consequences of criminal behavior while at the same time holding them accountable for their actions to the extent of the child’s age, education, mental and physical condition, background, and other relevant factors. §32A-2-2(A).

The Delinquency Act is also intended to provide children accused of delinquent acts with a program of supervision, care, and rehabilitation, and to provide effective deterrents to acts of juvenile delinquency, including an emphasis on community-based alternatives. An additional purpose of the Act is to strengthen families and to successfully reintegrate children into homes and communities. All of this should be done consistent with protection of the public interest. §32A-2-2.

In 2007, the Legislature amended §32A-2-2 of the Delinquency Act and expanded its purpose to address a broader array of issues. The statutory objectives added in 2007 include:

- fostering and encouraging collaboration between government agencies and communities regarding juvenile justice policies and procedures;
- developing juvenile justice policies and procedures that are supported by data;
- developing objective risk assessment instruments to be used for admission to juvenile detention centers;
- encouraging efficient processing of cases;
- developing community-based alternatives to detention;
- eliminating or reducing disparities based upon race or gender;
- improving conditions of confinement in juvenile detention centers; and
- achieving reductions in the number of warrants issued, the number of probation violations, and the number of youth awaiting placements.

1.2 Children’s Court in New Mexico

1.2.1 Appointment of Children’s Court Judges

The Children’s Code establishes children’s court as a division of the district court, whose power is established by the New Mexico Constitution. The district court for each judicial district is required to appoint one or more judges to serve as children’s court judges. §32A-1-5. The judge

who will hear the case is designated at the time of filing of the petition pursuant to local district court rule. Rule 10-161(A).

If the designated judge has been excused or recused, the district court clerk randomly assigns a district judge of the same judicial district in the same manner as cases are originally assigned, or pursuant to local district court rule. If all district court judges in the district have been excused or recused, the district court clerk must immediately inform the Chief Justice of the Supreme Court, who will designate a judge, justice, or judge pro tempore to hear all further proceedings. Any judge designated by the Chief Justice may not be excused pursuant to Art. VI, §18 of the New Mexico Constitution. Rule 10-161(D).

If a proceeding is filed in any county of a judicial district in which a district employee or judge is a party, no judge of the district may hear the matter unless the parties agree in writing. If the parties have not filed a stipulation agreeing to a judge in the district within 10 days, the clerk is required to ask the Supreme Court to designate a judge. Rule 10-161(C).

1.2.2 Summary of Children’s Court Jurisdiction

The children’s court exercises subject matter jurisdiction over all proceedings under the Children’s Code in which a child is alleged to be a delinquent child or in which a person is 18 years of age or older and was a child at the time the alleged delinquent act was committed. §32A-1-8.

A child 15 to 18 years of age charged with and indicted or bound over for trial for first degree murder is not a “delinquent child” under the Code. The child is considered a “serious youthful offender” and is tried in regular district court under the procedures and laws applicable to alleged adult offenders. §32A-2-3(H); Rule 10-101(A)(2)(a). *See also State v. Stephen F.*, 2005-NMCA-048, *rev’d in part, aff’d in part*, 2006-NMSC-030.

1.3 Brief History of Delinquency Law

1.3.1 *Parens Patriae* and the Establishment of Children’s Courts

The concept of treating children in the criminal justice system differently from adults began with the juvenile court movement at the end of the nineteenth century and the passage of a juvenile court statute in Illinois in 1899. *In re Gault*, 387 U.S. 1, 14 (1968).

New Mexico established its first juvenile court in 1917, which employed special procedures for dealing with juveniles charged with criminal offenses. *Peyton v. Nord*, 78 N.M. 717, 723, 437 P.2d 716, 722 (1968).

Prior to the juvenile court movement, society at common law handled children over the age of seven accused of committing criminal offenses no differently than adults, and subjected them to arrest, trial, and in theory to punishment like adult offenders. Children under the age of seven were excepted because they were considered incapable of possessing criminal intent. *Gault*, 387 U.S. at 16-17; *Peyton*, 78 N.M. at 723, 437 P.2d at 722.

The reformers who started the juvenile court movement were opposed to applying adult procedures and penalties to children, including giving children long prison sentences and putting children in jail with adult criminals. The reformers believed that society's duty to the child extended beyond the mere concept of justice, and that

[s]ociety's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The child -- essentially good, as they saw it -- was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.

In re Gault, 387 U.S. at 15-16 (footnotes omitted).

The exclusion of juveniles from the due process protections granted to adults under the Fourteenth Amendment was justified by the idea that the state was proceeding as *parens patriae*, or in other words, as a parent. Under this reasoning, "the child, unlike an adult, has a right 'not to liberty but to custody.' " If parents do not effectively perform their custodial functions, the state may intervene. The state is not depriving "the child of any rights because he has none." The state is simply providing "the 'custody' to which the child is entitled." Proceedings involving juveniles were described as civil not criminal and therefore not subject to the requirements applicable when the state seeks to deprive a person of liberty. *Id.* at 17 (footnotes omitted).

The departure from established procedures in juvenile cases resulted in broad discretionary powers for juvenile courts, often producing the incongruous result of juveniles being afforded fewer procedural protections than adults and the arbitrary use of power by the juvenile courts. As the Court wrote in *Gault*, "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Id.* at 18.

Prior to *Gault*, the New Mexico courts upheld the constitutionality of the state's juvenile laws based on the *parens patriae* rationale. *In re Santillanes*, 47 N.M. 140, 152, 138 P.2d 503, 510 (1943) (discussing its agreement with a line of cases declaring that the constitutional rights applied to adult criminal proceedings are not applicable because juvenile proceedings are civil, not criminal, in nature).

1.3.2 *In re Gault*

In *Kent v. United States*, 383 US 541, 562 (1966), the U.S. Supreme Court finally recognized, after years of decisions upholding the constitutionality of juvenile laws under the *parens patriae* system, that the discretionary powers of the juvenile courts had gone too far and were encroaching on the constitutional rights of juveniles. The Court ruled that waiving a juvenile to adult court without a hearing violated the child's Sixth Amendment rights, and "that the hearing must measure up to the essentials of due process and fair treatment." *Kent*, 383 U.S. at 562.

Shortly after the holding in *Kent*, in the landmark case of *In re Gault*, the U.S. Supreme Court ruled that specific Fourteenth Amendment due process protections apply to juveniles during the adjudicatory phase of a delinquency proceeding. *In re Gault*, 387 U.S. 1 (1967). The case involved Gerald Gault, a 15-year-old juvenile sentenced to a maximum of 6 years in a state training school for making obscene phone calls to a neighbor woman. The case was originally heard in an informal juvenile court proceeding in which there was no transcript of the proceedings or any other record made, and the juvenile was not represented by counsel. The child's parents were not initially notified that he was taken into custody and were not allowed to take him home after locating him at a juvenile detention home. The child was released after his preliminary hearing without explanation and his parents merely received notice of the time and date of his delinquency hearing, with no further information. The petition was not served on the parents or the child, contained no factual basis for the judicial action, and had no citation to the statute that the juvenile was charged with violating. *Id.* at 5-6.

After dismissal of their writ of habeas corpus by the Arizona court, Gault's parents took the case to the U.S. Supreme Court. The United States Supreme Court ruled that the Fourteenth Amendment due process clause applies to the adjudicatory phase of a juvenile court proceeding.

The most significant holding in the *Gault* case was the Court's finding that the juvenile had a right to counsel. The Court reasoned that a delinquency proceeding entailing the potential loss of the juvenile's liberty is comparable in seriousness to a felony prosecution. *Gault*, 387 U.S. at 36. The Court found that the Fourteenth Amendment requires that in juvenile delinquency proceedings potentially resulting in commitment to an institution, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. The Court further found that whether they did or did not choose to waive the right must be specifically considered. *Id.* at 41.

The Court also held that the child has a right to be notified of the charges against him. Notice must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and the notice must set forth the alleged misconduct with particularity. *Id.* at 33.

In *Gault*, the Supreme Court also afforded juveniles the right to confrontation and cross-examination. Previously, witnesses were not sworn at the delinquency proceeding, and the complainant was not present at any of the hearings. The court found that absent a valid confession adequate to support the determination, confrontation and sworn testimony by

witnesses available for cross-examination were essential for a finding of delinquency and an order committing a child to a state institution. *Id.* at 57.

Finally, the Court found that the Fifth Amendment privilege against self-incrimination, recognized two years earlier in the Supreme Court case of *Miranda v. Arizona* as applied to adult criminal proceedings, was applicable to juveniles as well as adults. *In re Gault*, 387 U.S. at 55. In *Miranda v. Arizona*, the Supreme Court found that “because compelling pressures present during custodial police interrogation, the Fifth Amendment requires that prior to any questioning, a person ‘must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.’ ” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

The *Gault* court found that the confession was made outside the presence of parents and counsel, and without advising the juvenile of his right to silence. The Court went on to note the special problems that may arise with respect to waiver of the privilege by a juvenile, and emphasized the need for ensuring that any waiver of such rights is voluntary: “If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.” *Gault*, 387 U.S. at 55.

1.3.3 Expansion of Due Process Rights

Subsequent to the holding in *Gault*, the U.S. Supreme Court and the New Mexico Supreme Court have expanded the federal and state constitutional rights afforded to juveniles. In 1968, on the heels of the *Gault* case, the New Mexico Supreme Court ruled that the right to trial by jury in Article II, §12 of the New Mexico Constitution applied to juveniles. *Peyton v. Nord*, 78 N.M. 717, 723, 437 P.2d 716, 722 (1968).

Article II, §12 states in pertinent part: “The right to trial by jury as it has heretofore existed shall be secured to all and remain inviolate.” The New Mexico Supreme Court found it unnecessary to determine whether a juvenile proceeding was civil or criminal in nature. Quoting *Gault*, the Court noted that “[c]ommitment is a deprivation of liberty. It is incarceration against one’s will, whether it is called ‘civil’ or ‘criminal’ ” *Peyton*, 78 N.M. at 724, 437 P.2d at 723.

We see no escape from the conclusion that at the time of the adoption of our constitution petitioner could not have been imprisoned without a trial by jury. This being true, no change in terminology or procedure may be invoked whereby incarceration could be accomplished in a manner which involved denial of the right to jury trial.

Id. (citations omitted). (Note that the U.S. Supreme Court has not recognized a federal constitutional right to a jury trial for a juvenile. *See* Chapter 2 of this Handbook).

In 1970, the U.S. Supreme Court determined that the historic requirement of proving charges beyond a reasonable doubt was a constitutional due process requirement. *In re Winship*, 397 U.S. 358, 364 (1970). The Court held that “the Due Process Clause protects the accused

[juveniles as well as adults] against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Id.*

1.3.4 Adult Sentencing of Juveniles

Following the expansion of due process rights for juveniles in the 1960s and 1970s, in the 1980s the courts turned their focus to public safety concerns resulting from what was perceived as an epidemic of violent juvenile criminals. Many states around the country responded to violent juvenile crime with legislative initiatives that automatically transferred violent juvenile offenders to adult courts. Other states gave prosecutors complete discretion to transfer juveniles into adult court, where they would be tried and sentenced as adults without regard to the child’s individual circumstances and his or her potential for rehabilitation. *State v. Ira*, 2002-NMCA-037, ¶26 (citing Patrica Torbet, et al., *State Responses to Serious and Violent Juvenile Crime*, pp. 3-4, Washington DC: Office of Juvenile Justice and Delinquency Prevention (1996)).

New Mexico did not go this route, but rather developed a unique approach in which the only juveniles tried in adult court are older youth being prosecuted for first degree murder. All other juveniles are adjudicated in children’s court, and only after adjudication are “youthful offenders” considered for juvenile or adult sanctions at an amenability hearing. The recent Supreme Court cases of *State v. Rudy B.* and *State v. Jones* offer a helpful history of adult sentencing of juveniles in New Mexico. See *Rudy B.*, 2010-NMSC-045; *Jones*, 2010-NMSC-012.

In recent years, the U.S. Supreme Court has confronted the issue of whether adult sentencing schemes for juveniles violate the Eighth Amendment prohibition on cruel and unusual punishment.

In 1988, a plurality of the U.S. Supreme Court ruled that national standards of decency did not permit the execution of any offender under the age of 16 at the time of the crime. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988). The next year, a 5-to-4 Court refused to extend the prohibition against the death penalty for children aged 16 to 17 years old at the time of the crime. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

In the case of *Roper v. Simmons*, the U.S. Supreme Court reversed its decision in *Stanford v. Kentucky*, and ruled that imposing the death penalty on juveniles under the age of 18 violates the Eighth Amendment’s ban on cruel and unusual punishment. The U.S. Supreme Court examined the “evolving standards of decency that mark the progress of a maturing society” as it had in previous cases testing the constitutionality of the death penalty for juveniles and mentally retarded persons to determine which punishments are so disproportionate as to be “‘cruel and unusual’” under the Eighth Amendment. *Roper*, 543 U.S. 551, 561 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)).

The *Roper* Court surveyed state practices in imposing the death penalty on juveniles, and discovered that the majority of states rejected the imposition of the death penalty on juveniles or used it rarely even when it was on the books. The Court also found trends toward abolishing its practice in those states that still allowed it. Using language from *Atkins v. Virginia* respecting the mentally retarded, the Court noted that our society today views juveniles “categorically less

culpable than the average criminal.” *Roper*, 543 U.S. at 567 (citing *Atkins*, 536 U.S. 304, 316 (2002)).

The *Roper* Court noted three differences between juveniles and adults. According to the court, these differences demonstrate that juveniles cannot be reliably classified among the worst offenders:

- juveniles tend to have a lack of maturity and an underdeveloped sense of responsibility when compared with adults;
- juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and
- the character of a juvenile is not as well formed as that of an adult, with more transitory and less fixed personality traits.

Roper, 543 U.S. at 569-570.

The Court applied the reasoning of the plurality in *Thompson v. Oklahoma*, finding that the same rationale applies to all persons under 18. According to the Court, once the diminished culpability of juveniles is recognized, the penological justifications for the death penalty of retribution and deterrence apply with lesser force. *Id.* at 571. The Court drew the line at 18 because it is the point where society draws the line for many purposes between childhood and adulthood. *Id.* at 574.

In 2010, in *Graham v. Florida* the U.S. Supreme Court held that the Eighth Amendment of the U.S. Constitution does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide offense. The Court stated that “[n]o recent data provide reason to reconsider *Roper*’s holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment.” 130 S. Ct. 2011, 2016 (2010).

The holdings and rationales in *Roper* and *Graham* reflect the current tendency in juvenile justice law to focus on developmental differences of children when determining culpability and punishment. Amendments to the Children’s Code enacted in 2009, requiring a judge to consider a child’s social and emotional health, brain development, trauma history and disability when determining whether to sentence a child as an adult, echo a similar trend in New Mexico law. See §32A-2-20(C)(5).

1.4 Anatomy of a Delinquency Case

1.4.1 Referrals

A law enforcement officer initiates a delinquency case by arresting a child, investigating a case and listing the juvenile as a suspect on the police report, or issuing a citation on a case other than a minor driving offense. If the child is arrested, he or she will usually be taken to a county juvenile detention center. A child may be taken to an adult jail or lock-up but only for up to 6 hours and only if the child is segregated from adult inmates by sight and sound. §32A-2-4.1. Most children are released to a parent or guardian. If a child is not released, then a detention

hearing will be held within 48 hours of the arrest. If the child turned eighteen on probation and is arrested for a probation violation or a new charge, he may be held in an adult jail but a detention hearing should still be held.

If a child is not in detention, the originating police department will refer the police report or citation to probation services at the Children Youth and Families Department (CYFD or department). CYFD will conduct a preliminary inquiry with the child and the child's parents to determine whether to recommend to the children's court attorney (CCA) in the district attorney's office that a formal petition alleging a commission of a delinquent act and initiating a formal delinquency proceeding be filed with the children's court. Probation services will send a letter notifying the family of the preliminary inquiry. If the child is in detention, the probation officer must give the parents reasonable notice of the preliminary inquiry. §32A-2-7(C).

During the preliminary inquiry, the juvenile probation officer (JPO) will discuss the charges, possible outcomes, the route a case might take through children's court, the child's rights, and recommendations to the CCA about disposition of the case.

The best interests of the child and of the public guide the JPO's determination of whether to recommend that a formal petition alleging delinquency be filed. The Children's Code requires that if the complaint alleges a felony or if the child has had three or more prior misdemeanors within two years of the instant offense, probation services must inform the CCA of the complaint and recommend a disposition. Otherwise, probation services may dispose of the complaint informally. The JPO may direct the child to another appropriate agency and conferences may be held to make adjustments or enter into agreements that will obviate the need to file a petition. The JPO also has the option of notifying the CCA about the referral and recommending appropriate disposition. *See* §32A-2-7(E) and (F).

1.4.2 Petition

Cases referred to the district attorney's office from probation services are first assigned to an attorney, and either that attorney or a paralegal in the office will do the initial screening. The assigned attorney will then review the recommendation of probation services and the complaint for legal sufficiency.

When determining whether to file a formal petition in a particular case, the CCA considers the strength of the evidence, the seriousness of the offense, the child's prior record of contact with the juvenile justice system, and any other relevant factors. If the attorney decides to file a formal petition, the CCA must endorse on the petition that the filing is in the best interest of the public and the child. §32A-2-8. The CCA can override the recommendation of probation services, and can proceed with filing a petition or forego filing a petition despite a contrary recommendation.

If the child is in detention, the CCA must file any petition within two working days of the date of detention. Rule 10-211(C); Rule 10-107. If the child is not in detention, a preliminary inquiry by probation services must be conducted within 30 days, unless the department determines that an extension is necessary to conduct a thorough preliminary inquiry and the extension is not prejudicial to the best interests of the child. §32A-2-7. Any petition must be filed within 60

days of completion of the preliminary inquiry, unless the time period is extended upon motion and good cause shown. After a petition is filed, the court clerk will set the case for first appearance.

If the child is not in detention, the case should go to trial within 120 days of the time the petition is served on the child. However, if the child is in detention, the case must go to trial within 30 days of the date the petition is served. In both cases there are exceptions, as outlined in Rule 10-243.

If the child does not appear for a scheduled court appearance, the court may issue a bench warrant for failure to appear, which tolls the time limits in the Code and Children's Court Rules. When the child is arrested, the time limits begin anew. Rule 10-243.

1.4.3 Adjudicatory Hearing

As a practical matter, most cases in children's court are settled by a plea agreement. If a case goes to trial, a child is entitled to a six person jury if the delinquent act charged is not one for which the CCA is seeking adult sanctions. If the charges would be petty misdemeanors if the child were an adult or if the case is charged as a probation violation, there is no jury and a judge hears the case.

Certain violent offenses enumerated in Subsection J of §32A-2-3 are classified as youthful offender charges. If the CCA files a notice to invoke adult sanctions in a case involving a youthful offender offense, the case is set with adult deadlines and the child is tried by a 12 person jury rather than a six person jury. The judge may impose an adult sentence if the state meets its burden of proving that the child is not amenable to treatment or rehabilitation as a juvenile or eligible for commitment to an institution for children with developmental disabilities or mental disorders. A child 15 years old or older who is charged with first degree murder is classified as a serious youthful offender, and the case is handled in district court like an adult criminal proceeding.

1.4.4 Disposition

There are four basic ways in which the children's court may dispose of a case: time waiver, consent decree, probation, and commitment. The court may also impose a fine. A time waiver is an agreement between the child and the CCA to waive the time limits and keep the case open for six months. The child does not have to admit to any of the charges. The agreement will include a requirement that the child have no more referrals for other delinquent acts, may include a set period of community service, and may include any other condition upon which the parties agree. If the child violates the agreement, the CCA will file a notice of noncompliance, which brings the case back before the court for a trial or plea agreement.

A consent decree is similar to a deferred sentence in the adult context. The child may, but is not required to, admit a charge to enter into a consent decree. Under a consent decree, the child will be placed on probation for 6 months. If the child successfully completes probation, the case is dismissed. The 6-month probation period can be extended for 6 more months by agreement or

court order. There is no longer any limit on the number of consent decrees that a child may enter during a certain period of time.

Probation is for an indeterminate period of time not to exceed either one or two years. The conditions of a 2-year probation are often the same as those of a consent decree. Standard conditions of probation include reporting to a probation officer, obeying parents, living with parents, going to school, not using drugs or alcohol, not possessing weapons, and not breaking the law. Other conditions that are commonly imposed include not associating with negative peers, keeping a curfew, attending counseling, not driving, making restitution, and performing community service. The court may add other special conditions if appropriate, including specialized probation supervision and conditions designed to improve the child's behavior in the future, such as drug court. Some courts offer special programs, such as grade court in the 11th Judicial District or the Program for the Empowerment of Girls (PEG) in the Second.

Unlike a consent decree, a judgment of probation is not automatically dismissed upon successful completion of a term of probation; rather, it remains a judgment on the child's record.

A commitment to the custody of CYFD may be for one year or two years. If a child has committed any offense that is classified as a youthful offender offense under the Code, then the child may be committed until the age of twenty-one. The child may also be committed for 15 days on an interim basis to CYFD for diagnosis and recommendations, or to the juvenile detention center as a final disposition. There may also be special dispositions depending on the type of delinquent act committed by the child, such as revocation of driving privileges for certain traffic offenses.

1.5 Terminology Applicable to Delinquency Proceedings

The terminology used in juvenile delinquency proceedings is different from adult criminal proceedings and reflects an intent to treat juvenile delinquency proceedings as non-criminal in nature. For example:

<u>Criminal</u>	<u>Delinquency</u>
Defendant	Respondent
Trial	Adjudication
Convicted	Adjudicated
Sentence	Disposition
Incarceration	Commitment
Indictment	Petition

1.6 Timeline for the Proceeding

Observance of time frames is important in delinquency proceedings because the failure to abide by them may result in release from detention or even dismissal of a case in some circumstances. Many of the time frames hinge on whether or not the child is in detention. This subchapter summarizes the time frames applicable to a delinquency proceeding. *It does not address the time frames applicable in proceedings involving youthful offenders and serious youthful offenders,*

unless expressly stated otherwise. The applicable time frames for youthful offenders, and serious youthful offenders will be discussed later in this Handbook.

Petition: If a child is in detention, the CCA must file any petition within two working days from the date of detention. If the CCA fails to comply with these time frames, then the child must be released from detention. If the child is not in detention, the petition must be filed within 60 days of completion of the preliminary inquiry, unless a motion is granted extending the time limit for good cause shown. §32A-2-7(D). Probation services must complete the preliminary inquiry within 30 days of receipt of the referral from law enforcement, unless the department determines that an extension of 30 days is necessary to conduct a thorough preliminary inquiry and that the extension is not prejudicial to the best interests of the child. §32A-2-7(C).

Probable cause finding: The court must make a probable cause finding within 48 hours after detention commences and no later than the first appearance of the respondent child, whichever occurs earlier, when a juvenile has been arrested without a warrant and has not been released. Rule 10-222(A). If the court finds no probable cause, or if the probable cause finding has not been made within the above-described time frames, then the court must release the child from detention.

Youthful offenders: After a petition is filed, if the CCA plans on seeking adult sanctions for an alleged youthful offender, the CCA must file a notice of intent to invoke adult sanctions within 10 days of the petition, although this time may be extended by motion. A grand jury presentment or preliminary hearing to determine whether probable cause exists to support the youthful offender offense alleged in the petition must be held within 10 days after a notice of intent to invoke an adult sentence is filed, unless the child waives the right to a preliminary hearing or grand jury. Rule 10-213(B).

Disclosures by the state: The state must make certain disclosures within 10 days after the date of delinquency petition, unless the court orders a shorter time period. Rule 10-231(A). A certificate of compliance with these requirements must be filed at least 10 days prior to the adjudicatory hearing. Rule 10-231(C).

Disclosures by respondent child: The child must make his or her required disclosures within thirty days after the filing of petition or not less than ten days before the adjudicatory hearing, whichever date occurs earlier, unless a notice of intent to invoke adult sanctions has been filed. Rule 10-232(A). A certificate stating that the required disclosures have been made must be filed at least ten days prior to the adjudicatory hearing. Rule 10-232(D).

Notice of alibi, entrapment, or insanity defense: The child must, upon written request of the CCA, serve upon the CCA a notice of any intention to introduce evidence of an alibi or entrapment defense within 10 days before the adjudicatory hearing or such other time as the children's court may direct. Rule 10-233(A). Similarly, the child must provide notice of an insanity defense or intent to call an expert witness on the issue of whether the child was incapable of forming specific intent within 10 days after service of the petition, or within 10 days

after an attorney is appointed or enters an appearance on behalf of the child, whichever occurs later. This time limit may be waived for good cause shown. Rule 10-241(A).

Adjudicatory hearing: If the child is in detention, an adjudicatory hearing must be held within 30 days of service of the petition or other event enumerated in the rules. If the child is not in detention or is released from detention prior to the 30 day time frame for the adjudicatory hearing, the adjudicatory hearing must be held within 120 days from the date the petition is served or other certain triggering events. Rule 10-243(B). On the other hand, time limits for commencement of trial no longer apply to youthful offender cases. Instead courts will apply a “speedy trial” analysis to the length of time required to get a case to trial or resolution. Rule 5-604 (as amended in 2010).

Extension of adjudicatory hearing timeframes: The children’s court may extend the deadline for an adjudicatory hearing upon good cause for up to 60 days. After the children’s court has extended the date by 60 days, the CCA must go the Supreme Court for any additional extensions, and the Court may extend the time frame further for good cause shown. If the adjudicatory hearing is not begun within the time specified or within the period of any extension, the court may dismiss the petition with prejudice or consider other sanctions as appropriate. Rule 10-243.

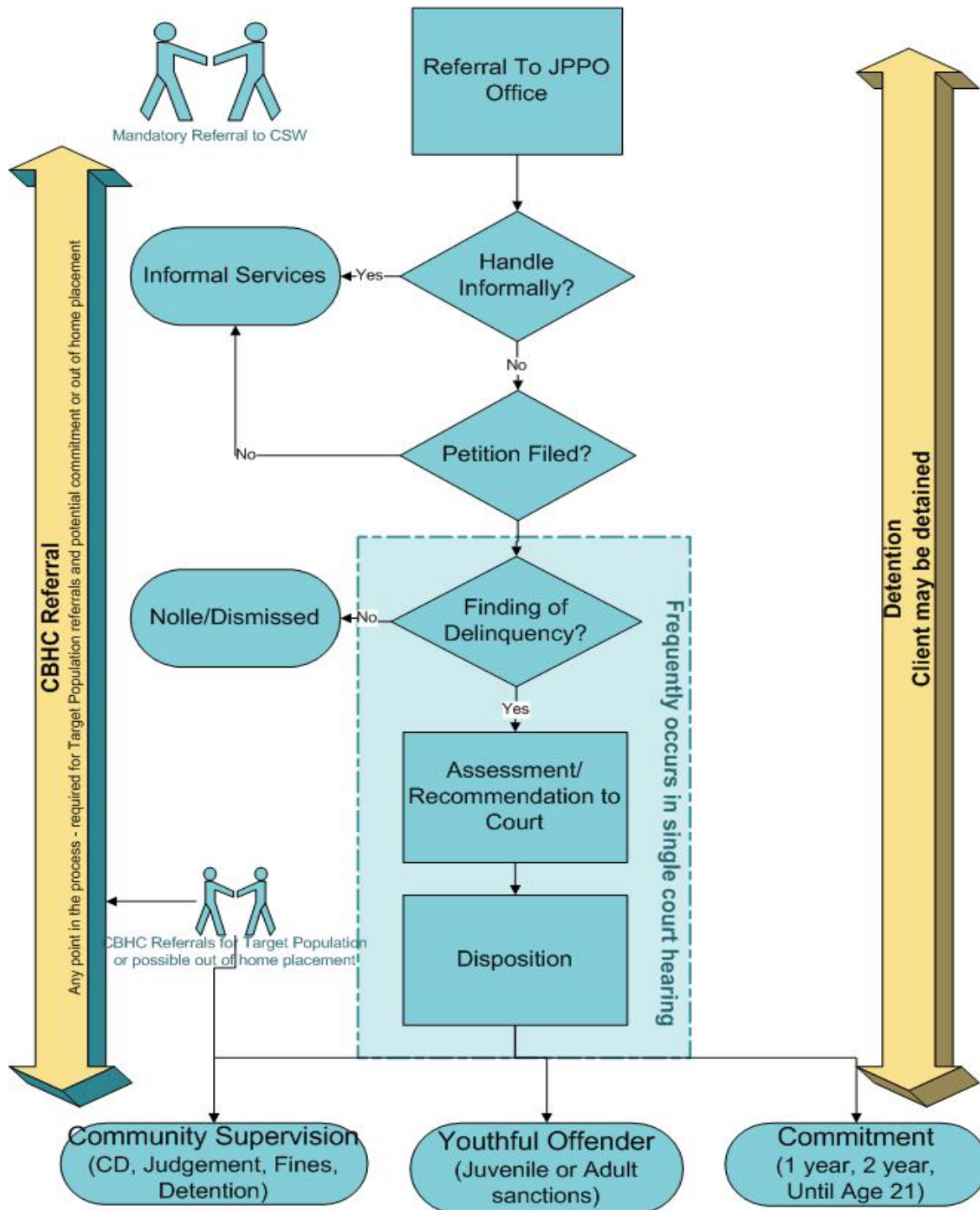
Dispositional hearing: If the child is in detention pending disposition, the dispositional hearing must begin within 30 days from the date of the conclusion of the adjudicatory hearing or trial in a youthful offender proceeding, or the date the court accepts an admission of the factual allegations of the petition. Rule 10-246(B). If the child is committed for diagnosis, the dispositional hearing must be recommenced within 45 days of the court’s commitment order. Rule 10-246(C). The Supreme Court may extend the time frame for a dispositional hearing upon good cause shown. Rule 10-246(D). There are no time limits on a dispositional hearing for a child who is not in detention or who is undergoing (but not committed for) diagnosis. The remedy for noncompliance with these time limits is release from detention, not dismissal of the case. *See* Rule 10-246 (Committee Commentary).

Reconsideration and appeals: A motion to modify or reconsider a disposition must generally be filed within 30 days after the judgment is filed if the initial commitment period is 2 years or less, or within 90 days after judgment is filed if the initial commitment period is more than 2 years. Rule 10-252. The time limits for appeal are governed by the Rules of Appellate Procedure. Rule 10-251.

1.7 Graphic Illustration of Process

The referral process, from beginning to end, is graphically illustrated on the next page. This chart was prepared by CYFD Probation and Aftercare Services for a Juvenile Justice 101 workshop at the 2010 Children’s Law Institute.

New Mexico Juvenile Justice Division Referral Intake Process



CHAPTER 2

RIGHTS OF THE CHILD

This chapter covers the child's rights, including:

- Right to assistance of counsel
- Privilege against self-incrimination
- Right of confrontation
- Right to trial by jury
- Proof beyond a reasonable doubt
- Right not to be tried while incompetent

2.1 Overview

The federal and state constitutions are the original source of a child's rights in a delinquency proceeding. The Children's Code often expands upon the rights granted under the constitutions.

The Children's Code expressly states in §32A-2-14, entitled "Basic rights," that "[a] child subject to the provisions of the Delinquency Act is entitled to the same basic rights as an adult, including rights provided by the Delinquency Act, except as otherwise provided in the Children's Code." *See also* §32A-1-16(A). According to the New Mexico Supreme Court, Subsection A's reference to the "same basic rights" refers to basic constitutional rights such as the right to be free from unreasonable search and seizure, and the Sixth Amendment right to confront witnesses. *State v. Javier M.*, 2001-NMSC-030, ¶32.

The other provisions of §32A-2-14 either constitute exceptions to the general rule in Subsection A by granting children *broad*er rights than those granted to adults under the U.S. Constitution, at least with regard to the privilege against self-incrimination, or elaborate upon circumstances that may be particularly relevant for juveniles. For instance, Subsection E provides a list of factors to consider when determining whether the child has made a knowing, intelligent, and voluntary waiver of his or her constitutional rights. *Javier M.*, ¶27.

This chapter reviews a number of the rights accorded children under the federal and state constitutions and statutory law, and highlights distinctions between the rights of juveniles in delinquency proceedings and adults in criminal proceedings and under federal and state law.

2.2 Assistance of Counsel

2.2.1 Federal Constitution

In *In re Gault*, the U.S. Supreme Court extended to juveniles the Sixth Amendment right to assistance of counsel, including court-appointed counsel if the child is indigent. 387 U.S. 1, 41 (1968). Chapter 1 contains a more thorough discussion of the holdings in *Gault*.

2.2.2 State Law

Subsections B and H of §32A-2-14 of the Children Code, entitled “Rights,” codify the Sixth Amendment right to assistance of counsel, including court-appointed counsel for indigent children, recognized in *Gault*. A child must be represented by counsel at “all stages of the proceedings on a delinquency petition, including all post-dispositional court proceedings.” §32A-2-14(H); Rule 10-224.

The child, and the child’s parent, guardian or custodian, must be advised by the court or its representative that the child must be represented by counsel at all stages of the proceeding. If counsel is not retained for the child or if it does not appear that counsel will be retained, counsel will be appointed. §32A-2-14(H). Counsel must be appointed no later than five days after the petition is filed or at the commencement of the detention hearing, whichever occurs earlier. Rule 10-223.

A child has a statutory right to be represented by the public defender if the court declares child’s parent, guardian, or custodian to be indigent, or if the parent, guardian, or custodian is financially able to pay for an attorney but is unwilling to do so. If a parent, guardian, or custodian is able but unwilling to pay, the court will order him or her to reimburse the state for the costs of public defender representation. §32A-2-14(B).

2.3 Privilege Against Self-Incrimination

2.3.1 Federal Constitution

In re Gault extended to juveniles the right to assert the Fifth Amendment privilege against compulsory self incrimination. 387 U.S. 1, 55 (1968). In summary, the Fifth Amendment of the U.S. Constitution states that “no person ... shall be compelled in any criminal case to be a witness against himself.” The privilege protects the respondent from involuntarily taking the stand and testifying against himself or herself in a delinquency proceeding.

This right against self-incrimination under the federal Constitution includes the constitutional guarantees articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the U.S. Supreme Court held that, because of the compelling pressures present during custodial police interrogation, the Fifth Amendment requires that prior to any questioning of a person in custodial interrogation, a person “ ‘must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an

attorney, either retained or appointed.’ ” *Miranda*, 384 U.S. at 444, cited in *State v. Javier M.*, 2001-NMSC-030, ¶15.

As discussed directly below, state law goes beyond *Miranda* and further limits the admissibility of extrajudicial statements made by the respondent child.

2.3.2 State Law

2.3.2.1 Interrogating or Questioning a Child

Section 32A-2-14(C) provides that “[n]o person subject to the provisions of the Delinquency Act who is alleged or suspected of being a delinquent child shall be interrogated or questioned without first advising the child of the child’s constitutional rights and securing a knowing, intelligent and voluntary waiver.” The New Mexico Supreme Court has held that this language provides greater protection to children than is mandated by *Miranda v. Arizona*. *State v. Javier M.*, 2001-NMSC-030, ¶29.

In *Javier M.*, the Supreme Court held that under §32A-2-14(C) a child has the right to be advised of his or her constitutional rights during investigatory detention, an earlier stage than the federal Constitution requires. The Court considered the plain language of the statute and its history in reaching the conclusion that the statute grants a child more rights than *Miranda v. Arizona*. The Court noted, for example, that the Legislature used much broader terms than *Miranda* triggering terms such as “custody” or “custodial interrogation.” It used terms such as “alleged,” “suspected,” “interrogated” and “questioned.” Given the inclusion of these broad terms in the statute, the Court concluded that “the Legislature did not intend to merely codify *Miranda*, but instead intended to provide protection to children in areas outside the narrow context of custodial interrogation.” *Javier M.*, 2001-NMSC-030, ¶¶28-29.

The Court identified the investigatory detention as the appropriate point at which the statute’s protections are triggered. This is when an officer with a reasonable articulable suspicion briefly detains individuals whom he or she suspects of criminal activity and asks them questions in an attempt to confirm or dispel the officer’s suspicions. The Court reasoned that, “given a child’s possible immaturity and susceptibility to intimidation, a child who is subject to an investigatory detention may feel pressures similar to those experienced by adults during custodial interrogation.” *Id.* ¶37.

According to the Court, law enforcement must inform a child who is subject to an investigatory detention that the child has the right to remain silent. The child must also be advised of the consequences of waiving the right to remain silent, including that anything the child says may be used against the child in court. However, the police officer is not required to advise the child of his right to retain an attorney before questioning because a child does not have a right to an attorney during an investigatory detention. *Id.* ¶¶44-47.

While requiring warnings when the officer asks questions to confirm or dispel the officer’s suspicion that the child has committed a delinquent act, the Court made it clear in *Javier M.* that officers must be free to ask a child questions relating to the officer’s administrative concerns,

such as the child's name or age. *Id.* ¶39. The statute's protections also do not apply when a child, not subject to investigatory detention, answers general on-the-scene questions or when the child makes a voluntary statement. *Id.* ¶40.

Subsequent to the Supreme Court's decision in *Javier M.*, the Court of Appeals decided *State v. Gerald B.*, 2006-NMSC-022, in which it considered whether the lower court should have suppressed statements a child made during a pat-down for weapons. In the course of doing the pat-down search, the officer asked if the child had any syringes with needles. The officer later explained that he did not want to get punctured while searching for weapons. The Court of Appeals concluded that asking the child whether he had any needles, within the context of a valid pat-down search, was proper for the purpose of ensuring the officer's safety and the officer was not required to have issued *Miranda* warnings. *Id.* ¶¶15-19. When the child said he did not have any needles but volunteered that he possessed marijuana, this statement could be admitted since it was volunteered in response to the inquiry about needles. However, the officer's follow-up question about whether the child had any further marijuana went too far under *Javier M.* *Id.* ¶19.

2.3.2.2 Admissibility of Statements or Confessions: Knowing, Intelligent, and Voluntary Waiver Required

Section 32A-2-14(D) provides that no statement or confession by a child may be introduced at a trial or hearing unless the state proves that the statement or confession offered in evidence was elicited after a knowing, intelligent and voluntary waiver of the child's constitutional rights. This provides the remedy for a violation of Subsection C and places the burden on the state to prove that a statement obtained from the child was voluntary. *State v. Javier M.*, 2001-NMSC-030, ¶27.

Subsection E of §32A-2-14 sets forth the statutory standard to be applied when determining whether a child knowingly and voluntarily waived his constitutional rights before police questioning. *State v. Jason F.*, 1998-NMSC-010, ¶18. In determining whether the child knowingly, intelligently, and voluntarily waived the child's rights, the court is to consider:

- the age and education of the respondent;
- whether the respondent was in custody;
- the manner in which the respondent was advised of his or her rights;
- the length of questioning and circumstances under which the respondent was questioned;
- the condition of the quarters where the respondent was being kept at the time of questioning;
- the time of day and the treatment of respondent at the time of questioning;
- the mental and physical condition of the respondent at the time of questioning; and
- whether the respondent had the counsel of an attorney, friends, or relatives at the time of being questioned.

§32A-2-14(E). This list of factors is essentially a codification of the totality-of-circumstances test used to determine whether an adult defendant gave a knowing and voluntary confession. *Javier M.*, 2001-NMSC-030, ¶27; *Jason F.*, 1998-NMSC-010, ¶18.

Chapter 26 on Evidence summarizes cases addressing the admissibility of evidence based on the state's claim that a child knowingly, intelligently, and voluntarily waived his or her constitutional rights.

2.3.2.3 Inadmissibility of Statements of Children Under 13

No confessions, statements, or admissions of any kind may be introduced against a child under 13 years old on the allegations of the petition. §32A-2-14(F).

According to the New Mexico Supreme Court in *State v. Jade G.*, this is so regardless of whether the statements were made in a custodial setting or whether the statements were made to a person in a position of authority. Subsection F provides complete protection to children under 13, and does not allow the State under any circumstances to introduce the confessions, statements, or admissions of individuals under 13 regardless of when and to whom they were made. 2007-NMSC-010, ¶16.

The Court noted that excluding all statements of children under the age of 13 is compatible with the legislative purpose of protecting the very young and furthers the goal of encouraging free communication between children and adults. *Id.* ¶19.

2.3.2.4 Presumption of Inadmissibility of Statements of Children 13 to 14 Years Old

If a child is 13 or 14 years old, there is a rebuttable presumption that any confessions, statements, or admissions made by the child to a person in a position of authority are inadmissible. §32A-2-14(F). A person in a position of authority has been described broadly to include parents, other adult relatives, employers, private security guards, or teachers. When determining whether the state has rebutted the presumption of inadmissibility, the child's maturity and intelligence are appropriate factors to consider. *State v. Adam J.*, 2003-NMCA-080, ¶16 (Alarid, J., specially concurring).

If the state fails to show that the child is more intelligent or mature than the average 13 or 14 year old, then the state cannot overcome the presumption against admissibility. The children's court may consider the personal traits of the child when determining whether the child differs from the expectations adopted in the presumption and is capable of making a knowing, intelligent, and voluntary waiver. Traits that might be considered include, for example, the child's background, maturity, intelligence, ability to understand and react to new situations. *Adam J.*, 2003-NMCA-080, ¶8.

Limiting the admissibility of statements made by a 13 or 14 year old child reflects the legislature's expectation that most children of that age are not capable of making a knowing, intelligent and voluntary waiver, and its attempt to draw a line based on age between children who are too young to waive their rights and children who are not. *Adam J.*, 2003-NMCA-080, ¶8; *see also State v. Jonathan M.*, 109 N.M. 789, 791 P.2d 64 (1990).

2.3.2.5 Corroborated Extrajudicial Admissions or Confessions

An extrajudicial admission or confession made by the child may only be used to support a finding that a child committed delinquent acts alleged in the petition if the admission or confession is corroborated by other evidence. §32A-2-14(G).

2.3.2.6 No Fingerprinting or Photographing Children Under 13 Years Old

A child under the age of 13, alleged or adjudicated to be a delinquent child, may not be fingerprinted or photographed for identification purposes unless a court order is obtained. §32A-2-14(I). A child is alleged to be a delinquent child and the requirement of a “court order” is triggered once a formal petition alleging delinquency has been filed in the children’s court. *State v. Jade G.*, 2007-NMSC-010, ¶29.

2.4 Search and Seizure and the Exclusionary Rule

2.4.1 Unreasonable Search and Seizure

Juveniles have a right to be free from unreasonable searches and seizures under both the federal and state constitutions. For example, for investigatory detention to be permissible “there must be a reasonable and articulable suspicion ‘that the law is being or has been broken.’ A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law.” *State v. Jason L.*, 2000-NMSC-018, ¶20 (citation omitted).

State v. Pablo R., 2006-NMCA-072, addressed school searches. The Court of Appeals applied the two prong test established by the U.S. Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 341-43 (1985), to determine whether a search of a student conducted by school officials is reasonable. The two questions were: (1) whether the search was justified at its inception and (2) whether the search, as conducted, was reasonably related in scope to the circumstances which justified the search in the first place. In *Gage R.*, decided in 2010, the Court of Appeals further refined the law on school searches, finding that the search of a group of students gathering at the “smoker’s corner,” without reason to suspect that any particular student is in possession of contraband, was not constitutionally sound. The court remanded the case to the district court for a determination on whether the search was justified by an individualized and particularized suspicion. *State v. Gage R.*, 2010-NMCA-104. The court held that “even assuming a lessened expectation of privacy, some articulable facts that focus suspicion on a specific student must be demonstrated before any school search can be carried out.” *Id.* ¶19.

2.4.2 Exclusionary Rule

Courts have interpreted the New Mexico Constitution as providing enhanced protection to both adults and juveniles with regard to the exclusionary rule, under which evidence obtained during an unreasonable search or seizure is excluded from consideration at the trial or adjudicatory hearing. Under federal law, the exclusionary rule stemming from the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution is not itself a constitutional right but rather a judge-made

doctrine that prohibits the government's use of evidence obtained through unconstitutional searches or seizures. State law differs.

In *State v. Gutierrez*, the New Mexico Supreme Court held that the exclusionary rule was a right under Art. II, §10 of the state Constitution. If evidence is seized in violation of the New Mexico Constitution, it is inadmissible under the Constitution.

The exclusionary rule imposes the template of the constitution on the entire warrant-issuing process. Because the good-faith exception to the federal exclusionary rule is incompatible with the constitutional protections found under Article II, Section 10, the fruits of the search conducted in violation of the New Mexico Constitution in this case must be suppressed.

116 N.M. 431, 447, 863 P.2d 1052, 1068 (1993).

The exclusionary rule applies to juveniles as well as adults. In New Mexico a child has the right to have evidence that is illegally obtained by the government excluded as evidence in delinquency proceedings. See, e.g. *State v. Paul T.*, 1999-NMSC-037, ¶24.

The Court of Appeals has held that the exclusionary rule applies to probation revocation hearings as consistent with the state constitutional protection accorded by the rule. *State v. Marquardt*, 1997-NMCA-090, ¶17. On the other hand, the appellate court has held that the rule does not apply in school disciplinary proceedings. *Scanlon v. Las Cruces Public Schools*, 2007-NMCA-150, ¶10.

2.5 Advisement of Rights

A child must be advised of the child's rights at his or her first appearance before the court on a petition under the Delinquency Act. The child must be advised of:

- the offense charged;
- the penalty provided by law for the offense charged;
- the right, if any to bail;
- the right if any, to trial by jury;
- the right to the assistance of counsel at every stage of the proceeding;
- the right, if any, to representation by an attorney at state expense;
- the right to remain silent, and that any statement made by the respondent child may be used against the respondent child; and,
- the right, if any, to a preliminary examination.

§§32A-2-14, 32A-1-16(B); Rule 10-224. However, failure to advise a child of his or her rights is not reversible unless the child shows that he was prejudiced by the failure. *In the Matter of Doe*, 88 N.M. 481, 542 P.2d 61 (Ct. App. 1975).

2.6 Allocation

A child has the right to address the children's court before a juvenile disposition. This is referred to as the right of allocation. The right of allocation is a right recognized at common law. The Court of Appeals has ruled that the right of allocation is one of the basic rights that should be afforded to children in delinquency proceedings pursuant to the guarantee in the Children's Code that children have "the same basic rights as an adult." *State v. Leyba*, 2009-NMCA-030, ¶27 (citing *State v. Setser*, 1997-NMSC-004, ¶20, n.1); *State v. Ricky G.*, 110 N.M. 646, 647, 798 P.2d 596, 597 (Ct. App. 1990).

In *Ricky G.*, the New Mexico Court of Appeals acknowledged the right of allocation in adult felony cases, finding that " '[t]here is no substitute for the impact on sentencing which a defendant's own words might have if he chooses to make a statement.' " The Court found that this right is even more important in children's court cases:

The child's own view of the situation, his willingness to accept responsibility for it, and his remorse or lack thereof is, or at least should be, an important consideration in determining an appropriate program of care, supervision, and rehabilitation. Moreover, by inviting the child to participate directly in the dispositional hearing, the children's court indicates that the child's views are relevant and material. That message may have rehabilitative value.

Ricky G., 100 N.M. at 648, 798 P.2d at 598. The Court found that the child is entitled to address the court, even though adults are not entitled to address the court in misdemeanor cases, because a child charged with a delinquent act faces charges that are comparable in seriousness to a felony prosecution. To assure that this right is protected, the children's court should offer a child the opportunity to address the court before pronouncing sentence, and should not require the child to request this opportunity. *Id.* at 648-649, 798 P.2d at 597-598.

2.7 Pre-Trial Detention and Bail

The U.S. Supreme Court held in *Schall v. Martin* that pretrial detention of juveniles does not violate the Due Process Clause of the 14th Amendment as long as the detention is for a strictly limited time before trial. The Supreme Court viewed a finding that a juvenile is a serious risk to society and likely to commit a crime before trial as adequate to support pretrial detention of the juvenile. The Court found that the procedural safeguards in the challenged law authorizing pretrial detention of juveniles provide sufficient protection against erroneous and unnecessary deprivations of liberty. The challenged law's protections included the requirements of notice, a hearing, a statement of facts and reasons given to the juvenile prior to any detention, and a formal probable cause hearing shortly thereafter, as well as post-detention procedures, including habeas corpus review, appeals, and motions for reconsideration. 467 U.S. 253, 281 (1984).

According to §32A-2-14(M) of the Children's Code, a child held in a juvenile detention facility prior to adjudication does not have a right to bail but may be released as provided in the Delinquency Act. At the other end of the spectrum, a serious youthful offender detained in an adult facility prior to trial has a right to bail as provided in Rule 5-401 of the Rules of Criminal

Procedure. §32A-2-14(M). A delinquent or youthful offender detained in an adult facility would presumably have this same right.

Subsection M does not refer specifically to youthful offenders held in juvenile facilities. However, bail may be available under the Rules of Criminal Procedure, which are made applicable to cases in which adult sanctions are being sought by Rule 10-101(A)(2) of the Children's Court Rules. *See State v. Jones*, 2010-NMSC-010, ¶32 n. 2.

2.8 Trial by Jury

2.8.1 Federal Constitution

The U.S. Supreme Court held in *McKeiver v. Pennsylvania* that the right to trial by jury under the Sixth Amendment is not applicable to delinquency proceedings, finding that a jury trial is not necessary to assure "fundamental fairness." 403 U.S. 528 (1971).

2.8.2 State Law

2.8.2.1 Right to Jury Trial

A juvenile has a right to a trial by jury under the New Mexico Constitution and the Children's Code. Art. II, §12 of the state Constitution states in pertinent part: "The right of trial by jury *as it has heretofore existed* shall be secured to all and remain inviolate." (Emphasis added.) In *Peyton v. Nord*, the Supreme Court noted that, before the adoption of the first juvenile code, a minor charged with having committed a criminal offense was handled no differently than an adult and would have been entitled to a jury trial before he could have been imprisoned. 78 N.M. 717, 723, 437 P.2d 716, 722 (1968). The Court concluded that the juvenile in *Peyton*, who was charged with a count that would be a felony if committed by an adult, was entitled to a jury trial under Art. II, §12.

Whether the right to jury trial in *all* proceedings in juvenile court is guaranteed by either the federal or state constitutions need not be decided in this case. Whatever the correct answer to that question may be, under the facts here present petitioner is guaranteed a jury trial by our Constitution. This is true whether or not the *Fourteenth Amendment of the United States Constitution* would also require it.

78 N.M. at 723, 437 P.2d at 722 (emphasis in the original). *Peyton v. Nord* predates the decision *McKeiver* but the New Mexico Supreme Court has continued to hold that juveniles have a constitutional right to a jury trial under the state Constitution. *See State v. Eric M.*, 1996-NMSC-056.

Under the Delinquency Act, a child has the right to a jury trial when the offense alleged would be triable by jury if committed by an adult. §32A-2-16(A). According to a 1977 Court of Appeals case, this phrase meant a "district court offense." *State v. Doe*, 90 N.M. 776, 777, 568 P.2d 612, 614 (Ct. App. 1977). An adult defendant has a constitutional right to a jury trial when the statute or statutes under which the defendant is charged pose a potential loss of liberty

exceeding six months. *State v. Grace*, 1999-NMCA-148, ¶5. Petty misdemeanors carry with them a potential term of imprisonment not to exceed six months. §31-19-1(B). Hence, it appears that a jury trial is not required in children's court for a petty misdemeanor, even though the potential penalty for a child would be the same whether the misconduct were a felony, a misdemeanor, or a petty misdemeanor. *State v. Ricky G.*, 110 N.M. 646, 652, 798 P.2d 596, 602 (Ct. App. 1990) (Hartz, J., specially concurring).

A respondent child has a right to a six member jury, unless the children's court attorney has filed a notice to invoke adult sanctions. In that case, the child is entitled to a 12 person jury. Under the Delinquency Act the jury's function is limited to that of trier of the factual issue of whether the child committed the alleged delinquent acts. §32A-2-16(A).

In *State v. Rudy B.*, 2010-NMSC-045, the New Mexico Supreme Court held that the right to jury trial does not apply to amenability determinations in youthful offender proceedings under §32A-2-20. In so holding, the Court reversed the decision of the Court of Appeals that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires a jury determination of the facts necessary to impose an adult sentence. *Apprendi* held that, except for the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. *Rudy B.*, ¶20. In a lengthy opinion, the New Mexico Supreme Court concluded, in sum, that "because the amenability determination historically has not been made by the jury, applying *Apprendi* would interfere unnecessarily with New Mexico's traditional discretion in administering a system of juvenile justice." *Id.* ¶59.

2.8.2.2 Procedure: No Written Demand Required

A respondent child is not required to make a written demand for a jury trial in a delinquency proceeding. Rather, a jury will be provided unless the child makes a knowing and voluntary waiver of the right. Rule 10-245; see *State v. Eric M.*, 1996-NMSC-056, ¶¶9-10; *State v. Doe*, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980).

The state does not have a right under the Children's Code to demand a jury trial in a delinquency proceeding or to object to a child's waiver of the right to a jury trial. This differs from adult criminal proceedings, in which the state has a right of concurrence with a defendant's decision to waive a jury trial. See *In the Matter of Christopher K.*, 1999-NMCA-157, ¶¶3-4.

2.9 Confrontation Clause

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution (applied to states through the 14th Amendment) and Art. II, §14 of the New Mexico Constitution afford criminal defendants the right to cross-examine witnesses against them. *In re Gault* extended to juveniles the Sixth Amendment right to confront and cross-examine witnesses in delinquency proceedings. 387 U.S. 1, 56 (1968).

As discussed in more detail in Chapter 26 on Evidence, New Mexico courts have ruled in the following cases that a child's right of confrontation under the Sixth Amendment and Art. II, §14, was violated:

- *State v. Stephen F.*, 2008-NMSC-037. The children's court refused in a rape case to permit the child to cross examine his accuser regarding a prior incident related to the alleged victim's past conduct, pursuant to the rape shield law and Rule 11-413 of the Rules of Evidence. The New Mexico Supreme Court ruled that the children's court's refusal to permit cross-examination violated the child's right to confrontation. The Court applied a five factor framework developed in the criminal case *State v. Johnson*, 1997-NMSC-036, to a delinquency case to determine whether the child's right of confrontation would be impermissibly violated by the exclusion of evidence.
- *State v. Benny E.*, 110 N.M. 237, 241-242, 794 P.2d 380, 384-385 (Ct. App. 1990). The Court of Appeals recognized that the procedure for videotaped depositions, *see* Rule 10-234, has been held to be consistent with the Sixth Amendment right of confrontation, *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985). It also stated that the children's court must carefully consider the child's Sixth Amendment right in light of any unreasonable mental or emotional harm the victim will suffer if required to testify in open court in the child's presence.
- *In the Matter of Troy P.*, 114 N.M. 525, 842 P.2d 742 (Ct. App. 1992). The Court of Appeals found that the trial court's admission of a videotape of a victim talking to a social worker concerning allegations of sexual abuse by the respondent child under the residual exception to the hearsay rule violated the respondent child's right to confrontation and was reversible error.

2.10 Proof Beyond Reasonable Doubt

In *In re Winship*, the U.S. Supreme Court held that with respect to juveniles as well as adults, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358, 364 (1970).

The right to proof beyond a reasonable doubt at trial gives the state the burden of proving basic elements of the criminal charge and does not allow shifting the burden of proof to the defendant regarding any essential elements of the defense. The same applies to juvenile proceedings. Nowak & Rotunda, *Constitutional Law*, §13.4, pp. 650-651 n.11 and n. 13 (8th Ed. 2010).

2.11 Right Not to Be Tried While Incompetent

A child has a right not to be tried while incompetent. *See In the Matter of Daniel H.*, 2003-NMCA-063, ¶¶19, 26. The law has long acknowledged that a person who, as a result of his mental condition, lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, may not be subjected to a trial. *State v. Flores*, 2005-NMCA-135, ¶15 (*citing Drope v. Missouri*, 420 U.S. 162, 171 (1975)). The New Mexico Supreme Court has recognized that "it is a violation of due process to prosecute a defendant who is incompetent to stand trial." *State v. Rotherham*, 122 N.M. 246, 252, 923 P.2d 1131, 1137 (1996). The New Mexico Legislature and the Supreme Court have adopted statutes and rules that provide a procedural means for enforcing the right not to be tried while incompetent. *See* §32A-2-21(G); Rule 10-242; *see* Chapter 26, Competency.

2.12 Speedy Trial

“The right to a speedy trial is a fundamental right of the accused.” *State v. Garza*, 2009-NMSC-038, ¶10. The right applies in delinquency proceedings. *In the Matter of Darcy S.*, 1997-NMSC-026, ¶16.

When determining whether a defendant’s right to a speedy trial has been violated, New Mexico courts have adopted the balancing test from the U.S. Supreme Court case of *Barker v. Wingo*, 407 U.S. 514 (1972), which weighs the conduct of both the prosecution and the defense and considers:

- the length of the delay;
- the reasons for the delay;
- the assertion of the right; and
- the actual prejudice to the defendant that on balance determines whether the right has been violated.

Garza, 2009-NMSC-038, ¶13. In *Garza*, the New Mexico Supreme Court found that, while a defendant must generally show particularized prejudice to prevail on a speedy trial claim, the defendant need not show prejudice if the length and reasons for the delay weigh heavily in the defendant’s favor and defendant has asserted his right and not acquiesced in the delay. *Id.* ¶39.

In the earlier *Todisco* case, the Court of Appeals assumed, without deciding, that the speedy trial right in the Sixth Amendment of the U.S. Constitution and Art. II, §14 of the New Mexico Constitution applies to sentencing proceedings for a juvenile. It applied the four-factor balancing test from *Barker* to determine whether the child’s right to a speedy trial was violated. *State v. Todisco*, 2000-NMCA-064, ¶¶18-19.

The *Todisco* Court pointed out that sentencing delays involve different considerations than those related to pre-trial delay. The alteration of a child’s status from accused and presumed innocent to guilty and awaiting sentence is significant and must be taken into account when applying the balancing test to speedy sentencing claims. *Todisco*, ¶23. The interests that the speedy trial guarantee is designed to protect “‘diminish or disappear altogether once there has been a conviction,’” and society’s interests increase. Hence, for speedy sentencing claims, “the prejudice claimed by the defendant must be ‘substantial and demonstrable.’ ” *Id.* (quoting *Perez v. Sullivan*, 793 F.2d 249, 253 (10th Cir. 1986)).

The remedy for violating the right to a speedy trial is dismissal. *Strunk v. U.S.*, 412 U.S. 434 (1973).

2.13 Double Jeopardy

The U.S. Supreme Court has ruled that the federal Fifth Amendment right to be free of double jeopardy for the same offense applies to juvenile proceedings. Jeopardy attaches at the commencement of a juvenile proceeding, barring a subsequent criminal trial for the same offense. *Breed v. Jones*, 421 U.S. 519, 531 (1975).

2.14 Death Penalty and Life Sentences

The U.S. Supreme Court ruled in *Roper v. Simmons* that a juvenile may not be put to death for crimes committed while he or she was under 18 years of age. 543 U.S. 551 (2005). The *Roper* case is discussed in further detail in Chapter 1. New Mexico statutory law also prohibits the death penalty for children who were not the age of majority when the crime was committed. §31-18-14. The New Mexico Legislature extended its death penalty prohibition to adults in 2009. *Id.*

In 2010, in *Graham v. Florida* the U.S. Supreme Court held that the Eighth Amendment of the U.S. Constitution does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide offense. The Court stated that “[n]o recent data provide reason to reconsider *Roper*’s holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment.” 130 S.Ct. 2011, 2026 (2010).

Prior to *Graham*, in 2002 the New Mexico Supreme Court ruled that a sentence of life imprisonment with good time credit eligibility for a juvenile convicted of first degree depraved mind murder was not cruel and unusual punishment because it was authorized by statute and not constitutionally disproportionate to the crimes involved. *State v. Trujillo*, 2002-NMSC-005, ¶66. Since *Trujillo*, other cases have involved claims that life sentences imposed on juveniles committing first degree murder are cruel and unusual punishment under the Eighth Amendment, but the claims have not been decided due to a failure to properly preserve the issue below. See *State v. Chavarria*, 2009-NMSC-020.

2.15 Appeal and Habeas Corpus

A child has a right under the New Mexico Constitution and Children’s Code to appeal a judgment to the Court of Appeals. Art. VI, §2; §32A-1-17. At the time of disposition in a case that has gone to an adjudicatory hearing on a denial of the allegations of the petition, the court must advise the child of the right to appeal and the right of a person who cannot afford an appeal to proceed at state expense. If the judge fails to advise the child of this right, then the time for taking an appeal is tolled. Rule 10-251(B).

The child has a right to petition a court for a writ of habeas corpus, and the provisions of the Delinquency Act may not be interpreted to limit that right. §32A-2-14(N).

CHAPTER 3

KEY CONCEPTS

This chapter covers:

- Goals of Delinquency Act
- Disproportionate minority contact
- Gender responsiveness
- Juvenile Detention Alternatives Initiative
- Cambiar New Mexico
- NCJFCJ Guidelines for Judges

3.1 Goals of Delinquency Act

3.1.1 Non-Criminal Nature of Delinquency Proceedings

The juvenile justice system, including the terminology used and sanctions employed, embodies the concept that juvenile delinquents are not criminals. One of the primary purposes stated in the Delinquency Act is “consistent with the public interest, to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions....” §32A-2-2(A).

A judgment on a petition under the Delinquency Act resulting in a juvenile disposition is not deemed a conviction of a crime nor does it impose any civil disabilities ordinarily resulting from a criminal conviction or operate to disqualify the child in any civil service application or appointment. The disposition of a child and any evidence given in a court hearing is generally not admissible as evidence against the child in any case or proceeding in any other tribunal. §32A-2-18(A). Juvenile dispositions, even when crimes of a serious nature have been committed, are limited to commitment to the age of 21. §32A-2-19. The Delinquency Act’s provisions on the effect of juvenile judgments and dispositions and the juvenile dispositions authorized “reflect the Legislature’s intent to insulate delinquent children from the potentially life-long consequences under the adult criminal justice system that may flow from a bad decision.” *State v. Jones*, 2010-NMSC-012, ¶37.

3.1.2 Delinquency Act’s Emphasis on Rehabilitation

Another important concept underlying the juvenile justice system is the notion that juveniles have a greater potential for rehabilitation and should have the opportunity to be rehabilitated. In

two cases decided in 2010, the New Mexico Supreme Court emphasized the rehabilitative purposes of the Delinquency Act. In *State v. Jones*, the Court stated that the history of the Delinquency Act reflects “an evolving concern that children be treated as children so long as they can benefit from the treatment and rehabilitation provided for in the Delinquency Act.” 2010-NMSC-012, ¶32. Unlike the adult criminal justice system, which places emphasis on punishment and deterrence, the juvenile justice system “ ‘reflects a policy favoring the rehabilitation and treatment of children.’ ” *Id.* ¶35, (citing *State v. Jose S.*, 2007-NMCA-146, ¶16).

In *State v. Tafoya*, the Supreme Court found that New Mexico’s “strong policy of encouraging rehabilitation of juvenile offenders” applies even to serious youthful offenders sentenced as adults. The Court stated that, although the Legislature intended to treat serious youthful offenders as adults, not children, “the clear grant of discretion in sentencing serious youthful offenders, set forth in Sections 31-18-15.3(D) and 31-18-13(A), underscores the Legislature’s intent to treat serious youthful offenders as individuals who may be rehabilitated.” *Tafoya*, 2010-NMSC-019, ¶18.

The focus on rehabilitation is based on the assumption that the character of juveniles is less formed than that of adults and has more potential for reform. *Id.* (“Our legal system does not consider juvenile offenders to be ‘with reliability . . . among the worst offenders’ because youths’ consciences have not fully developed and thus they generally may be rehabilitated” (quoting *Roper v. Simmons*, 543 U.S. 551, 553 (2005)); *Jones*, ¶37 (citing *Roper*, 543 U.S. at 570).

Favoring rehabilitation over punishment and deterrence also derives from recognition by courts and lawmakers that developmental differences have a bearing on a juvenile’s culpability and on appropriate forms of punishment. In the case of *Graham v. Florida*, in which sentences of life without parole for juvenile offenders convicted of non-homicide crimes were held to be unconstitutional, the U.S. Supreme Court found that “[n]o recent data provide reason to reconsider *Roper*’s holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment.” 130 S. Ct. 2011, 2016 (2010). The focus on developmental differences of juveniles is reflected in recent amendments to the Delinquency Act, which now require a judge to consider such factors as the child’s brain development, trauma history, disability, as well as social and emotional health, when determining whether a youthful offender is amenable to treatment and eligible for juvenile as opposed to adult sanctions. See §32A-2-20(C)(5).

3.1.3 Public Interest and Safety

While the juvenile system places more emphasis on rehabilitation than the adult system, some believe that the “juvenile justice system has increasingly concerned itself with accountability and protection of the public, narrowing the gap between the two approaches.” *State v. Gonzales*, 2001-NMCA-025, ¶67 (Bustamante, J., specially concurring). The following statutory and rule provisions, some enacted recently, are examples of laws referring to the public safety or public interest as an important factor to be considered in delinquency-related proceedings:

- Before the Children’s Court Attorney (CCA) files a petition alleging delinquency, the CCA must determine and endorse upon the petition “that the filing of the petition is in the best interest of the public and the child.” §32A-2-8.
- The judge may enter a judgment extending or modifying the original judgment if the action is necessary to safeguard the child or the public interest. §32A-2-23(G).
- Enacted in 2009, the definition of “supervised release,” formerly referred to as “parole,” specifies that supervised release includes “conditions to protect public safety and promote successful transition and reintegration into the community.” §32A-2-3(I).
- Before deciding to terminate a child’s commitment early, agency rules require consideration of whether the public safety would be compromised. 8.14.2.12(F) NMAC.
- Recently enacted statutory provisions require notification to judges, district attorneys, and victims of the pending release or escape of a juvenile offender. §31-26-12(D); §31-26-11.

Two measures driven in particular by the concern with public safety are the Sex Offender Registration and Notification Act (SORNA), §§29-11A-1 *et seq.*, and provisions of the Delinquency Act authorizing juveniles to be sentenced as adults in certain cases.

As discussed in Chapter 31 of this Handbook, the Legislature amended SORNA in 2008 to delete from the definition of sex offender the requirement that a sex offender be a person 18 years of age or older. *Compare* §29-11A-3 (2003) *with* §29-11A-3 (2007). This means that youthful offenders who have been given adult sanctions are now subject to the Act’s requirements. Critics would argue that the requirement that juveniles register as sex offenders undermines rehabilitation, as it stigmatizes a youth by labeling him or her a sex offender and closing available doors for treatment and involvement in the community.

Before sentencing a youthful offender as an adult, §32A-2-20(B) of the Delinquency Act requires the judge to determine that the child is not amenable to treatment as a child in available facilities and not eligible for commitment to an institution for children with mental disorders or developmental disabilities. In making these findings, the judge, under §32A-2-20(C), must consider a number of factors relating to public safety and balance the interests in giving youth an opportunity to be rehabilitated with the protection of the public. Sentencing a child as an adult allows for a lengthy prison term, which results in a much longer separation of the individual from society at large.

As noted by then Judge Bosson (now Justice Bosson) in *State v. Ira*, judges may feel they need to err on the side of public safety when determining whether a child should receive a juvenile or adult sentence due to the lack of sentencing alternatives. However, once sentenced as an adult, a juvenile will serve a lengthy sentence in the presence of adults, diminishing his or her opportunity for rehabilitation. Judge Bosson advocated amendments to the Delinquency Act to permit a sentencing scheme that would enable a youth to be given juvenile sanctions on a conditional basis, and at the end of the term, the juvenile’s progress during commitment would be reviewed to determine whether adult sanctions are necessary. 2003-NMCA-080, ¶¶47-49 (Bosson, J., specially concurring).

3.1.4 Role of Brain Science in Recent Delinquency Jurisprudence

As touched on above, the juvenile justice system is based on the premise that juvenile delinquents are fundamentally different from adult criminals, and that they need to be held accountable in appropriate ways, as their conduct “ ‘is not to be measured by the same standard as that of a matured person.’ ” *State v. Adam J.*, 2003-NMCA-080, ¶18 (Alarid, J., specially concurring) (citations omitted). This principle is echoed in one of the stated goals of the Delinquency Act, which is to hold children “accountable for their actions to the extent of [their] age, education, mental and physical condition, background and all other relevant factors” §32A-2-2(A).

As acknowledged in *Adam J.*, recent research addressing the differences between the cognitive development of youth and adults has confirmed the “common knowledge” about youth development. *Id.* ¶19. The analysis in *Adam J.* reflects the current trend of courts citing research on the developmental differences of youth as support for the conclusion that juveniles have diminished culpability as well as greater potential for reform. As discussed in Chapter 1, the U.S. Supreme Court in *Roper v. Simmons* cited brain science relating to the differences between juveniles and adults, including lack of maturity and responsibility, vulnerability to peer pressure, and more transitory, less-fixed personality traits, in support of its finding that juveniles cannot be classified as the worst offenders and its ultimate conclusion that imposing the death penalty on offenders under the age of 18 is cruel and unusual punishment under the U.S. Constitution. *Roper*, 543 U.S. 551, 569 (2005).

3.2 Disproportionate Minority Contact

Disproportionate minority contact (DMC) refers to research and data showing that minority youth are overrepresented in the juvenile justice system and that the experience of youth of color in the system often differs from that of white youth when objective criteria of offense and offense history are held constant. Differential treatment has sometimes resulted in a higher likelihood of incarceration or increased length of incarceration. African American, American Indian, and Hispanic youth are the three populations that are most often identified as having disproportionate contact with the juvenile justice system. *See* Disproportionate Minority Contact Technical Assistance Manual, 4th Ed., available from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) at: http://www.ncjrs.gov/html/ojjdp/dmc_ta_manual.

In New Mexico, a Blue Ribbon Panel on Disproportionate Minority Contact worked for several years to identify and understand the problem and consider how to address it, with the goal being to eliminate the problem of discrimination in all segments of the juvenile justice system. Based on the data, the Panel determined that youth of color are more likely to be arrested, more likely to be detained in a juvenile detention center, more likely to be prosecuted in court, more likely to face adult sanctions, and, if given juvenile sanctions, more likely to be committed to a Children, Youth and Families (CYFD) facility. Currently, the New Mexico Sentencing Commission is working with CYFD to identify best practices for reducing DMC.

The OJJDP manual cited above contains recommendations for addressing DMC in the juvenile justice system. In particular, the manual has a chapter discussing the needs of Hispanic youth. The recommendations in the manual include the following:

- Provision of language-accessible and culturally appropriate services for Hispanic youth and their families that maximize parents' understanding of the legal process and support their participation as fully as possible in planning for the youth, and provide families with the services they need;
- Improvement in the assessment of language access needs of youth and their families;
- Improvement in access to services that meet the linguistic needs of youth and families;
- Addressing barriers to educational success for Hispanic youth, including language proficiency issues, lack of educational advocacy assistance, and lack of academic supports;
- Improving relationships of youth and their parents with the school and probation systems through providing bilingual probation staffing, services, and information to ensure that youth are enrolled in and attend school;
- Providing more intensive probation supervision; and
- Exploring new ways to increase families' understanding of the juvenile justice system and support parents in their efforts to help their children succeed during their probation.

In 2007, the New Mexico Legislature amended the purpose section of the Delinquency Act to include eliminating or reducing disparities based upon race. §32A-2-2. In 2009, the general provisions of the Children's Code were amended to add a definition of disproportionate minority contact: "the involvement of a racial or ethnic group with the criminal or juvenile justice system at a proportion either higher or lower than that group's proportion in the general population." §32A-1-4(G). So far there have been no amendments to the Children's Code making these concepts operational in specific ways. Nonetheless, their inclusion in the Code reflects a legislative concern with overrepresentation of minority youth in the juvenile justice system.

3.3 Gender Responsiveness

Over the past few decades, girls have been the fastest growing group in the juvenile justice system around the country. This trend was occurring even as the overall rate of juvenile offending was declining. In 1980, females represented 11 percent of juvenile arrests for violent offenses. By 2000, that proportion had grown to 18 percent, and by 2004 it had risen to 30 percent. Even though arrest rates remained higher for boys than for girls during that period, arrest rates for girls increased while rates for boys decreased. Because girls had been such a small group within the juvenile justice system, there was little research on the reasons for girls' delinquency or how to address it. One question being asked was whether girls were becoming more violent or were other reasons to account for the increase in arrest rates. *Girls Delinquency*, OJJDP in Focus, February 2010.

In 2004, OJJDP convened the Girls Study Group to gain a better understanding of girls' involvement in delinquency and to guide the development, testing and dissemination of strategies to reduce incidents of delinquency and violence among girls. The group found that a number of factors influence girls' behavior more strongly than boys' behavior. For girls, key

risk factors for delinquency and incarceration are family dysfunction, trauma and sexual abuse, mental health and substance abuse problems, high-risk sexual behaviors, school problems and affiliation with deviant peers. Physical abuse and sexual abuse contribute to male involvement in delinquency as well but girls are more likely to have been abused. *Resilient Girls – Factors That Protect Against Delinquency*, Hawkins et al, published by OJJDP, January 2009 (<http://www.ojjdp.gov/programs>).

With regard to the increase in arrest rates, the Girls Study Group found that pro-arrest laws and changes in law enforcement policy may have had more of an impact on arrest rates than changes in girls' behavior. *The Girls Study Group – Charting the Way to Delinquency Prevention for Girls*, Zahn et al., published by OJJDP, October 2008. Detention policies and other responses of the juvenile justice system may have also disproportionately impacted girls. Rather than being detained because they pose a threat of violence, they may be detained to protect themselves from perceived harm in their environments.

One of the purposes of the New Mexico Delinquency Act is to eliminate or reduce disparities based upon gender as well as race. §32A-2-2. Added in 2007, this purpose reflects a growing recognition of the need to ensure that girls are not coming into the juvenile justice system unnecessarily and to meet the needs of the girls who are in the system. Two examples of efforts to respond to the challenges faced by girls are the Program for the Empowerment of Girls (PEG), a court-sponsored program in the Second Judicial District, and the Girls Probation Unit in Albuquerque. Also, the Juvenile Justice Advisory Committee has been funding a number of Girls' Circles around the state; these are structured support groups intended to instill self-confidence and improve girls' interpersonal relationships. See *A Review of Juvenile Justice Programs in New Mexico*, New Mexico Sentencing Commission, July 2010 (<http://nmssc.unm.edu>). Work continues to be done to better understand the needs of girls in the delinquency system and design programming to meet those needs.

3.4 Juvenile Detention Alternatives Initiative

The vision of the national Juvenile Detention Alternatives Initiative (JDAI) is that all youth involved in the juvenile justice system have opportunities to develop into healthy, productive adults. JDAI focuses on juvenile detention because youth are often unnecessarily or inappropriately detained, with long-lasting negative consequences for both public safety and youth development.

JDAI promotes changes to policies, practices, and programs to:

- reduce reliance on secure confinement;
- improve public safety;
- reduce racial disparities and bias;
- save taxpayers' dollars; and
- stimulate overall juvenile justice reforms.

Launched by the Annie E. Casey Foundation in 1992, the Juvenile Detention Alternatives Initiative has demonstrated that jurisdictions can safely reduce reliance on secure detention.

There are now approximately 100 JDAI sites in 24 states and the District of Columbia, including New Mexico.

The Bernalillo County Youth Services Center is a JDAI Model Site. The Bernalillo County JDAI has reduced the population in detention by 44 percent by reorganizing its resources, budget, and staff to focus on community-based treatment and policies that cost taxpayers less money. Adhering to JDAI concepts has also allowed the CYFD to close its maximum-security facility in 2003. Some of the cost savings went into acquiring portable buildings outside the detention center's razor-wire fence to house an alternative public school, a community-custody program, a day treatment program, and a mental health clinic. See the JDAI website, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx>.

3.5 Cambiar New Mexico

An important initiative to CYFD has been Cambiar New Mexico, which shifts the focus in secure facilities from commitment and punishment to rehabilitation and relationships. Initiatives within this larger initiative include:

- implementing youth-centered unit management and milieu therapy focusing on smaller and safer living units;
- developing individualized service plans addressing the carefully assessed needs, strengths, and risks of all clients;
- staffing facilities with youth care specialists trained in the clinical and therapeutic skills necessary to properly serve the clients in their care; and
- continuing, as part of a long-term strategy to implement Cambiar, to plan and develop smaller secure regional facilities across the state.

2010-2011 CYFD Strategic Plan, p. 7 (<http://www.cyfd.org/node/13>).

CYFD has looked to the successful “Missouri model” for inspiration and the nonprofit Missouri Youth Services Institute has been providing training and otherwise assisting CYFD to implement the New Mexico program. Beginning with the John Paul Taylor Center in Las Cruces and then YDDC in Albuquerque, CYFD has been training staff in the new model and remodeling the facilities to permit youth to live in small 12 person units. The overall emphasis is on rehabilitation, treatment and education.

3.6 Juvenile Delinquency Guidelines for Judges

The National Council of Juvenile and Family Court Judges (NCJFCJ) has developed a set of Juvenile Delinquency Guidelines called *Improving Court Practice in Juvenile Delinquency Cases*, which were published in the spring of 2005. The Guidelines do not offer the same type of core principles that were developed for child welfare cases but the Guidelines describe a number of best practices nationally and offer a series of bench cards on the different hearings in a delinquency case. The National Council also offers conferences and training programs for judges hearing these cases. The Guidelines and other resources are available at <http://www.ncjfcj.org>.

CHAPTER 4

CHILDREN’S COURT ATTORNEY

This chapter covers:

- General duties
- Initiation and termination of delinquency proceeding
- Representation during preliminary proceedings and hearings
- Disclosure of information and continuing duty to disclose
- Adult sanctions for youthful offenders
- Involuntary placement and competency issues
- Role after entry of judgment
- Sealing of records
- Obligations under Victims of Crime Act

4.1 Overview

The children’s court attorney (CCA) represents the state in matters arising under the Children’s Code when the state is the petitioner. This includes petitions alleging that a child is a delinquent child. The district attorney (DA) for the judicial district where the delinquency case is tried is, by virtue of his or her office, the CCA. §32A-1-6.

4.2 Structure

The Children’s Code establishes an office of the CCA in each judicial district. The office of the CCA is part of the district attorney’s office. The CCA may delegate children’s court functions to an assistant district attorney if the CCA has sufficient staff and the workload requires such appointment. §32A-1-6(A) and (F).

Some judicial districts have deputy or assistant district attorneys who handle solely children’s court matters. This is the case in Bernalillo County. However, in most judicial districts in New Mexico, the attorneys within the district attorney’s office handle children’s court duties as well as adult criminal or civil duties.

4.3 General Duties

The CCA is bound by the applicable Rules of Professional Conduct and the best interests of the child and public. In addition to the standard duties of a prosecuting attorney, the CCA has the following authority and responsibilities under the Children's Code and Children's Court Rules:

- Represents the state at all adjudicatory hearings and all other stages of a delinquency proceeding, from making the initial determination as to whether a petition should be filed, through post-disposition proceedings involving compliance with plea agreements, consent decrees, conditions of probation and parole, and the sealing of records when a child has not been adjudicated delinquent. *See* Rule 10-244(B).
- Has the duty to ensure that notice of filing the petition is served on all parties. *Martinez v. Mafchir*, 35 F.3d 1486, 1493 (10th Cir. 1994).
- Has authority to enter into plea agreements and time waivers. *See* §32A-2-7(G); §36-1-22 (power to compromise or settle a criminal suit).
- Provides general assistance to law enforcement and the Children, Youth, and Families Department (CYFD) in applying the law during the course of an investigation, formal delinquency proceedings, and post-disposition compliance monitoring. §32A-2-8.
- Is responsible for helping ensure compliance with timelines in the Children's Court Rules and the Delinquency Act for holding adjudicatory hearings and other proceedings related to a delinquency petition.

4.4 Initiation and Termination of Delinquency Proceedings

The CCA is responsible for reviewing the recommendation made by CYFD probation services on whether or not to file a petition, and determining whether there are legally sufficient grounds to file a petition. The CCA is required to furnish legal services in connection with the authorization and preparation of the petition, including signing the petition and endorsing upon the petition that the filing of the petition is in the best interest of the public and child. *See* §32A-1-10(A); §32A-2-8.

Regardless of the recommendations of probation services, the CCA has the final authority to decide whether to file a petition. *See* Rule 10-211 (Committee Commentary). In deciding whether to file charges in a case, the CCA may consider the strength of the evidence, the seriousness of the offense, the child's prior record of contact with the juvenile justice system, and any other relevant factors. *State v. Doe*, 97 N.M. 792, 794, 643 P.2d 1244, 1246 (Ct. App. 1982) (discussing ABA standards for determining the best interests of the public and child.)

The CCA also has the authority, without order of the court, to dismiss a delinquency petition or petition to revoke probation at any time prior to the commencement of the adjudicatory hearing. Rule 10-145(A).

4.5 Representing the State in Preliminary Proceedings

Once a petition is filed, the CCA is responsible for serving the summons along with any other pleading or paper required to be served by the Children's Code or Children's Court Rules pursuant to the requirements of Rule 10-103. The CCA is also responsible for serving and filing other pleadings and papers in accordance with the requirements of Rule 10-104, and signing pleadings, motions, and other papers in accordance with Rules 10-115 and 10-165. The CCA must also ensure compliance with all other procedural and filing deadlines set forth in the Delinquency Act and Children's Court Rules. The CCA represents the state at all adjudicatory hearings. Rule 10-244(B).

Practice Note: Some district attorneys automatically send copies of police reports, etc., to the child's attorney. This causes problems for the state when the defense claims all or part of the discovery was not sent. An alternative would be to notify the defense as to what is in the state's possession and to give the defense an opportunity to inspect and request specific copies. A signed receipt would show what was inspected and provided. The Second Judicial DA documents the number of discovery pages in a given receipt, which defense counsel or his or her representative is required to sign before discovery is handed over. Some DA offices are providing discovery electronically or through access to a database.

4.6 Disclosure of Information and Continuing Duty to Disclose

Unless the CCA plans on filing a notice of intent to invoke adult sanctions against a youthful offender, in which case Rule 5-501 of the Rules of Criminal Procedure for the District Courts would apply, *see* Rule 10-101(A)(2) NMRA, the CCA has a duty to disclose or make available to the respondent within 10 days of the date of filing of a petition, unless a shorter period of time is ordered by the court, the information enumerated in Rule 10-231. Chapter 23 on Discovery and Disclosure, describes the duty in detail.

In these cases, the CCA must file with the court a certificate stating that all of the information required to be disclosed pursuant to Rule 10-231 has been produced, except as specified, including an acknowledgement of the continuing duty to disclose additional information. Again, *see* Chapter 25, Discovery.

Youthful Offender Note: Rules 5-501 and 5-502 of the Rules of Criminal Procedure govern disclosures in youthful offender proceedings and have different triggering dates for the state and defendant to make their required disclosures. The state must make the disclosures enumerated in Rule 5-501 within ten days of arraignment or waiver of arraignment. The defendant must make the disclosures required in Rule 5-502 within thirty (30) days after the date of arraignment or filing of a waiver of arraignment or not less than ten (10) days before trial, whichever date occurs earlier.

4.7 Adult Sanctions for Youthful Offenders

The CCA has the discretion to decide whether to seek the imposition of adult sanctions against a youthful offender in accordance with the offenses listed in Subsection J of §32A-2-3 and the factors and legal standard enumerated in Subsections B and C of §32A-2-20. If the CCA decides to invoke adult sanctions, the CCA must file a notice within 10 days of filing the petition pursuant to Rule 10-213, or within the time frame of any extension granted by the court. Rule 10-213(A). This is discussed further in Chapter 14, Initial Proceedings.

4.8 Involuntary Placement and Competency Issues

The CCA may initiate involuntary placement proceedings under §32A-6A-22 of the Children's Mental Health and Developmental Disabilities Act (CMHDD Act). Any person who believes that a child, as a result of a mental disorder or developmental disability, is in need of residential mental health or developmental disabilities services may request that a CCA file a petition with the court for the child's involuntary placement §32A-6A-22(D). If the child is already in the custody of the department, the CYFD may ask the CCA to petition for the child's placement under the CMHDD Act. §32A-2-21(E). The District Attorney serves as the ex-officio children's court attorney in involuntary commitment proceedings involving an alleged delinquent child. §32A-1-6(E).

While typically raised by the defense, the CCA may raise the issue of a child's competency to stand trial or participate in his or her defense, including moving the court to order the child to be examined at a suitable place by a physician, licensed psychologist, or licensed independent social worker prior to the adjudicatory hearing when there are indications that the child may have a mental disorder or developmental disability. §32A-2-17(B). If a judge dismisses a petition because of competency issues, *see* §42A-2-21(G), the court may recommend that the CCA initiate proceedings pursuant to the CMHDD Act.

4.9 Role After Entry of Judgment

The CCA's involvement with a delinquency proceeding continues after the entry of a dispositional judgment. While typically filed by the defense, the CCA may determine that it is in the best interest of the public and the child to file a motion for modification of the judgment pursuant to Rule 10-252, or an appeal pursuant to Rule 10-251, and ensure that such filings are timely.

The CCA is also responsible for screening, reviewing, and preparing petitions to revoke probation instigated by probation services, as well as for petitioning for extension or revocation of a consent decree when appropriate. §32A-2-24(A); Rule 10-261(A); Rule 10-262; 10-228. The CCA must also be notified when a person 18 years of age or older who has an outstanding juvenile warrant is taken into detention in an adult facility. §32A-2-12(F).

4.10 Sealing of Records

The CCA has certain obligations to ensure that a child's records are sealed when required by statute. Changes to the Children's Code promulgated in 2009 provide that "[a] child *who is determined by the court not to be a delinquent offender* shall have the child's files and records in the instant proceeding automatically sealed by the court upon motion by the children's court attorney at the conclusion of the proceedings." §32A-2-26(H) (2009) (emphasis added). The prior version of Subsection H contained similar language, referring to a person "who is determined by the court not to be a delinquent offender," but it did not require the CCA to present a sealing motion to the court. §32A-2-26(G) (2003).

The children's court rule governing sealing of records was promulgated in 2008, before the statute changed, and proposed amendments to Rule 10-262 were pending in early 2011. However, like the 2009 amendments to the statute, the rule directs the CCA to seek automatic sealing of records when a delinquency petition has not resulted in an adjudication of delinquency.

The committee commentary to Rule 10-262 indicates that a delinquency petition "does not result in an adjudication of delinquency" when the child has satisfied the conditions of a time waiver, the child has completed the terms of a consent decree, the child has been acquitted or the case has otherwise been dismissed, or a ruling has been made on appeal that concludes the case without an adjudication of delinquency. The commentary explains that, while the foregoing circumstances do not always result in a formal order of dismissal or a formal determination that the child is not delinquent, a dismissal nonetheless operates as an adjudication of the merits. Hence, the CCA should ensure that sealing orders are presented when any of these circumstances occur.

4.11 Obligations Under Victims of Crime Act

The New Mexico Victims of Crime Act (the Act) imposes certain obligations on CCAs. *See* §§31-26-1 *et seq.*

Once a victim has perfected his or her rights as a victim by complying with §31-26-5, the victim has the right to confer with the DA about the case. In addition, upon request of the victim, the DA will assist the victim by notify the victim's employer that the victim's cooperation in a proceeding requires absence from work. §31-26-4. While the victim has a right to submit an oral or written statement in post-adjudication hearings, the Act specifically provides that its provisions do not limit the district attorney's ability to exercise prosecutorial discretion on behalf of the state in a criminal case. *Id.*; §31-26-10.1. The nature and extent of a victim's rights under the Act are further discussed in Chapter 8.

The DA must provide the victim with certain information within seven working days after a petition is filed against the accused for a criminal offense:

- A copy of Art. II, §24 of the New Mexico Constitution on victims' rights;
- A copy of the Victims of Crime Act;

- A copy of the charge filed against the accused for the criminal offense;
- A clear and concise statement of the procedural steps generally involved in prosecuting a criminal offense;
- The name of a person within the DA's office whom the victim may contact for additional information regarding prosecution of the criminal offense; and
- Oral or written notice in a timely manner of a scheduled court proceeding attendant to the criminal offense. §31-26-9.

To aid the DA's office in fulfilling its responsibilities under the Act, the children's court must give the office oral or written notice of a scheduled court proceeding at least seven working days before the proceeding, unless a shorter notice period is reasonable under the circumstances. *See* §31-26-10.

The DA and victims are entitled to the following notifications regarding a child's release from custody.

- The adult parole board and CYFD must provide a copy of their respective regular release dockets to each DA in the state at least 10 working days before the docket is considered, and each supplemental, addendum, or special docket to each DA at least 5 working days before the docket is considered. §§31-26-12(A) and (B). The DA must in turn notify any victim of the offense known to reside in the district. §31-26-12(A).
- Following consideration of a release docket, the adult parole board or CYFD must promptly notify each DA of recommendations for release of an inmate from incarceration or a delinquent child from custody. The DA must notify any victim of the offense known to reside in the district. §31-26-12(C).
- If an inmate is scheduled to be released from incarceration without parole or prior to parole for any reason, or a delinquent child is scheduled to be released from custody, the Corrections Department or CYFD must notify each DA at least 15 working days before the inmate's or delinquent child's release. The DA is then responsible for notifying any victim of the offense known to reside in the district. §31-26-12(D).

In addition, any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the CCA must be returned promptly by the attorney or law enforcement, unless there are compelling evidentiary reasons to retain the victim's property. §31-26-4(K).

CHAPTER 5

DEFENSE COUNSEL

This chapter covers:

- Public Defender Department
- Child's right to counsel
- Role and duties of the child's attorney
- Representation of clients with diminished capacity

5.1 Public Defender Department

In 1973, the legislature enacted the New Mexico Public Defender Act to meet the state's constitutional obligations to provide counsel to indigent persons charged with crimes in New Mexico state courts. The Act provided for a Public Defender Department (PD) structure that was a model when created, with centralized, state-appropriated funding and centralized administration. The PD's structure remains the same as when the Public Defender Act was first enacted. The PD department is made up of both staff and contract attorneys.

5.2 Child's Right to Counsel

5.2.1 Appointment

A child must be represented by counsel at all stages of a delinquency proceeding, including post-dispositional proceedings. §32A-2-14(H). Unless counsel has entered an appearance on behalf of the child, the court will automatically appoint the PD to represent the child within 5 days from the date of the filing of the petition or at the commencement of the detention hearing, whichever occurs first. Rule 10-223(A); §32A-2-14(H). This appointment of counsel is mandatory and a child cannot waive it. *See State v. Doe*, 95 N.M. 302, 304, 621 P.2d 519, 521 (Ct. App. 1980). Under the Fifth Amendment, a child also has a right to be represented by counsel during custodial interrogation, prior to a petition being filed. *See* Chapter 2 of this Handbook, Rights. Form 10-408 is the form for appointing counsel for an indigent child.

The court must serve the order appointing counsel, along with the requirements and procedures for establishing indigency on the parents, guardian, or custodian. The eligibility form must be completed and returned to the PD within 5 days of receipt of the order. If indigency is not established, the parent will be required to reimburse the state for PD representation. The parent may appeal a determination that the parent, guardian, or custodian is not indigent and has a right to a court hearing on the matter. Rule 10-223. The notice of requirement to pay attorney fees is found in Form 10-407 of the Children's Court Rules and Forms.

5.2.2 Right to Effective Assistance of Counsel

The right to be represented by counsel includes the right to effective assistance of counsel, including when counsel is court-appointed. *See* §31-16-3; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *State v. Young*, 2007-NMSC-058 (finding that the New Mexico legislature attempted to implement the constitutional right of effective assistance of counsel for indigent persons accused of crimes by enacting the Indigent Defense Act); *In the Matter of the Termination of Parental Rights of James W. H.*, 115 N.M. 256, 257, 849 P.2d 1079, 1080 (Ct. App. 1993). Claims of ineffective assistance of counsel may be raised on direct appeal and in habeas corpus proceedings. *See e.g., State v. Dylan J.*, 2009-NMCA-027.

5.2.3 Possible Conflicts of Interest

The right to effective assistance of counsel under the Sixth Amendment of the U.S. Constitution includes the right to be free from conflicts of interest. *State v. Joanna V.*, 2004-NMSC-024, ¶5; *see also Strickland v. Washington*, 466 U.S. 668, 692 (1984).

In *Joanna V.*, the child raised the issue of ineffective assistance due to a conflict of interest because the same attorney served as her guardian ad litem (GAL) in an abuse and neglect proceeding and then as her defense counsel in a delinquency proceeding. As GAL, an attorney is required to zealously represent the child's best interests while counsel's role is to advocate zealously for the client's position. 2004-NMSC-024, ¶¶11-12. The Supreme Court recognized that there is a natural tension between the roles of the GAL and defense counsel and a heightened potential that an attorney would be compromised by attempting to do both. The Court expressed concern that this situation has the potential to become an actual, active conflict of interest warranting careful judicial scrutiny. *Id.* ¶13. However, the Court also noted that the conflict in a case of common representation is potential, not inherent and that the child in *Joanna V.* therefore had the burden to demonstrate prejudice sufficient to warrant a finding of ineffective assistance of counsel. The child failed to show that her attorney's representation was compromised by an actual, active conflict of interest in that case. *Id.* ¶17.

The Children's Code was amended in 2005 to state explicitly that a GAL appointed under the Children's Code may not serve concurrently as both GAL and the child's delinquency attorney. *See* §32A-1-7(I).

5.2.4 Non-English Speaking Clients

Under the New Mexico Constitution, an accused has the right to an interpreter. N.M. Const. Art. II, § 14 (granting the right to an accused "to have the charge and testimony interpreted to him in a language that he understands"); *see also State v. Nguyen*, 2008-NMCA-073. This includes the right to have an interpreter when a defendant confers with his counsel, and extends to juveniles in delinquency proceedings.

A court will consider a claim of ineffective assistance of counsel based on inadequate communications between a non-English speaking client and his or her attorney. *See State ex rel. CYFD v. William M.*, 2007-NMCA-055. A child's attorney should attempt to independently

determine the ability of a client to understand and respond in English. A client may have some understanding of English, but important, subtle points can be lost without careful interpretation. If the attorney determines that a client has communication difficulties that are serious enough to necessitate the presence of an interpreter, the child's attorney should ensure that an interpreter is present for attorney-client meetings, court proceedings, and for other meetings. The courts will pay for interpreters for hearings and other statutorily-required meetings, as well as for conferences between the attorney and the client.

5.2.5 Standard of Review

In *State v. Dylan J.*, the New Mexico Court of Appeals set forth the manner in which a claim of ineffective assistance of counsel of a child who has been adjudicated in a trial should be determined on direct appeal. The Court applied the following two prong test, originally set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which places the burden on the defendant to show that:

- counsel's performance was deficient; and
- the performance prejudiced the defense.

State v. Dylan J., 2009-NMCA-027, ¶36.

Under the two-prong test described in *State v. Dylan J.*, defense counsel's performance is deficient if defense counsel's conduct falls below that of a reasonably competent attorney. *Dylan J.*, ¶37. Judicial review of counsel's performance under this standard is highly deferential, and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Lytle v. Jordan*, 2001-NMSC-016, ¶50).

"A defense is prejudiced if, as a result of the deficient performance, 'there was a reasonable probability that . . . the result of the trial would have been different.'" *Dylan J.*, ¶38 (citing *Lytle*, ¶29). In *State v. Ira*, the Court of Appeals rejected a claim that defendant tried as an alleged youthful offender received ineffective assistance of counsel because counsel did not correctly advise defendant of the penalties to which he would be subject if he pled guilty. The Court found that even though counsel's performance was objectively unreasonable because he was not aware of the applicable law when he advised his client to plead guilty, the defendant did not adequately demonstrate that he would have proceeded differently and gone to trial if his lawyer had advised him correctly. *State v. Ira*, 2002-NMCA-037, ¶39.

In *State v. Paredes*, the New Mexico Supreme Court held that counsel must advise their client of the specific immigration consequences of pleading guilty. 2004-NMSC-036, ¶19. In *State v. Edwards*, the Court of Appeals concluded that, pursuant to the holding in *Paredes*, defense counsel's performance in a sex crimes case was deficient because of counsel's failure to advise client that a plea of guilty or no contest would most likely result in client having to register as a sex offender. The Court remanded the case for an evidentiary hearing to determine whether the failure was prejudicial. *Edwards*, 2007-NMCA-043.

5.2.6 Court's Role in Protecting Child's Due Process Rights and Assuring Effective Assistance of Counsel

The court has a duty to protect the child's due process rights and to help assure effective assistance of counsel. When a child attempts to admit or plead guilty to a charge, or plead no contest, the court should question the child to ensure that the attorney fully informed him or her of the consequences of the plea, and that the child is acting without any undue influence. The court should also question the attorney and ascertain the basis for the guilty plea. *State v. Joanna V.*, 2004-NMSC-024, ¶9. Furthermore, once a child is adjudicated as delinquent, the court should inquire of the child whether the child has any concerns about the representation provided by counsel. If the child raises concerns that warrant further inquiry, the court should consider holding an evidentiary hearing on the issue of effective assistance of counsel before proceeding to a disposition. *See, e.g., State v. Dylan J.*, 2009-NMCA-027, ¶45 (remanding case to district court for evidentiary hearing when defendant made a prima facie case of ineffective assistance).

5.3 Traditional Attorney-Client Model of Representation

The Children's Code provides that an attorney retained or appointed to represent a child shall provide the same manner of legal representation and be bound by the same duties to the child as are due to an adult client in accordance with the rules of professional conduct. Such representation extends through any subsequent appeals. §32A-1-7.1. Thus, the role of the child's attorney in a delinquency proceeding is to zealously advocate for the child's position. Although counsel may advise the client on counsel's view of the client's best interests, counsel is ultimately required to advance the client's expressed wishes. *State v. Joanna V.*, 2004-NMSC-024, ¶12).

Just as with representation of an adult client, the same attorney client confidentiality applies between an attorney and his juvenile client. If family members or other persons participate in discussions between the child and the lawyer, the presence of such persons does not generally affect the applicability of the attorney-client evidentiary privilege as long as the discussions are necessary to assist in representing the child. *See* Rule 16-114 (Committee Commentary).

5.4 Duties of Child's Attorney

The duties and obligations of a child's attorney include but are not limited to:

- Providing assistance to parents in any indigency determination proceeding. *See* Rule 10-223(B).
- Counseling the child on the law and the impacts on his or her life choices.
- Making active efforts to locate the client who is not in detention pending the adjudicatory hearing, and facilitating attendance at hearings and other meetings.
- Ensuring that purported decisions on respondent's part were voluntarily, intelligently, and knowingly made.
- Being aware of client's immigration status and whether and how that status might be affected. *State v. Paredes*, 2004-NMSC-036 (involving an adult defendant).

- Informing the court when a reasonable doubt exists as to the competency of a child to stand trial and proffering evidence to substantiate such claim. *See, e.g., State v. Flores*, 2005-NMCA-135. *See also* Chapter 26 of this Handbook, Competency to Stand Trial.

5.5 Child with Diminished Capacity

5.5.1 Rule 16-114 of Rules of Professional Conduct

When a person's ability to make adequately considered decisions regarding his or her representation in legal proceedings is impaired, the person is said to be suffering from "diminished capacity." Rule 16-114 of the Rules of Professional Conduct addresses a lawyer's duties to a client when a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason. In this case, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Maintaining the normal lawyer-client relationship when the client is a minor may not be possible in all respects. The normal relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters, which may not be true for a child. There are different degrees of capacity that must be considered when representing a minor, and the status of a child as a minor does not necessarily mean that the minor is incapable of making decisions concerning his or her representation. A client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting his or her own well-being. *See* Rule 16-114 (Committee Commentary).

In determining the extent of the client's diminished capacity, the lawyer should consider the following factors:

- the client's ability to articulate reasoning leading to a decision;
- variability of state of mind and ability to appreciate consequences of a decision;
- the substantive fairness of a decision; and
- the consistency of a decision with the known long-term commitments and values of the client.

Rule 16-114 (Committee Commentary ¶6). In appropriate circumstances, the lawyer may seek guidance from a diagnostician.

5.5.2 Authorized Actions to Protect a Child with Diminished Capacity

Paragraph B of Rule 16-114 provides a mechanism for lawyers to take action when required to protect a client with diminished capacity from substantial physical, financial, or other harm. Paragraph B provides that the lawyer may take reasonably necessary protective action if:

- the lawyer reasonably believes that the client has diminished capacity;

- the client is at risk of substantial physical, financial or other harm unless action is taken; and
- the client cannot adequately act in his or her own interest.

Protective action may include consulting with individuals or entities that have the ability to take action to protect the client. Such measures could include consulting with family members. Rule 16-114(B) and Committee Commentary, ¶8. In appropriate cases, protective action may mean seeking the appointment of a guardian ad litem (GAL) or guardian. Rule 16-114(B). Indeed, a GAL or guardian may also be appropriate under §32A-2-14(J) or (K) of the Delinquency Act.

Even though the lawyer may be authorized to take protective action in certain circumstances, the lawyer must be mindful that disclosure of the client's diminished capacity may adversely affect the client's interest. As noted in Paragraph 8 of the committee commentary to Rule 16-114, "the lawyer's position in such cases is an unavoidably difficult one."

Rule 16-114(C) states that information relating to the representation of a client with diminished capacity is protected by Rule 16-106, which authorizes disclosure of information relating to representation of a client only in limited circumstances. Under Rule 16-106, the client must give informed consent, the disclosure must be impliedly authorized in order to carry out the representation, or the disclosure must be permitted under the circumstances listed in Rule 16-106(B). Rule 16-114(C) provides that a lawyer taking protective action is "impliedly authorized" under Rule 16-106 to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

When a client with seriously diminished capacity is threatened with imminent and irreparable harm, there are measures that a lawyer may take even if the lawyer is unable to establish a client-lawyer relationship with that person or if the person is unable to make or express considered judgments about the matter. These measures are discussed in Paragraphs 9 through 10 of the Rule 16-114 Committee Commentary.

5.6 Resources for Defense Counsel

The National Juvenile Defender Center in Washington D.C. has developed a number of resource materials that may be of assistance to attorneys representing juveniles in delinquency proceedings. These include:

- Juvenile Defender Delinquency Notebook, an Advocacy and Training Guide, Second Edition, June 2006;
- Role of Juvenile Defense Counsel in Delinquency Court, Spring 2009; and
- Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems, Second Edition, July 2008.

These resources are available on-line at <http://www.njdc.info>.

CHAPTER 6

PARENTS, GUARDIANS AND GUARDIANS AD LITEM

This chapter covers the roles and responsibilities of:

- Parents
- Guardians
- Guardians ad Litem

6.1 Definitions

6.1.1 Parent

The Children’s Code defines the term “parent” as including biological or adoptive parents provided that he or she has “a constitutionally protected liberty interest in the care and custody of the child.” §32A-1-4(P). Generally, a parent has a constitutionally protected liberty interest in the care and custody of the child if the parent has established some sort of familial relationship with the child.

6.1.2 Guardian

The Children’s Code defines a “guardian” as “a person appointed as a guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law.” §32A-1-4(I).

The Delinquency Act provides that the court *shall* appoint a guardian in a delinquency proceeding if the court determines that the child does not have a parent or legally appointed guardian in a position to exercise effective guardianship. No officer or employee of an agency that is vested with legal custody of the child may be appointed guardian of the child except when parental rights have been terminated and the agency is authorized to place the child for adoption. §32A-2-14(K).

6.1.3 Guardian ad Litem

A guardian ad litem (GAL) is an attorney appointed by the children’s court to represent and protect the best interests of the child in a court proceeding. §32A-1-4(J). The Delinquency Act provides that the court may appoint a GAL for a child who is a party at any stage of the proceeding on a petition under the Children’s Code if:

- the child does not have a parent, guardian or custodian appearing on behalf of the child; or
- the interests of the parent, guardian or custodian conflict with those of the child. §32A-2-14(J).

No party or employee or representative of a party to the proceeding may be appointed to serve as a GAL, nor may an attorney serve concurrently as GAL and defense counsel. §32A-1-4(J); §32A-1-7(I).

Section 32A-1-7 enumerates the powers and duties of a GAL but it is not clear to what extent these powers and duties are applicable to the GAL in a delinquency case, where the child also has counsel. Rather, they appear to focus on the role of the GAL in the abuse or neglect case.

Practice Note: If a GAL is to be appointed in a delinquency case, the court should consider outlining the duties of that GAL in the order of appointment.

It should also be kept in mind that a GAL may be appointed under Rule 16-114 of the Rules of Professional Conduct in situations involving diminished capacity, in appropriate circumstances. Again, the court should consider outlining in its order the duties of the GAL in this situation.

6.2 Roles and Responsibilities of Parents/Guardians

In any complaint alleging delinquency, a parent of the child alleged to be delinquent may be made a party in the petition. §32A-2-28. The parent may also apply to intervene in the proceeding. Rule 10-122(B)

Whether or not the parent is made a party to the petition, the parent has a number of responsibilities in connection with the proceedings and may be required to participate in certain programs and pay certain costs. The following sections touch on these responsibilities and obligations.

Practice Note: In some judicial districts, parents are made parties as a matter of course. In others, it will depend on the case.

6.2.1 Participation in Treatment

If a parent is made a party to a petition and a child is adjudicated delinquent, the court may order the parent or parents to submit to counseling, participate in any probation or other treatment program ordered by the court, and if the child is committed for institutionalization, participate in any institutional treatment or counseling program, including attendance at the site of the institution. §32A-2-28(A).

Parents may be required or encouraged to participate in a therapeutic court program ordered for the child, such as drug court. For more information on therapeutic, or problem-solving, courts, *see* Chapter 30 of this Handbook.

6.2.2 Mental Examination

After an adjudicatory hearing, the court may order a physician or psychiatrist, a licensed psychologist, a licensed professional clinical counselor, or a licensed independent social worker to examine a parent or custodian whose ability to care for or supervise a child is an issue before the court. §32A-2-17(C).

6.2.3 Payment of Costs of Institutionalization

If legal custody of an adjudicated child is vested in someone other than the child's parents, including an agency, institution, or department of this state, the court may order the parent or other legally obligated persons to pay the custodian in the manner the court directs a reasonable sum that will cover all or part of the expenses of the support and treatment of the child subsequent to the entry of the custody order. §32A-1-19(C).

In order to impose expenses pursuant to §32A-1-19(C), the court must hold a hearing after notice to the parents or other persons legally obligated to support the child and find that the parents or other legally obligated persons are financially able to pay all or part of the costs and expenses of the support and treatment. The court may use the child support guidelines in §40-4-11.1 to calculate a reasonable payment. If the parents or other legally obligated persons willfully fail or refuse to pay the sum ordered, the court may proceed with contempt charges. If the order for payment is filed, it has the effect of a civil judgment. §32A-1-19(C).

6.2.4 Fines

If a court imposes a fine against a child, the parent of the child is not liable to pay the fine. §32A-2-28(B).

6.2.5 Costs of Representation

Under the general provisions of the Children's Code, the court may order the parent or person legally obligated to care for and support a child to pay all or part of the court costs and expenses, including reasonable compensation for services and related expenses for counsel appointed by the court, when:

- the child has been found to be a delinquent child;
- the parent or other person legally obligated to care for and support a child is given notice and a hearing to determine the parent or person's financial ability to pay the costs and expenses; and
- the court finds that the parent or person is able to pay all or part of the costs and expenses.

Unless the court otherwise orders, payment must be made to the court for remittance to those to whom compensation is due, or if the court has paid costs and expenses, to the court for remittance to the state. The court may prescribe the manner of payment. §32A-1-19(B). The court costs and expenses that a parent or other person legally obligated to care for and support the child may be ordered to pay include:

- reasonable compensation for services and related expenses for counsel appointed by the court;
- reasonable compensation for services and related expenses of a GAL or a child's attorney appointed by the court; and
- the expenses of service of summonses, notices, subpoenas, traveling expenses of witnesses and other like expenses incurred in the proceeding. §32A-1-19(A).

Section 32A-2-30 of the Delinquency Act authorizes the court to order the parents or guardians to pay the costs of representation of non-indigent children. It directs the children's court to use the standard adopted and information provided by the Public Defender Department (PD) to determine indigency, including the fee schedule adopted by the PD. The eligibility determination form developed by the PD and approved by the Supreme Court can be found in Form 10-408 of the Children's Court Rules and Forms.

Under the Children's Court Rules, the PD makes the initial determination of whether a child is indigent and such determination will only be reviewed by the court if the child files a motion opposing the PD's determination. Rule 10-223.

If the parents or other legally obligated persons willfully fail or refuse to pay the sum ordered, the court may proceed with contempt charges. Any order for payment filed with the court will have the effect of a civil judgment. §32A-1-19(C). *See also* Chapter 5 of this Handbook, Defense Counsel.

6.2.6 Other Responsibilities

Other responsibilities of a parent, guardian, or custodian include but are not limited to the following:

- A parent should be present at all court hearings involving the child.
- Parents have a role in ensuring that the child complies with any conditions of release or probation or supervised release. If a judge determines not to detain a child, a judge may decide to place the child in the parent's custody pending the delinquency hearing. As part of a condition of release from custody prior to the hearing, the judge can require a written promise from the parent, guardian, or custodian to bring the child before the court when requested. §32A-2-10(A).
- A parent, guardian, or custodian has the responsibility to bring the child before the court as directed by the summons or other order. §32A-2-6(B). A failure to bring the child into court as promised can result in child being taken into custody by law enforcement and brought before the court.

- Under §32A-2-19(I), if a child is adjudicated delinquent for a graffiti offense, mandatory community service is required and, if the child fails to comply, the name and address of child's parent or legal guardian will be published in a newspaper, accompanied by notice that he or she is the parent or legal guardian of a child adjudicated delinquent for committing graffiti.
- The ability of the parents to care for the child in the home may be considered in the disposition. §32A-2-19(A).

A parent or other family member may participate in discussions with the child's lawyer if the client wishes. When necessary to assist in the representation, the presence of a parent does not affect the attorney-client privilege. *See* Rule 16-114 (Committee Commentary ¶3). However, the client's interests must be considered first by the lawyer, and except for protective action authorized under Rule 16-114(B), the lawyer must look to the client and not the parent or parents or other family members to make decisions on the client's behalf.

6.3 Rights of Parents

A parent's rights in a delinquency proceeding include the following:

- A parent, guardian, or custodian has a right to notice of and must have an opportunity to be present at a preliminary inquiry. §32A-2-7(C).
- A parent, guardian, or custodian must be notified in writing within 24 hours when a child is taken into custody and is not released, along with a statement of reasons for taking the child into custody. §32A-2-10(D).
- A parent, guardian, or custodian has a right to oral or written notice of a detention hearing, if the parent can be found, which includes the time, place and purpose of the hearing. If child is not released at the hearing and a parent, guardian, or custodian was not notified and did not appear or waive appearance at the hearing, the judge or special master must rehear the matter without unnecessary delay upon the filing of an affidavit stating the facts and a motion for rehearing. §32A-2-13(C) and (I).
- The parent, guardian, or custodian must be advised that the child is to be represented by counsel at all stages of the proceedings. §32A-2-14(H).
- If a child is adjudicated delinquent, the wishes of the child's parents as to the child's custody may be considered by the judge in the dispositional judgment. §32A-2-19(A).
- While the social records pertaining to the child are generally kept confidential, parents have a right to access those records when necessary for the child's treatment or care, but only such records as are necessary for those purposes. §32A-2-32(C).

CHAPTER 7

JUVENILE PROBATION OFFICERS (JPOs)

This chapter covers the powers and duties of juvenile probation officers (JPOs):

- Preliminary inquiry
- Formal and informal supervision
- Detention hearings
- Reporting
- Supervised release
- Sealing of records
- Truancy cases

7.1 Overview

Originally, juvenile probation was part of the court system but it has been part of the Children, Youth and Families Department (CYFD or department) for almost twenty years. Juvenile probation was part of CYFD's Juvenile Justice Services until recently, when it became part of the agency's Youth and Family Services. Juvenile probation officers (JPOs) were called juvenile probation and parole officers until 2009, when the Legislature eliminated the concept of parole and replaced it with supervised release. *See* Chapter 10 on the Juvenile Public Safety Advisory Board.

JPOs have a wide range of responsibilities within the juvenile justice system. Besides their handling of informal referrals and dispositions, they are involved to some degree at all stages of a formal delinquency proceeding, from intake and detention of alleged delinquent youth to monitoring compliance with conditions of consent decrees, plea agreements, probation, and supervised release. The powers and responsibilities of the JPO are listed throughout the Children's Code, particularly in §32A-2-5(B), as well as throughout Title 8, Chapter 14, Juvenile Justice, of the New Mexico Administrative Code (NMAC).

7.2 Preliminary Inquiry

JPOs receive referrals from the originating police department. Upon receipt of a referral from law enforcement, probation must conduct a preliminary inquiry with the child and the parents, to determine whether is in the best interests of the public and the child to proceed formally under the Delinquency Act and file a petition or whether to dispose of the referral informally by making appropriate case referrals for services. §32A-2-7.

During the preliminary inquiry the JPO discusses the charges, the possible outcomes, the route a case might take through children's court, the child's rights, and recommendations to the children's court attorney (CCA) concerning disposition of the case. The CCA is the district attorney or, more typically, an assistant district attorney, or ADA.

JPOs have the power under the Children's Code to informally dispose of up to three misdemeanor charges brought against a child within two years without notifying the CCA. A JPO may nonetheless refer any case to the CCA for review and possible prosecution regardless of the child's prior record. §32A-2-5(B) and §32A-2-7(E).

The JPO is required to notify the CCA of the receipt of any felony complaint and any recommended adjustment to the complaint. §32A-2-7(F). Even if a JPO refers a case to the CCA's office, the JPO may recommend against filing a formal petition. However, the CCA has the final say as to whether or not to file a petition. §32A-2-8.

The JPO has a duty to maintain the confidentiality of all of the communications, either oral or written, that are made during the course of the preliminary inquiry. 8.14.2.9(B)(2) NMAC (*citing* Rule 11-509(B) of the Rules of Evidence). *See* Chapter 12, Petition, for a detailed discussion of the preliminary inquiry.

7.3 Pre-Petition Diversions

The JPO may determine that it is appropriate to handle a referral informally if the matter would be a misdemeanor. The JPO may monitor the child's progress and compliance with any conditions established as part of the informal diversionary plan.

Examples of informal resolutions by the JPO include:

- counseling with monitoring;
- referring the child to a particular diversion program;
- some form of informal supervision; or
- requiring and monitoring restitution.

Some of the specific programs that may be available, depending on the district, include first offender diversion programs, parent-child mediation, victim-offender mediation, family counseling, teen court, or alcohol and drug education. Even letters of apology or essays are used.

7.4 Indian Children

If an Indian child is involved in a delinquency case, the department has the duty to identify the child as an Indian child and must take into consideration the Indian child's cultural needs throughout the process to ensure that the Indian child will have reasonable access to cultural practices and traditional treatment. Probation staff must notify an Indian child's tribe upon receipt of a referral to the department and will consult and exchange information with the tribe when preparing reports or when commitment or placement is contemplated or has been ordered.

The predisposition report should indicate the name of the person contacted in the Indian child's tribe and the results of the contact. §32A-2-5(B); 8.14.2.9(E) NMAC.

7.5 Intake and Detention

When a child is delivered to a place of detention after arrest, the JPO will interview the child to determine whether the child should be detained. Rule 10-221(A). The Children's Code requires the department to develop a detention risk assessment instrument (RAI) in order to provide a standardized method for determining whether the criteria for detention in the Code have been met. A child may only be placed in detention if department staff or a trained county detention professional designated by the department completes a RAI and determines that the child poses a substantial risk of harm to himself or others, or that the child may leave the jurisdiction of the court. §§32A-2-10(B) and 32A-2-11.

Juvenile probation may override the intake detention screening instrument should significant factors exist for detention. And, no matter what, no youth age eleven or younger may be detained in a detention facility. §32A-2-10(C).

A copy of the RAI in use as of late 2010 can be found at the end of this chapter.

Practice Note: In Bernalillo County, the RAI is administered in person to the child at the Youth Services Center (formerly called the Juvenile Detention Center). In other counties, law enforcement contacts Statewide Central Intake (SCI) and the RAI is administered telephonically to the child.

7.5.1 Probable Cause Determination

If the child was arrested without a warrant, a judge, hearing officer or magistrate will have to determine whether law enforcement had probable cause to arrest the child. This judicial determination must be made within 48 hours, including Saturdays, Sundays and legal holidays. A statement by the law enforcement officer, which must include the charges, may be the basis for a probable cause determination. The determination is also supposed to be non-adversarial, it may be held in the absence of the child and counsel, and it may be conducted by telephone. If the court does not find probable cause to believe the child committed an offense, the child will be released from detention. *See* §32A-2-13.

7.5.2 Detention Hearing

If a child is being held in detention, the child will have a detention hearing to determine if continued detention is necessary. §32A-2-13(C). The department will utilize the detention screening tool, review the continued need for detention, and recommend conditional or unconditional release from detention. If the court orders pre-trial detention, probation services is responsible for visiting a child remaining in detention at least weekly. 8.14.2.9(G) NMAC. If the judge does not order pre-trial detention, the judge may place a child on conditional release

pursuant to Rule 10-225(C). *See* Chapter 13 of this Handbook for a more detailed discussion of detention hearings.

7.6 Time Waivers

A time waiver is an informal agreement between the child, through his or her counsel, and the CCA, to waive the time limits for adjudication. The length of a time waiver is on average six months, in anticipation that the pending petition can be dismissed upon the child's compliance with certain agreed-upon conditions. The standard condition of a time waiver is that the child not receive another referral for the duration of the time waiver, however, other conditions may be agreed upon and included. JPOs may be asked to monitor conditions associated with a time waiver; however the department must become a party to a delinquency proceeding if probation services are requested as part of a time waiver. §32A-2-7(G).

7.7 Juvenile Dispositions

7.7.1 Pre-Disposition Studies and Reports

At the court's discretion, the department may be responsible for making predisposition recommendations, including preparing predisposition studies and assessments, and submitting them to the court. The reports concern the child, the family of the child, the child's environment, and any other matters relevant to the need for treatment or to appropriate disposition of the case. The reports must be provided to court and counsel at least five days before actual disposition or sentencing. §32A-2-17(A); 8.14.2.12 NMAC.

Department staff may also be required to prepare a report concerning a youthful offender's amenability to treatment and a subsequent predisposition report if the court finds that a juvenile disposition is appropriate. §32A-2-17(A).

The department may also be asked to provide a recommendation in its predisposition report as to whether and what community placement would be appropriate for the juvenile as an alternative to commitment and as a condition to probation. *See* §32A-9-6; 8.14.2.13(D) NMAC. *See* Chapter 18 of this Handbook on dispositions.

The reports used for compiling and reporting predisposition information are not required until the child has been adjudicated delinquent, unless the child, with the advice of counsel, consents to the investigation prior to the adjudication. *See* 8.14.2.12(D) NMAC. The court may also order the child to undergo an evaluation by a professional for purposes of diagnosis. Among other things, this evaluation must indicate the disposition that seems most appropriate. The evaluation must generally be completed within fifteen days, whether or not the child is being detained. §32A-2-17(D) and (E).

7.7.2 Client Family Baseline Assessment

The JPO must prepare a client family baseline assessment after the child is placed on probation. The baseline assessment is a written report identifying the child's delinquent history and the strengths and needs of the client's family. 8.14.2.7(I) NMAC. The JPO also uses a classification tool, called the structured decision making tool, to assess the child's risk, needs, and strengths and determine the appropriate level of supervision. The JPO will prepare a plan of care, which is a plan for treatment or supervision of clients in the custody of or under the supervision of CYFD. When possible, the child and his or her family should be included when developing the plan of care. 8.14.2.13(C) NMAC.

7.7.3 Probation

Whenever probation is the recommended disposition, the department must identify the standard and special conditions of probation that are needed to provide a rehabilitative supervision plan for the child and family. 8.14.2.13(B) NMAC. When creating a supervision plan for probation which consists of a plan for treatment and supervision, the input of the child and the child's parent, guardian or custodian must be taken into consideration. Probation services should also make reasonable efforts to use local services before recommending a commitment to the court. *See* 8.14.2.13(C) NMAC. *See* Chapter 18 for more information on probation and conditions of probation.

7.7.4 Commitment

The department is entitled to reasonable oral and written notification and an opportunity to be heard prior to any child being placed in its custody. *See* §32A-2-19(F). If a child is committed by the court, legal custody of that child transfers to the state. Legal custody requires the state to determine the appropriate placement, supervision, and rehabilitation program for the child in addition to ascertaining the appropriate educational programs and services. §32A-2-19(B); 8.14.3 NMAC.

7.7.5 Supervised Release

If the commitment is a short-term commitment of one year or a long-term commitment of no more than two years, at least ninety days within that period must be served on supervised release. §32A-2-19(B)(1). As noted below, probation services is responsible for monitoring compliance with supervised release.

7.8 Compliance Monitoring

A JPO is responsible for monitoring compliance with the conditions of probation or supervised release for those children who have been placed on probation or supervised release. On the rare occasion that a child is temporarily released from a facility on a "furlough" or pass, JPOs are responsible for their supervision. If probation services are requested as a condition of a consent

decree or plea agreement, a JPO is responsible for monitoring compliance with the conditions. §32A-2-19(B)(2).

When a child is placed on supervised release or probation, the JPO supervises clients according to the court order, probation or supervised release agreement, the classification tool, and the plan of care. 8.14.2.13(C) NMAC. The JPO may be required to supervise the juvenile several times a day, or only once a month, pursuant to the tool and plan. Pursuant to the Interstate Compact on Juveniles (ICJ) the JPO is also responsible for supervising persons who were placed on probation or supervised release in other states. *See* Chapter 33 on the ICJ.

The probation staff must furnish the conditions of probation or supervised release in writing to the child and the child's parents, guardian or custodian, and ensure the probation or supervised release conditions are acknowledged in writing. The JPO or department staff must notify the child's parent, guardian, or custodian in advance of a decision to make a major change to the probation or supervised release agreement, unless emergency conditions require immediate implementation. 8.14.2.13(C) NMAC.

The probation staff is also responsible for referring children to appropriate community programs for services identified in the plan of care, and to determine the availability of treatment services. JPOs are required to meet regularly with treatment providers to review client progress. 8.14.2.13(D) NMAC.

7.9 Probation and Supervised Release Violations

Probation staff have limited enforcement authority over probation and supervised release violations. If the JPO has reason to believe a child has violated the conditions of probation or supervised release or may leave the court's jurisdiction, the department has the authority to place children in detention upon application of the detention screening tool. §32A-2-5(C); 8.14.2.16(A) NMAC.

Pursuant to the 2009 revisions to the Children's Code, JPOs also have authority to seek a warrant for persons who abscond from supervised release. §32A-2-23(I). In addition, the JPOs help law enforcement locate and recover absconders by notifying law enforcement of their possible location. 8.14.2.16(E) NMAC. The JPO may also make recommendations to the CCA to revoke the child's probation or supervised release when the child has failed to comply with any part of a probation or supervised release agreement, provided it is in the best interest of the client's rehabilitation and the public safety to do so. 8.14.2.16(C) NMAC; §32A-2-24(A). Lastly, the JPO may detain a child on supervised release status who has allegedly violated one of the conditions until completion of a preliminary supervised release revocation hearing. §32A-2-25(A).

7.10 Termination of Probation or Supervised Release

A judgment of probation or protective supervision may not remain in force past the term of commitment from the date entered. However, the department has the authority to release a child and terminate probation or supervision when it appears that the purpose of the order has been

achieved before the expiration of the judgment. Any such release or termination and the reasons for it must be reported to the court promptly. §32A-2-23(B) and (C).

Under CYFD rules, the JPO may only recommend early termination of probation supervision or supervised release supervision under one or more of the following circumstances:

- when progress toward rehabilitation has been made and the goals set forth in the plan of care have been completed;
- when probation or supervised release is unsuccessful and because of age or status, commitment to CYFD facility is of no benefit to the client; or
- when the public safety is not expected to be compromised by termination or early release from supervision. *See* 8.14.2.13(F) NMAC.

Prior to termination of supervision, the JPO must develop a discharge plan in collaboration with the child and service providers. The child's parent must be given the opportunity to participate in the creation of the discharge plan. The JPO must notify the court in writing of termination of supervision, §32A-2-23(C), and prepare a written summary of client performance during the period of supervision. *See* 8.14.2.13(F) NMAC.

Under the 2009 amendments to the Children's Code, the department has exclusive jurisdiction and authority to release an adjudicated delinquent child during the term of a child's commitment. §32A-2-23.1. That authority was formerly vested in the Juvenile Parole Board, which has been renamed the Juvenile Public Safety Advisory Board and assigned different duties, but is still part of the release process. §9-2A-5. *See* Chapter 10 for a more detailed description of this new approach.

7.11 Sealing of Records

The department is responsible for sealing the child's files and records when the child reaches the age of 18 or at the expiration of the disposition, whichever occurs later, and also notifying the court (if a petition was filed), the CCA, the child's attorney and the referring law enforcement agency that the child's records are subject to sealing. In addition, the department must notify the child that the department's records have been sealed and that the above persons have been notified. §32A-2-26(F) and (G). The department will also be responsible for sealing its records whenever a motion has been filed and granted pursuant to Subsection A of the statute.

Upon the entry of a sealing order, the department must treat the proceedings as if they never occurred and delete all index references, and upon inquiry, must reply that no record exists with respect to the person. §32A-2-26(C). However, the department may store and use the person's records for research and reporting purposes, subject to the confidentiality provisions of §32A-2-32 and other applicable federal and state laws.

See Chapter 29 of this Handbook for a more detailed discussion on sealing of records.

7.12 Truancy Cases

The juvenile probation office has responsibilities under the Compulsory Attendance School Law, §22-12-1 et seq., independent of its responsibilities under the Children's Code. The local school board or school is required to give written notice of habitual truancy to the parent of the student involved. If unexcused absences continue, the student is reported to the probation services office in the judicial district where the student resides. Under the law, probation must investigate as to whether the child should be considered a neglected child or a child in a family in need of services and thus subject to the Children's Code. The probation office may send notice to the parent directing the parent and student to report to the probation office to discuss services. In addition to any other disposition, the children's court may order the habitual truant's driving privileges to be suspended. §22-12-7(C).

If, after review by the juvenile probation office where the student resides, a determination is made that the student's habitual truancy may have been caused by the parent, the probation office will refer the matter to the district attorney's office or law enforcement for appropriate investigation and the filing of charges. Charges may be filed against the parent in metropolitan court, magistrate court or district court. The Compulsory School Attendance Law makes violation of the Law a petty misdemeanor for that parent. §22-12-7(D) and (E).



DETENTION SCREENING Statewide Risk Assessment II

FACTS #:		First Name:		Last Name:	
SS#:		DOB:		Gender: Male Female	
		Ethnicity:		Hispanic: Y N	
Caller:		Arrest Date:		Time:	
				Referral County:	
				Referring Agency:	
Screener:			Screening Date:		
			Time:		
Primary Reason for Referral Detention	<input type="checkbox"/> Delinquent Offense		<input type="checkbox"/> Committed/Diag – return to court on pending case		
	<input type="checkbox"/> Delinquent Offense+VOP, VCO, Other Viol. <i>(delinquent offense while on probation)</i>		<input type="checkbox"/> Drug Court or Juvenile Court Hold (post disp)		
	<input type="checkbox"/> Probation/Parole Violation		<input type="checkbox"/> Disposition –15 day Detention		
	<input type="checkbox"/> Probation/Parole Violation <i>(with warrant)</i>		<input type="checkbox"/> Detained Pending Post-Dispositional Placement		
	<input type="checkbox"/> Warrant-		<input type="checkbox"/> Electronic Monitoring or GPS Violation		
	Type of warrant- Arrest, Bench, FTA, Magistrate/Municipal, Not indicated, Parole Detention Order/Retake		<input type="checkbox"/> ICJ/INS Hold *State: _____		
			<input type="checkbox"/> Parole Retake		
			<input type="checkbox"/> Transfer from Other Center		
			<input type="checkbox"/> Violation of Court Order/Cond. Of Release		
	<i>If one of the above is checked, complete entire form.</i>		<i>If one of the above is checked, complete: Projected Detention Center (Required)</i>		
Primary (most serious) Referral Offense: _____					
Enumerated		Fel/Mis:	Degree:	Det Category:	
Use or Possession of a Weapon in Commission of Crime: <input type="checkbox"/> Knife or other sharp instrument <input type="checkbox"/> Firearm <input type="checkbox"/> Other					

A. OFFENSE (Score only the most serious offense)

- | | |
|---|----|
| 0. All enumerated offenses in 31-22-8..... | 12 |
| 1. Violent Offense Against Person Resulting in Serious Bodily Injury or Death | 12 |
| 2. Violent Sexual Felony | 12 |
| 3. Use or Possession of Firearm in Commission of a Crime | 12 |
| 4. Felony Crimes of Violence..... | 8 |
| 5. Felony Sexual Offenses | 8 |
| 6. Felony Property Crimes including Auto Theft | 5 |
| 7. All Other Felony Crimes and Misdemeanors | 3 |
| 8. All infractions, Petty Misdemeanors and non-criminal probation violations | 0 |

OFFENSE SCORE

+

B. PRIOR OFFENSE HISTORY (Score only one of the following)

- | | |
|--|---|
| Felony petition <i>filed and</i> pending | 6 |
| Prior felony adjudication/within the last six months | 5 |
| Two or more adjudications, one a felony, within the last 12 months | 5 |
| Prior felony adjudication within the last three years | 3 |
| None | 0 |

PRIOR HISTORY SCORE

+

C. RISK OF FTA AND REOFFENSE (Add all that apply up to 3 points)

- | | |
|--|------|
| Previous Escape/abscond from secure facility, or court ordered placement | 1/ea |
| Previous failure to appear for court | 1/ea |
| Pending citations or referrals | 1/ea |

FTA AND REOFFENSE SCORE

+

D. Aggravating Factors (Add all that apply, up to 3 points)

- | | |
|--|------|
| Multiple Felonies & Victims separated in time and space alleged this referral..... | 1/ea |
| Two or more violent adjudications, past year | 1/ea |
| Alleged crime/behavior particularly vicious/violent | 1/ea |

AGGRAVATING FACTORS SCORE

+

E. Mitigating Factors (Subtract all that apply, up to 3 points)

****Do not complete for enumerated offenses****

- | | |
|--|------|
| Involvement in offense was remote, indirect or otherwise mitigated..... | 1/ea |
| Family member or caretaker able to assume responsibility for minor | 1/ea |
| No arrests or citations within the last year | 1/ea |

MITIGATING FACTORS SCORE

-

TOTAL SCORE (A+ B+ C + D - E)

DETENTION RECOMMENDATION (Based on score)

- ☐ Do Not Detain (0-7 Points)
☐ Non-Secure Alternative (Home/Community Supervision 8-11)
☐ Secure Detention (12 Or More Points)

DETENTION DECISION

- ☐ Do Not Detain (0-7 Points)
☐ Non-Secure Alternative (Home/Community Supervision 8-11)
☐ Secure Detention (12 Or More Points)

OVERRIDE: (Check one)

- ☐ Deadly weapon pattern
☐ Domestic violence
☐ Drug trafficking/distribution
☐ DWI/DUI
☐ No adequate supervision/care
☐ Override to release
☐ Parents located but unavailable
☐ Parents refuse custody
☐ Protective services involvement, charges substantiated
☐ Risk of harm to self
☐ Seriousness of injury to victim
☐ Other: (must explain override reason, supervisor authorization to be noted in other internal comments box)

Always include name of JPO Supervisor approving Override.

If client is Detained only, complete the following section:

Projected Detention Center: _____

- ☐ Domestic Violence ☐ Abuse of neglect

Non-Secure Detention Placement *(at time of decision)*

Services: *(Check all that apply)*

- ☐ CCMHC
☐ Community Corrections
☐ Community Custody Program
☐ Community Monitoring (non-electronic monitoring)
☐ Electronic Monitoring
☐ Emergency Shelter Bed
☐ Group Home
☐ Home Detention
☐ Surveillance
☐ 24 Hour House Arrest
☐ Youth Reporting Center
☐ Other: *(explain)*

Comments:

CYFDJJS 01/09

CHAPTER 8

VICTIMS

This chapter covers:

- Overview of the Victims of Crime Act
- Victims' rights in delinquency cases
- Victim's rights after commitment

8.1 Overview

The Constitution of the State of New Mexico lays out the protections afforded to victims of crimes. Art. II, §24 The Legislature implemented Art. II, §24 by enacting Chapter 31, Article 26, entitled the Victims of Crime Act. Pursuant to the law of New Mexico, while a victim does not have a right to be a party in a delinquency proceeding, a victim who has complied with the provisions of the Victims of Crime Act has a right to limited participation in delinquency proceedings, and to receive notices of proceedings and other matters regarding the alleged perpetrator of the crime.

8.2 Applicability

According to §31-26-3(F) of the Victims of Crime Act:

“victim” means an individual against whom a criminal offense is committed. “Victim” also means a family member or a victim’s representative when the individual against whom a criminal offense was committed is a minor, is incompetent or is a homicide victim.

Not all victims of crime are entitled to exercise rights under the Act. The term “criminal offense” is limited to the following crimes:

- negligent arson resulting in death or bodily injury pursuant to §30-17-5;
- aggravated arson pursuant to §30-17-6;
- aggravated assault, §30-3-2;
- aggravated battery, §30-3-5;
- dangerous use of explosives, §30-7-5;
- negligent use of a deadly weapon, §30-7-4;
- murder, §30-2-1;
- voluntary or involuntary manslaughter, §30-2-3;
- kidnapping, §30-4-1;

- criminal sexual penetration, §30-9-11;
- criminal sexual contact of a minor, §30-9-13;
- armed robbery, §30-16-2;
- homicide by vehicle, §66-8-101;
- great bodily injury by vehicle, §66-8-101;
- abandonment or abuse of a child, §30-6-1;
- stalking, §30-3A-3;
- aggravated stalking, §30-3A-3.1;
- aggravated assault against a household member, §30-3-13;
- assault against a household member with intent to commit a violent felony, §30-3-14;
- battery against a household member, §30-3-15; or
- aggravated battery against a household member, §30-3-16.

§31-26-3(B).

There is no reference in the definition of “criminal offense” to the Delinquency Act. However, it is reasonably clear that the Victims of Crimes Act accords rights to the victim of a delinquent act if the act is included in the above list. The definition of the term “court” includes “children’s court” and the term “formally charged” is defined in pertinent part as including “the filing of a petition.” *See* §31-26-3(A) and (E). Moreover, several of the Act’s requirements specifically refer to delinquent children. For instance, §31-26-12 requires that the Children, Youth and Families Department provide its release docket to the district attorney and requires notification to victims when delinquent children are released from custody. Similarly, §31-26-11 requires that the judge be notified if a delinquent child escapes from the custody of CYFD. Under that same section, the district attorney (DA) is required to notify the victim of the delinquent offense for which the delinquent child was committed.

8.3 Victim’s Rights

Section 31-26-4 of the Act lists the rights to which a victim is entitled. These include the right to:

- be treated with fairness and respect for the victim’s dignity and privacy throughout the criminal justice process;
- timely disposition of the case;
- be reasonably protected from the accused throughout the criminal justice process;
- notification of court proceedings;
- attend all public court proceedings the accused has the right to attend;
- confer with the prosecution;
- make a statement to the court at sentencing and at any post-sentencing hearings for the accused;
- restitution from the person convicted of the criminal offense that caused the victim’s loss or injury;
- information about the conviction, sentencing, imprisonment, escape or release of the accused;

- have the prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work for good cause; and
- be informed by the court at a sentencing proceeding that the offender is eligible to earn meritorious deductions from the offender's sentence and the amount of meritorious deductions that may be earned by the offender. (**Note:** This would only apply in children's court if the child is receiving an adult sentence.)

A victim may exercise his rights pursuant to the Act only if he or she:

- reports the criminal offense within five days of the occurrence or discovery of the criminal offense, unless the DA determines that the victim had a reasonable excuse for failing to do so;
- provides the DA with current and updated contact information; and
- fully cooperates with and responds to reasonable requests made by law enforcement agencies and district attorneys.

§31-26-5.

A victim's rights take effect under the Act when an individual is formally charged by the DA for allegedly committing a criminal offense against a victim. The rights and duties remain in effect until final disposition of the proceeding related to the charged criminal offense. §31-26-6

8.4 Victim's Representative

A victim may designate a victim's representative to exercise all rights in the Act, and may revoke the designation of the representative at any time. §31-26-7(A).

The court should consider appointing a victim's representative to act in the best interests of the victim if the individual against whom a criminal offense was committed is a minor, incompetent, or deceased. If an incompetent victim regains his or her competency, the victim may revoke the court's appointment of a victim's representative. §31-26-7(B).

When the victim is a minor, the victim's parent or grandparent may exercise the victim's rights, unless the parent or grandparent of the victim is accused of committing the criminal offense against the victim, in which case the court may appoint another victim's representative for the victim. §31-26-7(C).

8.5 Responsibilities of DA and Court

Most of the responsibility for implementing the Act falls on the district attorney's office and those duties are discussed in greater detail in Chapter 4 of this Handbook, Children's Court Attorney.

To aid the DA in fulfilling his or her responsibility to provide the victim with notice of scheduled court proceedings, the children's court must provide the DA's office with oral or written notice of a proceeding. This notice must be given seven working days prior to the proceeding, unless a shorter notice period is reasonable under the circumstances. §31-26-10.

At the proceeding, the court must inquire on the record whether a victim is present for the purpose of making an oral statement or submitting a written statement. If the victim is not present, the court must inquire on the record whether an attempt has been made to notify the victim of the proceeding. If the DA (that is, the children's court attorney in children's court) cannot verify that an attempt has been made, the court must either reschedule the hearing or continue with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement. In that case, the court will order the children's court attorney to notify the victim of the rescheduled hearing. §31-26-10.1(A).

Section 31-26-10.1 specifically provides that its provisions do not:

- limit the DA's ability to exercise prosecutorial discretion on behalf of the state in a criminal case; or
- require the court to continue or reschedule any proceedings if it would result in a violation of a jurisdictional rule.

Practice Note: The right of a victim to make a statement in the court proceedings is generally considered to apply to the disposition or sentencing hearing, not at the adjudicatory hearing or trial, where the Rules of Evidence apply.

8.6 Responsibilities of Parole, Corrections and CYFD

The adult parole board and CYFD must provide a copy of their respective regular release dockets to each DA in the state at least 10 working days before the docket is considered, and each supplemental, addendum, or special docket to each DA at least 5 working days before the docket is considered. §§31-26-12(A) and (B). The DA must in turn notify any victim of the offense known to reside in the district. §31-26-12(A).

Following consideration of a release docket, the adult parole board or CYFD must promptly notify each DA of recommendations for release of an inmate from incarceration or a delinquent child from custody. The DA must notify any victim of the offense known to reside in the district. §31-26-12(C).

If an inmate is scheduled to be released from incarceration without parole or prior to parole for any reason, or a delinquent child is scheduled to be released from custody, the Corrections Department or CYFD must notify each DA at least 15 working days before the inmate's or delinquent child's release. The DA is then responsible for notifying any victim of the offense known to reside in the district. §31-26-12(D).

When an inmate escapes from a correctional facility or a delinquent child escapes from a juvenile facility, the Corrections Department or CYFD must immediately notify the sentencing judge or the children's court judge, the DA, and the probation officer who authored the presentence report. They are also required to notify the court, the DA and the probation officer when an inmate or delinquent child who is convicted in New Mexico of a capital, first degree, or second degree felony and transferred to a facility in another state escapes from that facility. §31-26-11.

8.7 Victim Restitution

Section 32A-2-31 authorizes the children's court to order a delinquent child to pay restitution to the victim of the child's delinquent act. Section 31-17-1 is the corresponding provision for victim restitution in the Criminal Code which applies when a child is given an adult sentence. Chapter 18 of this Handbook, Dispositions, discusses victim restitution in further detail.

CHAPTER 9

SPECIAL MASTERS

This chapter covers:

- The appointment, roles and duties of a special master

9.1 Overview

As provided in Rule 10-163, the children's court judge may appoint a special master to assist in any children's court proceeding. The purpose of allowing special masters to assist in delinquency proceedings is to further the juvenile justice system's goal of providing early and prompt judicial disposition of a case. Rule 10-163 is designed to allow supplementation of judicial resources to further this goal. *See* Rule 10-163(A) (Committee Commentary).

9.2 Appointments

The children's court judge may appoint a special master to assist in a proceeding under the Delinquency Act. Rule 10-163(A). The order of appointment should specify the matters that are submitted for the special master's consideration. *See* Rule 10-163(D).

The judge is required to approve all contracts with special masters and to fix their hourly compensation, subject to the approval of the director of the Administrative Office of the Courts. §32A-2-13(B). A juvenile probation officer may not be appointed as a special master.

9.3 Qualifications and Removal

To be appointed a special master, an attorney must have been licensed to practice law in New Mexico for at least three years and be familiar with children's court matters. Rule 10-163(B). A special master may be removed from a proceeding at any time upon the motion of any party upon good cause shown, or upon the court's own motion. Rule 10-163(G).

9.4 Scope of Duties

Unless the children's court specifies otherwise, the special master has the power to perform any of the functions of a children's court judge pursuant to the Children's Court Rules, except that the parties must concur with having a special master preside at a preliminary hearing or examination, jury trial, bench trial, adjudicatory hearing, or dispositional hearing. Rule 10-163(C). The Children's Code and Court Rules specifically provide that a special master may preside over detention hearings and probable cause determinations. §32A-2-13(A) and (B); Rules 10-222 and 10-225(F).

9.5 Recommendations

With the exception of detention hearings and probable cause determinations, when a special master is presiding, the special master must prepare a written report including proposed findings of fact and conclusions of law on the matters submitted to the special master by the order of appointment. The report must be filed with the court and served on the parties in accordance with the Children's Court Rules. Rule 10-163(D). All such recommendations of the special master must be finally approved by the children's court judge.

Any party may file exceptions to the special master's report within five days after service. After receipt of the report, the court must review the special master's recommendations and determine whether to adopt the recommendations. If specific objections are timely filed to the recommendations, the court is required to conduct an "appropriate and sufficient" hearing to resolve the objections. The hearing must be limited to review of the record unless the court determines that additional evidence will aid in resolution of the party's objections. The court must make an independent determination of the objections, and may adopt the special master's recommendations, modify them, reject them in whole or in part, receive further evidence, or recommit the recommendations to the special master with instructions. After the hearing, the court will enter a final order, including findings and conclusions when required. Rule 10-163(F).

9.6 Timeframes

The Children's Court Rules specifically provide that if a special master is assigned to make recommendations on a proposed admission or consent decree for a child who is in detention, the recommendations must be submitted to the court within five days after the admission or consent decree was referred to the special master. Rule 10-163(H). The rules do not provide other deadlines for the special master's actions, but they do provide that no time limits set forth in the rules may be tolled or enlarged because a special master is appointed. This suggests that the order of appointment should specify a time frame for the special master to submit his or her recommendations. Rule 10-163(H).

CHAPTER 10

JUVENILE PUBLIC SAFETY ADVISORY BOARD

This chapter covers:

- Creation and composition of the board
- Powers and duties of the board
- Assessments of child; administrative reviews and reports
- Court and CYFD review of release decisions

10.1 Creation of the Board

In 2009, the Juvenile Parole Board Act was repealed and replaced by the Juvenile Public Safety Advisory Board Act, §§32A-7A-1 through 32A-7A-7. The Legislature applied the changes to all children who, on July 1, 2009, were on release or otherwise eligible to be placed on release.

Significantly, under the new Act, the board is advisory and no longer has the exclusive authority to parole or release an adjudicated delinquent child. The Children, Youth, and Families Department (CYFD or department) now has “exclusive jurisdiction and authority to release an adjudicated delinquent child during the term of the child’s commitment, consistent with the provisions of the Victims of Crime Act.” In addition, the term “parole” has been replaced with the term “supervised release” throughout the Children’s Code and the Act. §32A-2-23.1. *See* §19.4 of this Handbook on supervised release.

10.2 Composition; Attached to CYFD

The Juvenile Public Safety Advisory Board consists of seven members appointed by the Governor to six year terms. The Governor designates one member of the board to serve as chair, who may in turn designate two members to serve as regional vice-chairs. The Governor may remove a member of the board pursuant to Art. V, §5 of the New Mexico Constitution. §§32A-7A-2 through 32A-7-5.

The Governor appoints a director to serve as the board’s administrative officer, and the director may employ other staff as necessary to carry out the board’s duties. The board is administratively attached to CYFD. §32A-7-2(B).

Members of the board must be persons qualified by education or professional training in such fields as criminology, education, health, psychology, psychiatry, law, social work, or sociology for children or youth. Membership must be reasonably representative of the various geographic regions of the state. §32A-7A-4.

10.3 Powers and Duties of the Board

Section 32A-7A-6(A) provides that the board will:

- advise CYFD on release decisions, including the criteria to be used to grant release and participation in decisions to grant or deny release;
- meet with the CYFD Secretary or designee at least twice each year to review the activities of the department;
- visit each CYFD-operated facility for adjudicated delinquent children at least once each year and, on or before June 30 of each year, submit a written report to the Governor and CYFD Secretary regarding conditions relating to the care and treatment of youth assigned to the facilities and any other matters judged to be pertinent by the board;
- make recommendations to the Secretary and the Director of CYFD's Juvenile Justice Division concerning programs and facilities for adjudicated delinquent children; and
- adopt rules and regulations as necessary for the discharge of its duties.

10.4 Assessments of Child, Administrative Reviews, and Reports

The board is supposed to conduct an initial assessment of a juvenile within 40 days of the juvenile's arrival at a facility. Thereafter, at regularly scheduled intervals, the board must conduct administrative reviews to assess the juvenile's progress. After each administrative review, the board must prepare a report of the offender's progress with recommendations as to readiness for release or appropriateness of programming. §32A-7A-6(B).

The board is permitted access at reasonable times to any adjudicated delinquent child and any records pertaining to the child if CYFD is considering the child's release or the child has requested release. The agency or facility to which legal custody was transferred must provide the board with facilities for communicating with and interviewing children. §32A-7A-8.

10.5 Court and CYFD Review of Release Decisions

The board may petition the court for review of a department decision to release or deny release to a child if it recommended the contrary. The board must file any such petition within ten days of the decision. §32A-2-23.1(D).

The court has jurisdiction to review the matter and issue an order that either denies or grants release to the child. No formal hearing is required. The child may not be released until the court has issued a decision. §32A-7A-23.1(D).

If the board does not petition the court for review within the required 10 day period, then CYFD's decision is final and the department will release the child or continue the commitment in accordance with the terms of its decision. §32A-2-23.1(D). However, the Secretary or designee may review a case upon the child's or the board's reasonable request at any time after release is denied. §32A-2-23.1(E).

CHAPTER 11

JURISDICTION, TRANSFER AND VENUE

This chapter covers:

- Children's Court jurisdiction
- Concept of transfer
- Venue

11.1 Children's Court Jurisdiction

11.1.1 Children's Court

The Children's Code establishes the children's court as a division of district court for each county. §32A-1-5. The district court's power was established under Article VI, Sections 1 and 13 of the New Mexico Constitution, which confers jurisdiction on the district courts over "special cases and proceedings as may be conferred by law." *See State v. Steven B.*, 2004-NMCA-086, ¶51 (Kennedy, J., specially concurring).

Because the children's court is a creature of statute, it is a court of limited jurisdiction and may only act in the manner specifically authorized by statute. *In the Matter of Angela R.*, 105 N.M. 133, 137, 729 P.2d 1387, 1391 (Ct. App. 1986). However, the children's court also has broad and inherent powers to accomplish the results contemplated by the Children's Code. *Id.* at 138, 729 P.2d at 1392; *see also State v. Steven B.*, 2004-NMCA-086, ¶17.

The Children's Code states explicitly that the children's court has exclusive original jurisdiction of all proceedings under the Children's Code in which a child is alleged to be a delinquent child. §32A-1-8(A). It also provides for exclusive jurisdiction over proceedings in which a person is eighteen years of age or older and was a child at the time the alleged act was committed. *Id.*

The Supreme Court also has the power to promulgate rules of procedure for children's court that supersede any conflicting procedural rules passed by the Legislature. The New Mexico Constitution gives the Supreme Court the power to regulate all procedure affecting the judicial branch of government. N.M. Const. Art. 6, §3 (the Supreme Court has superintending control over all inferior courts); *Ammerman v. Hubbard Broadcasting Inc.*, 89 N.M. 307, 310-11, 551 P.2d 1354, 1357-58 (1976).

While the Children's Code provides that the Supreme Court has the authority to adopt rules of procedure governing children's court proceedings *not in conflict with* the Children's Code, §32A-1-5(B), the appellate courts have made it clear that if there is a conflict between the Children's Code and a procedural rule adopted by the Court, the rule controls. *See State ex rel.*

CYFD v. Arthur C., 2011-NMCA-022, ¶21; *In the Matter of Daniel H.*, 2003-NMCA-063, ¶10; *State v. Doe*, 90 N.M. 568, 572, 566 P.2d 117, 121 (Ct. App. 1977). Since time limits are considered procedural, for example, the time frames in the Children’s Court Rules govern over any conflicting time frames in the Children’s Code. *Doe*, 90 N.M. at 572, 566 P.2d at 121.

11.1.2 Delinquent Child

The children’s court has exclusive original jurisdiction of all proceedings in which a child is alleged to be a “delinquent child.” §32A-1-8 (A)(1). A “child” is a person who is less than eighteen years old. §32A-1-4(B). A “delinquent child” is a child who has committed a delinquent act, discussed below. §32A-2-3(B). While some states have established a minimum age for prosecution, New Mexico has no minimum age requirement for trying a child as a delinquent child.

The exclusive jurisdiction of the children’s court extends to proceedings in which the person in question is eighteen or older but was a child at the time of the alleged offense. §32A-1-8(A). If the case for some reason is in district court and it becomes clear that the accused was under eighteen when the offense occurred, the district court must transfer a case to children’s court. *See* §32A-2-6; *State v. Doe*, 95 N.M. 88, 90, 619 P.2d 192, 194 (Ct. App. 1980).

11.1.3 Delinquent Act

A “delinquent act” is an act committed by a child that would be designated as a crime under the law if committed by an adult. §32A-2-3(A); *see generally In the Matter of Gabriel M.*, 2002-NMCA-047, ¶¶27-32) (discussing definition of “delinquent act”). According to §32A-2-3(A), delinquent acts *include*:

- driving under the influence of alcohol or drugs;
- failure to stop in the event of an accident causing death, personal injury, or damage or property;
- unlawful taking of a vehicle or motor vehicle;
- receiving or transferring of a stolen vehicle or motor vehicle;
- vehicular homicide;
- injuring or tampering with a vehicle;
- altering or changing an engine number or other vehicle identification numbers;
- altering or forging of a driver’s license or permit or any making of a fictitious license or permit;
- reckless driving;
- driving with a suspended or revoked license;
- an offense punishable as a felony;
- buying, attempting to buy, receiving, possessing or being served any alcoholic liquor or being present in a licensed liquor establishment, other than a restaurant or a licensed retail liquor establishment, except in the presence of the child’s parent, guardian, custodian or adult spouse;

- a violation of §30-29-2 regarding the illegal use of a glue, aerosol spray product or other chemical substance;
- a violation of the Controlled Substances Act;
- escape from the custody of a law enforcement officer or a juvenile probation or parole officer or from any placement made by the CYFD by a child who has been adjudicated a delinquent child;
- a violation of §30-15.1.1 regarding unauthorized graffiti on personal or real property; and
- a violation of an order of protection issued pursuant to the Family Violence Protection Act.

The use of the term “include” in §32A-2-3(A) indicates that the acts enumerated therein are not the only acts considered “delinquent acts.” Any other act committed by a child that would be “designated as a crime under the law if committed by an adult” would also constitute a delinquent act and be subject to children’s court jurisdiction.

There are certain types of offenses that would be “designated as a crime under the law if committed by an adult” but that are exempted from the children’s court’s jurisdiction. These are discussed in the following section.

11.1.4 Acts Not Subject to Children’s Court Jurisdiction

11.1.4.1 First Degree Murder by Older Youth

As explained above, the children’s court has jurisdiction over proceedings in which a child is alleged to be a “delinquent child,” and a “delinquent child” is defined as “a child who has committed a delinquent act.” §32A-1-8; §32A-2-3(B). While the crime of first-degree murder is clearly an act that would be “designated as a crime under the law if committed by an adult,” certain individuals under the age of eighteen who are charged with first degree murder are not subject to children’s court jurisdiction. The Delinquency Act provides that an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder is not a “delinquent child” as defined in the Act. §32A-2-3(H). These “serious youthful offenders” are tried as adults in district court. *See* Rule 10-101(A)(2)(a). In contrast, a fourteen year old adjudicated for first degree murder is tried in children’s court as a “youthful offender” and included in the definition of a “delinquent child.” §32A-2-3(J).

11.1.4.2 Certain Traffic Offenses

Section 32A-2-3(A)(1) of the Delinquency Act only identifies traffic offenses of a more serious nature as delinquent acts. The following traffic-related offenses are enumerated as “delinquent acts”:

- Driving while under the influence of intoxicating liquor or drugs;
- Failure to stop in the event of an accident causing death, personal injury, or damage to property;
- Unlawful taking of a vehicle or motor vehicle;
- Receiving or transferring of a stolen vehicle or motor vehicle;

- Vehicular homicide;
- Injuring or tampering with a vehicle
- Altering or changing of an engine number or other vehicle identification number;
- Altering or forging a driver's license or permit or making a fictitious license or permit;
- Reckless driving;
- Driving with a suspending or revoked license; or
- An offense punishable as a felony.

With one exception, the municipal, magistrate, or metropolitan court has original exclusive jurisdiction over all Motor Vehicle Code and municipal traffic code violations not listed in §32A-2-3(A)(1). The exception is for traffic offenses that arose out of the same occurrence as a delinquent act. If the children's court acquires jurisdiction over a delinquent child because of a delinquent act, it has exclusive jurisdiction over all traffic offenses alleged to have been committed by the child arising out of the same occurrence. §32A-2-29(B). This provision of the statute giving the children's court exclusive jurisdiction over related traffic offense was added to the statute in 2009.

If the children's court acquires jurisdiction over a minor traffic offense as described above, disposition of the delinquent offenses is pursuant to the Delinquency Act, and disposition of the traffic violation is pursuant to the respective Motor Vehicle Code or municipal traffic code. §32A-2-29(D) (as amended in 2009).

Whether the child is in children's court or in municipal, magistrate or metro court on the traffic violation, the child is subject to the reporting and suspension and revocation requirements of the Motor Vehicle Code. However, only the children's court may incarcerate a child who has been found guilty of a Motor Vehicle Code or municipal traffic code violations. §32A-2-29(F) (as amended in 2009).

11.1.4.3 Status Offenses

The term "status offense" refers to an act that would *not* be a crime if committed by an adult, such as truancy, running away from home, underage tobacco use, or curfew violations. In New Mexico, status offenses are not delinquent acts, and are therefore not subject to the provisions of the Delinquency Act. *See ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶18. *See* Chapter 32 of this Handbook on status offenses.

11.1.5 Three Categories of Cases

The Delinquency Act categorizes a youth alleged to have committed a delinquent act as:

- a delinquent offender;
- a youthful offender; or
- a serious youthful offender.

Where the youth falls in this list determines whether the youth is tried in children's court or regular district court, and whether the Children's Court Rules or the Rules of Criminal

Procedure, or a hybrid of both, apply. The classifications also determine whether a child will be given a juvenile disposition or considered for an adult sentence.

11.1.5.1 Delinquent Offender

A “delinquent offender” is a “delinquent child” who is subject to juvenile sanctions only and who is not a “youthful offender” or a “serious youthful offender.” §32A-2-3(C).

Delinquent offenders are tried in children’s court and the Children’s Court Rules apply to the proceedings. If the case actually goes to adjudication, the hearing itself is governed by the Rules of Criminal Procedure, including Rules 5-606 through 5-611, but the case in general is governed by the Children’s Court Rules. *See* Rule 10-101(A)(1)(a) and Rule 10-244(A) (Committee Commentary). The children’s court has no authority to impose an adult sentence on a delinquent offender and may only impose one of the dispositions authorized in §32A-2-19. *See State v. Jones*, 2010-NMSC-012, ¶12. *See* Chapter 18 on Dispositions.

11.1.5.2 Youthful Offender

The Children’s Code describes juveniles who commit certain enumerated offenses as “youthful offenders.” These offenses are generally of a more serious nature.

Under the Delinquency Act, a “youthful offender” is a “delinquent child” subject to adult or juvenile sanctions who is:

- fourteen to eighteen years old at the time of the offense and adjudicated as having committed at least one of the offenses listed in §32A-2-3(J)(1) (see below);
- fourteen to eighteen years of age at the time of the offense and adjudicated for any felony offense, and who has had three prior separate felony adjudications within the three-year time period immediately preceding the offense, provided that the felony adjudications did not arise out of the same transaction or occurrence or series of events related in time and location. Consent decrees are not considered prior adjudications for purposes of this requirement; or
- fourteen years of age who is adjudicated for first degree murder under §30-2-1. §32A-2-3(J).

The following offenses are considered youthful offender offenses under §32A-2-3(J)(1):

- second degree murder, §30-2-1;
- assault with intent to commit a violent felony, §30-3-3;
- kidnapping, §30-4-1;
- aggravated battery, §30-3-5(C);
- aggravated battery against a household member, §30-3-16(C);
- aggravated battery upon a peace officer, §30-22-25(C);
- shooting at a dwelling or occupied building or shooting at or from a motor vehicle, §30-3-8;
- dangerous use of explosives, §30-7-5;
- criminal sexual penetration, §30-9-11;

- robbery, §30-16-2;
- aggravated burglary, §30-16-4;
- aggravated arson, §30-17-6; and
- abuse of a child that results in great bodily harm or death, §30-6-1.

A youthful offender proceeding, however, is only triggered when the children's court attorney (CCA) files a notice of intent to invoke an adult sentence. As a practical matter, it is the notice of intent that changes the nature of the proceeding, not the offense. If the CCA decides for some reason not to file a notice of intent, the case proceeds under the Children's Court Rules and only juvenile sanctions may be considered. *See* Rule 10-101(A)(2)(b); Rule 10-213.

All youthful offenders are tried in children's court but the Children's Court Rules provide that the Rules of Criminal Procedure will generally govern the procedures in the case. Rule 10-101(A)(2)(b) provides in pertinent part that:

[e]xcept as specifically provided by these rules . . . the Rules of Criminal Procedure for the District Courts govern the procedure . . . in all proceedings in the Children's Court in which a notice of intent has been filed alleging the child is a "youthful offender" as that term is defined in the Children's Code.

In fact, there are a few provisions in the Children's Court Rules that specifically apply to youthful offender proceedings. *See State v. Stephen F.*, 2006-NMSC-030; Rule 10-246(B).

If the CCA files a notice of intent to seek adult sanctions and the child is found at adjudication to have committed a youthful offender offense, or pleads to such an offense, then the court will conduct an amenability hearing to determine whether to impose an adult or juvenile sanction. *See* Chapter 14, Initial Proceedings, and Chapter 20, Youthful Offender Proceedings, for the standards and procedures for imposing an adult sentence on a juvenile.

Note: If a "serious youthful offender" is not convicted of first-degree murder but is convicted of a youthful offender offense, the juvenile may be sentenced as an adult even though the CCA did not file a notice of intent to invoke adult sanctions. However, the court must conduct an amenability hearing under §32A-2-20 and consider the standards for sentencing the child as an adult in that section. *See* the discussion of serious youthful offenders below.

If the children's court sentences the child as an adult, the children's court's jurisdiction over the juvenile is terminated with regard to the acts alleged in the petition. A youthful offender given an adult sentence is treated as an adult offender and is transferred to the legal custody of the agency responsible for incarceration of persons sentenced as adults, namely the Department of Corrections. §32A-2-20(E).

11.1.5.3 Serious Youthful Offender

A "serious youthful offender" is an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder in district court. §32A-2-3(H).

In order to be charged with and indicted or bound over for trial for first degree murder, the court or grand jury must find probable cause for the charge. *See* N.M. Const., Art. II, § 14 (requiring a preliminary hearing to determine whether probable cause exists for capital, infamous, and felonious crimes if the state has not proceeded by indictment); *see also State v. Peavler*, 88 N.M. 125, 537 P.2d 1387 (1975) (there is no absolute right to a preliminary hearing in the New Mexico Constitution, and if a prosecutor proceeds by indictment it obviates the need for a preliminary hearing. Both the preliminary hearing and indictment protect the accused from being charged except upon probable cause.). If the court or grand jury fails to find probable cause, then the child must be discharged or, if there are other delinquent acts alleged in the petition, the case must be transferred to children's court. §32A-2-6(A).

As noted, the Children's Code classifies a child fifteen years of age or older as a "serious youthful offender" if the juvenile is *charged* with first degree murder. Unlike a "youthful offender," who is a "a delinquent child," the Children's Code expressly provides that a serious youthful offender is not a delinquent child. §32A-2-3(H). Cases against serious youthful offenders are tried in regular district court as if the child were an adult, and the Rules of Criminal Procedure apply. *See* Rule 10-101(A)(2)(a).

If the youth is found guilty of first degree murder, the imposition of adult sanctions is mandatory. However, the youth may be sentenced to less than the basic or mandatory sentence prescribed by the Criminal Sentencing Act, §31-18-12. §32A-2-20(E); *see also State v. Tafoya*, 2010-NMSC-019, in which the Supreme Court observed:

Although we have said that the Legislature intended to treat serious youthful offenders 'as adults, not as delinquent children,' [citation omitted] the clear grant of discretion in sentencing serious youthful offenders ... underscores the Legislature's intent to treat serious youthful offenders as individuals who may be rehabilitated."

Tafoya, 2010-NMSC-019, ¶18.

If a serious youthful offender is not convicted of first degree murder but is convicted of a youthful offender offense listed in §32A-2-3(J) (*see* §11.1.5.2 above), the youth may be subject to juvenile or adult sanctions as a youthful offender. §32A-2-20(G). As noted above, §32A-2-20 requires amenability findings before the youthful offender can be sentenced as an adult. This remains true even if the case was heard as a serious youthful offender case in adult court.

If the serious youthful offender is not convicted of first degree murder or a youthful offender offense, but is convicted of a delinquent act, then the district court is required to give the youth a juvenile disposition under §32A-2-19. §32A-2-20(H).

It is important to note that §32A-2-20(G) and (H), which provide that the penalties in §32A-2-19 and §32A-2-20 apply if a serious youthful offender is not convicted of first degree murder, were enacted in 2005 and supersede *State v. Muniz*, 2003-NMSC-021. In *Muniz*, the Supreme Court had held that a serious youthful offender who is not convicted of first degree murder but of another offense may be sentenced as an adult regardless of the act for which the offender was adjudicated. *Muniz*, 2003-NMSC-021, ¶15.

11.2 Concept of Transfer

11.2.1 Requirements for Transfer

Under the Children's Code, "transfer" refers to the mechanism by which a delinquency case that is inappropriately sent to a tribunal as a criminal case is moved to children's court. §32A-2-6(A). For example, the case may have been sent first to magistrate or metropolitan court, or filed in adult district court because of misinformation about age or offense. The tribunal should ensure that defendants who were under eighteen years old at the time the alleged offense occurred are promptly transferred to the children's court, serious youthful offenders excepted. *Id.*

The tribunal must send a copy of the accusatory pleading and other papers, documents, and transcripts relating to the case to the children's court. §32A-2-6(A). The transferring tribunal must also order that the defendant be promptly taken to the court or place of detention designated by the court, or released to the custody of a parent, guardian, custodian or other person legally responsible for the defendant to be brought before the court at the time designated by the court. Upon transfer, the CCA and probation officer are responsible for preparing and filing a petition, if warranted, in accordance with the Delinquency Act. §32A-2-6(B).

11.2.2 Transfer Under Prior Law

The concept of transfer currently in the Children's Code is different than its former meaning in New Mexico and its current application in most other states. "Transfer" is typically the term used for moving a child out of juvenile court and into district court to be tried as an adult for any number of crimes. Prior to 1993, New Mexico maintained this system of transfer and permitted any juvenile to be transferred to district court for prosecution as an adult, regardless of the crime, if evidence demonstrated that a child would not benefit from the structure of rehabilitation or that the danger the child posed to the community outweighed the possible benefits of treatment within the juvenile system. *See State v. Gonzales*, 2001-NMCA-025, ¶14 (citing, *e.g.*, 1955 N.M. Laws, ch. 205, § 9, which allowed juvenile court to transfer juveniles over the age of fourteen years to district court for prosecution if the juvenile charged with a felony was found "not a proper subject for reformation or rehabilitation").

The 1993 amendments to the Children's Code abolished the prior transfer system in favor of giving the children's court authority to preside over a youthful offender case and to sentence the youthful offender as an adult under certain circumstances, an approach that is not common in this country. *State v. Gonzales*, 2001-NMCA-025, ¶15 (citing Patricia Torbet, et. al., *Juveniles Facing Criminal Sanctions: Three States That Changed the Rules* (2000)); *see also State v. Ira*, 2002-NMCA-037, and the discussion in *State v. Jones*, 2010-NMSC-012.

It is still common to hear members of the media and others refer to a juvenile being tried as an adult when, in actuality, the youth is being tried in children's court as a youthful offender with the possibility of an adult sentence after an amenability hearing. Only serious youthful offenders (older youth charged with the specific offense of first degree murder) are tried in adult court.

Using the Term “District Court”: For the sake of simplicity, the term “district court” is used in this Handbook to refer to the criminal division of district court. Children’s court is also a division of district court, and children’s court judges are district court judges who have been assigned all or part of the children’s court docket in their district.

11.3 Venue

The Children’s Code allows a petition alleging delinquency to be brought in the county:

- where the child resides;
- where the alleged delinquent act occurred; or
- where the child is detained.

If the proceeding is commenced in a county other than the county where the child resides, the court may, on its own motion or the motion of a party, transfer the case to the children’s court for the county where the child resides. This transfer may take place at any time prior to disposition. Similarly, if the child changes his or her residence during or after the proceeding, the court may transfer venue to the children’s court of the county of the child’s new residence. Certified copies of all legal and social records pertaining to the proceeding must accompany the case on transfer. §32A-1-9.

CHAPTER 12

PETITION

This chapter covers:

- The process leading up to filing of petition
- Informal resolution
- Preliminary inquiry
- Review by children's court attorney
- Filing and service of petition.

12.1 Complaint or Referral

A child enters the delinquency system when a law enforcement officer arrests the child, investigates a case and lists the juvenile as a suspect on the police report, or issues a citation to the juvenile on a case other than a minor driving offense. Complaints alleging delinquency, otherwise known as referrals from law enforcement, are referred to probation services of the Children, Youth, and Families Department (CYFD or department).

Once a complaint is referred to the department, a children's court action may be formally commenced by the filing of a petition with the court. Rule 10-102. The filing of a petition is a two-step process:

- **Preliminary inquiry by probation services:** Probation services conducts a preliminary inquiry (PI) and decides whether to recommend the filing of a petition.
- **Children Court attorney's review of preliminary inquiry:** The Children's Court attorney (CCA) reviews the matter to determine whether there are legally sufficient grounds to file a petition and initiate a formal delinquency proceeding.

Rule 10-211 (Committee Commentary).

Serious Youthful Offenders. If the complaint alleges that the child committed first degree murder and is over 14 (in other words, the child is alleged to be a serious youthful offender), then the case will be automatically docketed in district court and the requirements in the Criminal Procedure Act, §§31-1-1 through 31-3-9, will apply. However, this might not be determined until later, in which case the case may start with a petition. Once the child is bound over or indicted for first degree murder, then the case will be filed in district court.

12.2 Preliminary Inquiry

12.2.1 Purpose

Upon receipt of a referral from law enforcement, probation services will conduct a PI to determine the best interests of the child and public with regard to any action to be taken. The purpose of the PI is to assist probation with the decision to file a petition, not to determine whether the child is delinquent. *State v. Doe*, 91 N.M. 232, 572 P.2d 960 (Ct. App. 1977). A PI must be completed before a delinquency petition is filed. *See* Rule 10-211 (Committee Commentary); *State v. Doe*, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982). Under the Children's Code, attendance of the child and the parents at a PI is not mandatory, as "no party may be compelled to appear at any conference, to produce any papers, or visit any place." §32A-2-7(B). *See also State v. Doe*, 91 N.M. 232, 234, 572 P.2d 960, 962 (Ct. App. 1977) (stating that nothing in the former statute or rule, including the language that "conferences may be conducted," indicates that there cannot be a valid preliminary inquiry without a conference.) Thus, assuming that a parent was given reasonable notice and an opportunity to be present at the PI, there can be a valid PI without a conference involving the child and his parents or attorney.

12.2.2 Timeline and Notice

12.2.2.1 Child in Detention

If a child is in detention, the PI must be completed, and the CCA must file a petition, within two days of the date of detention, excluding Saturdays, Sundays, and legal holidays. *See* Rule 10-211(C), Rule 10-107. The juvenile probation officer (JPO) must give the child's parent, guardian or custodian or the child's attorney reasonable notice and an opportunity to be present at the PI. §32A-2-7(C); 8.14.2.9(A)(3) NMAC. Written notice is not necessarily required. *See State v. Doe*, 92 N.M. 198, 199, 585 P.2d 342, 343 (Ct. App. 1978) (decided under prior law). If the JPO fails to complete the PI or the CCA fails to file the petition within two days of detention, the child must be released from detention and the time frames for conducting a PI for a child who is not in detention apply.

12.2.2.2 Child Not in Detention

If the child is not in detention, probation services must complete the PI within thirty days of receiving the referral from law enforcement. However, if the department determines that an extension is necessary to conduct a thorough PI and that the extension is not prejudicial to the best interests of the child, the thirty-day time period may be extended. §32A-2-7(C). Within two business days of the completion of the PI, probation services must forward information related to the PI to the CCA. *See* 8.14.2.9(A)(2) NMAC.

12.2.3 Discrepancy Between Time Limits in the Code and Rules

The time limit in the Children's Code, which requires that a petition be filed (and hence a PI completed) within twenty-four hours after a child is taken into custody, excluding weekends and holidays, differs from the time limit in the Children's Court Rules. As noted, the Children's

Court Rules require that a petition be filed within two days. *Compare* Rule 10-211(C) and §32A-2-13(A). According to the committee commentary to Rule 10-211, the difference between time limits in the statute and the rule is intentional and the Children's Court Rule applies because it is a procedural rule. *See also* Chapter 11 of this Handbook, Jurisdiction.

It is also important to note that, when the designated time period stated is eleven days or less, the intermediate Saturdays, Sundays and legal holidays are not included in the computation. Rule 10-107(A). Hence, the two days does not count weekends and holidays. Rule 10-107.

12.2.4 Advisement of Rights

At the commencement of any PI conference, the JPO must advise the child and parent, guardian, or custodian of the following basic rights of the child.

- The child has the right to remain silent and if the child is questioned, the child has the right to refuse to answer any questions and may stop answering questions at any time.
- The child has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, either oral or written, made during the course of the PI between the child, parent, guardian or custodian and a probation officer.
- The child has the right to be represented by an attorney present at the PI, and to have an attorney present at all court proceedings against the child. If the child does not have an attorney for court proceedings, an attorney will be appointed.
- If the child is 13 years or older, a statement made by the child can be used against the child only if the constitutional rights have been explained to the child, and the child knowingly and voluntarily waived his constitutional rights.
- The state is not entitled to use against the child out-of-court statements by the child which are constitutionally inadmissible, evidence illegally seized or obtained or a statement or admission made out of court, unless it is corroborated by other evidence, and no confessions, statements, or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition.
- If the child is under the age of 13 and is charged and adjudicated as a delinquent child, the child may not be fingerprinted or photographed for identification purposes without a court order.
- If the child does not have a parent, guardian, or custodian appearing on the child's behalf, or the child's interests are in conflict with theirs, the child may request appointment of a guardian by the court.
- If the child is taken into custody and detained, then the child has the right to a judicial determination of probable cause by a judge, special master, or magistrate court within 48 hours, including Saturdays, Sundays, and legal holidays.
- The child may introduce evidence on his own behalf, confront and cross-examine witnesses testifying against him, have witnesses of his choosing subpoenaed, and may admit or deny the charges in the petition.

See 8.14.2.9(B) NMAC.

12.2.5 Topics

During the PI, the JPO discusses the charges, the possible outcomes, the route a case might take through children's court, and possible recommendations to the CCA concerning disposition of the case. The JPO may refer the matter to another appropriate agency and conferences may be conducted for the purpose of effecting adjustments or agreements that would obviate the necessity for filing a petition. §32A-2-7(B).

12.3 Pre-Petition Informal Resolutions

The JPO may attempt to resolve the complaint informally with the child and not recommend filing a petition. The JPO may informally dispose of misdemeanor charges unless the child has been referred for three or more prior misdemeanors within the past two years. §32A-2-5(B). Examples of informal dispositions by the JPO might include:

- counseling with monitoring;
- referring the child to a particular diversion program; or
- some form of informal supervision.

Programs that may be available include first offender diversion programs, parent-child mediation, victim-offender mediation, family counseling, or alcohol and drug education. Even letters of apology or essays are used.

12.4 Referral to Children's Court Attorney

The JPO may refer juvenile misdemeanor cases to the CCA and recommend an appropriate disposition, unless the child has been referred for three or more prior misdemeanors within two years of the instant offense, in which case the JPO must notify the CCA of the referral and recommend an appropriate disposition. §32A-2-7(E). The JPO is also required to notify the CCA of any complaint involving a felony and recommend a disposition. §32A-2-7(F).

Practice Note. The CCA in a given judicial district may also have an agreement with juvenile probation office to refer certain types of cases to the CCA, even if such referral is not mandatory under the Children's Code or Children's Court Rules.

12.5 Review by Children's Court Attorney

12.5.1 Legal Sufficiency

Upon receipt of the referral and recommended disposition from the JPO, the CCA must review the matter to determine whether there are legally sufficient grounds to proceed to court with the case. The CCA makes the final determination irrespective of the JPO's recommendation. Rule 10-211 (Committee Commentary); *State v. Doe*, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

12.5.2 Best Interests of Public and Child

Before filing a petition, the CCA, after consulting with probation services, must determine and endorse upon the petition that filing the petition is in the best interest of the public and the child. §32A-2-8. The best interest determination has been described as a social determination, not a legal one, and involves the exercise of discretion. *State v. Doe*, 97 N.M. 792, 795, 643 P.2d 1244, 1247 (Ct. App. 1982).

In *Doe*, the children's court had dismissed the petition because it found that the best interest determination was based solely on the severity of the offense and that this was insufficient as a matter of law. The Court of Appeals disagreed and reversed the children's court. *Id.* However, it also thought that the state's claim that a best interests determination is never subject to review was too broad. *Id.* at 794, 643 P.2d at 1246. The Court suggested that a claim that the determination amounted to "egregious vindictiveness or was intentionally discriminatory" would be subject to review. *Id.*

According to IJA-ABA standards commentary cited by the Court of Appeals in *Doe*, one of the primary factors that should be considered when determining how to handle a complaint is the nature of the offense charged, and most commentators agreed at the time that a juvenile who has committed a serious offense should ordinarily have a petition filed against him or her. Some of the other factors listed were the seriousness of the offense, the nature and number of the child's prior contacts with children's court, the circumstances surrounding the alleged delinquent conduct, the age and maturity of the child, the child's school attendance and behavior, the child's attitude concerning the alleged conduct, towards law enforcement and the children's court, and the availability of services to meet the child's needs. *State v. Doe*, 97 N.M. at 794-95, 643 P.2d at 1246-47 (citing IJA-ABA Joint Commission on Juvenile Justice Standards, 1980).

12.5.3 Timeframes for Filing Petition

The Legislature intended that there be prompt adjudication of cases under the Children's Code. *Doe v. State*, 88 N.M. 347, 350, 540 P.2d 827, 830 (Ct. App. 1975). Accordingly, when a child is in detention, a petition alleging delinquency must be filed within two days from the date of detention, excluding Saturdays, Sundays, and legal holidays. Rule 10-211(C); Rule 10-107(A); *see* §12.2.3 earlier in this chapter.

When a child is not in detention, a petition alleging delinquency must be filed within sixty days of receipt of completion of the PI, unless a motion is granted to extend the time limit for good cause shown. If the child is not in detention, a petition may not be dismissed for failure to comply unless there is a showing of prejudice to the child. §32A-2-7(D).

12.6 General Form and Content

Section 32A-1-11 sets forth the general form and content required for a petition. The petition is to set forth with specificity the following:

- the facts necessary to invoke the court's jurisdiction;

- citation to all laws alleged to have been violated;
- the name, birth date, and residential address of the child;
- the name and residential address of the parents, guardian, custodian or spouse, if any, of the child; and if no parent, guardian, custodian or spouse, if any, resides or can be found within the state or if a residence address is not known, the name of any known adult relative residing within the state or, if there are none, the known adult relative residing nearest to the court;
- whether the child is in custody or detention, and if so, the place of custody or detention and the time the child was taken into custody;
- whether the child is an Indian child; and
- a statement of any matters not known and the fact that they are not known.

The petition must also include the CCA's signature and endorsement that the filing of the petition is in the best interests of the public and child. The form of the petition is set forth in the Children's Court Rules and Forms adopted by the Supreme Court. *See* Form 10-406.

12.7 Parties

12.7.1 Basic Parties

The parties to a delinquency proceeding are the child alleged to be delinquent, the state, a parent of a child alleged to be delinquent if named pursuant to §32A-2-28, and any person made a party by the court. Rule 10-121(A). The CCA must usually file a separate petition for each child who is alleged to be a delinquent child.

12.7.2 Joinder

A party may move to join two or more respondent children, or the CCA may file a statement of joinder contemporaneously with the filing of the petitions under the following circumstances:

- when each of the respondents is charged with accountability for each offense included;
- when all of the respondents are charged with conspiracy and some of the respondents are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
- when, even if conspiracy is not charged and not all of the respondents are charged in each count, the several offenses charged:
 - were part of a common scheme or plan; or
 - were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of others.

Rule 10-212(B).

12.7.3 Severance

The court may order separate trials of offenses, grant a severance of respondent children, or provide whatever other relief justice requires, if it appears that a respondent or the state is

prejudiced by joinder. Rule 10-212(C). For instance, a joint respondent may be prejudiced if another respondent attempts to introduce evidence that violates the joint respondent's constitutional right of confrontation. The U.S. Supreme Court ruled in *Bruton v. U.S.*, a criminal case, that such evidence is not admissible. *Bruton v. U.S.*, 391 U.S. 123, 130-31 (1968). In ruling on a motion for severance, the court may order the state to deliver to the court for in camera inspection any statements or confessions made by the respondents that the state intends to introduce in evidence at the adjudicatory hearing. Rule 10-212(C).

12.8 Intervention

Upon timely application to intervene, the court has the discretion to allow the following persons to intervene under such terms and conditions as the judge may prescribe:

- the parents, guardian, or custodian of the child;
- a person with a statutory basis for intervention;
- any person who has a constitutionally protected liberty interest in the proceedings if the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties; or
- any other person permitted by law to intervene.

Rule 10-122(B). Any party wishing to intervene must file a motion pursuant to the requirements of Rules 10-122(C) and 10-104.

12.9 Joinder of Offenses

A single petition alleging delinquency may join two or more offenses, with each allegation stated in a separate count, if the allegations:

- are of the same or similar character, even if not part of a single scheme or plan; or
- are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

Rule 10-212(A). A motion for consolidation necessitates a review of the evidence to determine whether the charges logically arise from the same episode or acts of a similar nature. *State v. Burdex*, 100 N.M. 197, 204, 668 P.2d 313, 320 (Ct. App. 1983).

12.10 Multiple Petitions

It is not uncommon for a child to be facing multiple petitions simultaneously. Generally, when a child has multiple petitions pending at the same time in the same district, the cases may be consolidated. If a child has multiple petitions assigned to two or more different judges, the cases may be consolidated to the judge with the lowest case number (the oldest case), depending on the local district court rules. See, e.g. LR2-105, LR6-207 or LR8-202.

12.11 Statement of Probable Cause

If a child is to be detained and was arrested without a warrant, a copy of the statement and determination of probable cause required by Rules 10-221(C) and 10-222 must be filed with the petition.

12.12 In Need of Care or Rehabilitation

The Delinquency Act formerly required that the petition allege that the child had committed a delinquent act and that the child was in need of care and rehabilitation. *See In the Matter of Doe III*, 87 N.M. 170, 531 P.2d 218 (Ct. App. 1975). The Delinquency Act no longer requires the petition to allege that the child is in need of care or rehabilitation. Language similar to the “in need of care or rehabilitation” language now appears in §32A-2-19 of the Delinquency Act on dispositions, which directs the court to make any of the enumerated dispositions for the “supervision, care and rehabilitation of the child.” §32A-2-19(B).

12.13 Amendment

Upon motion by the CCA or the child’s attorney and when it appears from the facts during the course of any proceeding under the Children’s Code that some finding or remedy other than or in addition to those indicated by the petition are appropriate, the court may amend the petition and proceed to hear and determine those additional or other issues, findings or remedies. §32A-1-18(A). According to Rule 10-211(E), any motion by the CCA, and resulting amendment of petition, to charge the child with additional or different offenses is subject to the provisions of Rule 10-212 on joinder of offenses and parties, and must occur prior to the commencement of the adjudicatory hearing. Upon such amendment, the court must grant a continuance if requested by the child to allow further time for preparation. Rule 10-211(E).

Any extension of time for holding the adjudicatory hearing may not exceed the sixty day total time limitation on extensions of time for adjudicatory hearings in Rule 10-243(D), unless the Supreme Court grants a petition for extension for a longer time period pursuant to 10-243(E).

Rule 10-214 also permits the court, at any time prior to an adjudication on the merits, to cause the pleadings to be amended to cure errors, defects, omissions, imperfections or variances if substantial rights of the child are not prejudiced. According to the Court of Appeals, this provision addresses minor technical amendments to a petition, such as correcting the date of the offense or the name of the victim, or typographical errors, not major substantive amendments like the addition of different charges. *See In the Matter of Garrison P.*, 2002-NMCA-094, ¶8 (discussing when amendment to a petition affects the “substantial rights” of defendant).

12.14 Assignment of Judge upon Filing of Petition

The judge before whom the case is to be tried shall be designated at the time the petition is filed and will be assigned in accordance with local district court rule. Rule 10-161(A). *See, e.g.*, LR 2-103 and LR 2-104.

12.15 Summons

12.15.1 Required

The Children's Code and Children's Court Rules require that the clerk of the court issue a summons and deliver it to the CCA for service. The summons must be signed by the clerk, issued under the seal of the court, and be directed to the child. When the child is not in detention, the clerk will set the case for first appearance, which usually occurs within four to six weeks of the time the petition is filed. If the child is in detention, the detention hearing is usually the first appearance. Any child may waive the issuance or service of summons. Rule 10-103.

12.15.2 Contents

The summons must have a copy of the petition attached and:

- include the name of the court and county where the petition is filed, the docket number of the case, the names of the parties, and the name of each party to whom the summons is directed;
- contain the name, address, and phone number of the CCA;
- require the child to appear personally before the court at the time fixed by the summons to answer the allegations of the petition; and
- advise the parties of their right to counsel.

§32A-1-12(B); Rule 10-103.

The court may additionally endorse upon the summons an order directing the parent, guardian, custodian, or other person having physical custody or control of the child to bring the child to the hearing. §32A-1-12(C). In addition, if it appears from any sworn statement presented to the court that the child needs to be placed in detention, the judge may also endorse on the summons an order that an officer serving the summons shall at once take the child into custody and take the child to the place of detention designated by the court. §32A-1-12(D).

12.15.3 Service

The summons shall be served on the child and parents in accordance with the requirements of §32A-1-13 and Rule 10-103. If the child is present at the hearing, the child's counsel, with the consent of the parent, guardian, or custodian, may waive service of the summons in the child's behalf. §32A-1-12(E).

12.16 Notice of Petition

The CCA must serve notice of filing the petition on the parents, guardians, or custodians of the child if they are not joined in the delinquency proceeding. Rule 10-211(D); *Martinez v. Mafchir*, 35 F.3d 1486, 1493 (10th Cir. 1994) (finding that the CCA bears the burden of providing notice to the parties). The CCA must serve the notice in accordance with the requirements of Rule 10-104.

12.17 Appointment of Counsel

The court must appoint the Public Defender to represent the child within five days from the date the petition is filed, or at the beginning of the detention hearing, whichever occurs first, unless counsel has already entered an appearance on behalf of the child. Rule 10-223(A). For a more in-depth discussion *see* Chapter 5 of this Handbook, Defense Counsel.

CHAPTER 13

TAKING INTO CUSTODY; DETENTION

This chapter covers:

- Taking a child into custody
- Detaining a child pending a delinquency petition
- Detention hearings
- Places of detention
- Detention hearing checklist

13.1 Overview

Taking a child into “custody” and “detaining” a child are not the same thing under the Children’s Code. A child is “in custody” when the child is under the supervision of a law enforcement officer or agency. “Detention” refers to a term of custody when a child is delivered to a detention facility and detained there pending the adjudicatory hearing or trial pursuant to a determination that the child meets the criteria for detention.

This chapter only discusses taking a child into custody and detaining a child pending a court hearing on delinquency. The requirements for committing a delinquent child or incarcerating a youthful offender or serious youthful offender are discussed in Chapter 18 of this Handbook, Dispositions.

Section 32A-2-9 lists three circumstances in which a child may be taken into custody:

- pursuant to the laws of arrest for commission of a delinquent act;
- pursuant to a court order issued because a parent, guardian, or custodian failed, when requested, to bring the child before the court after promising to do so when the child was released from custody;
- by a juvenile probation officer (JPO) who proceeds under §32A-2-5.

Under §32A-2-23(I), added in 2009, CYFD may seek a warrant from the court when the child absconds from supervised release.

13.2 Arrest

A police officer may arrest a child and take the child into custody if the police officer has probable cause to believe that the child committed a delinquent act. Probable cause exists if the

officer has within his or her knowledge reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe that the suspect has committed or is committing a crime. *See Beck v. Ohio*, 379 U.S. 89 (1964); *State v. Hawkins*, 1999-NMCA-126, ¶17 (stating that the test for probable cause is “whether the facts and circumstances within the officer's knowledge would warrant a person of reasonable caution to believe that an offense is being committed”).

13.2.1 Warrantless Arrests

Under the common law, if probable cause exists, a police officer may apprehend a person in a public place and arrest him without a warrant if the police officer has reasonable grounds to believe that a felony has been committed and that the person before him or her committed it. This is so even if the officer has time to get a warrant. *See U.S. v. Watson*, 423 U.S. 411 (1976).

Under the common law, a police officer may also arrest a child without a warrant for a misdemeanor committed in the officer's presence. *See Wong Sun v. U.S.*, 372 U.S. 471 (1963); *State v. Juna*, 93 N.M. 773, 777, 606 P.2d 183, 187 (1980). This includes misdemeanor traffic offenses. *See State v. Bricker*, 2006-NMCA-052 (citing *State v. Gutierrez*, 76 N.M. 429, 430, 415 P.2d 552, 553 (1966)). A crime is committed in the officer's presence if the officer is aware of it through any of his or her senses.

Several statutes and rules also authorize warrantless arrests. They include, but are not limited to, statutes on the following:

- criminal trespass, §30-21-3;
- crimes punishable by death or a felony punishable by over one year in prison, §31-4-14 (applies to extradition cases);
- violations of conditions of parole release, §31-21-14(B);
- illegal gambling, §30-19-12;
- assault or battery on a household member, §31-1-7;
- violations of the Drug Precursor Act in an officer's presence, or violations of the Act that are felonies, §30-31B-13; and
- violations of orders of protection under the Family Violence Protection Act, §40-13-6(D).

13.2.2 Arrest Warrants

If a warrantless arrest is not authorized under the common law or statute, the children's court judge or district judge must issue a warrant for the arrest of a child alleged to have committed a delinquent act or to have violated conditions of release or otherwise failed to appear in court. Rule 10-215.

The warrant must be issued, executed, and returned in accordance with the Rules of Criminal Procedure for the District Courts. Rule 10-215(A). The form for an arrest warrant is found in the Children's Court Forms, Form 10-410, and the required probable cause affidavit for the arrest warrant is Form 10-409. These forms were amended and a form of bench warrant, Form 10-412A, added effective February 14, 2011.

13.3 Failure to Appear Upon Written Promise

The second circumstance in which a child may be taken into custody under §32A-2-9 is when the court issues an arrest warrant because of a parent, guardian, or custodian's failure when requested to bring the child before the court after having promised to do so upon release of the child from custody. §§32A-2-9(A); 32A-2-10(A)(2).

13.4 Violation of Probation or Supervised Release; Threat of Leaving Court's Jurisdiction

The third circumstance under which a child may be taken into custody under §32A-2-9 is when a JPO has reasonable cause to believe that a child who is under the Children, Youth and Families Department's (CYFD or department) supervision as a delinquent child or a youthful offender has violated a condition of probation, supervised release or may leave the court's jurisdiction. In this instance, a JPO may take the child into physical custody and place the child in detention subject to the provisions of the Delinquency Act relating to custody and detention procedures and criteria, which will be discussed below. §§32A-2-9(C); 32A-2-5(C); 32A-2-25.

If a child absconds from supervised release supervision, the department may seek a bench warrant from the court. §32A-2-23(I). If a child absconds from supervised release supervision and is apprehended in another state after the issuance of a retake warrant, the department will cause the return of the child to the state at the department's expense. §32A-2-25(B).

13.5 Release from Custody or Delivery to a Place of Detention

The Children's Code and the Children's Court Rules favor releasing children taken into custody. *See* §32A-1-15. A child taken into custody must be released "with all reasonable speed" to the parent, guardian, or custodian, or adult authorized to sign on behalf of the child's parent, guardian or custodian, or delivered to a place of detention, a medical or evaluation facility, or a center or organization that the court or the department recognizes as an alternative to secure detention, such as a juvenile reception and assessment center. §32A-2-10(A).

13.6 Criteria for Detention

13.6.1 Interview

If law enforcement delivers a child to a place of detention, the Code provides that only a department employee or a trained county detention professional designated by the department may place the child in detention. §32A-2-10(B). The Children's Court Rules require that upon delivery of a child to a place of detention, unless the court specifically orders otherwise, a JPO will interview the child and if possible, the parents, to determine whether continued detention is necessary. Rule 10-221(A). No child may be placed in detention unless a determination is made that the child meets the statutory criteria for detention.

13.6.2 Risk Assessment Tool

The department is required to develop a detention risk assessment instrument (RAI) in order to provide a standardized method for determining whether the criteria for detention in the Code have been met. The RAI consists of a series of questions, each with an assigned value, which address a variety of items ranging from the child's offense history, to weapons, to any mitigating or aggravating factors. A copy of the RAI in use in early 2011 can be found at the end of Chapter 7 of this Handbook.

The JPO must apply the RAI before placing any child in detention, and a determination must be made pursuant to application of the tool that the child:

- poses a substantial risk of harm to himself;
- poses a substantial risk of harm to others; or
- has demonstrated that he may leave the court's jurisdiction.

§32A-2-11.

Practice Note: If, based upon the RAI, a child does not meet the criteria for detention but the parent or guardian refuses to accept custody, the child could remain in detention if the department is unable to place the child in an alternative facility such as a juvenile shelter.

13.6.3 Probable Cause

If an arrest is made without a warrant and the child is not released, then a judicial determination of probable cause is required. There must be probable cause to believe that the child committed an offense. Rule 10-222(A) and (D).

The arresting officer is required to prepare a statement of probable cause which includes the charges against the child and is substantially in the form approved by the Supreme Court. Rule 10-221(C); Form 10-430; §32A-2-13(A)(1). The arresting officer or his designee must inform the child of the contents of the statement, and provide a copy of the statement to the child and the child's attorney prior to the detention hearing. Rule 10-221(C).

The court must make the judicial determination of probable cause promptly. The determination may be made by a district judge, magistrate, or special master, but must in any event be made within forty-eight hours after custody commences and no later than the child's first appearance, whichever occurs earlier. The determination is non-adversarial, may be held in the absence of the child and counsel, and may be conducted by telephone. No witnesses are required unless the court determines that there is a basis for believing that the appearance of one or more witnesses might lead to a finding that there is no probable cause. The statement of probable cause by the law enforcement officer may be the basis of a probable cause determination by the court. If the statement of probable cause fails to make a written showing of probable cause, the officer may file an amended statement of probable cause with sufficient facts to show probable cause for detaining the respondent child. Rule 10-222(C); §32A-2-13(A)(1).

If the court finds no probable cause, the child must be released. Rule 10-222(D); §32A-2-13(A)(1).

13.7 Release from Detention

A child may not be detained, or must be released from detention under the following circumstances:

- Based on application of the RAI, probation services determines that the child does not pose a substantial risk of harm to the child's self or others, or has not demonstrated that he or she may leave the jurisdiction of the court. §32A-2-10(A); 32A-2-11(A).
- The judge, special master, or magistrate determines that there is no probable cause for the charge or fails to make a probable cause determination pursuant to Rule 10-222 within forty-eight hours. Rule 10-222; §32A-2-13(A)(1).
- The children's court attorney (CCA) fails to file a petition within two days of the time the child is taken into custody, excluding Saturdays, Sundays, and legal holidays, or if the court fails to hold a detention hearing within the time frames in Rule 10-225. Rule 10-211(C), §32A-2-13(A)(2). (**Note:** The rule and the statute conflict; the rule would control since the timeline is procedural.)
- The child is under the age of eleven. The child may not be held in detention, but a peace officer may detain and transport the child for an emergency mental health evaluation and care in accordance with §32A-6A-19 if the child poses a substantial risk of harm to the child's self or others. §32A-2-10(C).
- The child is believed to be suffering from a serious illness that requires prompt treatment or prompt diagnosis. The child may not be placed in detention and instead must be delivered to a medical facility, if available. §32A-2-10(C)(4).
- The person taking the child into custody has reasonable grounds to believe the child presents a likelihood of serious harm to the child or others or is suffering from some other serious mental condition or illness that requires prompt treatment or prompt diagnosis. The child must be delivered to an evaluation facility, if available. §32A-2-10(C)(5).

13.8 Notice of Detention

If the child is detained pursuant to the RAI, notice must be given to the parent, guardian or custodian as soon as possible, but at least within twenty four hours. The statute and the rule differ somewhat in their instructions. The statute, §32A-2-10(D), requires that the person taking the child into custody give written notice to the parent, guardian or custodian, or to an adult authorized by the parent, guardian or custodian, and to the court. The rule, Rule 10-221, requires that the person in charge of the place of detention advise the parent, guardian or custodian of the detention. The Notice of Detention form, Form 10-413, provides a signature line for Probation Services, and permits notice to be given orally.

The notice of detention must include:

- the reason the child has been placed in detention;
- the place where the child is detained and the visiting hours;

- that if no petition is filed, the child will be released;
- that if a petition is filed, a detention hearing will be held to determine whether continued detention is necessary; and
- that the child has a right to an attorney and if they do not obtain an attorney for the child, the Public Defender will represent the child.

Rule 10-221(B).

13.9 Detention Hearing

13.9.1 Purpose; Notice Required

The purpose of a detention hearing is to determine whether continued detention is necessary because the child poses a risk of harm to themselves or others, or has demonstrated that he is a flight risk. §32A-2-13(A)(3).

The court is required to give oral or written notice of the detention hearing to the CCA, the public defender, and probation services. Probation services in turn must make a reasonable effort to give oral or written notice of the time and place of the detention hearing to the child and to the parents, guardian, or custodian of the child if they can be found. Rule 10-225(B). The person giving the notice is expected to use good faith in providing notice to the parents, guardian, or custodian of the child as soon as it appears that a petition will be filed and a date and time for the detention hearing is ascertained.

13.9.2 Timeline

Under Rule 10-225(A), a detention hearing must be held within one day from the time:

- the petition is filed if the child is in detention when the petition is filed;
- the child is placed in detention if the child is placed in detention after the petition is filed;
- the child is placed in detention without a warrant for failure to comply with the conditions of release; or
- the child moves the court for release after being placed in detention pursuant to a warrant for failure to comply with conditions of release. Rule 10-225(A).

The second bullet is designed to cover those situations in which the petition has already been filed and a determination is made later to arrest the child. Rule 10-414 is the form containing a demand for a release hearing.

13.9.3 Participants

The participants in the detention hearing usually include the child, the child's parent, guardian, or custodian, the CCA, the Public Defender or private attorney representing the child, and the judge or special master. The judge may appoint one or more persons to serve as special master on a full- or part-time basis to hold the detention hearing, provided that a JPO may not be

appointed as a special master. §32A-2-13(B). The judge must afford probation services with an opportunity to be heard, and the department may appear as a party. §32A-2-13(C).

13.9.4 Public Access to Hearings

Detention hearings, like all delinquency proceedings are open to the public. However, the court may deem it appropriate to conduct a closed hearing based upon a finding of exceptional circumstances. If a court orders a hearing closed to the public, only the parties, their counsel, witnesses, and other approved persons may be present at the hearing. Any person admitted by the court to a closed hearing, does so on the condition that they refrain from divulging any information concerning the exceptional circumstances that resulted in the need for a closed hearing. Representatives of the news media are subject to the same conditions, as well as any other conditions that the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Delinquency Act. Any person in attendance at a closed hearing who intentionally divulges information in violation of this prohibition is guilty of a petty misdemeanor. §32A-2-16(B) and (C).

13.9.5 Appointment of Counsel, Guardians, and Guardians ad Litem

The judge or special master must appoint the Public Defender to represent the child at the commencement of the detention hearing unless counsel has already entered an appearance on behalf of the child. *See* Rule 10-223(A); §32A-2-13(D). *See* Chapter 5 of this Handbook.

The beginning of the detention hearing is also a time to consider whether a guardian needs to be appointed. §32A-2-13(D). A guardian must be appointed if the child does not have a parent or legally appointed guardian in a position to exercise effective guardianship. §32A-2-14(K).

At any stage of the proceeding, the court may appoint a guardian ad litem for the child (as distinct from a guardian) if there is no parent, guardian, or custodian appearing on the child's behalf, or if the interests of the parent, guardian or custodian conflict with those of the child. §32A-2-14(J). *See* Chapter 6 for a discussion of the role of parents, guardians, and GALs.

13.9.6 Electronic Hearings

In 2009, the statute on detention hearings was amended to allow detention hearings to be conducted electronically in certain circumstances. At the request of any party, the court may permit a detention hearing to be conducted by appropriate means of electronic communications, provided that:

- all hearings conducted by electronic means are recorded and preserved as part of the record;
- the child has legal representation present;
- no plea is allowed to be taken via electronic communication; and
- the court finds that:
 - undue hardship will result from conducting the hearing with all parties, including the child, present in the courtroom; and

- the hardship substantially outweighs any prejudice or harm to the child that is likely to result from the hearing being conducted by electronic means.

See §32A-2-13(A)(3).

13.9.7 Advisement of Rights

At the start of a delinquency proceeding, the judge or special master must advise the child of the basic rights provided under the Children's Code. §32A-2-13(D). If a child has been placed in detention, the advisement of rights will likely occur at the detention hearing, at all other times this will occur at the child's First Appearance.

The rights of which the child must be advised at their First Appearance are:

- the offense charged;
- the penalty provided by law for the offense charged;
- the right, if any, to bail;
- the right, if any, to trial by jury;
- the right to the assistance of counsel at every stage of the proceedings;
- the right, if any, to representation by an attorney at state expense;
- the right to remain silent, and that any statement made by the child may be used against the child; and
- the right, if any, to a preliminary examination.

Rule 10-224.

Practice Note: The majority of the time, a child will choose to waive the advisement of their rights by signing a form in which they deny the allegations of the petition and waive the right to a personal appearance, after reviewing it with their attorney. Children's Court Form 10-415A is the denial of petition and explanation of rights form.

13.9.8 Criteria for Detention

At the detention hearing, the judge or special master is required to determine whether the child:

- poses a substantial risk of harm to himself;
- poses a substantial risk of harm to others; or
- has demonstrated that he may leave the court's jurisdiction.

§32A-2-11(A). In making this determination, all relevant and material evidence helpful in determining the need for detention may be admitted by the judge or special master even though it would not be admissible in a hearing on the petition. §32A-2-13(H).

13.9.9 Denial of Release

If the judge finds that the child's detention is appropriate under the Code's criteria for detention, the judge or special master shall order detention in an appropriate facility. §32A-2-13(E). The court may review a denial of release at any time. Rule 10-225(D). If a child is not released at the detention hearing and the parent, guardian, or custodian was not notified of the hearing and did not appear or waive appearance at the detention hearing, the judge or special master must rehear the detention matter without unnecessary delay upon the filing of an affidavit stating the facts and a motion for rehearing. §32A-2-13(I).

13.9.10 Conditional Release

If the judge or special master finds that detention is not appropriate under the Delinquency Act's criteria, the judge or special master must order the release of the child. However, the child's release may be conditioned on one of the following:

- placement of the child in the custody of a parent, guardian, or custodian, or under the supervision of an agency agreeing to supervise the child, §32A-2-13(F)(1);
- placement of restrictions on the child's travel, association with other persons or place of abode during the period of the child's release, §32A-2-13(F)(2); or
- imposition of any other condition deemed reasonably necessary to assure the child's appearance as required, including a condition requiring that the child return to detention as required.

Rule 10-225(C). *See also* §32A-2-13(F), which provides that the court may "impose any other condition deemed reasonably necessary and consistent with the criteria for detaining children established by the Children's Code."

The court may amend an order conditionally releasing the child to impose additional or different conditions of release or to return the child to custody or detention for failure to conform to the conditions originally imposed. §32A-2-13(G).

13.10 Places of Detention

13.10.1 CYFD Licensing of Detention Facilities

When a child is detained by a JPO prior to the detention hearing or by a judge prior to an adjudicatory hearing, the child shall be delivered to a place of detention authorized under §32A-2-12. The Delinquency Act defines detention facility as "a place where a child may be detained under the Children's Code pending court hearing and does not include a facility for the care and rehabilitation of an adjudicated delinquent child." §32A-2-3(D). CYFD is required to promulgate standards for the site, design, construction, equipment, care, program, personnel and clinical services at a detention facility, and must certify all detention facilities within the state.

No child may be detained in a detention facility unless it is certified by the department. The department is required to inspect all detention facilities at least once a year and must revoke or

refuse to renew certification if the detention facility fails to meet the standards. §32A-2-4. The department's standards and requirements are set forth in 8.14.14 and 8.14.15 NMAC.

13.10.2 Type of Facility

A child alleged to be a delinquent child may be detained in any of the following places:

- a licensed foster home or a home otherwise authorized under the law to provide foster or group care;
- a facility operated by a licensed child welfare services agency;
- a shelter-care facility provided for in the Children's Shelter Care Act;
- a detention facility certified by the CYFD for children alleged to be delinquent children;
- any other suitable place, other than a facility for the long-term care and rehabilitation of children who have been adjudicated, that is designated by the court and that meets the standards for detention facilities pursuant to the Children's Code and federal law; or
- the child's home or place of residence, under conditions and restrictions authorized by the court.

§32A-2-12(A).

The Children's Code was amended in 2009 to specify that if a child is placed in a shelter-care facility, the facility must be in compliance with all standards, conditions, and regulatory requirements, and shall be considered a temporary placement subject to judicial review within thirty days of placement. §32A-2-12(A)(3). In addition to the judicial review provided for in §32A-2-12(A)(3), the Code was further amended to allow a child detained in any other out-of-home placement to request judicial review of the appropriateness of the placement. *See* §32A-2-12(G).

13.10.2.1 Protective Measures for Children in Adult Jails

In certain instances, a child may be detained in an adult jail.

- Under §32A-2-12(C), a child adjudicated as a youthful offender who is violent toward staff or other residents in a detention facility may be transferred and detained pending a court hearing in a county jail.
- Under §32A-2-12(D), a child who has previously been incarcerated as an adult or a person 18 years of age or older may be detained in a county jail, although a child may not be transferred to a county jail solely on the basis of turning 18 while detained in a juvenile detention facility;
- Under §32A-2-12(E), a child alleged to be a serious youthful offender may be detained, pending a court hearing and prior to arraignment, in a county jail if other options listed in the statute are inappropriate.

In all of these situations the director of the jail must presume that the child is vulnerable to victimization by inmates within the adult population due to his age, and take measures to protect

the child. The protective measures must not result in diminishing the child's civil rights to less than those afforded to incarcerated adults. §32A-12-12(C) - (E).

In 2009, the Legislature added a new section to the Delinquency Act, §32A-2-4.1, which provides that children arrested and detained for an alleged delinquent act may be temporarily held in an adult jail or lockup for no longer than six hours. During that time, the child must be placed in a setting that is physically segregated by sight and sound from adult offenders. §32A-2-4.1. These protective measures correspond with those required by the federal Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §5633(a)(13)(A) and (B). *See* Chapter 34 regarding federal laws applicable to juvenile justice.

13.10.2.2 Pregnant Detainees

In 2009, the Legislature enacted a new law restricting restraints used on pregnant prisoners. It provides that an adult or juvenile correction facility, detention center, or local jail must use the least restrictive restraints necessary when the facility has actual or constructive knowledge that an inmate is in the second or third trimester of pregnancy. It further provides that no restraints of any kind may be used on an inmate who is in labor, delivering her baby, or recuperating from the delivery unless there are compelling grounds to believe that the inmate presents:

- an immediate and serious threat of harm to herself, staff or others; or
- a substantial flight risk and cannot be reasonably contained by other means.

If an inmate who is in labor or who is delivering her baby is restrained, only the least restrictive means necessary to ensure safety and security may be used. §33-1-4.2.

13.11 Detention Hearing Checklist

The checklist on the following page is provided to assist courts in detention hearings. Not all of these matters are addressed at detention hearings in every court. The probable cause hearing, if one was required, may have already taken place. The first appearance hearing could be at a different time although, if there is a detention hearing, it is likely to be the child's first appearance. A plea could be taken but it may be taken at a later hearing, such as an arraignment.

DETENTION HEARING CHECKLIST

- ☐ Preliminary matters:
 - Probable cause determination/arrest warrant (§32A-2-13(A))
 - Notice of detention hearing
 - Appointment of counsel (§32A-2-14(H))
 - Timeliness (§32A-2-13(A))
 - Probable cause determination
 - Filing of petition
 - Detention hearing
 - Appearances
- ☐ Children's court attorney:
 - Identify the child: name and date of birth
- ☐ Advisement of rights (§32A-2-13(D); Rule 10-224):
 - Offense charged (child can opt to waive a reading of the charges);
 - Penalty provided by law for the offense;
 - Right, if any, to trial by jury;
 - Right to assistance of counsel (at state expense if indigent);
 - Right to remain silent, and that any statement may be used against the child.
 - Right, if any, to bail.
 - Right, if any, to preliminary examination.
- ☐ Child's plea, if taken at this hearing:
 - **Most common:** Child enters a denial to the allegations;
 - Child admits the allegation;
 - Child pleads no contest.
- ☐ Juvenile probation officer (§32A-2-5):
 - Report to court
 - Recommendations
- ☐ Criteria for detention (§32A-2-11(A)):
 - Substantial risk of harm to self or others
 - Demonstrated may leave the court's jurisdiction
- ☐ If detention is appropriate:
 - Determine place of detention (§32A-2-13(E))
- ☐ If detention is not appropriate:
 - Establish conditions of release (§32A-2-13(F))
 - Parents made party to petition? (§32A-2-28)
- ☐ Scheduling of further proceedings:
 - Adjudicatory hearing

CHAPTER 14

INITIAL PROCEEDINGS

This chapter covers:

- First Appearance hearings
- Indigency determinations
- Youthful offender proceedings
 - Preliminary examinations
 - Grand jury proceedings
 - Arraignments
- First Appearance checklist

14.1 Overview

This chapter discusses some of the hearings and procedural steps that may occur soon after a delinquency petition is filed. Counsel will be appointed, the child will make a first appearance before the judge, and, if the children's court attorney decides to seek adult sanctions for a youthful offender offense, there may be a preliminary examination or hearing before the grand jury.

14.2 First Appearance Hearing

After a petition is filed, the clerk will set the case for first appearance. If the child is not in detention, the first appearance usually occurs within 4 to 6 weeks. If the child is in detention, the first appearance usually is the detention hearing. Detention hearings are discussed in Chapter 13, Taking Into Custody; Detention.

At the first appearance, the judge must advise the child of the following matters enumerated in Rule 10-224:

- the offense charged;
- the penalty provided by law for the offense charged;
- the right, if any, to bail;
- the right, if any, to trial by jury;
- the right to the assistance of counsel at every stage of the proceedings;

- the right, if any, to representation by an attorney at state expense;
- the right to remain silent, and that any statement made by the child may be used against the child; and
- the right, if any, to a preliminary examination.

The following issues might be discussed during the first appearance hearing:

- Whether, pursuant to Rule 10-223, counsel must be appointed for the child.
- Whether the child intends on admitting the allegations of the petition, pleading no contest, or denying the allegations of the petition. (If the child admits the allegations or pleads no contest, the judge must make the inquiries and disclosures required by Rule 10-227, which are discussed in Chapter 15, Non-Adjudicatory Resolutions. The judge must also afford the child the right of allocution before proceeding to impose a disposition. *See* Chapter 2, Rights).
- Whether the parties are conducting plea negotiations and a possible time frame for filing a plea agreement.
- Whether the parties are discussing a time waiver under §32A-2-7(G).

A checklist for the First Appearance hearing that takes place when the child is not in custody can be found at the end of this chapter. A detention checklist is at the end of Chapter 13.

14.3 Indigency Determination

If the Public Defender will be representing the child, the Public Defender Department will need to determine whether the child's parent, guardian, or custodian is indigent or whether the person will be required to pay the costs of public defender representation. Rule 10-223; Form 10-408. The parent, guardian, or custodian may appeal a determination by the public defender that a child is not indigent to the children's court, in which case the court would conduct a hearing on the determination pursuant to §32A-2-30 and Rule 10-223. *See also* Chapters 5 and 6 of this Handbook.

14.4 Delinquency or Youthful Offender Proceeding?

14.4.1 Types of Proceedings

Most delinquency proceedings are proceedings in which only juvenile sanctions may be imposed. However, certain proceedings, called youthful offender proceedings, can result in an adult sentence. Both types of proceedings are conducted in the children's court division of district court, or "children's court." However, the procedures as well as the potential outcomes vary depending on the type of proceeding that is chosen early on.

Serious Youthful Offenders. Only juveniles between the ages of 15 and 18 and accused of first degree murder are tried in adult court, that is, the criminal division of district court. They are not the focus of this handbook.

The Children's Code defines a delinquent child who meets the criteria in §32A-2-3(J) as a "youthful offender" who is subject to either adult or juvenile sanctions. However, a child may have committed one of the offenses listed in §32A-2-3(J) and yet not be the subject of a youthful offender proceeding in which adult sanctions are sought.

If the children's court attorney intends to seek adult sanctions for one or more of the offenses listed in §32A-2-3(J), he or she must file a notice of intent to invoke an adult sanction within 10 working days of filing the petition. Rule 10-213(A). For good cause shown, the court may permit the filing of a notice of intent at any time prior to the commencement of the adjudicatory hearing. §32A-2-20(A); Rule 10-213.

Practice Note. Rule 10-213(A) refers to this notice both as a "notice of intent to request the court to treat the respondent child as a 'youthful offender' " and as a "notice of intent to invoke an adult sanction." The latter is most commonly used and will be used throughout this Handbook.

14.4.2 Initial Procedures When Notice of Intent Filed

Once the notice of intent is filed, the court will hold a preliminary hearing or there will be a hearing before a grand jury to determine whether probable cause exists to support the allegations contained in the petition. §32A-2-20(A). However, the child can waive the right to a grand jury or preliminary hearing. Rule 10-213(B).

Rule 10-213 requires that the children's court hold the preliminary hearing within 15 days after the filing of the notice unless the case is presented to a grand jury pursuant to §§31-6-1 *et seq.*, or the child waives the right to a preliminary hearing or grand jury. If the indictment or bind over order does not include a youthful offender offense, then adult sanctions cannot be imposed. If other offenses were included in the indictment or bind over order, the case will be heard as a delinquency proceeding under the Children's Court Rules.

If the indictment or bind over order includes a youthful offender offense, then an arraignment will be held, unless waived. The requirements for preliminary examinations, grand jury proceedings, and arraignments are discussed in the sections below.

If the indictment or bind over order includes a youthful offender offense and the child is eventually found guilty, the court will hold an amenability hearing prior to the dispositional or sentencing hearing to determine whether the child meets the criteria in §32A-2-20 of the Delinquency Act for imposing adult sanctions.

In *State v. Jones*, the New Mexico Supreme Court found that, even though Rule 10-213 permits a child to waive the right to a grand jury or preliminary hearing, the Delinquency Act does not authorize a child to waive an amenability hearing. An amenability hearing and determination pursuant to §32A-2-20 are conditions precedent to invoking an adult sentence. 2010-NMSC-012, ¶¶40, 24. Amenability hearings are discussed further in Chapter 20, Youthful Offender Proceedings.

14.4.3 Preliminary Examinations

14.4.3.1 When Required

Preliminary examinations take place in children's court if the CCA has filed notice of intent to invoke adult sanctions on a youthful offender, and has not proceeded by grand jury indictment. §32A-2-20. Preliminary examinations are also authorized in children's court if the CCA has filed notice of intent to invoke adult sanctions and a grand jury has been convened but has failed to issue an indictment. *State v. Isaac M.*, 2001-NMCA-088, ¶1 (holding that the state may proceed by criminal information against a juvenile defendant if no bill is returned by a grand jury).

The source of §32A-2-20's preliminary examination requirement is Art. II, §14 of the New Mexico Constitution, which requires the defendant to be afforded a preliminary hearing when the state has not proceeded by indictment, and when the defendant is tried for any capital, felonious, or infamous crime. *State v. Melendrez*, 49 N.M. 181, 191, 159 P.2d 768 (1945); *State v. Peavler*, 88 N.M. 125, 537 P.2d 1387 (1975) (there is no absolute right to a preliminary hearing in the New Mexico Constitution, and if a prosecutor proceeds by indictment it obviates the need for a preliminary hearing).

14.4.3.2 Timeline

The Children's Court Rules require the court to hold the preliminary hearing within 15 days of the filing of the notice of intent to invoke adult sanctions. Rule 10-213. This time frame differs from the time limit in the Delinquency Act, which provides that a preliminary hearing must be held within 10 days. §32A-2-20(A). The 15-day time limit in the Children's Court Rules applies because the time limit is procedural and, when there are conflicting procedures, the Supreme Court's rules control. *See* Chapter 11, Jurisdiction.

According to the committee commentary to Rule 10-213, the reason for the 15-day notice period is to allow the 10-day requirement of notice of grand jury target in §31-6-11 to be met first, eliminating the need to write special rules for grand jury proceedings.

14.4.3.3 Purpose

The purpose of the preliminary hearing is to determine whether probable cause exists to support the allegations contained in the petition. §32A-2-20(A); Rule 10-213. *See also State v. Melendrez*, 49 N.M. 181, 191, 159 P.2d 68 (1945) (stating that the purpose of the preliminary examination is to conduct an inquiry concerning the commission of a crime and the connection of the accused with it, in order that the accused may be informed of the nature and character of the crime charged against him, and, if there is probable cause for believing him guilty, that the state may take the necessary steps to bring him to trial).

The preliminary hearing is a critical stage of the proceeding. *Williams v. Sanders*, 80 N.M. 619, 549 P.2d 145 (1969).

14.4.3.4 Hearing Procedures

Previously, a case could be transferred to the magistrate or metropolitan court for the preliminary examination. However, this provision was removed from the Children's Court Rules in 2008. Cf. Rule 10-222 NMRA (1999) with Rule 10-213 (2009). Now the rules provide for a preliminary examination by "the court" which is defined in the Children's Code as the children's court division of district court. Rule 10-213(B); §32A-1-4.

Rule 5-302 of the Rules of Criminal Procedure for the District Courts outlines the requirements for preliminary examinations. There is no corresponding provision in the Children's Court Rules.

Which rules apply? As noted elsewhere, the Children's Court Rules provide that the Rules of Criminal Procedure apply in all proceedings in which a notice of intent has been filed alleging the child is a youthful offender, unless a Children's Court rule specifies otherwise. Rule 10-101(A).

In a footnote, the Supreme Court in *State v. Jones* encouraged the Children's Court Rules Committee to revisit the question of which rules best protect the rights and interests of children. *Jones*, 2010-NMSC-012, ¶32 n.2. It is too early to know whether and how the rules will be changed in response.

At the preliminary examination, witnesses required by the CCA or the child must be subpoenaed and examined in the child's presence and may be cross-examined by the child's counsel. Upon request, the court must ensure that a record of the preliminary examination is made. If requested, the record must be filed with the court clerk within 10 days of the request. Rule 5-302.

Rule 5-302(C) directs the court to make a probable cause determination at the completion of the preliminary examination. It states as follows:

If, upon completion of the examination, it appears to the court that there is no probable cause to believe that the defendant has committed an offense, the court shall discharge the defendant. If the court finds that there is probable cause to believe that the defendant committed an offense, it shall bind the defendant over for trial.

If a bind over order is issued as a result of the preliminary examination but does not include a youthful offender offense, then the Children's Court Rules will apply to the remainder of the proceeding and adult sanctions may not be applied. Rule 10-101(A). If the bind over order includes a youthful offender offense, then adult sanctions may be considered if the child is adjudicated delinquent for that offense.

14.4.4 Grand Jury Proceedings

Grand jury proceedings are required in children's court if the CCA has filed a notice of intent to invoke adult sanctions on a youthful offender, and the CCA has not proceeded to preliminary

hearing. §32A-2-20. If the case is presented to a grand jury, the procedures in §31-6-1 *et seq.* apply, except as otherwise provided in the Children’s Court Rules. Rule 10-213(B). A detailed discussion of grand jury procedures is beyond the scope of this handbook.

If as a result of the grand jury proceedings the child is indicted for a youthful offender offense, then the child may be tried as a youthful offender and potentially sentenced as an adult. If the child is not indicted for a youthful offender offense, then the Children’s Court Rules will apply to any remaining proceedings on other offenses alleged in the indictment. Rule 10-101(A).

From “Serious Youthful Offender to “Youthful Offender.” A serious youthful offender is defined as “an individual fifteen to eighteen years of age who is charged with and *indicted or bound over for trial* for first degree murder.” §32A-2-3(H) (emphasis added). If, as a result of the grand jury proceeding or preliminary examination, an alleged serious youthful offender is not indicted or bound over for trial for first degree murder, then the child no longer meets the definition of serious youthful offender. *See State v. Jones*, 2010-NMSC-012, ¶22 (finding that from the moment the state dropped the first-degree murder charge, the child was no longer a serious youthful offender, and, being a potential youthful offender due to the remaining offenses charged, the child was entitled to the full range of protections afforded to youthful offenders by the Delinquency Act).

If the district court indicts or binds over the child for any offenses remaining in the complaint, §32A-2-6 would seem to require that the case be transferred to the children’s court. Section 32A-2-6 requires that cases involving juveniles charged with delinquent acts who are not serious youthful offenders be transferred to children’s court.

14.4.5 Arraignments

14.4.5.1 When Required

Arraignments are not required in Children’s Court proceedings unless the CCA has filed a notice of intent to impose adult sanctions on an alleged youthful offender, and the indictment or bind over order includes a “youthful offender” offense. Rule 10-101(A).

Rule 5-303 governs arraignments. The purpose of the arraignment is to notify the child of the charges against him or her, to receive the child’s plea, and to review or set bail, if authorized, and conditions of release. In some jurisdictions, the arraignment takes place at First Appearance.

Practice Note: Practice varies with regard to the terminology used in referring to an alleged offender. In a non-youthful offender delinquency case, the child is a “respondent” or a “child.” In a youthful offender case governed by the Rules of Criminal Procedure pursuant to the Children’s Court Rules, the child is often referred to as a “defendant.” Rule 14-9001, which instructs the court on the use of uniform jury instructions in Children’s Court, requires that the word “child” be substituted for “defendant.” The appellate courts also tend to use the term “child.” As a general matter, the word “child” will be used in the Handbook.

14.4.5.2 Timeline

Under the Rules of Criminal Procedure, arraignments must occur within 15 days after the date of filing the information or indictment, or the date of arrest, whichever occurs later. Rule 5-604.

14.4.5.3 Procedure

The child may appear in open court or through two way audio-visual communications if the criteria enumerated in Rule 5-303 are met.

At the arraignment, the CCA or district attorney must deliver to the child a copy of the indictment or information and read the complaint, indictment, or information to the child unless the child waives such reading.

The court must then ask the child to plead. The child may plead guilty, not guilty, or no contest subject to the approval of the court. If the child refuses to plead or stands mute, the court must direct the entry of a plea of not guilty on the child's behalf. Rule 5-303.

Practice Note. Until recently, an alleged offender could plead guilty but mentally ill. Sections 31-9-3 and 31-9-4, which allowed this option, were repealed in 2010 and Rule 5-303 has been amended accordingly.

14.4.5 4 Waiver of Arraignment

A child, with the court's consent, may waive arraignment if the child is to plead not guilty with the court. To waive arraignment, the child must file a written waiver of arraignment and plea of not guilty with the court and serve a copy on the state in time to give notice to interested persons, including victims, that an arraignment will not be held. Rule 9-405, n.1. The judge must sign the waiver of arraignment before the waiver is effective and before the waiver may be filed with the court. Rule 5-303.

The waiver of arraignment and entry of a plea of not guilty must be substantially in the form approved by the Supreme Court in Rule 9-405 of the Criminal Forms. Rule 5-303. If the court decides to impose new or additional conditions of release prior to accepting the waiver of arraignment, the court must issue a notice of hearing to all parties to address conditions of release. Rule 9-405, n.2.

14.4.6 Required Inquiries and Disclosures

The court may not accept a guilty or no contest plea without first addressing the child personally in open court and informing the child of and determining that the child understands the following:

- the nature of the charge to which the plea is offered;

- the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered;
 - that the child has the right to plead not guilty, or to persist in that plea if it has already been made;
 - that, if the child pleads guilty or no contest, there will not be a further trial of any kind, so that by pleading guilty or no contest the child waives the right to a trial;
 - that, if the child pleads guilty or no contest, it may affect the child's immigration or naturalization status, with the court also determining that the child has been advised by counsel of the immigration consequences of the plea;
 - that, if the child is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the child's constitutional right to bear arms, including shipping, receiving, possessing, or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and
 - that, if the child pleads guilty or no contest to a crime for which sex offender registration may be required, the court must determine that the child has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act.
- Rule 5-303.

The court may not accept a plea of guilty or no contest without first addressing the child personally in open court and determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court must also inquire of the child, the child's counsel, and the district attorney as to whether the child's willingness to plead guilty or no contest results from prior discussions between the district attorney and the child or the child's attorney. Rule 5-303(G).

14.4.7 Record of Proceedings

The court must ensure that a verbatim record of the proceedings is made. If there is a plea of guilty or no contest, the record must include, without limitation, the court's advice to the child, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea. Rule 5-303.

14.4.8 Bail and Conditions of Release

Rule 5-303 provides that, upon the child's request, the court will evaluate the child's bail and conditions of release considering the factors stated in Rule 5-401. If conditions of release have not been set, the court must set them.

Practice Note. The Children's Code provides that a serious youthful offender who is detained prior to trial in an adult facility has the right to bail under Rule 5-401. It also provides that a child held in a juvenile facility before adjudication does not have a right to bail but may be released under the Delinquency Act. §32A-2-14(M). The Code does not explicitly address youthful offenders. However, the Supreme Court indicated in *State v. Jones* that bail is available because the Rules of Criminal Procedure apply. *Jones*, 2010-NMSC-012, ¶32 n.2.

14.5 First Appearance Checklist

The checklist on the following page is provided to assist the court at the child's first appearance before the court.

FIRST APPEARANCE* CHECKLIST

- ☐ Preliminary Matters
 - Appearances
 - Consultation with counsel
 - Parents made party to petition? (§32A-2-28)
- ☐ Advisement of rights
 - the offense charged;
 - penalty;
 - right, if any, to trial by jury;
 - right, if any, to bail;
 - right to assistance of counsel (at state expense if indigent);
 - right, if any, to preliminary examination;
 - right to remain silent, and that any statement may be used against the child.
- ☐ Child's plea, if taken at first appearance:
 - **Most common:** Child enters a denial to the allegations;
 - Child admits the allegation;
 - Child pleads no contest.
- ☐ Inquiry (by child's attorney) regarding:
 - Possibility of a time waiver (§32A-2-7-(G))
 - Possibility of a consent decree (§32A-2-22(A))
 - Plea negotiations and possible time frame for plea agreement.
- ☐ Scheduling of further proceedings
 - Adjudicatory hearing

*The First Appearance may be combined with a detention hearing or an arraignment if either of these events is the child's first appearance. See Rule 5-303 for advisement of rights at arraignment.

CHAPTER 15

NON-ADJUDICATORY RESOLUTIONS

This chapter covers:

- Diversion programs
- Time waivers
- Plea agreements and consent decrees
 - Inquiries and disclosures
 - Requirements of plea agreements
 - Plea negotiations
 - Dispositions
 - Withdrawal of pleas
- Appeal issues

15.1 Pre-Petition Diversionary Programs

If as a result of the preliminary inquiry the Children, Youth, and Families Department (CYFD or department) determines that a petition alleging delinquency should not be filed, and CYFD is not obligated to refer the case to the children's court attorney (CCA), CYFD may refer the child for services that are appropriate or desirable. *See* §32A-2-7(B) (authorizing the juvenile probation officer (JPO) to refer the complaint to another appropriate agency and conduct conferences “for the purpose of effecting adjustments or agreements that will obviate the necessity for filing a petition.”) Examples of informal resolutions by the JPO include:

- counseling and supervision of the child;
- referring the child to a particular program;
- some form of informal supervision; or
- any other reasonable resolution.

Some of the programs that may be available include first offender diversion programs, parent-child mediation, victim-offender mediation, family counseling, or alcohol and drug education. Even letters of apology or essays are used. *See also* Chapter 30 of this Handbook for a discussion of problem-solving courts.

15.2 Time Waivers

A time waiver is an informal agreement between the child, through his or her attorney, and the CCA to defer adjudication of the charges in a delinquency petition and keep the case open for a period of time, typically six months but sometimes longer, depending on the judicial district. The agreement is called a time waiver because it waives the strict time limitations in the Children's Court Rules for an adjudicatory and dispositional hearing on a delinquency petition.

The essence of the agreement is a requirement that, during the specified period of time, the child will not have any more referrals for other alleged delinquent acts. The agreement may also include any other conditions agreed upon among the parties. Probation services may be requested as a condition of the time waiver, in which case the department becomes a party to the proceeding. §32A-2-7(G).

The court will dismiss the petition at the end of the time period if no new referrals for other alleged delinquent acts are received by the department and the child successfully completes any agreed-upon conditions. If CYFD receives any more referrals for other alleged delinquent acts or the child violates any other conditions of the agreement, the CCA may file a notice of noncompliance, which brings the case back before the court. If the CCA files a new petition against the child, the CCA may proceed on both the original petition and the new charges. *Id.*

15.3 Plea Agreements and Consent Decrees

15.3.1 Generally

Rules 10-226 and 10-227 govern pleas in non-youthful offender delinquency proceedings in children's court. Admissions and no contest pleas usually take place in the context of a plea agreement with the CCA. The requirements of plea agreements are discussed in more detail in §15.3.3 below.

As a general matter, the laws and procedures discussed below also apply to consent decrees. A consent decree may be part of a plea agreement or a party may move the court for a consent decree. There are additional laws and procedures which apply only to consent decrees and those will be discussed later in this chapter.

Rule 10-227 provides, in relevant part, that in response to a delinquency petition the child may:

- admit sufficient facts to permit a finding that the allegations of the petition are true;
- enter a plea of no contest to the allegations in the petition; or
- if a consent decree is sought, stand mute.

If the child denies the charges, then an adjudicatory hearing must be held to determine whether the child committed the alleged delinquent acts. *See* Chapter 16, Adjudicatory Hearings.

If the child pleads no contest, admits the allegations of the petition or is granted a consent decree, no adjudicatory hearing is necessary. However, before accepting an admission or a no contest plea or granting a consent decree, the judge must hold a hearing in open court and make the inquiries and disclosures explained below. Failure to do so is fundamental error. *See* Chapter 17, Dispositional Hearings and *In the Matter of Aaron L.*, 2000-NMCA-024, ¶25 (finding that the trial court's failure to follow the mandatory procedures in Rule 10-224, an earlier version of Rule 10-227, at the preliminary hearing violated due process and rendered his admission invalid).

Practice Note: Children's Court Form 10-424, Advice of Rights by Judge (Delinquent Offender) provides for the judge to sign the form stating that the child understands the constitutional rights that the child is giving up by admitting, not contesting or, in the case of a consent decree, standing mute to the offenses alleged. The form also provides for the child's signature and for the child's counsel to certify that he or she has reviewed the matters in the form with the client and explained them in detail.

15.3.2 Required Inquiries and Disclosures

15.3.2.1 Knowing

The court may not accept an admission or a no contest plea or grant a motion for consent decree without addressing the child in open court and determining that the child understands the following:

- the charges;
- the possible dispositions authorized by the Children's Code for the offense;
- the right to deny the allegations in the petition and have a trial;
- that an admission, no contest plea, or motion for consent decree accepted by the court waives the right to a trial and to appeal the adjudication (unless an issue has been reserved for appeal); and
- that if the child admits, pleads no contest, or stands mute to the charges (in the case of a consent decree), it may have an effect upon the child's immigration and naturalization status.

See Rule 10-227(B) and Form 10-424.

15.3.2.2 Voluntary

The court may not accept an admission or a no contest plea or, in the case of a consent decree, allow the child to stand mute without addressing the child in open court to determine that the child's decision is voluntary and not the result of force or threats except promises made as part of the plea agreement. Rule 10-227(C). *See State v. Ortiz*, 77 N.M. 751, 755, 427 P.2d 264, 267 (1967) (criminal case in which unkept promise of leniency rendered the plea involuntary). Note: In determining whether a factual basis exists before granting a motion for a consent decree, the

court may not require any statement or admission from the child. The child is permitted to stand mute. §32A-2-22(A); Rule 10-227(D).

15.3.2.3 Factual Basis

The children's court may not enter a disposition based on an admission or no contest plea unless the court makes an inquiry sufficient to satisfy it that a factual basis exists for the allegations in the petition. *See* Rules 10-227(D), 10-228(A). Similarly, the court may not issue a consent decree without satisfying itself that a factual basis exists. If the child chooses to stand mute, the court will need to look elsewhere for the factual basis.

15.3.2.4 Judicial Discretion to Accept or Reject Plea

The children's court is not required to accept an admission or no contest plea from a child. *See* Rule 5-303(D) (providing that "no contest" pleas are subject to the court's approval, but not "guilty" and "not guilty" pleas).

15.3.2.5 Right of Allocution

If the judge accepts an admission or no contest plea or, in the case of a consent decree, the child stands mute, the judge must also afford the child his right to address the court (the right of allocution) before entering a disposition. *See* Chapter 2, Rights of Respondent Child.

15.3.2.6 Applicability to Probation Revocation Proceedings

The Court of Appeals has held that the inquiries and disclosures applicable to pleas that are outlined in Rule 10-227 also apply to probation revocation proceedings. *In the Matter of Aaron L.*, 2000-NMCA-024, ¶14.

15.3.3 Requirements of Plea Agreements

15.3.3.1 Notification of Plea Agreement

There is no time frame in the Children's Court Rules for notifying the judge of the existence of a plea agreement. However, under the Rules of Criminal Procedure, the parties are required to notify the court of the existence of a plea agreement at such time as may be fixed by the court, except upon good cause shown. Rule 5-304(E).

15.3.3.2 Court's Role

The judge is not permitted to participate in any plea discussions. Rule 10-226(A). This prohibition is a departure from former practice in which judicial involvement in plea bargaining varied with the interest of the individual judges. *See* Rule 5-304 (Committee Commentary). Under the current rule in both district and children's court, the judge's role is expressly limited to acceptance or rejection of the bargain agreed to by counsel for the state and child. *Id.*

15.3.3.3 Required Form

The Children's Court Rules provide that any plea and disposition agreement entered into between the child and the CCA must be put in writing and submitted substantially in the form approved by the Supreme Court. Form 10-423; Rule 10-226(A). However, in *State v. Jonathan B.*, the Supreme Court ruled that it would not invalidate a plea for failure to strictly comply with the rules, including a failure to obtain the defendant's signature on the plea agreement and not using the form set out in the rule, provided that "there has been substantial compliance with the rules and the defendant acts knowingly and voluntarily." 1998-NMSC-003, ¶13 (also finding that the thoroughness of the plea hearing ensured the plea was knowing and voluntary).

15.3.3.4 Terms of Form 10-423

Form 10-423 is the form for a plea and disposition agreement, which may but does not have to be used in connection with a consent decree. The form has not been updated since the statute and rules on consent decrees were amended to permit the child to stand mute rather than admit the allegations.

Form 10-423 provides:

- As part of the plea agreement, the child must either admit the allegations or plead no contest. The allegations that the child is admitting or pleading no contest to must be listed on the form. (If the form will be used in connection with a consent decree and the child chooses to stand mute, the form should be modified accordingly.)
- The child may indicate on the form that there are no agreements as to disposition, in which case the form states that a pre-disposition report will be prepared. The form requires that the maximum penalties for the charges be listed.
- In the alternative to having the judge choose the disposition, one or more of the following dispositions are listed on the form and may be selected:
 - a consent decree for a period of _____ months;
 - the child will not oppose an extension of the consent decree;
 - a consent decree will end _____;
 - a probationary period not to exceed 2 years in accordance with the probation order approved by the court;
 - commitment to CYFD for pre-dispositional diagnosis, rehabilitation, and education for a period not exceeding 15 days, with CYFD setting a dispositional hearing upon completion of the evaluation;
 - commitment to CYFD for an agreed-upon period of time; or
 - commitment to the detention center specified in the plea agreement for an agreed-upon time period.
- The form includes space for listing any other specific conditions.

- The form contains space for listing any additional charges that the Children’s Court attorney agrees to dismiss or not file.
- The form contains space for including any restitution that the child agrees to pay.
- The form includes the following additional terms:
 - **Effect on petition:** The plea agreement, if accepted by the court, serves to amend the petition to charge delinquent acts to which the child pleads, without the need for filing any additional pleading. If the plea is rejected or withdrawn, the original charges are automatically reinstated.
 - **Waiver of defenses:** Unless the plea is rejected or withdrawn, the child gives up all motions, defenses, objections, or requests that the child has made or raised, or could assert hereafter, to the court’s entry of judgment and disposition, provided the judgment and disposition is consistent with the plea agreement. The child waives the right to appeal the judgment and disposition that results from the entry of the plea agreement.
 - **Withdrawal permitted if agreement rejected:** If after reviewing the agreement and any predisposition report the court concludes that any of its provisions are unacceptable, the court will allow the withdrawal of the plea, and the agreement will be void. If the plea is withdrawn, neither the plea nor any statements arising out of the plea proceedings shall be admissible as evidence against the defendant in any children's court or criminal proceedings.

15.3.3.5 Requirements for Disposition; Predispositional Reports

An agreed-upon disposition in a plea agreement must be consistent with the dispositions authorized in the Children’s Code and the parties *cannot vary* the dispositions from those mandated in the Code by agreement. *See State of New Mexico ex rel. CYFD v. Paul G.*, 2006-NMCA-038, ¶24 (finding that the Delinquency Act does not authorize a disposition in a plea agreement that commits a delinquent offender for an indeterminate period up to the age of 18 because that is not one of the juvenile dispositions authorized in §32A-2-19 of the Code).

If a judge approves a plea agreement, the court may not impose a sentence that is outside the parameters of the plea agreement.

If the parties to a plea agreement do not agree on a particular disposition, Form 10-423 provides that a pre-disposition report will be prepared, and the court will determine the appropriate disposition.

It is unclear whether the judge may order a pre-disposition report if the parties have agreed on a particular disposition in the plea agreement. Unlike the Rules of Criminal Procedure, the Children’s Court Rules and Forms do not expressly refer to the preparation of a pre-disposition report if the parties have agreed to a disposition in a plea agreement. Nonetheless, §32A-2-17 provides for the filing of predisposition reports after “either a finding with respect to the allegations of the petition has been made or a notice of intent to admit the allegations of the

petition has been filed.” Since an order approving a plea agreement results in an adjudication of delinquency, ordering a predispositional report before approving a plea agreement is consistent with §32A-2-17. *See also State v. Doe*, 92 N.M. 354, 357, 588 P.2d 555, 558 (Ct. App. 1978) (finding that even though §13-14-29, a prior version of the statute on consent decrees, does not make reference to pre-disposition reports in connection with consent decrees, the judge properly called for information concerning the child’s background when determining whether to accept or reject a consent decree, in part because “[c]alling for information on the child’s background is also consistent with the legislative purpose of providing a ‘program of supervision, care and rehabilitation.’ ”)

15.3.3.6 Hearing

Before accepting a plea and disposition agreement, the court must hold a hearing and require disclosure of the agreement in open court. Rule 10-226(B). The court must also address the child in open court and make the inquiries required by Rule 10-227, which are discussed in §15.3.2 above.

15.3.3.7 Appeal

Form 10-423, the plea and disposition agreement form in the Children’s Court Rules and Forms, requires the child to waive his right to appeal the judgment and disposition that results from entry of the agreement. However, the parties may agree that the child reserves the right to appeal a certain issue, in which case this term should be included in the agreement.

Practice Note: While a voluntary guilty plea ordinarily constitutes a waiver of a right to appeal, a plea agreement may not waive the right to challenge on appeal whether a sentence was imposed without jurisdiction or inconsistent with the terms of the plea agreement. *See State v. Tafoya*, 2010-NMSC-019.

There is also at least one reported decision in which the appellate court permitted the state to challenge a decision by the lower court to reconsider the disposition. In that case, there had been a plea agreement but with no agreement as to disposition. *In the Matter of Christobal V.*, 2002-NMCA-077, ¶2.

15.3.3.8 Judicial Discretion to Accept or Reject Plea Agreement

If the judge accepts a plea agreement, the court is bound by it and is barred from imposing a sentence that is outside the parameters of the plea agreement. *See State v. Sisneros*, 98 N.M. 279, 281, 648 P.2d 318, 320 (Ct. App. 1981), *aff’d in part, rev’d in part*, 98 N.M. 201, 647 P.2d 403 (1982), *aff’d*, 101 N.M. 679, 687 P.2d 736 (1984).

In the criminal context, a judge’s rejection of a plea bargain because the defendant received too light a sentence under the circumstances of the case has been upheld by the Court of Appeals as a sound reason for rejecting a plea agreement. *See State v. Holtry*, 97 N.M. 221, 224, 638 P.2d 433, 436 (Ct. App. 1981).

If the court rejects the plea agreement, the court will inform the parties of the rejection, advise the child personally in open court that the court is not bound by the plea agreement, and advise the child that if the child persists in admitting the allegations or pleading no contest, the disposition of the case may be less favorable to the child than that contemplated by the plea agreement. Rule 10-226(C).

15.3.3.9 Inadmissibility of Plea and Statements Made During Negotiations

If the plea is withdrawn, neither the plea nor any statements arising out of the plea proceedings is admissible as evidence against the child in any children's court or criminal proceedings. Rule 11-410; Form 10-423. The purpose of the rule excluding such evidence is to foster negotiations between the defendant and the state. *See State v. Anderson*, 116 N.M. 599, 866 P.2d 327 (1993). The issue becomes whether the statements are "arising out of plea negotiations" and should be excluded.

New Mexico courts have addressed the issue of whether a statement arose out of plea negotiations and should be excluded. On the one hand, it is clear that any statements made during formal plea negotiations when the district attorney is present should be excluded. *Anderson*, 116 N.M. at 603, 866 P.2d at 331 (finding that, to ensure fairness when a suspect is induced by the state to engage in plea negotiations, as in formal plea negotiations with a state attorney, there is an irrebuttable presumption that the person has relied on this rule in breaking his silence, and that all statements made during the discussions are inadmissible in future proceedings, whether the statements are offers to confess or offers to plead guilty).

On the other hand, the court will consider on a case-by-case basis whether statements made outside of the formal plea bargaining process nonetheless arose out of plea negotiations and must be excluded. *Anderson*, 116 N.M. at 602-603, 866 P.2d at 330-31 (when determining whether to exclude statements made outside the context of formal plea negotiations, the determining factor is whether it may be naturally inferred that the defendant relied on the rule on inadmissibility of statements made during plea negotiations in deciding to break silence). The Court of Appeals has found that a letter voluntarily written by defendant initiating contact with the authorities is not within the protection of this rule, even if the letter is construed as an offer to plea bargain. *State v. Fernandez*, 117 N.M. 673, 875 P.2d 1104 (Ct. App. 1994).

15.3.4 Consent Decrees

15.3.4.1 Generally

A consent decree is an order suspending the proceedings without a judgment and continuing the child under supervised probation under terms and conditions negotiated with probation services and agreed upon by all the affected parties. Either the CCA or the child's attorney may move for a consent decree any time after the filing of the petition and before the entry of a judgment. §32A-2-22(A). Consent decrees are only available in children's court.

Successful completion of a consent decree will result in dismissal of the delinquency petition with prejudice. §32A-2-22(E). Also, successful completion of a consent decree does not count

as a prior adjudication for the purposes of determining whether a child is a youthful offender due to three prior, separate felony adjudications. §32A-2-3(J).

In recent years, the Legislature has removed many of the Code's restrictions on entering consent decrees. Consent decrees now contain the following features:

- **Timing:** The parties may move for entry of a consent decree at any time after the filing of a delinquency petition and before entry of a judgment. §32A-2-22(A); *see also* Rule 10-228 (consent decree after adjudication).
- **No limitation on number:** There is no limit on the number of consent decrees that a child may enter into in any given time period.
- **No requirement of admission or no contest plea:** A child may stand mute and is not required to admit or plead no contest to the allegations of the petition in order for the judge to approve a consent decree. §32A-2-22(A); *see also* Rule 10-227.

People are sometimes surprised to learn that the CCA does not have to concur in the child's motion for a consent decree for a consent decree to be considered by the court. A consent decree may not be issued if the child objects but if the CCA objects after consulting with probation services the court may proceed to determine whether a consent decree is appropriate and, in its discretion, enter the decree. §32A-2-22(B).

15.3.4.2 Duration

A consent decree is for a duration not to exceed six months unless probation services discharges a child sooner or the court grants a petition to extend the decree for an additional period not to exceed six months, or an extension not to exceed six months is included in the consent decree. §32A-2-22(C); Rule 10-228. If the child objects to an extension, the court must hold a hearing on the issue of extension. §32A-2-22(C). There is a one-year limit on the total duration of a consent decree. Rule 10-228(C).

15.3.4.3 Forms

Form 10-425 of the Children's Court Rules and Forms is a form of order approving a consent decree. This form was amended in 2010 to reflect the fact that an admission is no longer required for a consent decree order. *See* §32A-2-22(A) (as amended in 2005); Rule 10-227(A)(3) (as amended in 2008).

The form for an order approving a consent decree allows for incorporation of a plea and disposition agreement, a probation agreement or the motion for a consent decree in the order's terms. Note, however, that the language of the plea and disposition form, Form 10-423, has not been updated to comply with the Children's Court Rules permitting a child to stand mute in the case of a motion for consent decree. Rule 10-227(A)(3).

A number of the terms in Form 10-423 are relevant to consent decrees. The form provides:

- a space for indicating whether a consent decree will be entered and the period of time during which it will be in effect;
- a space for the child to indicate whether the child agrees not to oppose an extension of the decree;
- a space for indicating the date when the consent decree will end;
- a space for listing any other specific conditions; and
- the standard terms for plea and disposition agreements, summarized in §15.3.3.4 above.

The judge, the child and the child's attorney must sign the advice of rights form (*see* Form 10-424 as amended in 2010) ,but only the judge and counsel sign the consent decree. *See* Form 10-425 as amended.

15.3.4.4 Special Conditions for Consent Decrees

Some of the standard conditions included in consent decrees are:

- reporting to a probation officer;
- obeying parents;
- living with parents;
- going to school;
- not using drugs or alcohol;
- not possessing weapons;
- not breaking the law; and
- that the parents be party to the order.

Other conditions that are commonly included are not associating with negative peers, keeping a curfew, attending counseling, not driving, making restitution, and performing community service.

If a delinquency petition is filed based on allegations that that the child violated Paragraphs (2), (3), or (4) of Subsection A of §32A-2-3, and the child is 15 years old or older, then a condition of the consent decree may be denial or revocation of the child's driving privileges. §32A-2-22(G). The offenses listed in Paragraphs (2), (3), and (4) are, respectively:

- buying, attempting to buy, receiving, possessing alcohol or being present in a licensed liquor establishment, other than a restaurant or a licensed retail liquor establishment, without a parent, custodian, guardian or adult spouse, §32A-2-3(A)(2);
- a violation of §30-29-2, regarding the illegal use of a glue, aerosol spray product, or other chemical substance; or
- a violation of the Controlled Substances Act, §30-31-1 *et seq.*

The denial or revocation of driving privileges is for a 90-day period, unless it is a second or subsequent adjudication. For a second or subsequent adjudication, the child's driving privileges may be denied or revoked for a period of one year.

If the judge enters a decree suspending or revoking the child's driving privileges, the court must send the decree to the Motor Vehicle Division within 24 hours of entry of the decree. §32A-2-22(G). The director of the division must then implement the decree suspending or revoking the child's driving privileges. However, the child is not prohibited from applying for a limited driving privilege pursuant to §66-5-35 or an ignition interlock license pursuant to the Ignition Interlock Licensing Act (§66-5-501 *et seq.*), and nothing precludes the child's participation in an appropriate educational, counseling, or rehabilitation program. §32A-2-22(G).

15.3.4.5 No Admission Required

The child is not required to admit any of the allegations in the delinquency petition for the court to enter an order approving a consent decree. The child may plead no contest or the child may stand mute, even if the child moved for the consent decree. §32A-2-22(A); Rule 10-227(A)(2) and (3).

15.3.4.6 Court's Discretion

Entry of a consent decree is entirely within the discretion of the judge. *See In the Matter of Crystal L.*, 2002-NMCA-063. However, if a child objects to a consent decree, then the judge may not enter the decree but must proceed to findings, adjudication, and disposition of the case. If the child does not object to a consent decree but the CCA objects after consultation with probation services, the court will consider the objections and the reasons for the objections, and determine whether it is appropriate to enter a consent decree. The judge may enter a consent decree even upon objection by the CCA. §32A-2-22(B).

15.3.4.7 More Lenient Requirements

Recent amendments to the Children's Code have resulted in fewer restrictions on consent decrees than prior law. As noted, a consent decree may be entered at any time prior to entry of a judgment, *even after a jury verdict*. §32A-2-22(A). The law formerly prevented a child from availing herself of a consent decree after the court or jury entered a verdict. *See In the Matter of Crystal L.*, 2002-NMCA-063, 132 N.M. 349, 48 P.3d 87 (2002). What is now Rule 10-228(A) was amended by the Supreme Court in 2002 to allow for consent decrees even after adjudication.

The child also is not required to admit any of the allegations in the delinquency petition for a consent decree to issue. As amended in 2005, Subsection A of §32A-2-22 now states: "An admission of some or all of the allegations stated in the delinquency petition shall not be required for a consent decree order." The Children's Court Rules reflect this change as well. *See* Rule 10-227(A).

Furthermore, under the 2005 changes to the Children's Code, there is no limit on the number of consent decrees that a child may enter. Under former law, a court could not enter more than one consent decree for a child in a two-year period. *See* §32A-2-22 (2003).

15.3.4.8 Denial of Consent Decree

Upon denial of a motion for consent decree or reinstatement of a delinquency petition after initially granting a consent decree, a judge can be excluded from further participation in proceedings on the delinquency petition. If a child objects, the judge who has elicited or examined information or material about a child that would be inadmissible in a hearing on the allegations of the petition may not participate in subsequent proceedings on the delinquency petition if:

- a consent decree is denied and the allegations in the petition remain to be decided in a hearing in which the child denies the allegations; or
- a consent decree is granted but the delinquency petition is subsequently reinstated.

§32A-2-22(F); *see also* Form 10-423.

15.3.4.9 Approval and Completion of Consent Decree

The successful completion of a consent decree results in dismissal of the delinquency petition with prejudice and the attachment of jeopardy protections. According to §32A-2-22(E):

A child who is discharged by probation services or who completes a period under supervision without reinstatement of the original delinquency petition shall not again be proceeded against in any court for the same offense alleged in the petition or an offense based upon the same conduct and the original petition shall be dismissed with prejudice.

Practice Note. Not all courts enter a formal order at the end of the period of supervision dismissing the case. Subsection E suggests that such an order would be appropriate.

In addition, consent decrees are not considered prior adjudications for purposes of §32A-2-3(J)(2). This statute provides that a child who is 14 to 18 years of age at the time of a felony offense and who has had three prior, separate felony adjudications within the three years prior to the current offense is a “youthful offender.” The last sentence reads: “Successful completion of consent decrees are not considered a prior adjudication for the purposes of this paragraph.”

15.4 Withdrawal of Plea

The child may voluntarily withdraw a plea, upon timely motion, if the plea was not made knowingly and voluntarily. *See State v. Steven B.* 2004-NMCA-086, ¶24. It is within the sound discretion of the court to allow withdrawal of a plea. *Id.*

If a plea is withdrawn, the time frame for holding an adjudicatory hearing is reset and begins from the date the court allows withdrawal of a plea. Rule 10-243(A)(8) and (B)(7).

15.5 Waiver of Defects and Rights; Appeals

If a child voluntarily enters into a plea and disposition agreement, he or she waives objections to prior defects in the proceedings and may not “ ‘thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior* to the entry of the guilty plea.’ ” *State v. Todisco*, 2000-NMCA-064, ¶13 (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). In *Todisco*, the Court ruled that the defendant did not waive objections to *subsequent* defects in the proceeding. In that case, the Court held that it could consider defendant’s speedy sentencing claim because the alleged deprivation of constitutional rights occurred after the defendant’s plea. *Todisco*, ¶13.

Form 10-423, the plea and disposition agreement form, states that the child waives his or her right to appeal the judgment and disposition that results from entry of the agreement. However, a plea agreement may not waive the right to an appeal on the grounds that a sentence was imposed without jurisdiction or that the sentence was inconsistent with the terms of the plea agreement. See *State v. Tafoya*, 2010-NMSC-019¶¶6-7.

The Court of Appeals has also found that conditional consent decrees are appealable and that they are appealable without waiting for a final order. In *State v. Crystal B.*, the child entered into a conditional consent decree, expressly reserving the right to appeal the denial of her motion to suppress. She appealed the denial of her motion to suppress. 2001-NMCA-010, ¶¶13. The Court held that the order entering the consent decree, while not a final order, was nonetheless appealable. The Court noted that an appeal is permissible to alleviate hardship if a party is sufficiently aggrieved by an order, even though the order is not the last order contemplated in the case. *Crystal B.* was sufficiently aggrieved by the consent decree order in the case because it subjected her to six months of probation with strict conditions, including drug testing. *Id.* ¶¶4-5.

A conditional admission or plea of no contest, where an issue for appeal has been specifically reserved, is also allowed. See, e.g., *State v. Michael S.*, 1998-NMCA-041, ¶5. (Note that *Michael S.* has been overruled on other grounds. *Michael S.* had agreed to the imposition of an adult sentence, which is no longer permitted under *State v. Jones*, 2010-NMSC-012.)

Practice Note: Form 9-408(C) is used for conditional pleas in cases under the Rules of Criminal Procedure. There is no children’s court form addressing conditional pleas, but as *State v. Crystal B.* indicates, conditional pleas are used and the plea and disposition agreement can be adapted accordingly.

CHAPTER 16

ADJUDICATORY HEARINGS

This chapter covers:

- Time limits for adjudicatory hearing
 - Child in detention
 - Child not in detention
- Continuances and extensions
- Conduct of hearings
- Role of the jury
- Jury instructions
- Burden of proof
- Judgments
- Checklist

16.1 Purpose

The adjudicatory hearing is comparable to a criminal trial in district court. Its purpose is to determine if the child has committed the delinquent act of which he or she has been accused. If the child has admitted the allegations, completed a time waiver, or entered a consent decree or plea agreement, an adjudicatory hearing is not necessary.

Youthful Offenders: If the Children’s Court attorney has filed a notice of intent to invoke adult sanctions on an alleged youthful offender, and the indictment or bind over order includes a youthful offender offense, then the hearing is referred to as a “trial” and the Rules of Criminal Procedure apply until disposition, unless the Children’s Court Rules specify otherwise. Rule 10-101(A)(2)(b).

This chapter focuses on delinquency proceedings in which only juvenile sanctions are sought. *See* Chapter 20 of this Handbook for a detailed discussion of youthful offender proceedings.

16.2 Time Limits

The adjudicatory hearing in a delinquency proceeding must be held within the time limits established in the Children’s Court Rules. §32A-2-15. Until 2009, the case had to be dismissed with prejudice if the adjudicatory hearing was not brought within the applicable time

limit or within the period of any extension granted by the court. In 2009, the New Mexico Supreme Court revised the rules on failure to comply. Now, if the adjudicatory hearing is not begun as required, the petition may be dismissed with prejudice or the court may consider other sanctions as appropriate. Rule 10-243(F). The sanctions that may be appropriate are not addressed in the rules.

16.2.1 Time Limit for a Child in Detention

If the child is in detention, the adjudicatory hearing must be commenced within thirty days of whichever of these events occurs last:

- the date the petition is served on the child;
- the date the child is placed in detention;
- if an issue is raised concerning the child's competency to participate at the hearing, the date an order is entered finding the child is competent to participate;
- if the proceedings have been stayed pursuant to a finding under Rule 10-242 of incompetency to stand trial, the date an order is filed finding the child competent to participate;
- if a mistrial is declared or a new adjudicatory hearing is ordered by the children's court, the date such order is filed;
- in the event of an appeal, the date the mandate or order is filed in the children's court disposing of the appeal;
- if the child fails to appear at a time set by the court, the date the child is taken into custody in New Mexico after the failure to appear. If the child is taken into custody in another state, the thirty days begins to run on the date the child is returned to this state;
- the date the court allows the withdrawal of a plea or rejects a plea; or
- if a notice of intent has been filed alleging the child is a youthful offender, the return of an indictment or the filing of a bind over order that does not include a youthful offender offense.

Rule 10-243(A). Extensions of time are addressed in §16.2.4 below.

16.2.2 Time Limit for a Child Not in Detention

If a child is not in detention, or is released from detention prior to the expiration of the Rule 10-243(A) time limits, then the adjudicatory hearing must be held within one-hundred and twenty days of the last of the following events:

- the date the petition is served on the child;
- if an issue is raised concerning the child's competency to participate at the hearing, the date an order is entered finding the child is competent to participate;
- if the proceedings have been stayed pursuant to a finding under Rule 10-242 of incompetency to stand trial, the date an order is filed finding the child competent to participate;

- if a mistrial is declared or a new adjudicatory hearing is ordered by the children’s court, the date such order is filed;
- in the event of an appeal, the date the mandate or order is filed in the children’s court disposing of the appeal;
- if the child fails to appear at a time set by the court, the date the child is taken into custody in New Mexico after such failure to appear or the date an order is entered quashing the warrant for failure to appear. If the child is taken into custody in another state, the one-hundred and twenty (120) days will begin to run on the date the child is returned to this state;
- the date the court allows the withdrawal of a plea or rejects a plea; or
- if a notice of intent has been filed alleging the child is a “youthful offender,” the return of an indictment or the filing of a bind over order that does not include a youthful offender offense.

Rule 10-243(B). In the situation of a child who is taken into custody for failure to appear, Subsection B will apply if the child is released rather than placed in detention. Subsection A would apply if the child is in detention.

16.2.3 Justification for Time Frames

In *State v. Anthony M.*, the Court of Appeals stated that the shorter time limit for an adjudicatory hearing for a child who is in detention is justified because the state has not proven any allegations against the child and the time limit protects the child’s liberty interests. When a child is not in detention pending the adjudicatory hearing, the child’s liberty interests are not implicated, and therefore a longer time period applies. 1998-NMCA-065, ¶9.

16.2.4 Extensions of Time

Under the Children’s Court Rules, if the child is in detention and the adjudicatory hearing will not commence within the thirty day time limit, the Children’s Court attorney (CCA) may move to have the child released before the limit is reached. If the child is no longer in detention, the 120 day time frame will apply.

Alternatively, the CCA may move for an extension of time as provided in Rule 10-243(D). *See, e.g., State v. Ruben O.*, 120 N.M. 160, 899 P.2d 603 (Ct. App. 1995). Under this rule, the children’s court may extend the time for commencing an adjudicatory hearing for good cause shown, provided that the aggregate of all extensions granted by the children’s court judge does not exceed sixty days.

Under Rule 10-243(E), the Supreme Court, a single Supreme Court justice, or a judge designated by the Supreme Court may also extend the time for commencing an adjudicatory hearing for good cause shown. The party seeking an extension must file with the Clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause for the extension. A copy must be served on opposing counsel.

The petition must be filed with the Supreme Court within the applicable time limit for holding the adjudicatory hearing. However, if exceptional circumstances beyond the control of the state or the court exist justifying the failure to file the petition within the applicable time limit, the petition for extension may be filed within ten (10) days after the expiration of that time limit. Rule 10-243(E).

What constitutes “exceptional circumstances” was discussed in *State v. Dominguez*, 2007-NMCA-132, in the context of a criminal proceeding. At that time, criminal cases in district court were governed by rules that set specific time limits, with provisions on exceptions similar to those in Rule 10-243. In *Dominguez*, the Court of Appeals held that oversights caused by heavy caseloads did not constitute exceptional circumstances justifying an extension of time after the time period for trial had elapsed. *Id.* ¶11. However, in some instances the period of time may be extended if application of the time limit and dismissal of the case are overly-technical or defy common sense. *Id.* ¶13.

Within five days after service of the motion filed in the Supreme Court, opposing counsel may file an objection to the extension setting forth the reasons for such objection. No hearing on the extension will be held except upon the Court’s order. If the Court finds that there is good cause for granting an extension beyond the applicable time limit, it will determine the time limit within which the adjudicatory hearing or trial must be commenced. Rule 10-243(E).

16.2.5 Multiple Petitions

If more than one delinquency petition is pending, the time limits applicable to each petition must be determined independently. Rule 10-243(C). If a child is in detention because of a prior adjudication of delinquency and a new petition based on a separate offense is filed, the child will not be considered to be in detention for purposes of the new petition, and thus, the 120 day time limit will be applied to the second adjudication. For example, in *State v. Augustine R.*, the court held that the 120 day time limit applied, even though the child was being detained, because the child’s detention was a result of a prior adjudication of delinquency in a different proceeding. 1998-NMCA-139, ¶¶9-10; *See also State v. Anthony M.*, 1998-NMCA-065, ¶8.

16.3 Initiation and Notice

The children’s court must ensure that a written notice of hearing is served upon each of the parties in accordance with Rule 10-104.

The CCA must provide the victim, or the victim’s authorized representative, with oral or written notice of all scheduled court proceedings in a timely fashion, provided that the victim satisfies the requirements of the Victims of Crime Act. §31-26-9(B). To enable the CCA to provide timely notice to the victim, the children’s court must provide the District Attorney’s Office with oral or written notice no later than seven working days prior to the scheduled proceeding, unless a shorter notice period is reasonable under the circumstances. §31-26-10.

16.4 Participants

16.4.1 Parties; Transport Order

The participants in an adjudicatory hearing include the parties, their attorneys, and the witnesses. If the child is in detention, a transport order may be needed. Local rules may govern transport of juveniles from a detention facility to court proceedings. *See, e.g.*, LR2-113.

16.4.2 Public Access; News Media; Closed Hearings

Adjudicatory hearings in delinquency cases are open to the public unless the court in its discretion, after a finding of exceptional circumstances, deems it appropriate to conduct a closed hearing. §32A-2-16(B).

If the judge finds that exceptional circumstances exist to close the hearing, only the parties, their counsel, witnesses, and other persons approved by the court may be present at the closed hearing. The court may admit those persons that the court finds have a proper interest in the case or the court's work to closed hearings on the condition that they refrain from divulging any information concerning the exceptional circumstances that resulted in the need for a closed hearing. §32A-2-16(B)

Representatives of the news media may be allowed to attend closed hearings under the same conditions. The media is also subject to such enabling regulations as the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Delinquency Act. §32A-2-16(B). Supreme Court Rule 23-107 contains guidelines for broadcasting, televising, photographing, and recording of court proceedings, and gives trial judges the discretion to limit or deny media coverage for good cause. UJI 14-109 is a jury instruction that may be proffered whenever cameras are present in the courtroom.

Any person granted admission to a closed hearing who intentionally divulges information in violation of the prohibition in §32A-2-16 is guilty of a petty misdemeanor. §32A-2-16(C).

16.5 Conduct of Hearing

16.5.1 Generally

If the child denies the allegations in the delinquency petition, an adjudicatory hearing must be conducted. The adjudicatory hearing to determine if the child committed the delinquent act alleged in the petition must be conducted separately from other proceedings. §32A-2-16(A) and (H).

16.5.2 Right to Trial by Jury Unless Affirmatively Waived

16.5.2.1 Affirmative Waiver Required

A jury trial on the issues of alleged delinquent acts may be demanded by the child, parent, guardian, custodian, or counsel when the offenses alleged would be triable by jury if committed by an adult. §32A-2-16(A).

A written jury demand is no longer required for delinquency proceedings. Juveniles have a state constitutional right to a jury trial and must be accorded that right absent an understanding and intelligent decision to waive the right. *State v. Eric M.*, 1996-NMSC-056, ¶¶9-10; Rule 10-245 (Committee Commentary). Rule 10-245 now provides that “*trial shall be by jury* on all delinquency petitions when the offense(s) alleged would be triable by jury if committed by an adult,” unless the child knowingly and voluntarily waives the right.

16.5.2.2 Unanimous Verdict

If a jury is empanelled, a unanimous jury verdict is required. §32A-2-16(A).

16.5.2.3 Distinction from Criminal Cases

Certain aspects of jury trials under the Rules of Criminal Procedure for the District Courts are not applicable to jury trials in the children’s court. Unlike in criminal proceedings, the child has the right to waive a jury trial without securing the consent of the state. *See In the Matter of Christopher K.*, 1999-NMCA-157, ¶12. Also, only a six-member jury is empanelled in a delinquency case, unless the CCA has filed a motion to invoke adult sanctions. In youthful offender proceedings, a twelve-member jury is used. §32A-2-16(A).

16.5.2.4 Jury’s Function

The jury’s function in a delinquency proceeding is normally limited to that of trier of the factual issue of whether the child committed the alleged delinquent act or acts. §32A-2-16(A). If and when a child is adjudicated delinquent, the judge determines the appropriate disposition for a child. *See* Chapter 17, Dispositional Hearing.

16.5.2.5 Child’s Competency

When the issue of the child’s competency to stand trial has been raised, if the judge finds there is evidence that raises a reasonable doubt as to the child’s competency to stand trial, a jury in certain circumstances will consider the issue. If a reasonable doubt is raised prior to the adjudicatory hearing, the children’s court, without a jury, may determine the issue of competency, or, in its discretion, may submit the issue to a jury, *other than the jury sitting at the adjudicatory hearing*. If the issue of competency is raised during the adjudicatory hearing, the Children’s Court judge in a nonjury case will determine the issue. In jury cases, the judge will instruct the jury on the issue. Rule 10-242(C).

If the child has previously been found to be competent to stand trial in the proceedings, the issue of the child's competency may only be reconsidered if the criteria in Rule 10-242(C)(2) are met. *See* Chapter 26, Competency.

16.5.2.6 Insanity Defense

If the child raises the defense of insanity in a jury trial a special verdict of the jury will determine the issue. In a non-jury trial, the judge will determine the issue. Rule 10-241(C).

16.5.3 Record of Proceedings; Preservation of Error

The proceedings must be recorded by stenographic notes or by electronic, mechanical, or other appropriate means. §32A-2-16(A).

The decision of the judge or the jury, as the case may be, at the adjudicatory hearing is appealable and it is important that counsel see that error is preserved for appeal. In a number of its decisions, the Court of Appeals has declined to address an issue because it was not preserved below, and the Court has noted that preservation issues plague children's court appeals. *State v. Steven B.*, 2004-NMCA-086. Preservation of error is discussed in greater detail in Chapter 21 of this Handbook, Appeals.

Practice Note: It is important that the practitioners before the court make a good record, offer the evidence that should be offered, and state objections clearly on the record.

16.5.4 Applicable Rules

16.5.4.1 Rules of Criminal Procedure

The Children's Court Rules state that, unless otherwise provided, the adjudicatory hearing in delinquency cases must be conducted in the same manner as trials are conducted under the Rules of Criminal Procedure for the District Courts. Rule 10-244(A). According to the committee commentary to Rule 10-244, the rule adopts the specific provisions of Rules 5-606 through 5-611. Rules 5-606 through 5-611 govern the following subject matter.

- Rule 5-606: jurors.
- Rule 5-607: the order for trial.
- Rule 5-608: instructions to juries.
- Rule 5-609: submission to jury.
- Rule 5-610: additional instructions to jury following retirement and communications between court and jury.
- Rule 5-611: return of verdict, mistrial, and discharge of jurors.

Another fundamental requirement in a jury trial can be found in Rule 5-115(C): "A defendant shall not be required to appear before the jury in distinctive clothing that would give the appearance that the defendant is incarcerated. Except by order of the court, the defendant may

not appear before the jury in any visible restraint devices ... which, if visible to the jury, would prejudice the defendant in the eyes of the jury.”

16.5.4.2 Rules of Evidence

Rule 10-141 provide that the Rules of Evidence govern children’s court proceedings, except as otherwise provided by law. Chapter 24 of this Handbook discusses evidentiary issues arising in children’s court.

16.5.4.3 Rules on Videotaped Depositions

Rule 10-234 provides for the taking and use of videotaped depositions in cases alleging criminal sexual penetration or criminal sexual contact on a child under the age of 16. The deposition, if taken in accordance with the rule, may be shown to the judge or jury at the adjudicatory hearing and admitted as an additional exception to the hearsay rule in certain situations. The deposition may be shown and admitted as an exception to the hearsay rule if:

- the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;
- the deposition was presided over by a children’s court judge and the child was present and represented by counsel or waived counsel; and
- the respondent child was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

The procedures for the taking of videotaped depositions under Rule 10-234 are described in Chapter 23, Discovery and Disclosure, while the use of depositions in lieu of live testimony is discussed in Chapter 24, Evidence.

While Rule 10-234 is limited to cases involving sexual abuse, the new Uniform Child Witness Protective Measures Act is not. Passed in 2011, the Act sets forth standards and procedures for allowing a child witness to testify by videotaped deposition. 2011 N.M. Laws, Ch. 98, §§2, 3. The court may allow a child witness under the age of sixteen to testify by videotaped deposition upon a showing that the child witness may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. *Id.* §5.

Under the Uniform Act, a number of factors must be considered by the court when deciding whether to permit an alternative method and ruling on the conditions necessary for taking or presenting the testimony. Any alternative method ordered must permit a full and fair opportunity for examination or cross-examination of the child witness by each party, subject to such protection of the child witness as the court deems necessary. 2011 N.M. Laws, Ch. 98, §§5, 6.

16.5.5 Order of Trial

Rule 5-607 sets forth the order of trial. As adapted for children’s court proceedings, the order is summarized as follows:

- jury selected and sworn (unless the child has waived his or her right to a jury trial);
- initial instructions as provided in Rule 14-9002 given by judge;
- opening statements. Child's counsel may reserve his or her opening statement until after the conclusion of the state's case;
- submission of evidence by the state;
- out of the presence of the jury, court determines sufficiency of the evidence, whether or not a motion for directed verdict is made;
- opening statement by defense, if reserved;
- defense may submit its evidence;
- state's rebuttal evidence;
- defense's surrebuttal;
- at any time before submission of case to the jury, the court may for good cause shown permit the state or defense to submit additional evidence;
- out of the presence of the jury, the court determines the sufficiency of the evidence, whether or not a motion for directed verdict is made;
- the instructions to be given are determined in accordance with Rule 5-608, and the court then instructs the jury;
- the state may make a closing argument;
- the defense may make its argument;
- the state may make rebuttal argument only.

16.5.6 Oral Instructions After Jury is Sworn and Before Opening Statements

Rule 14-9002 contains a script for the judge to use to explain the hearing procedure in a delinquency proceeding once a jury is empanelled. The explanation is given after the jury is sworn and before opening statements have begun. Rule 14-9002, n.1. The instruction is similar to the one used in criminal cases, but has language particular to delinquency proceedings.

In summary, the judge will orally instruct the jury on the following matters at the trial:

- the definition of a child, and the definition of delinquent act;
- the alleged act of which the child is accused, that the child has denied the allegation and is presumed innocent, and that the state has the burden to prove beyond a reasonable doubt that the child committed the act;
- what will generally occur in the proceeding and the role of the judge, lawyers, and jury in the case, and restrictions on their role; and
- whether jury members will be permitted to take notes during the hearing and, if so, how notes may be taken.

16.5.7 Use of Jury Instructions in Children’s Court Proceedings

The Uniform Jury Instructions for Criminal Cases (UJIs) are used in delinquency proceedings. Rule 14-9001 is a general use note explaining how to adapt the UJIs for children’s court. The UJIs for the various elements of the offense, as well as defenses, should be identified and modified as needed, although in no event may an elements instruction be altered other than to make it appropriate for children’s court.

Rule 14-9001 also provides that, in all instructions, the word “child” should be substituted for the word “defendant.” If the court determines that a uniform instruction must be altered for any other matter, the reasons for the alteration must be stated in the record. Rule 14-9001.

Rule 14-9001 also provides that, if no uniform instruction on essential elements is provided for a particular delinquent act, an appropriate instruction stating the essential elements must be drafted.

Rule 14-9002 provides a script for the judge to use in explaining trial procedure in children’s court. Rule 14-9003 contains a sample jury instruction for delinquency proceedings. Rule 14-9004 provides a sample verdict form.

16.5.8 Burden of Proof

Proof beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358, 368 (1970), and a unanimous verdict are required in delinquency proceedings. §32A-2-16(A) and (E). The state has the burden of proving the basic elements of the delinquent act and may not shift the burden of proof to the respondent regarding any essential elements of the defense. *See Nowak & Rotunda, Constitutional Law*, §13.4, pp. 650-51, n.11 (8th Ed. 2010).

16.5.9 Judgment and Findings

After hearing all of the evidence bearing on the allegations of delinquency, the court must make and record its findings on whether the delinquent acts were committed by the child. §32A-2-16(D). The court must make the finding of delinquency based on a valid admission of the allegations of the petition or on the basis of proof beyond a reasonable doubt, as determined by the judge in non-jury trials and a jury in jury trials. §32A-2-16(E).

Most often, if there is going to be an admission or no contest plea, the admission or plea will have occurred prior to the adjudicatory hearing. However, a child could decide at any time, even in mid-trial, not to contest any further, or to enter a consent decree with the CCA. At that point, counsel for the child should inform the court that the child is prepared to:

- admit sufficient facts to permit a finding that the allegations of the petition are true;
- enter a plea of no contest to the allegations in the petition; or
- in the case of a motion for consent decree, stand mute.

The court may not accept an admission or a no contest plea, or grant a motion for consent decree, without ensuring that the disclosures required by Rule 10-227 are made. The required disclosures are discussed in detail in Chapter 15, Non-Adjudicatory Resolutions.

16.5.10 Judgment Rendered In Open Court

If the court finds the child has committed a delinquent act, the court will enter a judgment to that effect. Rule 10-251(A). The judgment must be rendered in open court. The judge will ultimately sign and file a written judgment, which will also include the disposition, but this may be at a later date. A form for judgment and disposition can be found in the Children's Court Rules and Forms, Rule 10-416. See Rule 10-251(A). Judgments and dispositions are discussed in Chapter 17, Dispositional Hearing.

The court may proceed immediately to disposition or at a postponed dispositional hearing. §32A-2-16(F). The court may, on its own motion or motion of a party, continue the hearing for a reasonable time to receive reports and other evidence in connection with the disposition, including predisposition studies and reports. Since any predisposition reports required by statute or the judge must be provided to the parties and the judge at least five days prior to disposition, if such reports have not been provided prior to the adjudicatory hearing, the judge would have to postpone the dispositional hearing for the submission of these reports. See §§32A-2-16(H); 32A-2-17(A).

If the child is in detention, the dispositional hearing must begin within 30 days from the date the court concludes the adjudicatory hearing or accepts an admission of the factual allegations of the petition. If the court enters an order committing the child for diagnosis and dispositional recommendations, the dispositional hearing must be recommenced within 45 days after the filing of the court's order. Rule 10-246(B) and (C). The time frames for commencing a dispositional hearing and the consequences of non-compliance are discussed in Chapter 17.

If the court continues the dispositional phase of the hearing, the court must issue an appropriate order for detention or legal custody. §32A-2-16(H). It is not clear whether the requirement that the court make an "appropriate" order requires consideration of the criteria for detention before placing a child who has previously not been detained in detention pending disposition. See *State v. Steven B.*, 2004-NMCA-086.

16.6 Checklist for Adjudicatory Hearing

The checklist is provided to assist courts in adjudicatory hearings.

ADJUDICATORY HEARING CHECKLIST – DELINQUENT OFFENDER

- ☐ Preliminary matters
 - Appearances
 - Petition filed (§32A-2-8)
 - Manner and date of service
 - Appointment of counsel (§§32A-2-7.1(A) and 32A-2-14(H))
 - Language or cognitive challenges
 - Notice of hearing
 - Motions in limine
- ☐ Six-member jury selected and sworn (unless knowing, intelligent and voluntary waiver by child) (§32A-2-16(A))
- ☐ Initial instructions in Rule 14-9002 given
- ☐ Evidence on contested allegations
 - Rules of evidence apply
 - Standard of proof: beyond a reasonable doubt (§32A-2-16(E))
- ☐ Findings of fact
 - the child committed the alleged delinquent act or acts (§32A-2-16(E))
 - ensure children's court attorney proves every element of the alleged offense beyond a reasonable doubt
- ☐ If child is adjudicated delinquent:
 - conduct dispositional phase or continue hearing for filing of reports (§32A-2-16(F));
 - if dispositional phase continued, issue appropriate order for detention or legal custody or set appropriate conditions of release (§32A-2-16-(H));
 - at disposition, advise child of right to appeal and to proceed at state expense if unable to pay cost of appeal (Rule 10-251).
- ☐ If not adjudicated delinquent:
 - determine whether there are any pending petitions and whether continued confinement is necessary;
 - issue order sealing records, per CCA motion required by §32A-2-26.
- ☐ Scheduling further proceedings
 - Schedule dispositional hearing

CHAPTER 17

DISPOSITIONAL HEARINGS

This chapter covers the following topics related to the dispositional hearing:

- Timeline
- Initiation and notice to parties and victims
- Participants
- Pre-disposition reports and evaluations
- Hearing before judge
- Judgments
- Responsibilities to victims
- Advisement of right to appeal
- Corrections and modifications of judgments
- Checklist

17.1 Purpose

The purpose of a dispositional hearing is to determine the appropriate sanctions for a child adjudicated to be delinquent. This chapter will focus primarily on cases in which the child is adjudicated a delinquent offender, with youthful offender proceedings discussed in detail in Chapter 20.

Youthful Offenders. In youthful offender proceedings, the dispositional hearing is conducted in two phases. First, the children's court holds an amenability hearing to determine whether adult sanctions are appropriate in accordance with §32A-2-20. The court then continues the dispositional or sentencing hearing to allow the filing of necessary reports. *State v. Jose S.*, 2007-NMCA-146, ¶17. *See* Chapter 20.

Serious Youthful Offenders. In district court proceedings in which a serious youthful offender is convicted of first-degree murder, no amenability hearing is necessary and the court will proceed to sentence the child as an adult pursuant to Rule 5-701.

17.2 Timeline

17.2.1 Commencement Within 30 Days

When the child is in detention, the dispositional hearing must be commenced within 30 days from the date that:

- the court concludes the adjudicatory hearing in a delinquency proceeding or trial in a youthful offender proceeding; or
- accepts an admission of the factual allegations of the petition. Rule 10-246(B).

Note that the 30-day time frame for commencing the dispositional hearing applies to proceedings in which a child is adjudicated as a youthful offender as well as cases in which the child is adjudicated a delinquent offender.

Serious Youthful Offenders. In serious youthful offender proceedings in district court, the 90-day time frame for sentencing hearings, which commences from the date that the trial is concluded or a plea is entered, applies. Rule 5-701(B).

There is no time limit for holding a dispositional hearing when the child is not in detention. *See* Rule 10-246 (Committee Commentary). The hearing must be held within a reasonable time. *State v. Stephen F.*, 2006-NMSC-030, ¶18 (*citing* §32A-2-16(H)).

A failure to resume a dispositional hearing within a reasonable period of time may violate the child's right to speedy trial, which has been applied to juvenile sentencing proceedings. *See* §17.2.5 below.

17.2.2 Commencement Within 45 Days if Child Committed For Diagnosis

If the child is committed for diagnosis pursuant to §32A-2-17(D), the Children's Court Rules require the dispositional proceedings to be recommenced within 45 days after the filing of the court's order. If the hearing is not recommenced within 45 days, unless the child has agreed to the delay or has been responsible for the failure to comply with the time limits, the child must be released from detention on such conditions as are appropriate, until the dispositional hearing can be recommenced. Rule 10-246(C). *See also State v. Stephen F.*, 2006-NMSC-030, ¶18 (*citing* Rule 10-229, the prior version of Rule 10-246).

In 2009, the Legislature amended the provisions of the Children's Code relating to commitment for diagnosis. Section 32A-2-17(D) now states a preference for performing the evaluation in the child's community and requires that the evaluation be performed within 15 days of the court order. Under §32A-2-17(E), if the child does need to be detained for purposes of the evaluation, the evaluation still needs to be completed within 15 days. However, the subsection also provides that a child may "in no event" be detained for more than 15 days within a 365 day period for a pre-dispositional evaluation, "except for good cause shown." The court and parties should be

mindful of the deadlines in Rule 10-246 when considering an extension of the commitment for the purposes of the evaluation. *See* §17.6.5 on commitment for diagnosis below.

17.2.3 Verified Petition for Extension of Time

The Supreme Court, a Supreme Court justice, or a judge designated by the Supreme Court may extend the time for beginning a dispositional hearing in a proceeding involving a delinquent offender *or youthful offender*. The party seeking an extension of time is required to file with the Supreme Court clerk, and serve on opposing counsel, a verified petition concisely stating the facts petitioner deems to constitute good cause for an extension of time to commence the dispositional hearing. While the petition should normally be filed within the applicable time limits prescribed by the rule for a dispositional hearing, it may be filed within 10 days after expiration of the time limits if the late filing is due to exceptional circumstances beyond the control of the state or children's court that justify the failure to file the petition within the applicable time limit. Opposing counsel may file an objection to the extension within 5 days after service of the motion. The pleading must set forth the reasons for such objection. Rule 10-246(D).

If it finds good cause for an extension, the Supreme Court will fix the time limit within which the dispositional hearing must be commenced. *Id.*

17.2.4 Remedy for Failure to Comply with Time Limits

If the child is in detention, the child must be released from detention if the dispositional hearing is not begun within 30 days, unless the court has granted an extension of time or the child has agreed to or been responsible for the delay. Rule 10-246(B). Similarly, if the child has been committed for diagnosis pursuant to Rule 10-246(C) and §32A-2-17, and the dispositional hearing is not recommenced within 45 days, the child must be released from detention on such conditions as are appropriate. The court may set appropriate conditions on such release. Again, if the court grants an extension of time or the child agreed to or was responsible for the delay, the 45 day deadline is adjusted accordingly. Rule 10-246(C).

While a child may have to be released from detention if the time limits are not met, under the harmless error rule in the Children's Court Rules, a failure to meet these deadlines is not grounds for granting a new hearing or setting aside a verdict, for vacating, modifying, or otherwise disturbing a judgment or order, or for dismissing an action, unless refusal to take any such action appears to the court inconsistent with substantial justice or unless the rule expressly provides otherwise. Rule 10-144.

17.2.5 Conclusion of Dispositional Hearing and Right to Speedy Trial

The dispositional proceedings must be concluded as soon as practical. Rule 10-246(B). While there are no definite time limits for concluding a dispositional hearing, in *State v. Todisco*, the Court of Appeals assumed, without deciding, that the speedy trial right in the Sixth Amendment of the U.S. Constitution and Art. II, §14 of the New Mexico Constitution applies to juvenile sentencing proceedings. In determining whether the right to a speedy trial had been violated due

to a nine-month delay in concluding an amenability hearing on remand after appeal, the Court applied a four-factor balancing test. The test requires the court to balance (1) the length of the delay, (2) the reasons for the delay, (3) the assertion of the right, and (4) prejudice to the defendant. 2000-NMCA-064, ¶¶18-19.

The Court of Appeals in *Todisco* found no violation of the right because the defendant, who was a juvenile at the time of commission of the crime, failed to show “actual and substantial prejudice” resulting from the delay. *Todisco*, ¶23.

17.3 Youthful Offender Proceedings

As noted in earlier chapters, the Children’s Court Rules provide that the Rules of Criminal Procedure for the District Courts apply to youthful offender proceedings unless the Children’s Court Rules specify otherwise. Rule 10-101(A). Rule 10-246, which governs dispositional proceedings, specifically applies to youthful offender as well as delinquency proceedings. *See also State v. Stephen F.*, 2006-NMSC-030, ¶8 (interpreting a prior version of the rule).

Practice Note: Keep in mind that the Children’s Court Rules were amended, recompiled and renumbered effective January 15, 2009. Rule 10-246, for example, was formerly Rule 10-229.

Because the Children’s Court rule on dispositional proceedings applies to both delinquent and youthful offenders, much of the discussion in this chapter will apply to youthful offender proceedings. *See* Chapter 20, however, for a discussion of amenability hearings as well as adult sentencing.

17.4 Initiation and Notice; Notice to Victims

The children’s court may hold the dispositional hearing at the conclusion of the adjudicatory hearing or may continue the hearing on the petition for a reasonable time to receive reports and other evidence in connection with the disposition. §32A-2-16(H). Since pre-dispositional reports must be provided to the parties at least 5 days before the dispositional hearing, in many cases the dispositional hearing must be postponed to accommodate the submission of those reports. *See* Rule 10-246(A).

The children’s court must ensure that, pursuant to Rule 10-104 (or Rule 5-103 in the Rules of Criminal Procedure), the parties are served with written notice of the dispositional hearing. The Children’s Court Attorney (CCA) must provide the victim, or the victim’s authorized representative, with oral or written notice of scheduled court proceedings in a timely fashion, provided that the victim has satisfied the requirements of the Victims of Crime Act. §31-26-9(B). To enable the CCA to provide timely notice to the victim, the children’s court must provide the district attorney’s office with oral or written notice no later than seven working days prior to the scheduled proceeding, unless a shorter notice period is reasonable under the circumstances. §31-26-10. *See also* Chapter 8 of this Handbook, Victims.

17.5 Participants

17.5.1 Parties

The participants in a dispositional hearing include the child, the child's attorney, the CCA and any witnesses. If the child is in detention, a transport order may be needed. Local rules govern transport of juveniles from a detention facility to court proceedings.

If the parent, guardian or custodian has not already been made a party, they may be -- and many times are -- made a party at the dispositional hearing. Rule 10-121(A) and Rule 10-122(B)(1). The court must also inquire whether the victim is present and allow the victim to make a statement. §31-26-10.1.

Youthful Offenders. If an amenability hearing is conducted, experts usually testify on the child's prospects for rehabilitation and amenability to treatment, as well as the availability of facilities. *See State v. Hunter*, 2001-NMCA-078, ¶13. *See* Chapter 20 on youthful offender proceedings for a discussion of amenability hearings.

17.5.2 Public Access; News Media

Dispositional hearings in children's court are open to the public unless the court in its discretion, after a finding of exceptional circumstances, deems it appropriate to conduct a closed delinquency hearing. §32A-2-16(B).

If the judge finds that exceptional circumstances exist to close the hearing, only the parties, their counsel, witnesses, and other persons approved by the court may be present at a closed hearing. The court may admit those persons that the court finds have a proper interest in the case or the court's work to closed hearings on the condition that they refrain from divulging any information concerning the exceptional circumstances that resulted in the need for a closed hearing. *Id.*

Representatives of the news media will be allowed to be present at closed hearings under the same condition, and subject to such enabling regulations as the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Delinquency Act. *Id.* Supreme Court Rule 23-107 sets forth guidelines for broadcasting, televising, photographing, and recording of court proceedings, and gives trial judges the discretion to limit or deny media coverage for good cause.

Any person granted admission to a closed hearing who intentionally divulges information in violation of §32A-2-16's prohibition is guilty of a petty misdemeanor. *Id.*

17.6 Pre-Disposition Reports and Evaluations

At least 5 days before a dispositional hearing in children's court, copies of any social, diagnostic, or other predisposition reports ordered by or submitted to the court must be provided to the

parties. §32A-2-17(A); Rule 10-246. The purpose of the 5-day notice requirement is to assure that the child and the state have a reasonable opportunity to test the accuracy of any social, medical, psychological, and psychiatric reports before they are considered by the court at disposition. *See* Rule 10-246 (Committee Commentary).

Serious Youthful Offenders. Rule 5-703 governs predisposition reports in criminal trials and requires that they be provided no later than 10 days before the sentencing hearing. However, the Children’s Code provides that predisposition reports for serious youthful offenders must be provided within 5 days. §32A-2-17(A).

17.6.1 Discretionary Reports

In some cases, the judge has the discretion to decide whether to require the preparation of predisposition reports. For delinquent offenders, it is within the court’s discretion to require the Children, Youth and Families Department (CYFD or department), or an appropriate agency designated by the court, to prepare a written predisposition study and report concerning the child, the family of the child, the environment of the child, and any other matters relevant to the need for treatment or to appropriate disposition of the case. §32A-2-17(A).

The court may not order a predisposition study and report to be prepared until after a petition has been filed and the court has made a finding with respect to the allegations of the petition, or a notice of intent to admit the allegations of the petition has been filed. §32A-2-17(A). The report must be prepared and submitted to the parties at least 5 days before the dispositional hearing. Rule 10-246(A).

17.6.2 Client Family Baseline Assessment

If the judge does not require CYFD to prepare a predisposition report for a delinquent offender, juvenile probation will nevertheless prepare a client family baseline assessment when required by CYFD procedure. A client family baseline assessment, referred to as a CFBA in CYFD rules, is defined as a written report by the juvenile probation officer (JPO) that identifies the child’s delinquent history, and the strengths and needs of the client and family. The report may be prepared before a child is adjudicated delinquent if the client consents to an investigation prior to adjudication. However, information from the report may not be disclosed to the court before the adjudicatory hearing. *See* 8.14.2.12 NMAC, Juvenile Justice, Probation and Aftercare Services.

17.6.3 Mandatory Reports

If there is an adjudication of delinquency or the child has filed a notice of intent to admit the allegations of the petition, the predisposition report is prepared as follows:

- The adult probation and parole division of the Corrections Department prepares the predisposition report for a serious youthful offender.
- CYFD prepares the predisposition report for a child who had been charged as a serious youthful offender but who was convicted of an offense other than first degree murder.

- CYFD prepares the predisposition report for a youthful offender concerning the youthful offender’s amenability to treatment.
 - If the court finds a juvenile disposition is appropriate, CYFD will prepare a subsequent predisposition report.
 - If the court finds that an adult sentence should be imposed, the adult probation and parole division of corrections will prepare a subsequent presentencing report.

§32A-2-17(A). *See also State v. Jose S.*, 2007-NMCA-146.

17.6.4 Mental Health Evaluation

When there are indications that the child may have a mental disorder or developmental disability, the CCA or the child’s attorney may move the court to order the child examined at a suitable place by a physician or psychiatrist, a licensed psychologist, a licensed professional clinical counselor, or a licensed independent social worker. The examination may be made prior to a hearing on the merits of the petition or as part of the predisposition study and report. The examination must be conducted on an outpatient basis unless the court finds that placement in a hospital or other appropriate facility is necessary. §32A-2-17(B).

§32A-2-17(B) does not impose a time limit on conducting a mental health evaluation or placing a child in a hospital for such evaluation. However, if the court orders such examination after adjudication as part of a predisposition study or report, presumably the requirements of §32A-2-17(D) would apply. *See* §17.6.5 below.

17.6.5 Commitment of Adjudicated Delinquent Child for Diagnosis

In 2009, the Legislature amended certain provisions of the Children’s Code addressing predispositional evaluations. Under the amended version of §32A-2-17, the judge may order that a child adjudicated as a delinquent child be administered an evaluation by a professional designated by CYFD for purposes of diagnosis, with direction that a report be submitted to the court indicating what disposition appears most suitable when the interest of the child and the public are considered. The evaluation must be completed within 15 days of the court’s order and the preference is for performing the evaluation in the child’s community. §32A-2-17(D).

Delinquent Child. Note the reference to “a delinquent child” above. The term “delinquent child” is defined in the Children’s Code to include both alleged delinquent offenders and alleged youthful offenders. *See* the first line of §32A-2-3(J). *See also State v. Stephen F.*, 2006-NMSC-030, ¶10, in which the Supreme Court held that the use of this term in a rule meant that youthful offenders were included in the rule.

The court has the discretion to order the child detained for purposes of performing such a pre-dispositional evaluation, provided that the child is detained for no more than 15 days within a 365 day period unless good cause is shown for detaining the child longer. §32A-2-17(E). Before ordering a child committed for diagnosis, the child must be “adjudicated as a delinquent child.” §32A-2-17(D). *See also State v. Doe*, 90 N.M. 249, 250, 561 P.2d 948, 949 (Ct. App.

1977) (decided under prior law authorizing the filing of diagnostic reports for a child adjudicated as a delinquent child).

The prior version of §32A-2-17(D) permitted the court to transfer a child adjudicated as delinquent to the facility designated by the CYFD secretary for 15 days for purposes of diagnosis, which resulted in all persons committed for diagnosis being transferred to the Youth Diagnostic and Development Center in Albuquerque for evaluation. *See* §32A-2-17(D) (2005). Under the prior law, the judge could also extend the 15-day time period for an additional 15 days upon petition by CYFD and good cause shown. *See* §32A-2-17(E) (2005). Under the new law, if a child is committed for purposes of evaluation, the child can be committed for a period beyond 15 days for good cause shown. However, under the new law, the child does not have to be committed in order to be evaluated; rather the law expresses a preference for performing the evaluation in the child's community. *Compare* §32A-2-17(D) and (E) (2005) with §32A-2-17(D) and (E) (2009).

17.6.6 Examination of a Child's Parent or Custodian

After a hearing, the court may order a physician or psychiatrist, a licensed psychologist, a licensed professional clinical counselor, or a licensed independent social worker to examine a parent or custodian whose ability to care for or supervise a child is an issue before the court. §32A-2-17(C).

17.7 Evidence; Determination by Judge

At disposition, all relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and relied upon to the extent of their probative value even though not competent in the adjudicatory phase. §32A-2-16(G).

The judge, not the jury, determines the appropriate disposition for a child. *See* §32A-2-16(A) ("the jury's function is limited to that of trier of the factual issue of whether the child committed the alleged delinquent acts.").

The child has the right to address the court before disposition. This is referred to as the right of allocution and is discussed in more detail in Chapter 2 of this Handbook. The judge is required to give the child the opportunity to address the court, and the child is not required to assert this right. *See State v. Ricky G.*, 110 N.M. 646, 649, 798 P.2d 596, 599 (Ct. App. 1990).

The victim also has a right to make a statement. *See* Chapter 8 of this Handbook.

17.8 Amenability Hearing for Youthful Offenders

As noted early in this chapter, the dispositional hearing in a youthful offender case is conducted in two phases. First, the children's court must hold an amenability hearing to determine whether adult sanctions are appropriate in accordance with §32A-2-20. Then, the court must continue the dispositional or sentencing hearing to allow the filing of necessary reports. *State v. Jose S.*,

2007-NMCA-146, ¶17. *See* Chapter 20, Youthful Offender Proceedings, for a more detailed discussion.

17.9 Judgments

17.9.1 Timing

The judgment and disposition must be rendered in open court and the judge will sign a written judgment and disposition and file it with the court. Rule 10-251(A). There is no time limit in the Children's Court Rules for filing a written juvenile judgment and disposition. Rule 10-251(A). However, if the child is sentenced as an adult, the Rules of Criminal Procedure require the court to enter a written judgment and sentence within 30 days after the conclusion of the sentencing hearing. Rule 5-701(C).

17.9.2 Contents

The judgment must set forth the court's findings and disposition. §32A-2-18(A). For juvenile dispositions, the children's court must use the form of the juvenile judgment and disposition set forth in the Children's Court Rules and Forms, Rule 10-416. For youthful offenders sentenced as adults and convicted serious youthful offenders, the district court must use the judgment and sentence form in the Criminal Forms, Rule 9-604.

The types of juvenile dispositions and adult sentences that the judge may impose are discussed in Chapter 18 and Chapter 20 of this Handbook.

17.9.3 Findings

The court may make and include findings on the following in its juvenile dispositional judgment:

- the child's interaction and interrelationship with her parents, siblings, and any other person who may significantly affect the child's best interests;
- the child's adjustment to his home, school, and community;
- the mental and physical health of all individuals involved, including consideration of such factors as the child's brain development, maturity, trauma history and disability;
- the wishes of the child as to his custodian;
- the wishes of the child's parents as to the child's custody;
- whether there is a relative of the child or other individual who, after study by CYFD, is found to be qualified to receive and care for the child;
- the availability of services recommended in the predisposition report; and
- the ability of the parents to care for the child in the home.

§32A-2-19(A). The language regarding the court's consideration of the child's brain development, maturity, trauma history and disability was added by the Legislature in 2009.

17.9.4 Abuse and Neglect Findings

In addition to any other disposition pursuant to §32A-2-19, the court may make an abuse or neglect report for investigation and proceedings as provided in the Abuse and Neglect Act. The report may be made to a local law enforcement agency, CYFD, or a tribal law enforcement or social service agency for an Indian child residing in Indian country. §32A-2-19(G).

17.9.5 Indian Children

When the child is an Indian child, the court must consider the Indian child's cultural needs and provide reasonable access to cultural practices and traditional treatment in its disposition. §32A-2-19(C). If not already identified as an Indian child, the court must attempt to ascertain at the dispositional hearing whether the child is an Indian child.

17.9.6 Parental Responsibility

Under §32A-2-28, the court may order the child's parent or parents to submit to counseling, participate in any probation or other treatment program ordered by the court, and if the child is committed for institutionalization, participate in any institutional treatment or counseling program, including attendance at the institution site. §32A-2-28. If the child is committed for institutionalization, the court must order the parent to support the child by paying the reasonable costs of support, maintenance, and treatment of the child that the parent is financially able to pay. The court may use the child support guidelines in §40-4-11.1 to calculate a reasonable payment.

The court may enforce obligations imposed upon the child's parents, guardians or custodians through its contempt power. §32A-2-28(C).

17.10 Advising Child of Right to Appeal

At the time of disposition in a case that has gone to an adjudicatory hearing, the court must advise the child of the right to appeal. The court must also inform the child that, if he or she is unable to pay the cost of an appeal, the appeal may be taken at state expense. Rule 10-251(B). Failure to advise the child tolls the time limit for taking an appeal.

Youthful Offenders: Rule 5-702(A) of the Rules of Criminal Procedure includes a similar requirement.

Also, if a youthful offender is being sentenced as an adult for a sex offense, the court will need to provide the child with written notice of his duty to register pursuant to the state Sex Offender Registration and Notification Act. *See* Chapter 31 on SORNA.

17.11 Corrections and Modifications of Judgments

17.11.1 Correction of Judgment

The children's court may correct an unlawful disposition at any time and may correct a commitment imposed in an unlawful manner within the time provided in Rule 10-252 for a reduction of the term of commitment. Rule 10-252(A).

17.11.2 Motion to Modify or Reconsider

Any party may file a motion to modify or reconsider, and the court on its own motion may raise a motion to modify or reconsider, a children's court disposition. Rule 10-252(B); *see also* §32A-2-23. A motion to modify or reconsider a disposition is an exception to the general rule in Subsection A of §32A-2-23 that a judgment transferring legal custody to CYFD divests the court of jurisdiction at the time of transfer. *See In the Matter of Zac McV.*, 1998-NMCA-114, ¶12.

Youthful Offenders. Rule 5-801 of the Rules of Criminal Procedure applies to the correction and modification of a sentence in a youthful offender case, including an adult sentence. The timeframe for filing a motion to reduce a sentence is 90 days from the triggering events listed in the rule.

17.11.3 Timeline

A motion to modify or reconsider the disposition may be filed by any party or raised by the court on its own motion within the following time frames set forth in Rule 10-252(B):

- if the initial commitment period is 2 years or less, within 30 days after judgment is filed;
- if the initial commitment period is longer than 2 years, within 90 days after judgment is filed;
- within 30 days after filing in the children's court a mandate affirming the judgment or dismissal of an appeal; or
- upon revocation of probation as provided by law.

It should be noted that the former version of Rule 10-252, Rule 10-230.1 (2003), only addressed the time frames for modification or reconsideration of motions filed by the respondent, generating case law addressing the appropriate time frame for the state and the court to raise motions to reconsider. The Supreme Court amended and recompiled Rule 10-230.1 as Rule 10-252, effective January 15, 2009. Rule 10-252 now provides specific time frames for the parties or the court to file or raise motions to modify or reconsider a disposition.

The Supreme Court's changes to Rule 10-252, which now require that all motions to reconsider be filed within the above time frames, limit the holdings in cases like *State v. Dylan A.*, 2007-NMCA-114, ¶17 and *State v. Michael L.*, 2002-NMCA-076, ¶¶9, 10, which found that, under Rule 10-230.1, there is no time limit for filing state or court-initiated motions to reconsider.

However, notwithstanding the amendments to the Children's Court Rules, as pointed out in *State v. Dylan A.*, the time frames for filing motions to reconsider are not absolute. Under the Children's Court Rules, the court may extend the time for filing or raising a motion to reconsider if the conditions in Rule 10-107 are met. 2007-NMCA-114, ¶24.

17.11.4 Procedure

If the court believes that the matter should be reviewed, the court must hold a hearing on the motion to modify or reconsider the disposition. Rule 10-252(C). Notice must be provided to the parties, and the hearing should be conducted in the manner provided for hearings on delinquency petitions. §32A-2-23(H); Rule 10-252(C). Accordingly, a form of order setting a hearing and providing for transportation of the child must be submitted with the motion to modify or reconsider the disposition. Rule 10-252(C).

The court must enter an order denying or granting a motion to modify or reconsider the disposition within 60 days after the motion is filed, or the motion is deemed denied. Rule 10-252(D).

17.12 Dispositional Hearing Checklist

The checklist on the following page is provided to assist courts in dispositional hearings when juvenile sanctions are given. A checklist for amenability hearings in youthful offender cases is provided at the end of Chapter 20.

DISPOSITIONAL HEARING CHECKLIST – JUVENILE DISPOSITION

- ☐ Preliminary matters
 - Appearances
 - Notice of hearing
- ☐ Predisposition report by probation officer (§32A-2-17)
- ☐ Testimony - Rules of evidence do not apply (§32A-2-16(G))
- ☐ Opportunity for victim to make statement (§§31-26-4 and 31-26-10.1)
- ☐ Opportunity for child to address court (allocution)
- ☐ Dispositions (§32A-2-19):
 - Fines
 - Probation
 - Conditions and limitations
 - If certain alcohol or drug charges, treatment
 - 15 day commitment
 - 1 year commitment
 - 2 year commitment
 - Commitment to age 21, depending on offense
- ☐ Community corrections as alternative to commitment (§33-9A-6)
- ☐ If certain alcohol or drug charges, may revoke or deny driving privileges (§32A-2-19(H))
- ☐ If graffiti, require community service (§32A-2-19(I))
- ☐ Restitution to victim (§32A-2-31)
- ☐ Abuse and neglect report may be included (§32A-2-19(G))
- ☐ Indian child (§32A-2-19(C))
 - Consideration of cultural needs
 - Reasonable access to cultural practices and traditional treatment
- ☐ Parental responsibility (§32A-2-28(A))
 - Participation in counseling and treatment plans
 - Determine if payment of costs for past and future support of child is required
- ☐ Advisement of right to appeal/to proceed at state expense if indigent

CHAPTER 18

JUVENILE DISPOSITIONS

This chapter covers juvenile dispositions, including:

- Fines and restitution
- Commitment
- Probation
- Special dispositions
- Limitations on juvenile dispositions and judgments
- Corrections and modifications of judgments
- Effect of juvenile dispositions

18.1 Overview

If a juvenile disposition is appropriate, the court must follow the dispositional provisions in §32A-2-19 of the Delinquency Act. §32A-2-20(F). The court may impose a fine or order victim restitution. *See* §§32A-2-19(B) and §32A-2-31(A).

In addition, the court may enter “a judgment making any of the following dispositions for the supervision, care, and rehabilitation of the child:”

- transfer legal custody to the Children, Youth and Families Department for a certain period of commitment, with CYFD determining the appropriate placement, supervision, and rehabilitation program for the child;
- place the child on probation under the conditions and limitations prescribed by the court; or
- place the child in a local detention facility for a period not to exceed 15 days within a 365 day time period. §32A-2-19.

18.2 Fines and Restitution

If a child is found to be delinquent, the court may impose a fine not to exceed the fine that could be imposed if the child were an adult. §32A-2-19(B). Parents are not liable to pay the fine imposed on the child. §32A-2-28(B).

In addition, the court may order a delinquent child to pay restitution to the victim of the child's delinquent act. §32A-2-31. The statute notes that CYFD may provide compensation to a delinquent child who is engaged in a rehabilitative work program and that restitution may be deducted from that compensation. CYFD does not currently have this type of program.

18.3 Commitment

18.3.1 Term of Commitment

The court may also transfer legal custody to CYFD and impose one of the following commitments under §32A-2-19(B):

- a short-term commitment of one year in a facility for the care and rehabilitation of adjudicated delinquent children. A child may serve no more than 9 months at the facility and must serve at least 90 days on supervised release, unless a petition to extend commitment has been filed prior to commencement of supervised release, the commitment has been extended or supervised release has been revoked under §32A-2-25;
- a long-term commitment for no more than two years in a facility for the care and rehabilitation of adjudicated delinquent children. No more than 21 months may be served at the facility and no less than 90 days may be served on supervised release, unless the commitment is extended pursuant to §32A-2-23 or supervised release is revoked pursuant to §32A-2-25;
- commitment to age 21 if the child is a delinquent offender who committed a youthful offender offense listed in §32A-2-3(J), although the child may be discharged sooner; or
- commitment to age 21 if the child is a youthful offender, unless the child is discharged sooner.

A judgment transferring legal custody to CYFD divests the court of jurisdiction at the time of transfer, subject to §32A-2-23, which sets forth the requirements for extending a commitment after disposition. The requirements for extending a commitment are discussed in Chapter 19, Post-Disposition Proceedings.

18.3.2 Juvenile Community Corrections

Before ordering commitment to CYFD, the judge must consider whether the child should be placed instead in community corrections pursuant to the Juvenile Community Corrections Act, §§33-9A-1 through 33-9A-6.

Juvenile community corrections programs are available in several counties; *see* the list of providers in Appendix E, Resource Directory. These programs provide pre-sentencing alternatives each year for hundreds of adjudicated youth who might otherwise be committed. If a child is placed in juvenile community corrections, he or she must adhere to a specific plan of care that includes intensive supervision, educational and employment assistance, community service, or victim restitution, or a combination, and institutional transition services. *See* Appendix E. p. E-29.

Either the juvenile probation officer (JPO) will make a recommendation concerning community corrections placement and include the recommendation in the predisposition report, or CYFD will perform a diagnostic evaluation and include its recommendation regarding community placement in the evaluation. §33-9A-6(A). At the dispositional hearing, the judge will consider the report or evaluation. If the judge determines that placement in community corrections is appropriate, the judge will defer or suspend the sentence and as a condition of probation, require the individual to serve a period of time in a community corrections program. §33-9A-6(B).

Under §33-9A-5, a recommendation for community placement can also be made after a court orders a child committed. The Juvenile Community Corrections Act requires CYFD to establish a state panel to screen and identify delinquent children who have been sentenced to a juvenile correctional facility and transferred to the department's legal custody. The panel will identify individuals who:

- have committed an offense for which community service or reasonable restitution may be made using a payment schedule compatible with the total amount of restitution to be paid and the time the offender is to participate in a program; and
- are willing to enter into a contract that establishes objectives to be achieved before release from the program.

Section 33-9A-5(B) permits CYFD to establish additional criteria for screening youth who would benefit from participation in a community corrections program and who would not pose a threat to the community. If the panel determines that a child is suitable for placement in a program, the panel will present its recommendation for modification of disposition as soon as possible to the judge or the department "which may, notwithstanding any provision of law, accept, modify or reject the recommendation." The determination must also be presented to the county, municipality, or private nonprofit organization operating the program, as applicable, for approval or rejection. §33-9A-5(C).

As an alternative to the state panel, a county, municipality, or private non-profit organization, individually or jointly, may opt to establish a local panel to exercise the duties of the state panel. If a local panel is established, it may screen and identify individuals from its district using the same criteria as the state panel. §33-9A-5(D).

18.3.3 Jurisdiction to Determine Placement

If the court orders commitment, the judge may include recommendations for placement of the child but the department will determine the appropriate placement, supervision and rehabilitation program after receiving the child at a juvenile reception facility. §32A-2-19(B)(1).

A judgment transferring legal custody of an adjudicated delinquent child to an agency responsible for the care and rehabilitation of delinquent children divests the court of jurisdiction at the time of transfer of custody. This statutory divestiture of jurisdiction "relates specifically to the jurisdiction to decide particular programs or placements for the child." *State v. Augustine R.*, 1998-NMCA-139, ¶6. The one exception is for the commitments that are for 15 days or less, in which the court retains jurisdiction. §32A-2-23(A).

Generally, the children's court may not infringe on CYFD's authority to place a child during a commitment. *State v. Carlos A.*, 1996-NMCA-082, ¶13. Once custody is transferred, the children's court does not have authority to oversee the rehabilitation of the child. *Ruben D.*, ¶14. See also *State ex rel. Human Services Dept., In the Matter of Jacinta M.*, 107 N.M. 769, 764 P.2d 1327 (Ct. App. 1988) (decided under former code); *Health & Social Services Dept. v. Doe*, 91 N.M. 675, 677, 579 P.2d 801, 803 (Ct. App. 1978) (decided under former code) (finding that the court does not have the authority to order the department to place the physical custody of the child with any particular organization or to prohibit the agency from placing physical custody of the child with any particular person).

In *State v. Dylan A.*, 2007-NMCA-114, the children's court gave the child a two year commitment and invited reconsideration of disposition if the child was not receiving the recommended treatment. When an alternative placement became available after thirty days, the court granted the child's motion to reconsider the disposition. The Court of Appeals agreed that the children's court could reconsider its disposition under the circumstances but made it clear that reconsideration was permitted because the court invited the motion. Under §32A-2-23(G), the court retained jurisdiction to reconsider its disposition.

When the Children's Court Rules were recompiled and amended in late 2008, the rule at issue in *Dylan A.* was amended to require that motions to modify or reconsider a disposition, including motions by the court, be made:

- within 30 days after the judgment is filed if the initial commitment period is two years or less; or
- within 90 days if the initial commitment period is longer than two years.

Rule 10-252 (formerly Rule 10-230.1).

18.3.4 Providing Notice and Opportunity to Be Heard to CYFD

Before placing a child in the custody of CYFD, the judge must ensure that the department is provided with reasonable oral or written notification and an opportunity to be heard. §32A-2-19(F).

18.3.5 Transfer of Information Pertinent to Care of Child

Whenever the court vests legal custody in an agency, institution, or department, the court must transmit with the dispositional judgment copies of the clinical reports, pre-dispositional study and report, and other information pertinent to the child's care and treatment. §32A-2-19(E).

18.4 Probation

18.4.1 Generally

In addition to fines or restitution, the court may place the child on probation under conditions and limitations prescribed by the court. A judgment of probation or protective supervision remains in force for an indeterminate period not to exceed the term of commitment. §32A-2-23(B). .

Note that a consent decree is not a judgment but that the child is placed “under supervision” in the child’s home under terms and conditions negotiated with probation services. *See* §32A-2-22(A). *See also* Chapter 15 on pre-adjudicatory resolutions.

18.4.2 Probation Conditions

If, in its pre-dispositional report, CYFD recommends probation as the primary or alternative recommendation for disposition, it will identify special conditions needed to provide a rehabilitative supervision plan for the child and family, and recommend any such conditions along with the generally imposed conditions on probation. 8.14.2.13 NMAC, Juvenile Justice, Probation and Aftercare Services.

As a condition of probation, and as an alternative to commitment, the Children’s Code specifically mandates that the judge consider whether the individual should serve a period of time in a community corrections program. §33-9A-6. Community corrections programs are discussed in more detail in §18.3.2 above.

18.4.3 Authorized Probation Conditions

The Children’s Code does not limit the type of probation conditions that the children’s court may order. *State v. Wacey C.*, 2004-NMCA-029, ¶10. Probation conditions that New Mexico courts have upheld as acceptable under the Children’s Code include, but are not limited to, the following:

- Prohibition on returning to certain communities during the term of probation. In *State v. Wacey C.*, the Court of Appeals found that this type of probation condition did not amount to an impermissible banishment because the probationer was only prohibited from entering a small geographic area and was not ordered to leave the state or country entirely. Also, the condition was limited to the period of his probation and fashioned to protect the welfare of both the child and the area. 2004-NMCA-029, ¶9.
- Participation in grade court. The Court of Appeals upheld the use of the court’s contempt power in a situation in which participation in a grade court program was a condition of probation. *State v. Steven B.*, 2004-NMCA-086.

Standard conditions of probation may include reporting to a probation officer, obeying parents, living with parents, going to school, not using drugs or alcohol, not possessing weapons, and not breaking the law. Other conditions that are commonly imposed are not associating with negative

peers, keeping a curfew, attending counseling, not driving, making restitution, and performing community service. The court may add other special conditions, if appropriate, including specialized probation supervision. Community corrections might come under this category also.

18.4.4 Limitations on Probation Conditions

A probation order may not contain a self-executing provision requiring a child to be detained upon violation of probation without a probation revocation hearing or other court proceeding. In *State v. Henry Don S.*, the probation order contained a condition of incarceration for truancy. The Court of Appeals deemed this provision self-executing because it allowed the child to be automatically committed to the New Mexico Boys' School upon a reported absence from school and without a probation revocation hearing. 109 N.M. 777, 779, 790 P.2d 1058, 1060 (Ct. App. 1990). On the other hand, in *State v. Steven B.*, the Court of Appeals found that the court may use its contempt power to detain a child for violation of probation without holding a probation revocation proceeding. 2004-NMCA-086, ¶20

18.4.5 Criteria for Reviewing Probation Conditions

Even though the appellate courts have recognized that probation in juvenile cases is different from adult probation, the Court of Appeals has used adult cases as guidance in determining whether a juvenile's probation condition is reasonable. The general rule in adult criminal proceedings is that a judge may impose probation conditions reasonably related to rehabilitation that are designed to protect the public against the commission of other offenses during the probationary term, and have as their purpose deterrence of future misconduct. *Wacey C.*, 2004-NMCA-029, ¶11 (citing *State v. Donaldson*, 100 N.M. 111, 119, 666 P.2d 1258, 1266 (Ct. App. 1983)).

In the adult context, the court will overturn a probation condition if such condition:

- has no reasonable relation to the offense for which the defendant was convicted;
- relates to activity which is not itself criminal in nature; or
- requires or forbids conduct which is not reasonably related to deterring future criminality.

Wacey C., ¶11.

18.5 Commitment for 15 Days or Less

The court may place the child in a local detention facility that has been certified in accordance with the provisions of §32A-2-4 for a period not to exceed 15 days within a 365 day time period. §32A-2-19(B)(3); Rule 10-246(C). The term "detention facility" is defined in §32A-2-3(D) as a facility for detaining alleged delinquent children pending court hearing and does not include a facility for adjudicated delinquent children. If the court transfers legal custody for a commitment not to exceed 15 days pursuant to §32A-2-19, the court retains jurisdiction. §32A-2-23(A).

18.6 Special Dispositions

18.6.1 Dispositions for Drug and Alcohol Related Offenses

The Delinquency Act mandates additional dispositional options for children adjudicated delinquent for the following offenses:

- attempting to buy, buying, receiving, possessing, or being served any alcoholic liquor or being present in a licensed liquor establishment;
- violations of §30-29-2 regarding the illegal use of glue, aerosol spray product, or other chemical substance; and
- violations of the Controlled Substances Act, §30-31-1 *et seq.* §32A-2-19(B)(4).

If a child is found to be delinquent solely on the basis of these alcohol- and substance abuse-related offenses, the court may make any disposition provided by §32A-2-19 and may, in addition, place the child on probation and condition such probation on transfer of legal custody of the child to CYFD for a period not exceeding 6 months without further order of the court. However, the court may not transfer custody of the child to the department unless the court first determines that the department is able to provide or contract for adequate and appropriate treatment for the child and that the treatment is likely to be beneficial. §32A-2-19(B)(4).

In addition, if a child 15 years of age or older is adjudicated delinquent on the basis of the drug or alcohol related offenses listed above, the judge may send a copy of the order adjudicating delinquency to the Motor Vehicle Division of the Taxation and Revenue Department within 24-hours of the dispositional judgment. Upon receipt of the order, the MVD Director may deny the child's driving privileges or revoke the child's driver's license for a period of 90 days, or for a period of one year for a second or subsequent adjudication. §32A-2-19(H).

Nothing in §32A-2-19(H) prevents a delinquent child from applying for a limited driving privilege under §66-5-35, or an ignition interlock license under the Ignition Interlock Licensing Act, or from participating in appropriate educational, counseling, or rehabilitation programs.

18.6.2 Mandatory Disposition for Graffiti Offenses

In addition to any other disposition or penalty provided by law, when a child is adjudicated delinquent for a violation of §30-15-1.1, relating to the unlawful use of graffiti, the child must perform the mandatory community service set forth in that statute. If the child fails to completely perform the mandatory community service, the name and address of the child's parent or legal guardian must be published in a newspaper of general circulation, accompanied by a notice that he or she is the parent or legal guardian of a child adjudicated delinquent for committing graffiti. §32A-2-19(I).

Statutory Note: Section 32A-2-19(B)(3) limits disposition to probation, a fine or restitution when a child is found delinquent solely on the basis of Paragraph 3 of Subsection A of §32A-2-3. This limitation has been in §32A-2-19, unchanged, since before 1995. However, until 2005, Paragraph 3 described certain game and fish violations. When that Paragraph 3 was repealed in 2005, former Paragraph 4 on the illegal use of glue, aerosol products and other chemical substances took its place as Paragraph 3. This is not the Paragraph 3 for which the Legislature intended to limit disposition.

18.7 Limitations on Juvenile Judgments and Dispositions

18.7.1 Incarceration with Adult Offenders Prohibited

A child given a juvenile disposition may not be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crimes. §32A-2-19(D).

18.7.2 Consecutive Commitments Prohibited

A court may not impose consecutive commitments on a delinquent offender under §32A-2-19. Even though a delinquency petition may state several offenses, unlike a criminal proceeding in which the defendant is sentenced separately for each charge resulting in a conviction, the children's court may only order a single commitment upon such petition. *State v. Adam M.*, 2000-NMCA-049, ¶9. The *Adam M.* court reasoned that imposing consecutive commitments is inconsistent with the rehabilitative purposes of the code, which gives the children's court the discretion and flexibility to lengthen a commitment only at the end of a long-term disposition after reviewing a record of the child's performance during commitment, and not at the beginning when the court has less information before it. 2000-NMCA-049, ¶10.

However, the court may impose two separate concurrent commitments arising out of different facts at the same hearing, as long as each commitment is statutorily authorized. *State v. Jose S.*, 2005-NMCA-094, ¶11.

Youthful offenders. The prohibition on consecutive sentences does not apply to children given adult sentences. *See, e.g., State v. Ira*, 2002-NMCA-037.

18.8 Corrections and Modifications of Judgments

The children's court may correct an unlawful disposition at any time. It may correct a commitment imposed in an unlawful manner within the time provided in Rule 10-252 for a reduction of the term of commitment. Rule 10-252(A).

Any party may file a motion to modify or reconsider, or the court on its own motion may raise a motion to modify or reconsider, a children's court disposition within 30 days of the date judgment is filed. Rule 10-252(B); *see also* §32A-2-23. A motion to modify or reconsider a disposition is an exception to the general rule in Subsection A of §32A-2-23 that a judgment

transferring legal custody to CYFD divests the court of jurisdiction at the time of transfer. *See State v. Dylan A.*, 2007-NMCA-114, ¶31. Corrections and modifications of judgments are discussed in further detail in Chapter 17, Dispositional Hearings.

18.9 Effect of Juvenile Disposition

A judgment resulting in a juvenile disposition is not deemed a conviction of a crime nor shall it impose any civil disabilities ordinarily resulting from a conviction of a crime. §32A-2-18. The conviction may not be used as a conviction for purposes of the Criminal Sentencing Act. §31-18-15.3(F).

The judgment also does not operate to disqualify the child in any civil service application or appointment. The juvenile disposition of a child and any evidence given in a court hearing is not admissible as evidence against the child in any case or proceeding in any other tribunal whether before or after reaching the age of majority, except in sentencing proceedings after conviction of a felony and then only for the purpose of a presentence study and report. §32A-2-18(A).

CHAPTER 19

POST-DISPOSITION PROCEDURES

This chapter covers:

- Commitments
- Probation
- Revocation of probation or consent decree
- Supervised release
- Supervised release revocation
- Probation revocation hearing checklist

19.1 Commitments

19.1.1 Court's Jurisdiction to Extend Juvenile Commitment

Before a short-term one-year commitment expires, the children's court retains jurisdiction to extend the commitment for up to 6 months if the court finds that the extension is necessary to safeguard the welfare of the child or public safety. If the commitment is extended, the mandatory 90-day supervised release period required by §32A-2-19 must be included in the extension. §32A-2-23(D).

Before a long-term commitment expires, the court retains jurisdiction to extend the commitment for additional one year periods until the child reaches the age of 21 if the court finds that the extension is necessary to safeguard the welfare of the child or public safety. If the commitment is extended, the mandatory 90-day supervised release period must be included in the extension. §32A-2-23(E).

Notice and hearing are required for any extension of a juvenile's commitment. §32A-2-23(D) and (E).

The children's court only has jurisdiction at the end of the child's commitment period to consider extending the child's commitment. The court does not have the authority to order consecutive commitments. *State v. Adam M.*, 2000-NMCA-049, ¶10).

19.1.2 Court's Authority to Extend Commitment and CYFD's Authority to Grant Early Release

During the term of commitment, the Children, Youth, and Families Department (CYFD or department) has the exclusive power to parole or release a child. *See* §32A-2-23.1(A) (2009). In some circumstances, the department's jurisdiction to grant early release of a child may appear to overlap with the court's jurisdiction to extend a child's commitment. This is because the court must extend a child's commitment "prior to the expiration" of a commitment and the department has the authority to grant early release of a child during the term of commitment. Compare §32A-2-23.1 and §32A-2-23(E).

In *In the Matter of Ruben D.*, the Court of Appeals addressed the issue of whether the court had authority to extend a child's commitment after the Juvenile Parole Board (JPB) had issued a certificate of discharge. 2001-NMCA-006, ¶1. In that case, the JPB issued a certificate of discharge on January 11, 1999, effective at the end of January, the expiration of the child's term of commitment. After the issuance of the certificate of discharge but prior to the end of the child's commitment, the court entered an order to extend the commitment. The Court of Appeals held that the Children's Court's jurisdiction to extend the child's commitment was not affected by the JPB's certificate of discharge. *Id.* ¶17. The Court found that because the JPB was merely acknowledging the child's scheduled release date, and was not considering early release or parole, the board had not invoked its exclusive jurisdiction. *Id.* ¶¶14-17.

Section 32A-2-19 of the Delinquency Act has undergone significant changes since *Ruben D.* was decided. As explained in further detail in §19.4.3 below, the department now makes the final decision on whether to place a child on parole (now called "supervised release"), and the JPB has been replaced by the Juvenile Public Safety Advisory Board. In addition, §32A-2-19 now requires a 90-day period of supervised release to be incorporated into the term of commitment. See §32A-2-19(B)(1), which requires that for a one year commitment "[n]o more than nine months shall be served at the facility and no less than ninety days shall be served on supervised release," and for 2 year commitments, that "[n]o more than twenty-one months shall be served at the facility and no less than ninety days shall be served on supervised release."

Even though parole procedures have changed since *Ruben D.* was decided, the case may still support the assertion that, if CYFD places a child on supervised release prior to the time that supervised release is required by statute, then the court is divested of jurisdiction to extend the commitment. However, if the department is granting supervised release as a matter of course at the close of a child's commitment period, then the court may still have jurisdiction to extend the commitment, provided that it acts prior to the expiration of the commitment.

19.1.3 Procedure for Extending Commitment

19.1.3.1 Court's Authority to Extend Commitment *Sua Sponte*

According to the Court of Appeals in 2001, the children's court has the jurisdiction and authority to extend a child's commitment on its own motion under §32A-2-23. *See In the Matter of Ruben D.*, 2001-NMCA-006, ¶11.

The court may do so on its own motion at any time prior to the expiration of the commitment. *See* §§32A-2-23(D) and (E). Section 32A-2-23 does not specify whether the commitment expires when supervised release commences, or after the child has served his or her 90-day period of supervised release under §32A-2-19, raising the question of whether the court may extend a commitment after the supervised release period has commenced. However, the Delinquency Act defines “supervised release” in relevant part as “the release of a juvenile, whose term of commitment has not expired.” §32A-2-3(I). This definition may support the assertion that a juvenile’s commitment has not expired until the child has served his 90 day period of supervised release mandated by §32A-2-19(B), and that the court may extend a child’s commitment even after the child has been placed on supervised release. However, there is no obvious mechanism for returning the child to the facility in this situation.

Practice Note. Whether or not arguments can be made to allow the extension of a commitment after the child has been released, the court and parties should avoid the situation entirely. Decisions to extend commitment should be made before the child is given supervised release.

In the case of a short-term commitment, the filing of a petition to extend commitment, if filed prior to commencement of supervised release, may allow release to be delayed while the petition is heard. §32A-2-19(B)(1)(a). However, there is no provision in the statute for long-term commitments. Compare §32A-2-19(B)(10)(b).

19.1.3.2 Petition to Extend Commitment

While the statute does not identify the moving party, typically the district attorney’s children’s court attorney (CCA) would file a petition, or motion, requesting extension of a commitment. It would be important to file this motion in plenty of time for the court to make a decision before the child is released, and certainly before the commitment expires.

The court may extend the judgment under §32A-2-23(C) and (D) if it finds that the extension is necessary to safeguard the welfare of the child or the public safety. The motion to extend would be based on this standard. See the discussion in §19.1.4 below.

19.1.3.3 Procedure

The court may dismiss a motion to extend if it finds after preliminary investigation that the motion is without substance. §32A-2-23(G). The statute does not specify how this preliminary investigation would take place.

If the court believes the matter should be reviewed, it may proceed to a hearing after notice to all necessary parties. §32A-2-23(G). As noted earlier, notice and hearing are required for any extension of a juvenile’s commitment. §32A-2-23(D) and (E). The law provides for the court to “proceed to a hearing in the manner provided for hearings on petitions alleging delinquency.” §32A-2-23(G).

The court may terminate a judgment if it finds that the child is no longer in need of care, supervision or rehabilitation, or it may enter a judgment extending or modifying the original judgment if the action is necessary to safeguard the child or the public interest. §32A-2-23(G); *see State v. Sergio B.*, 2002-NMCA-070, ¶18 (involving challenge to recommitment based partly on alleged failure of state to give adequate notice of reasons for extending commitment).

19.1.3.4 Timeline for Decision

Section 32A-2-23(D) and (E) provide that the court may extend a commitment “prior to the expiration” of the commitment. An issue that has arisen is whether the proceeding to extend commitment must be completed by the expiration of the term of commitment. In *State v. Doe*, the Court of Appeals held that, based on the statutory language that the court should proceed in the same manner as on delinquency petitions, re-commitment hearings may be held up to 30 days after the expiration of the initial commitment order. *State v. Doe*, 93 N.M. 748, 750, 605 P.2d 256, 258 (Ct. App. 1980). A similar holding was made in connection with a petition to revoke a consent decree. In *State v. Katrina G.*, the Court of Appeals affirmed a lower court decision to hear a petition to revoke that was filed before the associated probation period had expired but not heard until after it expired. The court looked in part at the language in the Children’s Code to the effect that petitions to revoke consent decrees are governed by the procedures applicable to delinquency petitions, which include the timelines set forth in Rule 10-226 (recompiled and amended as Rule 10-243). *Katrina G.*, 2007-NMCA-048, ¶12, 20, 21.

Although there appears to be some authority for extending a commitment after the expiration of the commitment period, to ensure that the court retains jurisdiction, the court should act to extend a commitment prior to its expiration. In *State v. Ruben D.*, the Court of Appeals acknowledged that taking up to 30 days after the expiration of a term of commitment to extend it conflicts with the language in §32A-2-23(D) (now (E)), which provides that the court may extend a commitment “[p]rior to the expiration of a long-term commitment.” The court did not decide the issue of whether the court had jurisdiction to extend the commitment after it expired because the appellant failed to preserve the issue for review. 2001-NMCA-006, ¶¶18, 21.

19.1.4 Standard for Extending Commitment

The court may not extend a child’s commitment unless it makes a finding that “the extension is necessary to safeguard the welfare of the child or the public safety.” §32A-2-23(D); *see also State v. Sergio B.*, 2002-NMCA-070, ¶¶21, 23. This finding requires consideration of the child’s environment, age, maturity, past behavior, and predictions of future behavior. *Sergio B.*, ¶19 (*citing State v. Gonzales*, 2001-NMCA-025, ¶ 26).

When considering whether to extend a child’s commitment, the court must review the child’s progress during his term of initial commitment. The acts that justified the original commitment cannot provide the only basis for extending the commitment. *See Sergio B.*, ¶21.

New Mexico courts have not determined the appropriate standard of proof to apply to a re-commitment proceeding. However, in *Sergio B.*, the Court of Appeals found that recommitment

hearings are basically dispositional and that the determination that “the extension is necessary to safeguard the welfare of the child and the public safety” need not be proven beyond a reasonable doubt. The Court reasoned that this determination and the factors the court must consider do not lend themselves to proof beyond a reasonable doubt. 2002-NMCA-070, ¶19. The Court did not decide the appropriate standard of proof, however, because in that case the children’s court had not made a finding that an additional term was necessary and there was no evidence to support such a finding. The children’s court order extending commitment was reversed. *Id.* ¶23

19.2 Probation as Result of Adjudication or Consent Decree

19.2.1 Extension of Probation

While CYFD or other supervising agency has authority to release a child from probation or supervision prior to the expiration of the period of judgment, the court retains jurisdiction to extend a judgment of probation for “an additional period of one year until the child reaches the age of twenty-one if the court finds that the extension is necessary to protect the community or to safeguard the welfare of the child.” §32A-2-23(F). The Children’s Code and Children’s Court Rules do not state whether a hearing is required before extending a child’s probation.

The court may extend probation upon the motion of probation services. The statute and rules do not state whether the court has the authority to extend probation on its own motion. *Cf., In the Matter of Ruben D.*, 2001-NMCA-006, ¶11 (the court has authority to extend the term of commitment on its own motion).

19.2.2 Extension of Consent Decree

Prior to the expiration of the statutorily-mandated 6-month consent decree period, or prior to discharge by probation services, whichever occurs earlier, and upon motion of the CCA filed on behalf of probation services or any other agency supervising the child under a consent decree, the court may extend the decree for an additional 6 months. §32A-2-22(C); Rule 10-228(B). If the child objects to the extension, the court must hold a hearing and make a determination on the issue of extension. §32A-2-22(C). The Delinquency Act does not provide a legal standard for approving an extension of a consent decree. A consent decree and any extension may not exceed one year from the date of the entry of the original consent decree. Rule 10-228(C).

19.2.3 Early Release from Probation or Supervision

19.2.3.1 Release Before Expiration of Judgment

CYFD or other supervising agency has the authority to release a child and terminate probation or supervision when it appears that the purpose of the order has been achieved before the expiration of the period of judgment. §32A-2-23(C).

19.2.3.2 CYFD Standard for Early Release

The chief juvenile probation officer (JPO) or designee must authorize early termination of supervision. Under CYFD rules, a JPO may recommend early release in the following cases:

- When progress toward rehabilitation is made and the goals set forth in the plan of care developed by CYFD are completed;
- When probation or parole is unsuccessful and because of age or status, commitment is of no benefit to the client; or
- When public safety is not expected to be compromised by the termination or early release from supervision.

8.14.2.12(J) NMAC.

19.2.3.3 Notification Requirements

CYFD must promptly report a release or termination and the reasons therefor to the court in writing. §32A-2-23(C). CYFD must also notify the DA of any proposed release so that the DA can inform the victim under the Victims of Crime Act. *See* Chapter 8 on the Victims of Crime Act.

19.3 Revocation of Probation or Consent Decree

The CCA may file a petition to revoke probation or a consent decree if the child allegedly fails to fulfill the terms of the decree. §§32A-2-24(A) and 32A-2-22(D); Rules 10-228 and 10-261(B). Proceedings on petitions to revoke consent decrees are to be conducted in the same manner as proceedings on probation revocation petitions. Rule 10-228(D). In turn, proceedings to revoke probation are to be conducted in the same manner as proceedings on petitions alleging delinquency, with the exceptions noted below. §32A-2-24(A).

19.3.1 Petitions; No Preliminary Inquiry Necessary

The revocation petition should be styled “Petition to Revoke Probation” or “Petition to Revoke Consent Decree,” whichever is applicable, and must state the terms of the consent decree or probation alleged to have been violated and the factual basis for the allegations. Rule 10-261(C). In *State v. Doe*, 104 N.M. 107, 108, 717 P.2d 83, 84 (Ct. App. 1986), the Court of Appeals held that verified facts are required in a probation revocation petition, and the child has a due process right to be informed of the probation condition that he or she is accused of violating.

Petitions to revoke probation or consent decrees must be screened, reviewed, and prepared in the same manner and contain the same information as petitions alleging delinquency, except that no preliminary inquiry is necessary. *See* Rule 10-261.

19.3.2 Timeline

A petition to revoke probation may be filed at any time, but must be filed prior to the expiration of the probationary period. Rule 10-261(C). A petition to revoke a consent decree must be filed prior to discharge by probation services or the expiration of the consent decree, whichever occurs earlier. Rule 10-228(D).

Under the Children's Code, a petition to revoke probation or a consent decree must be heard within the same time frames as those in Rule 10-243, which sets forth the time limits for adjudicatory hearings. *See also State v. Katrina G.*, 2007-NMCA-048 (decided under Rule 10-226, the prior version of Rule 10-243).

In *Katrina G.*, the Court of Appeals addressed the issue of whether the children's court has the jurisdiction to revoke a child's probation after the probationary period expires. The Court found that §32A-2-22(E), which states in pertinent part that "[a] child who is discharged by probation services or who completes a period under supervision without reinstatement of the original delinquency petition shall not again be proceeded against in any court for the same offense," does not require the children's court to revoke a consent decree and reinstate the original petition before the child completes the probationary period. *See Katrina G.*, 2007-NMCA-048, ¶11. The Court of Appeals held that Rule 10-243, which requires adjudicatory hearings to be held within 30 or 120 days of certain triggering events, governs the time limits within which the court must hear a petition to revoke a child's probation, not §32A-2-22(E). *Id.* ¶12.

19.3.3 No Jury

A petition to revoke probation or a consent decree is tried by a judge, not a jury. §32A-2-24(B); Rule 10-228(D).

19.3.4 Taking a Child into Custody and Detention

The requirements in the Delinquency Act that apply to taking a child into custody and detention before an adjudicatory hearing apply to custody and detention in connection with probation and consent decree revocation proceedings. *See* §32A-2-24(A). Those requirements are discussed in Chapter 13, Taking into Custody; Detention.

19.3.5 Burden of Proof

The CCA has the burden of proving a willful violation of a probation or consent decree condition. The violation must be proved beyond a reasonable doubt. *See In the Matter of Bruno R.*, 2003-NMCA-057, ¶11.

19.3.6 Evidence

The Rules of Evidence apply to the adjudicatory phase of a probation or consent decree revocation proceeding but not to the dispositional phase. *See State v. Erickson K.*, 2002-NMCA-058, ¶16.

19.3.7 Double Jeopardy

Courts have found that revoking juvenile probation for an adult offense that the person is also charged with in a criminal proceeding is not double jeopardy. *See State v. Katrina G.*, 2007-NMCA-048, ¶11 (citing *In re Lucio FT*, 119 N.M. 76, 78, 888 P.2d 958, 960 (Ct. App. 1994)).

19.3.8 Contempt Power as Alternative to Probation Revocation

Probation revocation procedures are not mandated in all instances in which a child has violated a probationary term. Under certain circumstances, a court may use its contempt power in the alternative to conducting a probation revocation proceeding when a child violates a probation condition. In *State v. Steven B.*, the Court of Appeals upheld the use of a court's contempt power to punish a probation violation. *See* 2004-NMCA-086. *Cf. State v. Henry Don S.*, 109 N.M. 777, 779, 790 P.2d 1058, 1060 (Ct. App. 1990) (self-executing provision in probation order sending child to detention for violating condition of probation was invalid.)

19.3.9 Judgments

If the judge finds that the child has violated a probationary or consent decree term, the judge may extend the period of probation or make any other judgment or disposition that would have been appropriate in the original proceeding. *See* §§32A-2-22(D); 32A-2-24(B).

A child's disposition may be increased if the child is found to have violated conditions of probation, and a term of commitment may be imposed. *See State v. Henry L.*, 109 N.M. 792, 794, 791 P.2d 67, 69 (Ct. App. 1990). The disposition resulting from the revocation of a child's probation relates back to the child's original delinquent act and replaces the original disposition. *Katrina G.*, 2007-NMCA-048, ¶11 (citing *In re Lucio F.T.*, 119 N.M. 76, 78, 888 P.2d 958, 960 (Ct. App. 1994)). Unlike adult proceedings, there is no credit for time served while on probation. *See State v. Dennis F.*, 104 N.M. 619, 621, 725 P.2d 595, 597 (Ct. App. 1986) (decided under prior code).

If the judge determines as a result of a consent decree revocation proceeding that the consent decree should be extended, Rule 10-228(C) imposes a one-year limit on the term of a consent decree, including any extensions.

While Rule 10-227(D) requires the judge to find a factual basis for the allegations in the petition before approving a consent decree, consent decrees do not require the child to admit the allegations of the petition. §32A-2-22(A); Rule 10-227; Rules (Forms) 10-424 and 425, as amended). If the court approves a consent decree, the proceedings are suspended and there is no adjudication of delinquency.

19.4 Supervised Release

19.4.1 Summary

“Supervised release” is “the release of a juvenile, whose term of commitment has not expired, from a facility for the care and rehabilitation of adjudicated delinquent children, with specified conditions to protect public safety and promote successful transition and reintegration into the community.” The department monitors a juvenile on supervised release until the term of commitment has expired, and may return the child to custody for violating conditions of release. §32A-2-3(I) (2009).

Youthful Offenders. The provisions of the Children’s Code on supervised release do not apply to children who are sentenced as adults. Section 31-21-10 sets forth the procedure for parole in criminal proceedings.

19.4.2 2009 Amendments and Retroactive Application

In 2009, the Legislature extensively amended provisions of the Children’s Code and related statutes pertaining to supervised release, formerly parole. The Legislature changed the name of the Juvenile Parole Board to the Juvenile Public Safety Advisory Board and gave CYFD and the board different powers and duties. Significantly, the board no longer has the exclusive power to parole and release the child; rather the authority is now vested in the Secretary of CYFD pursuant to §32A-2-23.1(A). The changes were effective July 1, 2009, and apply retroactively to all children who on July 1, 2009, were on release or otherwise eligible to be placed on release.

19.4.3 Supervised Release Required

As discussed in Chapter 18 on dispositions, except for commitments for a 15-day period pursuant to §32A-2-19(B)(3), a 90-day period of supervised release must be incorporated into the term of the child’s commitment.

For short-term commitments of one year pursuant to §32A-2-19(B)(1)(a), no less than 90-days may be served on supervised release, unless:

- A petition to extend the commitment has been filed prior to the commencement of supervised release;
- The commitment has been extended pursuant to §32A-2-23; or
- Supervised release is revoked pursuant to §32A-2-25.

If the court extends a short-term one-year commitment under Subsection D of §32A-2-23, the mandatory 90-day supervised release required by §32A-2-19 must be included in the extension.

For long-term commitments pursuant to §32A-2-19(B)(1)(b), no less than 90 days shall be served on supervised release, unless:

- Supervised release is revoked pursuant to §32A-2-25; or
- The commitment is extended pursuant to §32A-2-23.

If the court extends a long-term commitment under Subsection E of §32A-2-23, the mandatory 90-day supervised release period required by §32A-2-19 must be included in the extension.

19.4.4 CYFD's Role In Supervised Release Decisions

19.4.4.1 In General

CYFD has exclusive jurisdiction and authority to release an adjudicated delinquent child during the term of the child's commitment, and the Secretary of CYFD, or the Secretary's designee, makes the decision to grant or deny release. Such release must be consistent with the Victims of Crime Act, and CYFD may impose any conditions on release that it deems appropriate. §32A-2-23.1 (as added in 2009).

19.4.4.2 Notification of Pending Release

If CYFD is considering releasing a child, the following notifications must be made:

Juvenile Public Safety Advisory Board

The department must provide a list of children recommended for release to the Juvenile Public Safety Advisory Board at least 35 days prior to the next regularly scheduled release consideration meeting. §32A-2-23.2(A).

District Attorneys and Victim Notification of Release Consideration Meetings

Pursuant to the Victims of Crime Act, the department must ensure that the following notifications of a pending release consideration meeting are made:

- Consistent with the Victims of Crime Act, CYFD must provide a copy of its regular release dockets to each district attorney (DA) in the state at least 10 working days before the docket is considered. The DA must then notify any person known to reside in the district who was a victim of the criminal offense for which the delinquent child was committed, §31-26-12(A).
- Consistent with the Victims of Crime Act, CYFD must provide a copy of each supplemental, addendum and special docket to each DA at least 5 working days before the release docket is considered. §31-26-12(B).

Child's Attorney

CYFD must notify the child's attorney of release consideration meetings. *See* §32A-2-23.2(B).

Notification of Recommendations for Release

Following consideration of a release docket, CYFD must promptly notify each DA of its recommendations for release of a delinquent child from custody. The DA in turn must notify anyone known to reside within the DA's district who was a victim of the criminal offense for which the delinquent child was committed. §31-26-12(C).

Notification to DA and Victims Upon Release

In addition, if a delinquent child is scheduled to be released from custody, CYFD must notify each DA at least fifteen working days before the delinquent child's release. The DA in turn must notify any person known to reside in the DA's district who was a victim of the criminal offense for which the delinquent child was committed. §31-26-12(D).

No Notice to Judge of Pending Release

Section 32A-7-6(B) (1993), which required that the Juvenile Parole Board notify the children's court judge at least 30 days before ordering parole and permitted the judge to express his or her views on the child's prospective parole to the board, was repealed and replaced with new procedures in 2009. The Children's Code and the Children's Court Rules no longer require a judge to be notified of a planned release from commitment. *See* §§32A-2-23.1 and 32A-2-23.2. However, CYFD must promptly report a release or termination and the reasons therefor to the court in writing. §32A-2-23(C).

19.4.4.3 Release Consideration Meetings

Regular release consideration meetings must be held at least quarterly. The meetings are to include the child, a quorum of the Juvenile Public Safety Advisory Board, and a representative of CYFD. The child's attorney may also be present at the release consideration meeting. The meetings are closed to the public. §32A-2-23.2(B).

19.4.4.4 Release Eligibility

A child is eligible for release any time after the entry of a judgment transferring legal custody to the department. At least 60 days after the child has been committed, the department may consider a reasonable request for release made by the child. §32A-2-23.1(C).

19.4.4.5 Criteria for Release

The department must give due consideration to the following factors when determining whether to place a child on supervised release:

- Public safety;
- The extent to which the child has been rehabilitated;
- The adequacy and suitability of the proposed release plan; and
- The needs and best interests of the child, including the child's need for behavioral health or medical services that are not available in facilities for adjudicated delinquent children.

§ 32A-2-23.1(A).

19.4.4.6 Conditions of Release

The department may impose any conditions of release it deems appropriate. *See* §32A-2-23.1. Such conditions must be designed to protect the public safety and promote successful transition and reintegration of the child into the community. §32A-2-3(I).

19.4.5 Juvenile Public Safety Advisory Board

19.4.5.1 Supervised Release Powers and Duties

The Juvenile Public Safety Advisory Board (JPSAB) has the duty to advise CYFD on release decisions, including the criteria to be used to grant release and participation in decisions to grant or deny release.

The JPSAB is also responsible for conducting initial assessments of committed juveniles within 40 days of each juvenile's arrival at a facility. Thereafter, at regularly scheduled intervals, the Board must conduct administrative reviews to assess the child's progress. After each administrative review, the JPSAB will prepare a report of the offender's progress with recommendations as to readiness for release or appropriateness of programming. §32A-7A-6(B).

The JPSAB is permitted access at reasonable times to any adjudicated delinquent child and any records pertaining to the child if the department is considering the child's release or the child has requested release. §32A-7A-8. The agency or facility to which legal custody was transferred must provide the JPSAB with facilities for communicating with and interviewing children. *Id.*

The power and duties of the JPSAB are discussed in further detail in Chapter 10, Juvenile Public Safety Advisory Board.

19.4.5.2 Court and CYFD Review of Release Decisions

The court cannot review a decision of the department to release a child unless the Juvenile Public Safety Advisory Board petitions the court for such review. §32A-2-23.1(D). If the department denies release of a child for whom the JPSAB has recommended release, or grants release for a child for whom the JPSAB has recommended denial of release, within 10 days the JPSAB may request a review of the decision by the court of the judicial district from which legal custody of the child was transferred. The department will transmit the child's records to the court for this review. §32A-2-23.1(D).

The court has jurisdiction to review the matter and issue an order that either denies or grants release to the child. No formal hearing is required. The child will not be released until such time as the court has issued a decision. *Id.*

If the JPSAB does not petition the court for review of the department's decision to grant or deny release within the required 10 day period, then CYFD's decision is final and the department must release the child or continue the commitment in accordance with the terms of its decision. §32A-

2-23.1(D). However, the CYFD Secretary or his or her designee may review a child's case upon the child's or the board's reasonable request at any time after release is denied. §32A-2-23.1(E).

19.4.6 Supervised Release Revocation

19.4.6.1 CYFD Monitoring

After a child is placed on supervised release, CYFD is responsible for monitoring the juvenile's compliance with any conditions of supervised release. §32A-2-3(I).

19.4.6.2 Absconders

Pursuant to Children's Code amendments effective July 1, 2009, CYFD may seek a bench warrant from the court when the child absconds from supervised release. §32A-2-23(I).

19.4.6.3 Violation of Terms of Supervised Release

The department may proceed against a child who violates a term of supervised release. A child alleged to have violated a condition of supervised release may be placed in detention, provided that the detention risk assessment tool developed by CYFD indicates that the Children's Code's criteria for detention have been met. *See* 8.14.2.16 NMAC.

The department or supervising agency, or a hearing officer contracted by the department who is neutral to the child and the agency, and not the children's court, will conduct the parole revocation proceeding. The proceeding will be conducted in accordance with procedures established by the department in cooperation with the Juvenile Public Safety Advisory Board. §32A-2-25(A). A child who is alleged to have violated a term or condition of parole may be detained on parole status by a JPO until the completion and review of a preliminary parole revocation hearing. *Id.*

19.5 Probation Revocation Hearing Checklist

The checklist on the following page is provided to assist courts in probation revocation hearings when probation was imposed as part of a juvenile disposition.

PROBATION REVOCATION HEARING CHECKLIST

- ☐ Preliminary matters
 - Appearances
 - Petition to revoke probation filed (§32A-2-24(A))
 - Manner and date of service
 - Notice of hearing
 - Appointment of counsel (§32A-2-14(H))
 - Language or cognitive challenges
- ☐ No jury (§32A-2-24(B))
- ☐ Testimony
 - Rules of evidence apply
 - Burden of proof: beyond a reasonable doubt (§32A-2-24(B))
- ☐ If grounds to revoke found, conduct dispositional hearing.
 - Receive pre-dispositional reports
 - Offer victim opportunity to make statement at disposition
 - Extend probationary period or make any other disposition that would have been appropriate in original proceeding (§32A-2-24(B))
- ☐ If dispositional phase continued, issue appropriate order for detention or legal custody or set appropriate conditions of release

CHAPTER 20

YOUTHFUL OFFENDER PROCEEDINGS

This chapter compiles in one place information on youthful offenders found elsewhere in this Handbook. It covers:

- Youthful offender/serious youthful offender
- Indictment or bind over
- Plea Agreements
- Trials
- Amenability hearings
- Sentencing
- Amenability Hearing Checklist

20.1 Overview

While youthful offenders are referenced throughout the Handbook, they are treated differently from delinquent offenders and the different approaches can be confusing. This chapter is intended to bring the requirements and procedures for youthful offenders together in one place. *Despite some repetition, it is hoped that taking the youthful offender proceeding from start to finish will be helpful to the reader.*

A “youthful offender” is a “delinquent child” who is subject to either adult or juvenile sanctions, as distinguished from a “delinquent offender,” who is a “delinquent child” subject only to juvenile sanctions. See §32A-2-3(B), (C), and (J). In order to be subject to adult sanctions, a child must be a youthful offender under §32A-2-3(J), the children’s court attorney (CCA) must file a notice of intent to invoke adult sanctions, the child must be adjudicated as a youthful offender, and the court must make the amenability findings required by §32A-2-20. These findings are twofold: that the child is not amenable to treatment or rehabilitation as a child in available facilities and the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders. Only if these findings are made, may the court consider an adult sanction.

The youthful offender model has been discussed at length in two major New Mexico Supreme Court decisions in 2010. The reader is encouraged to read in full the Court’s opinions in *State v. Jones*, 2010-NMSC-012, and *State v. Rudy B.*, 2010-NMSC-045. Review of the Court’s 2010 opinion on sentencing issues in serious youthful offender cases, *State v. Tafoya*, 2010-NMSC-019, is also invited.

20.2 Definitions

20.2.1 Youthful Offender

Under the Delinquency Act, a “youthful offender” is a “delinquent child” subject to adult or juvenile sanctions who is:

- (1) Fourteen to eighteen years of age at the time of the offense and adjudicated for at least one of the following offenses:
 - (a) Second degree murder, as provided in §30-2-1;
 - (b) Assault with intent to commit a violent felony, as provided in §30-3-3;
 - (c) kidnapping as provided in §30-4-1;
 - (d) aggravated battery, as provided in §30-3-5(C);
 - (e) aggravated battery against a household member, as provided in §30-3-16(C);
 - (f) aggravated battery upon a peace officer, as provided in §30-22-25(C);
 - (g) shooting at a dwelling or occupied building or shooting at or from a motor vehicle, as provided in §30-3-8;
 - (h) dangerous use of explosives, as provided in §30-7-5;
 - (i) criminal sexual penetration, as provided in §30-9-11;
 - (j) robbery, as provided in §30-16-2;
 - (k) aggravated burglary, as provided in §30-16-4;
 - (l) aggravated arson, as provided in §30-17-6;
 - (m) abuse of a child that results in great bodily harm or death to the child, as provided in §30-6-1;
- (2) fourteen to eighteen years of age at the time of the offense and adjudicated for any felony offense if the youth has had three prior, separate felony adjudications within a three-year time period immediately preceding the instant offense. These three felony adjudications may not have arisen out of the same transaction, occurrence or series of events related in time and location. Successful completion of a consent decree is also not considered a prior adjudication for purposes of this paragraph; or
- (3) fourteen years of age and adjudicated for first degree murder, as provided in §30-2-1.

§32A-2-3(J).

20.2.2 Serious Youthful Offender

The definition for a serious youthful offender is given here to distinguish the offender from the youthful offender described above. When a youth is charged as a serious youthful offender, the case is tried as an adult case and adult sanctions will be given if the youth is convicted as charged. These proceedings are not addressed at length in this Handbook.

A “serious youthful offender” is an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder. §32A-2-3(H). In order to be charged with and indicted or bound over for trial for first degree murder, the court or grand jury must find probable cause for the first degree murder charge. *See* N.M. Const., Art. II, § 14. If the court or grand jury fails to find probable cause, then the child must be discharged or, if there are delinquent acts alleged in the petition, the case will be transferred to children’s court. §32A-2-6(A).

As noted, the Children’s Code classifies a child 15 years of age or older as a “serious youthful offender” if the juvenile is *charged* with first degree murder and indicted or bound over. Unlike a “youthful offender,” the Children’s Code expressly provides that a “serious youthful offender” is “not a delinquent child.” §32A-2-3(H). Cases against alleged serious youthful offenders are tried in regular district court as if the child were an adult. §32A-2-3(H); Rule 10-101(A)(2)(a).

If the child pleads to a lesser charge, then the child should be treated as a youthful offender or delinquent offender, depending on the plea. In no event may the child give up the amenability hearing to which he or she is entitled as a youthful offender. *See State v. Jones*, 2010-NMSC-010.

20.3 Notice of Intent to Invoke Adult Sanctions

The discretion to charge a child as a youthful offender lies with the CCA. If the CCA believes that an adult sentence should be imposed on an alleged youthful offender, he or she must file notice of intent to invoke an adult sentence within 10 working days of the filing of the petition. Rule 10-213(A). For good cause shown, the court may extend the time for filing the notice at any time prior to the commencement of the adjudicatory hearing. §32A-2-20(A); Rule 10-213.

The Delinquency Act requires that a preliminary hearing or a hearing before a grand jury be held after the filing of the notice of intent to determine whether probable cause exists to support the allegations contained in the petition. §32A-2-20(A). *See* Chapter 14 of this Handbook.

If as a result of the preliminary examination or grand jury proceeding the indictment or bind over order does not include a youthful offender offense, then adult sanctions cannot be imposed. The Children’s Court Rules will govern further proceedings on any other offense that is included in the indictment or bind over order.

On the other hand, if the indictment or bind over order does include a youthful offender offense, then the child will be arraigned, as outlined in Chapter 14.

20.4 Pre-Trial Detention for Alleged Youthful Offenders

Generally, a child alleged to be a youthful offender may be detained in:

- a detention facility licensed by the department; or

- any other suitable place, other than a facility for the long-term care and rehabilitation of children adjudicated as delinquent and confined pursuant to §32A-2-19, that meets the standards for detention facilities pursuant to the Children’s Code and federal law.

See §32A-2-12(B).

20.5 Plea Bargaining Youthful Offenders

A youthful offender may not agree to an adult sentence in the course of a plea bargain. The right to an amenability determination cannot be waived. The court must conduct an amenability hearing, consider the criteria for sentencing a youthful offender as an adult, and make the appropriate findings. *State v. Jones*, 2010-NMSC-012. “[T]he Legislature did not intend this responsibility to be bargained away.” *Id.* ¶46.

20.6 Applicable Procedures

Alleged youthful offenders are tried in children’s court, but the Rules of Criminal Procedure for the District Courts will, as a general rule, apply to the proceeding. Rule 10-101(A) provides in pertinent part that “[e]xcept as specifically provided by these rules . . . the Rules of Criminal Procedure for the District Courts govern the procedure . . . in all proceedings in the Children’s Court in which a notice of intent has been filed alleging the child is a ‘youthful offender’ as that term is defined in the Children’s Code.”

As noted in Chapter 14, the Supreme Court in *State v. Jones* expressed some concern with the application of the Rules of Criminal Procedure to youthful offender proceedings and encouraged the Children’s Court Rules Committee to revisit the question of which rules best protect the rights and interests of children. *Jones*, 2010-NMSC-012, ¶32 n.2. It is too early to know whether and how the rules will be changed in response.

A youthful offender proceeding is heard by a twelve person jury, unless the child has knowingly and voluntarily waived his or her right to a jury trial. If a jury trial is held, the verdict must be unanimous, as in a criminal trial, and proof must be beyond a reasonable doubt. §32A-2-16(A). *See* Chapter 16 on the Adjudicatory Hearing for a more detailed discussion. Since the Rules of Criminal Procedure apply to the adjudication or trial in both delinquent offender and youthful offender cases, the procedures will be similar.

If the child is found to have committed a youthful offender offense, then the disposition is a two part proceeding. The first part, which cannot be waived under the Supreme Court’s decision in *State v. Jones*, 2010-NMSC-010, is the amenability hearing. The second part is the remainder of the dispositional hearing, whether it be to determine the juvenile disposition or an adult sentence for the child.

20.7 Time Limits for Commencement of Trial

Until recently, youthful offender proceedings had to be commenced within six months of certain events enumerated in what was Rule 5-604(B) NMRA. In the course of its consideration of certain difficulties with Rule 5-604 in *State v. Savedra*, the Supreme Court decided to repeal the six month rule. “In its place, defendants may rely upon and assert their right to a speedy trial whenever they believe impermissible delay has occurred, whether that delay is the result of a dismissal and refiling or any other cause.” *Savedra*, 2010-NMSC-025, ¶9.

The Supreme Court withdrew Paragraphs (B) through (E) of Rule 5-604 effective May 12, 2010. These were the provisions of the rule requiring that trial be commenced within six months, setting forth procedures for extensions of time and describing the effect of noncompliance.

20.8 Amenability Hearing

20.8.1 Purpose

If the child is tried and found to have committed a youthful offender offense, an amenability hearing must be held prior to and separate from the time the court announces disposition or sentencing. *See State v. Jose S.*, 2007-NMCA-146, ¶17. The purpose of the amenability hearing is to “gauge the possibility for meaningful rehabilitation,” and determine whether adult or juvenile sanctions are appropriate. *Id.*

Serious youthful offenders. Cases against alleged serious youthful offenders are tried in regular district court as if the child is an adult. Unlike proceedings for youthful offenders, no amenability hearing is necessary to sentence a child as an adult if the child is found guilty of first-degree murder. The imposition of adult sanctions is mandatory. §31-18-15.3(D).

20.8.2 Procedures for Amenability Hearing

Before the amenability hearing, CYFD must prepare a predisposition report for the child concerning the child’s amenability to treatment. Section 21A-2-17(A) requires that the report be provided to the parties and the court five days before the hearing.

The issue of amenability is tried to the judge, not a jury. The New Mexico Supreme Court recently reversed a decision of the Court of Appeals in which the Court of Appeals had decided that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), amenability was a determination for the jury. The Supreme Court, in an opinion filed October 19, 2010, held otherwise. *See State v. Rudy B.*, 2010-NMSC-045, upholding the statute that provides that amenability determinations are made by the judge.

While holding that amenability is decided by the judge, not the jury, the Court in *Rudy B.* also stated that:

[w]e think it prudent to submit the offense-specific factors in Section 32A-2-20(C)(2), (3) and (4) to the jury during the trial perhaps by way of special interrogatories. Doing so will place only a minimal burden on the process because it can be done during the trial. We refer this matter to the UJI Committee for Criminal Cases for appropriate action.

2010-NMSC-045, ¶36. *Rudy B.* was just decided in late 2010 and the UJI Committee has not yet acted on this referral. However, counsel may want to consider asking for special interrogatories in the meantime.

One question that arises is the burden and standard of proof in an amenability hearing. The state has the burden of proof but it is not entirely clear whether the standard of proof is preponderance of the evidence or clear and convincing. In *State v. Gonzales*, 2001-NMCA-025, the trial court had applied the clear and convincing standard and the defendant appealed, arguing that the standard should have been beyond a reasonable doubt. The state took the position that the standard is preponderance of the evidence. The Court of Appeals concluded that the standard was not beyond a reasonable doubt but did not decide whether the standard was clear and convincing or preponderance of the evidence. ¶37.

The appeals court in *Gonzales* did not decide which standard applies. The trial court's decision was supported by clear and convincing evidence and hence the issue did not need to be reached. Judge Bustamante specially concurred, arguing that the court should decide the standard and that it should be clear and convincing. *Id.* ¶51-64.

20.8.3 Legal Standard for Imposing Adult Sanctions

The Delinquency Act requires that, in order to impose adult sanctions on a youthful offender, in addition to finding that the child has committed a delinquent act classified as a youthful offender offense in §32A-2-3(J), the court make the following findings:

- the child is not amenable to treatment or rehabilitation as a child in available facilities; and
- the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders.

§32A-2-20(B).

In making these findings, the Delinquency Act requires the judge to consider the following factors:

- the seriousness of the alleged offense;
- whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
- whether a firearm was used to commit the alleged offense;
- whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;

- the maturity of the child as determined by consideration of the child’s home, environmental situation, social and emotional health, pattern of living, brain development, trauma history, and disability;
- the record and previous history of the child;
- the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available; and
- any other relevant factor, provided that the factor is stated on the record. §32A-2-20(C).

The requirement that social and emotional health, brain development, trauma history and disability be considered in connection with the maturity of the child was added in 2009. See §32A-2-20(C)(5).

If the child has been sentenced as an adult pursuant to §32A-2-20 in a previous case, there is “a rebuttable presumption that the child is not amenable to treatment or rehabilitation as a child in available facilities.” §32A-2-20(D).

20.8.4 Eligibility for Involuntary Commitment

To consider an adult sentence, the court must find both that the child is not amenable to treatment or rehabilitation as a child in available facilities and that the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders. §32A-2-20(B). Chapter 27 of this Handbook discusses the procedures and criteria required for involuntarily committing a child pursuant to the Children’s Mental Health and Developmental Disabilities Act, §32-6A-1 *et seq.* If there is no available facility offering adequate treatment, the court may find that the juvenile is not committable. *State v. Doe*, 98 N.M. 567, 569, 650 P.2d 851, 853 (Ct. App. 1982); *see also State v. Ernesto M., Jr.*, 1996-NMCA-039, ¶8 (upholding children’s court finding that the child was not eligible for commitment, which was based on conflicting expert opinions).

20.9 Procedure for Imposing Juvenile Dispositions

If the court determines at the amenability hearing that a juvenile disposition is appropriate, CYFD will prepare a subsequent, or second, predisposition report concerning the child, the child’s family, the child’s environment and any other matters relevant to the need for treatment or the appropriate disposition for the child. §32A-2-17(A). This same statute requires that the department provide copies to the party and the court five days before disposition. The judge will make an appropriate order for detention or legal custody during any continuance required to receive reports. §32A-2-16(H).

In making the disposition, the court will follow the provisions of §32A-2-19 on juvenile dispositions, as required by §32A-2-20(F). These provisions are discussed in detail in Chapter 18 on Dispositions.

20.10 Procedure for Imposing an Adult Sentence on a Juvenile

20.10.1 Sentencing Hearing

If the court makes the findings at the amenability hearing that are necessary to impose an adult sentence, then the Correction Department's probation and parole division will prepare the subsequent, or second, predisposition report. §32A-2-17(A). The court will continue the hearing prior to sentencing to allow time for the report and any other reports to be provided to the court and the parties within five days of the hearing, as required by §32A-2-17. The judge will make appropriate provision for detention or legal custody during the period of any continuance. *See* §32A-2-16(H).

The children's court may sentence the child to less than, but may not exceed, the mandatory adult sentence. This is an important distinction between youthful (and serious youthful) offenders and adult offenders. §32A-2-20(E).

A youthful offender given an adult sentence will be treated as an adult offender and transferred to the legal custody of an agency responsible for incarceration of persons sentenced to an adult sentence. This transfer terminates the children's court's jurisdiction over the child with respect to the delinquent acts alleged in the petition. *Id.*

20.10.2 Requirements for Sex Offenders

The state Sex Offender Registration and Notification Act (SORNA), §§29-11A-4 through 29-11A-5, sets forth the requirements for registering as a sex offender in New Mexico. A juvenile given an adult sentence in a youthful offender proceeding and convicted of a qualifying sex offense is required to register. *See* Chapter 31 on SORNA for more detail.

20.10.3 Responsibilities to Victims

At a sentencing proceeding for a child sentenced as an adult, the court must inform the victim that the offender is eligible to earn meritorious deductions from the offender's sentence and the amount of meritorious deductions that may be earned by the offender. §31-26-4(L).

20.11 Non-Capital Felonies

For non-capital felonies, the court may impose upon a youthful offender being sentenced as an adult:

- the basic sentence prescribed by §31-18-15, and alterations prescribed by §31-18-15; plus, if applicable,
- the enhancements prescribed by §31-18-16. *See State v. Guerra*, 2001-NMCA-031, ¶3.

The basic sentence and enhancements permitted by the Criminal Code for youthful and serious youthful offenders are described below.

20.11.1 Basic Sentence for Non-Capital Felonies

20.11.1.1 Imprisonment

Subsection A of §31-18-15 prescribes the following basic sentences and terms of imprisonment for noncapital felonies:

- for a first degree felony resulting in the death of a child, life imprisonment;
- for a first degree felony for aggravated criminal sexual penetration, life imprisonment;
- for a first degree felony, eighteen years imprisonment;
- for a second degree felony resulting in the death of a human being, fifteen years imprisonment;
- for a second degree felony for a sexual offense against a child, fifteen years imprisonment;
- for a second degree felony, nine years imprisonment;
- for a third degree felony resulting in the death of a human being, six years imprisonment;
- for a third degree felony for a sexual offense against a child, six years imprisonment;
- for a third degree felony, three years imprisonment; or
- for a fourth degree felony, eighteen months imprisonment.

20.11.1.2 Fines

The court may also impose a fine in addition to the basic sentence. §31-18-15(E) authorizes the following fines:

- for a first degree felony resulting in the death of a child or for aggravated criminal sexual penetration, \$17,500;
- for a first degree felony, \$15,000;
- for a second degree felony resulting in death of a human being or for a sexual offense against a child, \$12,500;
- for a second degree felony, \$10,000;
- for a third or fourth degree felony, \$5,000.

20.11.2 Alteration of Basic Sentence for Non-Capital Felonies

Under §31-18-15.1, the judge may reduce the basic sentence of a youthful offender or serious youthful offender upon a finding by the judge of mitigating circumstances surrounding the offense or concerning the offender. The court however cannot increase a juvenile's sentence based on a finding of aggravating circumstances. *State v. Guerra*, 2001-NMCA-031, ¶3 (finding that the court cannot increase the basic sentence of a youthful offender pursuant to §31-18-15.1 based on aggravating circumstances). The judge may reduce a youthful offender or serious youthful offender's sentence by any amount and is not limited by the one-third reduction

imposed on the sentencing of adult offenders. §31-18-15.1(G). The judge must issue a brief statement of reasons for the alteration of any sentence and incorporate the statement into the case record. §31-18-15.1(F).

20.11.3 Enhancements to Basic Sentence for Non-Capital Felonies

Section 31-18-16 gives the presiding judge the discretion to decide whether to increase a youthful offender's or serious youthful offender's sentence for one year when the court or jury has made a separate finding of fact showing that a firearm was used in the commission of a noncapital felony. §31-18-16(A). For a second or subsequent noncapital felony in which a firearm is used, the judge may increase the sentence by three years. §31-18-16(B). In contrast, the judge has no discretion and is required to increase the sentence by one or three years, whichever is applicable, for adult offenders using firearms in the commission of noncapital felonies.

20.11.4 Submission of Firearms Issue to Jury for Non-Capital Felonies

If a prima facie case has been established showing that a firearm was used in the commission of the offense, in jury trials, the court will submit the issue to the jury by special interrogatory. Otherwise the judge will decide the issue and make a separate finding of fact thereon. §31-18-16(C).

20.11.5 Habitual Offenders

The habitual offender statute appears not to apply to youthful offenders committing non-capital felonies. *See State v. Guerra*, 2001-NMCA-031, ¶12. The Court stated in dictum that §31-18-17 is not applicable to youthful offenders and went on to hold that the maximum sentence that may be imposed upon a youthful offender convicted of a non-capital felony is the basic sentence prescribed by §31-18-15, plus any enhancements specifically made applicable to youthful offenders by the Legislature. *Id.* ¶3. The penalties for habitual offenders in §31-18-17 are not specifically made applicable to youthful offenders.

20.12 Capital Felonies Under Criminal Sentencing Act

In 2009, the Legislature amended §31-18-14 of the Criminal Sentencing Act, eliminating the death penalty as a sentencing option for those who have reached the age of majority at the time of the commission of a capital felony. The former version of §31-18-14 authorized the death penalty or life imprisonment for adult offenders, but provided that "if the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he may be sentenced to life imprisonment but shall not be punished by death." *Compare* §31-18-14 (1993) *with* §31-18-14 (2009).

Pursuant to §31-18-14, as amended in 2009, when a defendant has been convicted of a capital felony, he or she must be sentenced to life imprisonment or life imprisonment without the

possibility of release or parole. The statute makes no exception for juvenile offenders. The prior version of the Criminal Sentencing Act only authorized a juvenile to be sentenced to life imprisonment which meant, under §31-21-10, that the person would be eligible for a parole hearing after serving thirty years of the sentence. Under the 2009 amendments, juveniles may now be sentenced to life imprisonment without the possibility of release or parole. (In *Graham v. Florida*, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), the U. S. Supreme Court held that sentencing a juvenile to life without parole for a non-homicide offense was unconstitutional. Homicide was not at issue in that case.)

Under §31-18-13(A), a judge may sentence an adjudicated youthful offender or convicted serious youthful offender to less than, but not in excess of, the basic or mandatory adult sentence prescribed by the Criminal Sentencing Act. *See* §32A-2-20(E). In *State v. Trujillo*, 2002-NMSC-005, ¶9, the Supreme Court found that under §31-18-15.3, the court may reduce a serious youthful offender's sentence to less than a life sentence. *See also* §31-18-13(A) (person sentenced as a serious youthful offender or a youthful offender may be sentenced to less than the basic or mandatory sentence prescribed by the Criminal Sentencing Act).

If the youthful or serious youthful offender is given less than a life sentence, then they may be eligible to earn good time credits pursuant to the Earned Meritorious Deductions Act, §33-2-34. The court has the discretion to award good time credit eligibility within the statutory framework of the Act, that is, zero, four, or thirty days good time credit eligibility per month. *See State v. Tafoya*, 2010-NMSC-019, ¶21.

20.13 Crimes Not Covered Under Code

If a youthful offender who is subject to adult sanctions is convicted of a crime under the New Mexico Constitution or a statute not contained in the Criminal Code that specifies the penalty to be imposed upon conviction, then the offender may be sentenced to less than the minimum term of imprisonment prescribed and the court may impose the fine prescribed. §31-18-13(B). If the constitutional provision or statute does not specify the sentence or fine to be imposed on conviction, but declares the crime to be a felony, the offense will constitute a fourth degree felony as prescribed under the Criminal Code for the purpose of the sentence, and the person may be sentenced to less than the minimum term of imprisonment prescribed. *See* §31-18-13(B).

20.14 Credit for Time Served

Unlike in Children's Court proceedings, if an alleged serious youthful offender is detained in a juvenile detention facility prior to trial, the time spent in the facility counts towards the completion of any sentence imposed. §31-18-15.3. The statute does not specify whether an adjudicated youthful offender given an adult sentence also receives credit for time served in a juvenile detention facility.

20.15 Parole

Sections 31-18-15 and 31-21-10 govern the terms of parole for adult offenders, including juveniles who are sentenced as adults. Unlike juvenile dispositions, the period of parole is served after completion of the sentence, and is not incorporated into the term of the commitment.

20.16 Effect of Judgment Imposing Adult Sentence

If the children's court gives a youthful offender an adult sentence, a record of the judgment may be admissible in any other case or proceeding in any other court involving the youthful offender. In addition, the determination of guilt at trial becomes a conviction for purposes of the Criminal Code, §§ 30-1-1 *et seq.* §32A-2-18(B). If an alleged serious youthful offender is convicted of first degree murder, the determination of guilt becomes a conviction for purposes of the Criminal Sentencing Act. §31-18-15.3.

20.17 Disposition in Serious Youthful Offender Cases

Practice Note. In serious youthful offender cases in district court, the sentencing hearing must begin with 90 days of the date the trial is concluded or the plea is entered, except for good cause shown. Rule 5-701(B).

If the serious youthful offender is found guilty of first degree murder, the imposition of adult sanctions is mandatory, but the serious youthful offender may be sentenced to less than the basic or mandatory sentence prescribed by the Criminal Sentencing Act (§31-18-12). §32A-2-20(E); *see also State v. Trujillo*, 2002-NMSC-005, ¶9 (finding that under §31-18-15.3, the court may reduce a serious youthful offender's sentence to less than a life sentence).

If the serious youthful offender is not convicted of first degree murder, but is convicted of a youthful offender offense set forth in §32A-2-3, then the child is subject to the dispositions in §32A-2-20. These require an amenability hearing to determine whether the child should be subject to juvenile or adult sanctions. §32A-2-20(G). No notice of intent to invoke adult sanctions is required in this instance. If the serious youthful offender is not convicted of first degree murder or a youthful offender offense, but is convicted of a delinquent act, then the district court is required to give the child a juvenile disposition pursuant to §32A-2-19. §32A-2-20(H).

It is important to note that Subsections G and H of §32A-2-20 were enacted in 2005, and that they overrule *State v. Muniz*, in which the Supreme Court held that a serious youthful offender not convicted of first degree murder may nonetheless be subject to adult penalties for other offenses. *See State v. Muniz*, 2003-NMSC-021.

Notwithstanding the language in the Children's Code that a youthful offender given an adult sentence is treated as an adult offender, *see* §32A-2-20(E), the Criminal Code allows for some differences. For example, a judge may sentence a youthful offender or serious youthful offender

to *less than*, but not in excess of, the basic or mandatory adult sentence prescribed by the Criminal Sentencing Act. *See* §32A-2-20(E); §31-18-13(A). If reducing a youthful or serious youthful offender's sentence based on mitigating circumstances, the judge is not limited by the one-third reduction authorized by §31-18-15.1(G) for adult offenders.

20.18 Serious Youthful Offenders and Appeals

Generally, appeals from children's court are taken to the Court of Appeals. *See* Rule 12-102. However, Rule 12-102(A) provides that appeals from the district courts in which a sentence of death or life imprisonment has been imposed are taken to the Supreme Court. This comports with Art. VI, §2 of the New Mexico Constitution, which provides for mandatory Supreme Court jurisdiction in appeals from district court judgments imposing a sentence of death or life imprisonment. In *State v. Trujillo*, the Supreme Court ruled that serious youthful offenders convicted of first degree murder must be allowed to invoke the Supreme Court's mandatory appellate jurisdiction under Art. VI, §2. This is the case even though the trial court has the discretion to sentence them to less than the life sentence required for adult offenders. *Trujillo*, 2002-NMSC-005, ¶¶8-9.

Trujillo would presumably also apply to fourteen year olds convicted of first-degree murder. They are classified as youthful offenders under §32A-2-3 but could be subject to life imprisonment for first-degree murder if the children's court imposes adult sanctions.

20.19 Checklist for Amenability Hearing

A possible checklist for the amenability hearing and consideration of adult sanctions in youthful offender (as distinct from serious youthful offender) cases can be found on the following page.

AMENABILITY HEARING CHECKLIST

- ☐ Preliminary Matters (§32A-2-20(A)):
 - Notice of intent to impose adult sanctions properly filed.
 - Preliminary hearing or grand jury proceeding conducted, unless waived.
 - Indictment or bind over order included youthful offender offense.
 - Child pled to or was tried and found guilty of a youthful offender offense (§32A-2-3(J)).
 - Predisposition report received from CYFD and provided to the parties.
- ☐ Amenability Hearing (§32A-2-20(B)):
 - Child amenable to treatment or rehabilitation as child in available facilities?
 - Child eligible for commitment to institution for children with developmental disorders or mental disorders?
- FACTORS TO CONSIDER (§32A-2-20(C)):
 - Seriousness of offense;
 - Whether offense was committed in aggressive, violent, premeditated or willful manner;
 - Whether firearm was used to commit offense;
 - Whether offense was against persons or property, greater weight being given to offenses against persons, especially if personal injury resulted; (for #2 – #4, consider special interrogatories to jury during trial on merits, per *State v. Rudy B.*, 2010-NMSC-045, ¶36);
 - Sophistication and maturity of child determined by considering child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history, and disability;
 - Record and previous history;
 - Prospects for adequate protection of public and likelihood of reasonable rehabilitation by use of procedures, services and facilities currently available; and
 - Any other relevant factor, provided factor is stated on the record.
- ☐ Standard of proof: clear and convincing evidence likely but not resolved. See *State v. Gonzales*, 2001-NMCA-025.
- ☐ If amenable to treatment or eligible for commitment, proceed to juvenile disposition/consider commitment under CMHDD Act. See checklist at end of Chapter 17.
- ☐ If not amenable and not eligible for commitment, proceed to adult sentencing:
 - May sentence child to, or less than, the mandatory adult sentence.
 - Disclosure to victims about eligibility for earned meritorious deductions under EMDA.
 - Notice to sex offenders of duty to register under SORNA.
- ☐ Advisement of right to appeal/to proceed at state expense if indigent
- ☐ If adult sanctions, child is transferred to the legal custody of Department of Corrections, terminating children's court jurisdiction.

CHAPTER 21

APPEALS

This chapter covers:

- Appeals as of right and by leave
- Time requirements
- Filing the transcript of proceedings
- Priority of cases
- Standard of proof; standard of review
- Stay of proceedings; jurisdiction during an appeal
- Appellate jurisdiction after appeal is terminated; mootness
- Preserving error for appeal
- Standing to appeal
- Serious youthful offenders and Supreme Court jurisdiction

21.1 Overview

It is incumbent on both the court and the parties before the court to be prepared for the possibility of appeal. Making a complete record that will permit adequate review is critical. Taking and docketing appeals properly is also very important.

Section 32A-1-17 of the Children's Code provides statutory authority to appeal a judgment issued by the children's court. Rule 10-251(C) in turn provides that appeals of judgments and dispositions on petitions alleging delinquency are governed by the Rules of Appellate Procedure, Rule 12-101 *et seq.*

In addition, interlocutory appeals may be brought as appropriate under §§39-3-3, 39-3-4 and 39-3-7. *See State v. Jade G.*, 2007-NMSC-10, ¶¶12-14, which holds that interlocutory appeals of suppression orders in delinquency proceedings are governed by §39-3-3.

21.2 Appeals as of Right

21.2.1 Final Orders

These final orders are appealable as of right to the Court of Appeals:

- An order dismissing a delinquency petition; *see In the Matter of Daniel H.*, 2003-NMCA-063;
- An order finding a child to be delinquent; *see In the Matter of Gabriel M.*, 2002-NMCA-047; and
- Any other final order. *See* annotations to Rule 12-201 for examples.

In addition, even though it is not a final order, an order approving a consent decree may be appealed under certain circumstances. *See State v. Crystal B.*, 2001-NMCA-010, ¶¶4-5.

In *Crystal B.*, the child entered into a conditional consent decree, expressly reserving the right to appeal the denial of her motion to suppress. 2001-NMCA-010, ¶¶2-5. The Court of Appeals held that the order entering the consent decree, while not a final order, was appealable. The Court noted that while normally an appeal does not lie from anything other than a final judgment, and a consent decree merely suspends the proceedings and is not the last act that must be completed by the court in a delinquency case, there is a construction of finality that permits an appeal to alleviate hardship if a party is sufficiently aggrieved by an order, even though the order is not the last order contemplated in a case. The Court found that the order sufficiently aggrieved the child because it subjected her to 6 months of probation with strict conditions, including drug testing.

For a discussion of what constitutes a final order, see *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992), discussed in the Court of Appeals' opinion in *State v. Candy L.*, 2003-NMCA-109.

21.2.2 Suppression Orders

The state has the right to appeal a decision or order of the children's court suppressing or excluding evidence or requiring the return of seized property, provided that the District Attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. §39-3-3(B)(2). Even though §39-3-3 by its express language applies to appeals from the district court in criminal proceedings, the Court of Appeals has held that Paragraph (B)(2) governs interlocutory appeals of suppression orders from children's court as well. The Court found that juvenile delinquency proceedings are sufficiently similar to criminal proceedings to warrant application of §39-3-3. The Court reasoned that the state has the same need for an automatic interlocutory appeal in delinquency proceedings as it does in criminal trials because whether or not evidence is suppressed often determines whether the state can go forward with its case. *State v. Jade G.*, 2007-NMSC-010, ¶¶9-14.

21.2.3 Denial of Release Pending Adjudicatory Hearing

Rule 10-225(D) of the Children's Court Rules states that a denial of release from detention pending adjudication may be reviewed at any time. Presumably, this review would be a review by the children's court. However, in a criminal proceeding where the district court has denied relief on a petition to review conditions of release, the defendant may file an appeal with the Court of Appeals or the Supreme Court, as appropriate. An appeal must be filed within ten days of entry of the district court's order denying relief. §39-3-3(A)(2); Rule 10-405; Rule 12-204. It is unclear whether these provisions govern appeals of denials of release in children's court pursuant to Rule 10-225(D).

21.3 Appeals by Leave

Orders that are not appealable as of right are appealable by leave of the Court of Appeals as an interlocutory appeal if the children's court, in its discretion, makes the finding required by Rule 12-203. This finding is that the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. §39-3-3(A).

21.4 Time Requirements

21.4.1 Filing Notice of Appeal in Appeal as of Right

An appeal as of right is taken by filing a notice of appeal with the District Court clerk within 30 days after the entry of the order or judgment appealed from, unless it is an appeal from a decision or order suppressing or excluding evidence or requiring the return of seized property pursuant to §39-3-3(B). *See* Rule 12-201; §39-3-7; §39-3-3(B); *State v. Jade G.*, 2007-NMSC-010 (applying §39-3-3(B) to delinquency proceedings). If the state is appealing a decision or order of the children's court suppressing or excluding evidence or requiring the return of seized property, the appeal must be taken within 10 days of the decision or order. §39-3-3(B)(2); Rule 12-201(A).

In criminal cases, the Court of Appeals has ruled that ineffective assistance of counsel is presumed where counsel fails to file a timely notice of appeal. *State v. Duran*, 103 N.M. 231, 232, 731 P.2d 374, 376 (Ct. App. 1986) (adopting a conclusive presumption of ineffective assistance of counsel where notice of appeal or affidavit of waiver is not filed within the time limit required). This does not mean an appeal can be filed at any time regardless of the time limits found in the Rules of Appellate Procedure. A conscious decision by a client not to file an appeal is not the same as the failure of counsel to file an appeal in a timely manner. The reported cases deal with the latter situation.

21.4.2 Filing an Interlocutory Appeal

An interlocutory appeal is taken by filing an application for leave to file an interlocutory appeal with the Court of Appeals within 15 days after the entry of the order appealed from. Rule 12-203(A). An interlocutory appeal may be filed in a criminal case if the trial court judge certifies

in writing that the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. §39-3-3(A). Under *Jade G.* above, this same provision would apply to delinquency cases.

21.4.3 Filing the Docketing Statement

Unless otherwise ordered by the Court of Appeals, trial counsel is responsible for preparing and filing the docketing statement with the Court within 30 days after filing the notice of appeal. Rule 12-208(A).

Practice Note. The docketing statement is one of the most important parts of the appeal process. The instructions found in Rule 12-208 must be followed carefully and what is said in the docketing statement must be clear with specific references to the record and legal authorities.

The respondent child's attorney has an obligation to make a good faith effort to present on appeal all contentions urged by a defendant. *See State v. Franklin*, 78 N.M. 127, 129, 428 P.2d 982, 984 (1967) (in preparing the record, it is incumbent upon counsel for the petitioner to have included therein such parts of the record as may be necessary to assure a review by the reviewing court, whether or not counsel considers such contentions to have any merit, and whether or not he intends to advance any argument thereon).

21.4.4 Deadlines for the Summary Calendar

If the case is assigned to the summary calendar, no transcript of proceedings is to be filed. Counsel has 20 days from the date of service of the Appellate Court Clerk's notice of proposed summary disposition to file a memorandum in response to the notice. Rule 12-210(D).

21.4.5 Deadlines for the General Calendar

Non-Expedited Bench. If the case is assigned to the general calendar, the case will be further assigned to the expedited bench or the non-expedited bench. For the non-expedited bench:

- A transcript of proceedings must be filed as provided by Rule 12-211.
- Briefs are to be filed in accordance with Rules 12-210(B) and 12-213.
- All documents filed with the Court of Appeals, including briefs, must now be in 14 point typeface.
- Appellant's brief in chief must be filed within 45 days after the transcript is filed in the appellate court. Rule 12-210(B).
- Appellee's answer brief must be filed within 45 days after service of appellant's brief in chief. Rule 12-210(B).
- Appellant's reply brief must be filed within 20 days after service of appellee's answer brief. Rule 12-210(B).

- The brief-in-chief and answer brief are limited to 35 pages and the reply brief, if any, is limited to 15 pages. If the page limit is exceeded, the party filing the brief must certify the number of words or number of lines, and that number cannot exceed the number provided in the applicable rule.

Expedited Bench. The parties may file written objections to an order assigning a case to the expedited bench within 10 days of the order. The court has the discretion to keep a case on the expedited bench despite objection by a party. For the expedited bench:

- The brief in chief is to be filed and served within 30 days after the transcript is filed; the answer brief is to be filed within 30 days of service of the brief-in-chief, and the reply brief, if any, is to be filed within 15 after service of the answer brief.
- The brief-in-chief and the answer briefs are limited to 20 pages, in 14 point typeface, and the reply brief, if any, is limited to 10 pages, except by leave of the court. The same rule regarding exceeding page limits for briefs in cases on the general calendar, non-expedited bench, applies to briefs on the expedited bench.
- Once the case is briefed, it is submitted to a panel of three judges for decision at the next available submission date. A hearing is scheduled at the next argument calendar after submission and the panel will announce its decision at the hearing, unless the panel removes the case from the expedited bench decision program. The notice of hearing will provide a method for counsel to waive attendance at the hearing for announcement of the Court of Appeal's decision. If all counsel waive attendance, no hearing will be held and the opinion will be issued within 24 hours of the hearing date. Oral argument is not automatically held, but the Court of Appeals will grant all requests for oral argument and the argument will be held on the hearing date.
- If oral argument is held, a decision is ordinarily announced from the bench, and a written decision filed usually within 24 hours.

In the Matter of the Court of Appeals Caseload, Misc. Order No. 1-46, June 23, 2010.

21.5 Filing the Transcript of Proceedings

21.5.1 Audio Recorded Transcripts

If the transcript of proceedings is an audio recording, within 15 days after receipt of the general calendar assignment, the district court clerk must prepare and send the original and two (2) duplicates of the audio recording and an index log to the appellate court. Rule 12-211(B).

21.5.2 Other Transcripts

If the transcript of proceedings is not an audio recording, within 15 days after service of the general calendar assignment, appellant must file in district court a description of the parts of the proceeding the appellant intends to include in the transcript. Rule 12-211(C).

Within 15 days after appellant's designation, appellee may file in district court a designation of additional parts to be included or may apply to the district court for an order requiring appellant to designate such parts. Rule 12-211(C).

Each party designating a portion of the stenographic transcript must make satisfactory arrangements with the court reporter for payment for the transcript and proof of satisfactory arrangements must be filed with the district court within 15 days of the designation. Rule 12-211(C).

Computer-aided transcripts must be filed within 30 days after the filing of the certificate of satisfactory arrangements. If the transcript is not a computer-aided transcript, it must be filed within 60 days after the filing of the certificate. Rule 12-211(C).

Practice Notes: If interviews are played for the jury during the adjudication or trial, they may be hard to hear on any audio-recording of the proceeding. In the case of stenographic transcription, they may not have been transcribed. Hence, it is suggested that counsel designate the tape or disc of the interview as an exhibit and ensure that it is included in the record on appeal.

As a general matter, it is important for trial counsel to consider the issues carefully and be sure that they designate the parts of the proceeding necessary to a review of those issues.

The parties may agree upon a statement of facts and proceedings and stipulate that they deem the statement sufficient for purposes of review. They must file the statement as a transcript of proceedings within 60 days of service of the general calendar assignment, unless otherwise ordered by the court. Rule 12-211(I).

21.6 Priority of Cases

If the order appealed from grants legal custody of the child to or withholds it from one or more of the parties to the appeal, the appeal must be heard at the earliest practicable time. § 32A-1-17(B).

21.7 Standard of Proof; Standard of Review

Proof beyond a reasonable doubt, *see In Re Winship*, 397 U.S. 356, 358 (1970), and a unanimous verdict are required in delinquency proceedings. §32A-2-16(A). The state has the burden of proving basic elements of the delinquent act and may not shift the burden of proof to the respondent child regarding any essential elements of the defense. *See* Nowak & Rotunda, Constitutional Law, §13.4, pp. 650-651 and notes 11-13 (8th Ed. 2010). Proof beyond a reasonable doubt is similarly required in probation revocation proceedings. *State v. Erickson K.*, 2002-NMCA-058, ¶18.

The appellate court will review the children's court's interpretation and application of the law *de novo*. *State v. Dylan A.*, 2007-NMCA-114, ¶13. A claim that procedural due process was denied

is also reviewed *de novo*. See *State v. Pablo R.*, 2006-NMCA-072, ¶9 (applying de novo review to the reasonableness of a search) (citing *In the Matter of Josue T.*, 1999-NMCA-115, ¶14 ("Determining the reasonableness of a search, however, is a matter of law."))

In appeals raising issues of fact and law, such as an appeal of the court's ruling on a motion to suppress, the appellate court will apply a two-part standard. First, the court will determine whether the findings of fact made by the trial court are supported by substantial evidence. The court views the facts as determined by the trial court in the light most favorable to the lower court's ruling. It indulges all reasonable inferences in support of the court's ruling and disregards all evidence and inferences to the contrary. Second, the appellate court will engage in a de novo review of the application of the law to those facts. See *Pablo R.*, 2006-NMCA-072, ¶9.

21.8 Stay of Proceedings

The order of the children's court from which an appeal is taken is not suspended during the pendency of the appeal unless the children's court or the appellate court specifically orders a stay or suspension of the order. Section 32A-1-17(B) of the Children's Code provides in relevant part as follows:

The appeal to the court of appeals does not stay the judgment appealed from, but the court of appeals may order a stay upon application and hearing consistent with the provisions of the Children's Code if suitable provision is made for the care and custody of the child.

The Children's Court Rules and the Rules of Appellate Procedure set forth the procedures and requirements for a stay. See §32A-1-17 and Rules 10-151 and 12-206.

21.9 Jurisdiction During an Appeal

The Children's Court judgment stands until reversed. The children's court retains jurisdiction in the case to enforce the order while it is on appeal and to take other actions for the welfare of the child and the public safety. §32A-1-17(B).

Uncertainty has existed over the continued role of the children's court when there is an appeal. *Kelly Inn No. 102, Inc. v. Kapnison* is not a delinquency case but the Court's opinion may be helpful to children's court judges and practitioners debating the jurisdiction of the children's court to address the needs of the child and the public safety while a case is on appeal. The Court observed:

[T]he rule that an appeal "completely divests" the trial court of jurisdiction over "the case" or "the litigation" has, through frequent repetition, taken on the character of an inflexible law of nature rather than a pragmatic guideline enabling trial courts to determine when to proceed further with some part of a case and when to refrain because issues already resolved are under consideration by an appellate court....

It is clear ... that a pending appeal does not divest the trial court of jurisdiction to take further action when the action will not affect the judgment on appeal and when, instead, the further action enables the trial court to carry out or enforce the judgment.

113 N.M. 231, 241, 824 P.2d 1033, 1043 (1992). When considering a question about the jurisdiction of the trial court more than 30 days after entry of judgment, under §39-1-1 on judgments, the Court stated: “The trial court retains the same jurisdiction to deal with matters collateral to or separate from the issues resolved in the judgment as it has following the filing of the notice of appeal.” 113 N.M. at 244, 824 P.3d at 1046.

Even though the Delinquency Act provides that a judgment of the children’s court divests the court of jurisdiction at the time of transfer of custody, *see* §32A-2-23, as discussed in Chapter 19, the children’s court retains limited jurisdiction after a judgment adjudicating a child as delinquent, including jurisdiction to extend a commitment or probation, to revoke a consent decree or probation, and to review a decision by the department to grant or deny early release.

In *State v. Hovey*, 106 N.M. 300, 302, 742 P.2d 512, 514 (1987), the Supreme Court confirmed that the lower court retains jurisdiction during an appeal if a stay of the judgment is not obtained. Hovey was originally charged in children’s court but was then transferred to district court to be tried as an adult. He appealed the transfer order but did not seek a stay, yet he disputed the power of the grand jury to indict him during the pendency of the appeal. The Court found that, since the defendant failed to request a stay of the order granting transfer of the case to district court, “the defendant waived any impediment to the State’s obtaining a grand jury indictment of defendant for trial in district court.” *Id.*

New Mexico courts have ruled the same way in the context of abuse and neglect proceedings, which are also governed by §32A-1-17. *Albuquerque Journal v. Jewell* involved the taking of a writ to the Supreme Court, not a regular appeal, but the same uncertainty over the continued role of the children’s court existed. The lower court did not believe it had jurisdiction over its order once the matter went before the appellate court. The Supreme Court disagreed. In accordance with Rule 12-504(D)(1), a party seeking a stay of some action must include a request for a stay in its petition. Unless a stay is granted, the children’s court retains jurisdiction over the order, notwithstanding the appellate court’s consideration of its propriety. *Albuquerque Journal v. Jewell*, 2001-NMSC-05, ¶8.

In *State ex rel. CYFD v. Frank G. and Pamela G.*, 2005-NMCA-026, *aff’d*, *In the Matter of Pamela A.G.*, 2006-NMSC-019, the Court of Appeals stated that “[w]hile an appeal of an abuse and neglect adjudication is pending, the children’s court has jurisdiction to take further action in the case under Section 32A-1-17(B) which states that an appeal to this Court ‘does not stay the judgment appealed from.’” 2005-NMCA-026, ¶42.

21.10 Appellate Jurisdiction After Judgment Is Terminated; Mootness

Appellate courts do not generally decide moot cases. An appeal is moot when no actual controversy exists, and an appellate ruling will not grant the appellant any actual relief. *State v.*

Sergio B., 2002-NMCA-070, ¶9. While appellate courts review criminal convictions even after a defendant’s term of incarceration ends based on the continuing collateral consequences of a conviction, it is not clear when New Mexico courts will view the collateral consequences of a delinquency adjudication as serious enough to justify appellate review. In *State v. Sergio B.*, 2002-NMSC-070, ¶10, the Court noted that, while under the federal mootness standard, the consequences of delinquency adjudication are insufficient to justify appellate review, the New Mexico courts have established their own mootness standards. However, the Court found an actual controversy on other grounds, without reaching the collateral consequences issue. (The collateral consequence in *Sergio* was that, if the respondent child was ever convicted of a felony as an adult, the order of recommitment as a child would appear in a pre-sentence report.)

If the issue is capable of repetition yet evading review, the appellate court may review a children’s court disposition even if the child will have served the commitment before the review is completed. *State v. Sergio B.*, 2002-NMCA-070, ¶11; *State v. Julia S.*, 104 N.M. 222, 223, 719 P.2d 449, 451 (Ct. App. 1986) (reviewing a children’s court case after a child’s term of protective supervision ended based on a finding that the issues were capable of repetition yet evading review).

21.11 Preserving Error for Appeal

21.11.1 Rule 12-216

Rule 12-216(A) of the Rules of Appellate Procedure provides as follows:

To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review. Further, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

As an exception to paragraph (A), paragraph (B) provides that the appellate court is not precluded from considering jurisdictional questions or in its discretion, issues involving the general public interest or fundamental error or fundamental rights of a party. Rule 10-216(B).

21.11.2 Purpose

Under the preservation rule, “it is essential that a party object to a claimed error below.” *State v. Joanna V.*, 2003-NMCA-100, ¶7, *aff’d State v. Joanna V.*, 2004-NMSC-024. The purpose of the preservation rule is to provide the lower court with an opportunity to correct any mistakes, provide the opposing party a fair opportunity to show why the court should rule in its favor, and to create a record from which the appellate court may make informed decisions. *Joanna V.*, 2003-NMSC-100, ¶7 (*citing State v. Reyes*, 2002-NMSC-024, ¶41); *see also State v. Gonzales*, 2001-NMCA-025, ¶7 (“The purpose of the preservation rule is to insure that the trial judge is alerted to the issue and has an opportunity to address it.”). The rule ensures that the appellate court may fulfill its main role of correcting trial court error. If the record is inadequate, it is difficult, if not impossible, to ascertain exactly what happened. *Joanna V.* ¶7.

21.11.3 Application of Rule

Preservation does not always require counsel to refer to the specific rule violated when making the objection. *See In the Matter of Garrison P.*, 2002-NMCA-094, ¶5. Moreover, in the context of appeals objecting to the admission of hearsay evidence, the courts have ruled that a motion to dismiss invoking rationales underlying the hearsay rule properly preserved the objection to hearsay testimony even when the objection was not made during the testimony. *See In the Matter of Bruno*, 2003-NMCA-057, ¶20; *cf. State v. Erickson K.*, 2002-NMCA-058, ¶5 (finding that hearsay objection was preserved because respondent child objected to some of the hearsay testimony as elicited and filed a motion to dismiss for insufficiency of evidence at close of case on the ground that there was no admissible testimony to prove the violation). Under some circumstances, a question raised during closing argument will be considered to be adequately preserved. *See Bruno* ¶20 (noting that child's attorney disagreed with trial court's ruling in regard to disputed evidence during her closing argument).

21.11.4 Exceptions

The rule on preservation is not applicable if the question raised is jurisdictional. *See Rule 12-216; State v. Ruben O.*, 120 N.M. 160, 163, 899 P.2d 603 606 (Ct. App. 1995).

The appellate court may exercise its discretion to review an issue not preserved below if there is fundamental error or a fundamental right is at stake. *See In the Matter of Aaron L.*, 2000-NMCA-024 (the court decided to address non-preserved issue because the child, as a juvenile probationer, had a constitutionally protected liberty interest in his probationary status). For example, the appellate court will review claims of an illegal sentence, regardless of whether the issues were properly preserved below. *See State v. Perez*, 2002-NMCA-040, ¶11; *State v. Steven B.*, 2004-NMCA-086, ¶25. *See also State v. Wilson*, 116 N.M. 793, 799-800, 867 P.2d 1175, 1181-1182 (1994) (a failure to instruct the jury upon essential elements when they are at issue constitutes fundamental error).

However, Constitutional rights can be waived. In *State v. Singleton*, the Court of Appeals held that the defendant's failure to make any objection below to the trial court's decision to excuse a juror, even when specifically asked whether there were any objections to the excusal, amounted to a waiver of his equal protection argument and the excusal of such juror was not fundamental error because there was no showing that the excusal of the juror prejudiced defendant. 2001-NMCA-054, ¶¶10-11, 19.

The court may also exercise its discretion to review an issue of general public interest. *State v. Ricky G.*, 110 N.M. 646, 647, 798 P.2d 596, 597 (Ct. App. 1990) (the Court of Appeals exercised its right to review children's court's failure to ask child if he had anything to say prior to announcing its disposition of the case regardless of whether issue was properly preserved below because it raised an issue of general public interest); *State v. Doe*, 90 N.M. 572, 574, 566 P.2d 121, 123 (Ct. App. 1977) (finding that issue related to dispositional powers of children's court with respect to mentally ill delinquent child raised issue of public interest warranting review).

Nonetheless, a court will decline to apply preservation exceptions if counsel fails to argue the exceptions on appeal. *See State v. Jason F.*, 1998-NMSC-010, ¶10 (declining to apply preservation exceptions when they were not argued on appeal); *State v. Joanna V.*, 2003-NMCA-100, ¶10 (refusing to review issues because they were not properly preserved below and there was no argument on appeal that the exceptions apply), *aff'd State v. Joanna V.*, 2004-NMSC 024. Even if fundamental error exists or a fundamental right is implicated, courts have required some showing of the nature of the error on appeal. *Doe v. State*, 88 N.M. 347, 351, 540 P.2d 827 (Ct. App. 1975).

21.11.5 More Stringent Requirements for State Constitutional Violations

Courts apply very specific preservation requirements to claims by a defendant that the state Constitution provides him more expansive protection. To “fairly invoke” a ruling on the question of whether a state Constitutional provision should be interpreted more expansively than its federal Constitutional counterpart, New Mexico courts have articulated the following standard:

Established precedent. When a litigant asserts protection under a New Mexico constitutional provision that has a parallel or analogous provision in the United States Constitution, the requirements for preserving the claim for appellate review depend on current New Mexico precedent construing that state constitutional provision. If established precedent construes the provision to provide more protection than its federal counterpart, the claim may be preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue. This is no more than is required of litigants asserting a right under the U.S. Constitution, a federal statute, a state statute, or common law. That is, Rule 12-216 requires that litigants “fairly invoke” a ruling by the trial court in order to raise that question on appeal. Assertion of the legal principle and development of the facts are generally the only requirement to assert a claim on appeal.

No precedent. However, when a party asserts a state constitutional right that has not been interpreted differently than its federal analog, a party also must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision. This will enable the trial court to tailor proceedings and to effectuate an appropriate ruling on the issue.

State v. Gomez, 1997-NMSC-006, ¶¶22-23. The *Gomez* requirements have been applied in children’s court. *See, e.g., Paul T.*, 1999-NMSC-037, ¶13; *State v. Jimmy R.*, 1997-NMCA-107, ¶5. However, *see State v. Garcia*, 2009-NMSC-046, in which Justice Bosson wrote a special concurring opinion suggesting a more liberal approach to preservation of state constitutional claims.

21.11.6 Preservation Issues in Grade Court Appeals

Practitioners should ensure that they preserve issues for appeal when their client is sentenced to grade court or some other alternative sentencing program. The Supreme Court noted that “[I]ack of preservation continues to plague . . . grade court appeals.” *State v. Steven B.*, 2004-NMCA-086, ¶7.

In *State v. Joanna V.*, the Court of Appeals held that the respondents failed to preserve their challenges to detention for violation of the program requirements when they did not object to conditions of release that required school attendance, did not object to the requirements of the grade court program and its detention sanctions when the children’s court explained them to the child as part of the plea agreement, and did not object when the children’s court again discussed the program at the final disposition hearing. 2003-NMCA-100, ¶¶8-10, *aff’d State v. Joanne V.*, 2004-NMSC-024. In *State v. Steven B.*, the Court held that respondents could not argue due process issues on appeal that they failed to raise below when responding to violations subjecting them to detention. 2004-NMCA-086, ¶7.

In *State v. Lucero*, the Court of Appeals articulated why preservation issues commonly arise in appeals to alternative sentencing programs.

Preservation issues arise with respect to alternative sentencing programs such as in this case because of the timing of the placement in a program. When a defendant has been convicted and there is the prospect of avoiding incarceration with the use of an alternative program, the defendant is frequently eager to participate in the program. At that time, the defendant does not have the impetus to challenge the program or its procedures. Later if the program does not work out after the defendant has participated in it, and the defendant wishes to assert challenges, it may be too late to preserve the issues because the program has progressed or because the defendant has received the benefit of the program.

State v. Lucero, 2007-NMCA-127, ¶16.

21.11.7 Preservation Issues and Withdrawal of Pleas

A word of caution about no contest and guilty pleas: A claim that a plea was involuntary or unknowing may be waived if the child does not move to revoke or withdraw the plea when he first learns the consequences and if she does not appeal at the time. *See State v. Martinez*, 2002-NMSC-008, ¶38 (finding that since defendant did not challenge his guilty plea in the trial court and never filed a motion to withdraw the plea, he did not preserve any argument regarding his guilty plea).

21.12 Standing to Appeal

Article VI, Section 2 of the New Mexico Constitution provides that "an aggrieved party shall have an absolute right to one appeal." An "aggrieved party" means a party whose interests are adversely affected. *In the Matter of Christobal V.*, 2002-NMCA-077, ¶8 (*citing State v. Castillo*, 94 N.M. 352, 354, 610 P.2d 756, 758 (Ct. App. 1980)).

One question is whether the Children, Youth and Families Department (CYFD) can appeal a disposition. The State is aggrieved by a disposition contrary to law and may properly challenge the disposition on appeal. *Christobal V.*, 2002-NMCA-077, ¶8. In *State ex rel. CYFD v. Paul G.* CYFD itself brought the appeal, not the state in a more general sense through the prosecutor. The child objected. The Court of Appeals found that CYFD had standing to appeal a children's court disposition, reasoning that the agency should not be precluded from raising concerns about a disposition it is responsible for carrying out. If CYFD wishes to contest the disposition of a child committed to its supervision or custody, it is not required to formally intervene in order to file an appeal. 2006-NMCA-038, ¶12-13.

21.13 Serious Youthful Offenders and Supreme Court Jurisdiction

Generally, appeals from children's court are taken to the Court of Appeals. Rule 12-102. However, Rule 12-102(A) provides in relevant part that appeals from the district courts in which a sentence of death or life imprisonment has been imposed shall be taken to the Supreme Court. In *State v. Trujillo*, the New Mexico Supreme Court ruled that serious youthful offenders convicted of first degree murder are allowed to invoke the Court's mandatory appellate jurisdiction under Art. VI, §2 of the state Constitution (providing for mandatory Supreme Court appellate jurisdiction in appeals from district court judgments imposing a sentence of death or life imprisonment), even though the trial court has the discretion to sentence them to less than the life sentence prescribed for adult offenders. 2002-NMSC-005, ¶¶8-9. *Trujillo* would presumably also apply to fourteen year olds convicted of first-degree murder, who are classified as youthful offenders under §32A-2-3 and also subject to life imprisonment for first-degree murder. *See also* Chapter 18, Dispositions, for a discussion of adult sentences imposed on juveniles.

CHAPTER 22

PARTIES; INTERVENTION

This chapter covers:

- The parties to the proceeding
- Who may intervene
- Non-party participants

22.1 Original Parties to the Proceeding

Children's Court Rule 10-121(A) lists the parties to a delinquency proceeding as:

- The child alleged to be delinquent;
- The state;
- Any person made a party by the court, including a parent of a child alleged to be delinquent if named by the state pursuant to §32A-2-28; and
- Anyone permitted to intervene under Rule 10-122.

Section 32A-2-28 provides that “[i]n any complaint alleging delinquency, a parent of the child alleged to be delinquent may be made a party in the petition.”

22.2 Intervention

Under Rule 10-122, the following persons may be permitted to intervene in a delinquency proceeding upon timely application and such terms and conditions as the judge may prescribe:

- The child's parent, guardian, or custodian;
- Any person with a statutory basis for intervention in the proceedings;
- Any person who has a constitutionally protected liberty interest in the proceedings if the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties; or
- Any other person permitted by law to intervene.

The trial court has a good deal of discretion in determining whether to allow intervention in Children's Court cases. *See, e.g., In re Termination of Parental Rights of Melvin B., Sr.*, 109 N.M. 18, 780 P.2d 1165 (Ct. App. 1989), although *Melvin B.* was not a delinquency case.

22.3 Non-Party Participants

Victims who have perfected their rights under §31-26-5 of the Victims of Crime Act are entitled to participate in delinquency proceedings. While they are not parties, they are entitled to:

- receive notice of court proceedings;
- attend all public court proceedings that the accused has a right to attend;
- confer with the prosecution;
- make a statement to the court at sentencing and post-sentencing proceedings;
- receive information about the conviction, sentencing, imprisonment, escape or release of the accused;
- have the prosecuting attorney notify the victim's employer, if requested by the victim, that the victim's cooperation and testimony in a court proceeding is necessary and that it may require the victim to be absent from work for good cause;
- receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecuting attorney, unless there are compelling evidentiary reasons to retain the property; and
- be informed by the court at a sentencing proceeding if the offender is eligible to earn meritorious deductions from the offender's sentence and the amount of meritorious deductions that may be earned.

§31-26-4(L). Some district attorneys' offices employ victim advocates who help the office comply with the Act and who may serve as part of the prosecution team. *See State v. Blackmer*, 2005-NMSC-008.

CHAPTER 23

DISCOVERY AND DISCLOSURE

This chapter covers:

- Discovery
- Videotaped depositions
- Protective orders
- Rules on disclosure
- Reports from court-ordered diagnostic examinations and evaluations

23.1 Discovery

23.1.1 Scope of Discovery

Rule 10-133 of the Children’s Court Rules describes the scope of discovery as follows:

Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the act charged or alleged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

The rule provides for two forms of discovery, “statements” and depositions.

23.1.2 Forms of Discovery; Procedures

Statements: Any person, other than the respondent child, with information subject to discovery must give a statement if requested by a party. If the person refuses, the party may obtain the statement by serving a “notice of statement” on the person to be examined and on other parties at least 5 days before the date scheduled for the statement. A subpoena may be served to secure the presence of the person to be examined or the materials to be examined during the statement. Rule 10-133(A).

Depositions: Depositions may be taken upon:

- agreement of the parties; or

- order of the court at any time after the petition is filed, upon a showing that it is necessary to take the person's deposition to prevent injustice.

Rule 10-133(B). Attendance of witnesses at depositions may be compelled by subpoena, and a subpoena *duces tecum* may be served to require the production of documents or things. In the latter case, a designation of materials to be produced must be attached to or included with the notice of deposition. Rule 10-133(D) and (E).

Rule 10-133 describes in detail the procedures to be followed for depositions. Rule 10-131 governs persons before whom depositions may be taken. Rule 10-132 allows the parties to vary procedures by written stipulation. Rule 10-134 provides specific procedures to be followed when a deposition is to be recorded by audiotape or videotape. Rule 10-136 allows for motions for orders compelling discovery in depositions, and sanctions for failure to comply. All of these rules should be reviewed when depositions are under consideration.

Rule 10-135 allows for the use of depositions in court proceedings for any purpose permitted by the Rules of Evidence. It also addresses the effect of errors and irregularities in a deposition to be used in court.

Youthful Offender Cases: Rules 5-501 through 5-512 of the Rules of Criminal Procedure govern discovery in youthful offender cases. The rules are similar to those in the Children's Court Rules.

23.1.3 Videotaped Depositions

As noted above, Rule 10-134 sets forth the requirements for audiotaped and videotaped depositions generally. In cases involving child witnesses, videotaped depositions are sometimes taken specifically for use in lieu of live testimony. The discussion is placed in this chapter because any such depositions would be conducted in advance of the hearing or trial.

23.1.3.1 Videotaped Depositions in Sex Offense Cases

Rule 10-234 addresses the taking and use of videotaped depositions in cases alleging criminal sexual penetration or criminal sexual contact on a child under the age of 16. These cases will be referred to as sex offense cases in the discussion below.

In order to take a videotaped deposition of the victim in a sex offense case, counsel must file a motion and provide notice to opposing counsel. The children's court may order the taking of the deposition if the movant shows that the victim may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. Rule 10-234(A).

Rule 5-504 of the Rules of Criminal Procedure is substantially similar to Rule 10-234. In the commentary to Rule 5-504, the rules committee recommended that the following factors be considered when determining whether a videotaped deposition should be taken to help prevent a child victim from suffering unreasonable and unnecessary mental or emotional harm:

- the child is unable to testify because of fear;
- there is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;
- the child suffers a mental or other infirmity; or
- conduct by defendant or defense counsel causes the child to be unable to continue testifying.

Rule 5-504 (Committee Commentary).

If the children's court judge permits the taking of a videotaped deposition, the judge is required to attend the deposition and provide such protection of the child as the judge deems necessary. Rule 10-234(A).

Rule 10-234(B) provides that the videotaped deposition may be shown to the judge or jury at the adjudicatory hearing and admitted as an additional exception to the hearsay rule in certain situations. The deposition may be shown and admitted as an exception to the hearsay rule if:

- the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;
- the deposition was presided over by a children's court judge and the child was present and represented by counsel or waived counsel; and
- the respondent child was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

A videotaped deposition may also be used if permitted by the Rules of Evidence. Rule 10-234(C).

23.1.3.2 Videotaped Depositions of Child Witnesses Under Uniform Act

During the 2011 session, the Legislature passed and the Governor signed the Uniform Child Witness Protective Measures Act, which takes effect in July of 2012. The Act sets forth standards and procedures for allowing a child witness to testify by alternative methods when the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. Nothing in the Act limits the proceedings to sex offense cases. 2011 N.M. Laws, Ch. 98 (HB 196), codified at §§38-6A-1 through 38-6A-9 (effective July 1, 2012).

Under this law, the presiding officer may order a hearing to determine whether to allow a child witness under the age of 16 to testify by an alternative method, for good cause shown. The motion may be made by a party, the child witness or an individual determined by the presiding officer to have sufficient standing to act on behalf of the child. §38-6A-4. A number of factors must be considered by the court when deciding whether to permit an alternative method and the order allowing or disallowing an alternative method must state the findings of fact and conclusions of law that support the determination. §§38-6A-5 – 38-6A-7. Any alternative method ordered must permit a full and fair opportunity for examination or cross-examination by each party, subject to such protection of the child as the court deems necessary. §38-6A-8.

For criminal and delinquency proceedings, the term “alternative method” refers to a videotaped deposition. However, the deposition may be structured differently depending on whether the concern is with the child testifying in an open forum in the presence and full view of the finder of fact or with the child testifying face-to-face with the defendant. As with a videotaped deposition under Rule 10-234, the judge must preside over the deposition. §38-6A-2.

Since the law does not take effect until July of 2012, it is too early to know whether the Supreme Court will adopt rules of evidence or procedure in connection with the new law.

23.1.4 Protective Orders

Either a party or the person from whom discovery is sought may move for a protective order for good cause shown, and the protective order may be issued by the court in which the action is pending or the court in the district where the deposition or statement is to be taken. The court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals. Rule 10-138(A).

The court may permit the showing of good cause to be in the form of a written statement for inspection by the court *in camera*, if the court concludes from the statement that there is a substantial need for the *in camera* showing. If the court does not permit the *in camera* showing, the written statement will be returned to the movant upon request. If no such request is made, or if the court enters an order granting the relief sought, the entire text of the statement will be sealed and preserved in the court’s records so that it may be available to the appellate court in the event of an appeal. Rule 10-138(B).

Rule 10-138(A) lists by way of example a number of restrictions that may be included in the protective order, including one or more of the following:

- that the deposition or statement not be taken;
- that the deposition or statement be deferred;
- that the deposition or statement may be had only on specified terms and conditions, including a designation of the time or place;
- that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- that the deposition or statement be conducted with no one present except persons designated by the court;
- that a deposition or statement, if sealed, be opened only by order of the court;
- that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; or
- that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

23.2 Rules on Disclosure

23.2.1 Disclosure by Parties Required

Rules 10-231 and 10-232 require the disclosure of certain information by the state and the respondent child. These rules are similar but not identical to the rules for disclosure in the Rules of Criminal Procedure (Rules 10-501 and 10-502).

23.2.2 Disclosure by the State Under Rule 10-231

The state must disclose or make available certain information to the respondent child within 10 days after filing the delinquency petition, unless the court orders a shorter period of time. The state must disclose or make available the following:

- any statement made by the respondent child, or a co-respondent, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the Children's Court Attorney (CCA);
- the respondent child's prior record of delinquent acts and probation records, if any, as is then available to the state;
- any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the adjudicatory hearing, or were obtained from or belong to the respondent child;
- any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the CCA;
- a written list of the names and addresses of all witnesses which the CCA intends to call at the adjudicatory hearing, together with any recorded or written statement, made by the witness and any record of prior convictions of any such witness which is within the knowledge of the CCA; and
- any material evidence favorable to the respondent child which the state is required to produce under the U.S. or New Mexico Constitution. *See Brady v. Maryland*, 373 U.S. 83 (1963).

The respondent child may examine, photograph, or copy any material disclosed pursuant to Rule 10-231(A). Rule 10-231(B).

Unless otherwise ordered, the CCA is not required to disclose any material required to be disclosed by Rule 10-231 if:

- the disclosure will expose a confidential informer; or
- there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure to defense counsel. Rule 10-231(D).

At least 10 days before the adjudicatory hearing, the CCA must file a certificate stating that all information required to be produced pursuant to Rule 10-231(A) has been produced, except as specified. The certificate must also contain an acknowledgement of the continuing duty to disclose additional information.

If information specifically excepted from the certificate is later furnished by the CCA to the respondent, a supplemental certificate must be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate must be served on the respondent. Rule 10-231(C).

23.2.3 Disclosures by Respondent Child under Rule 10-232

The respondent child must disclose or make available to the state certain information within 30 days after the petition is filed, or not less than 10 days before the adjudicatory hearing, whichever date occurs earlier, unless the court orders a shorter period of time. The child must disclose or make available the following information:

- any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the child, and which the child intends to introduce in evidence at the adjudicatory hearing which were prepared by a witness whom the child intends to call at the adjudicatory hearing;
- any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the child, which the child intends to introduce in evidence at the adjudicatory hearing or which were prepared by a witness whom the child intends to call at the adjudicatory hearing; and
- a list of the names and addresses of the witnesses the child intends to call at the adjudicatory hearing, together with any recorded or written statement made by any identified witness. Rule 10-232(A).

The state may examine, photograph, or copy any material disclosed pursuant to Rule 10-232(A). Rule 10-232(B).

Except as to scientific or medical reports, Rule 10-232 does not authorize the discovery or inspection of:

- reports, memoranda or other internal defense documents made by the respondent child, or the respondent child's attorneys in connection with the investigation or defense of the case; or
- statements made by the respondent child to the respondent child's agents or attorneys. Rule 10-232(C).

At least 10 days before the adjudicatory hearing, the respondent child must file a certificate stating that all information required to be produced has been produced, except as specified. The certificate must contain an acknowledgement of the continuing duty to disclose additional information.

If information specifically excepted from the certificate is later furnished by the respondent child, a supplemental certificate must be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate must be served on the state. Rule 10-232(D).

Note that if the respondent child plans on calling an expert witness on the issue of whether the child was incapable of forming the specific intent required as an element of an alleged delinquent act, notice must be given within the same time frames as notice of insanity defense, which are outlined in Rule 10-241 and discussed in further detail in Chapter 25, Defenses. In addition, different time frames may apply to the disclosure of witnesses connected with alibi and entrapment defenses.

23.2.4 Continuing Duty to Disclose

As mentioned, both Rule 10-231 and Rule 10-232 require that the parties acknowledge in their certifications the continuing duty to disclose additional information. The parties have a continuing duty to disclose information that would have been subject to disclosure if known at the time:

If, subsequent to compliance with Rule 10-221, 10-222, 10-331, 10-332, 10-333 or 10-334 NMRA and prior to or during the adjudicatory hearing or termination of parental rights hearing, a party discovers additional material or witnesses which the party would have been under a duty to produce or disclose at the time of such previous compliance if it were then known to the party, the party shall promptly give written notice to the other party of the existence of the additional material or witnesses.

Rule 10-137(A).

23.2.5 Sanctions for Failure to Disclose

Rules 10-231 and 10-232 both close with the statement: “If the [state or respondent child] fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 10-165 NMRA and Rule 10-137 NMRA.” Under Rule 10-165, an attorney who willfully fails to observe requirements of the rule may be held in contempt of court and subject to disciplinary action. Under Rule 10-137, the court may order discovery or inspection of the materials not previously disclosed, grant a continuance, prohibit the non-disclosing party from calling the witness or introducing into evidence the material not disclosed, or make other orders appropriate under the circumstances, including holding an attorney in contempt of court pursuant to Rule 10-165.

The Court of Appeals has upheld the lower court’s dismissal of a delinquency petition partly based on the state’s failure to obey a discovery order in a delinquency proceeding. *State v. Doe*, 92 N.M. 354, 588 P.2d 555 (Ct. App. 1978). The annotations to Rules 5-501 and 5-502, the corresponding criminal rules, contain numerous cases discussing whether sanctions were appropriate for failure to make the disclosures required by the Rules of Criminal Procedure.

23.3 Court-Ordered Diagnostic Examinations and Evaluations

Copies of any social, diagnostic, or other predisposition reports ordered by or submitted to the court must be provided to the parties at least 5 days before disposition. §32A-2-17(A); Rule 10-246. The purpose of the 5-day notice requirement is to assure that the respondent child and the state have a reasonable opportunity to test the accuracy of any social, medical, psychological and psychiatric reports before they are considered by the court at disposition. *See* Rule 10-246 (Committee Commentary).

Youthful Offender Cases: The Children's Code provides that pre-disposition reports for youthful offenders and serious youthful offenders must be provided 5 days before disposition or sentencing. §§32A-2-17(A).

CHAPTER 24

EVIDENCE

This chapter covers:

- Application of the Rules of Evidence in delinquency proceedings
- Confessions and statements of a child
- Fingerprinting or photographing a child
- Evidence of prior adjudications
- Admissions and no contest pleas
- Privileges and evidentiary immunities
- Pretrial motions and notices
- Hearsay in children's court
- Right of confrontation
- Rape shield laws and the right of confrontation
- Questioning of witness by court

24.1 Rules of Evidence and Delinquency Cases

The New Mexico Rules of Evidence, Rule 11-101 NMRA *et seq.*, govern all proceedings in children's court, except as otherwise provided by law. Rule 10-141. The law provides that the Rules of Evidence do not apply to the following types of proceedings in children's court:

- Detention hearings; §32A-2-13(H);
- Dispositional hearings; Rule 11-1101(D)(2); and
- Dispositional stage of a probation revocation proceeding. *State v. Erickson K.*, 2002-NMCA-058, ¶11.

Unlike adult probation revocation proceedings, the Rules of Evidence apply to the adjudicatory stage of a probation revocation proceeding in children's court. *See id.*; Rule 11-1101(D)(2).

24.2 Confessions and Statements of a Child

The Delinquency Act provides enhanced protection to respondent children regarding the use of their statements or confessions as evidence in a delinquency proceeding.

24.2.1 Statements of Children Under 13 Years Old

No confessions, statements or admissions of any kind may be introduced against a child under 13 years old. §32A-2-14(F). This restriction applies regardless of whether the statements were made in a custodial setting or whether the statements were made to a person in a position of authority. Subsection F provides complete protection to children under 13 and does not allow the State under any circumstances to introduce the confessions, statements, or admissions of individuals under 13 regardless of when and to whom they were made. *Jade G.*, 2007-NMSC-010, ¶16. The New Mexico Supreme Court has found that excluding all statements of children under the age of 13 is compatible with the legislative purpose of protecting the very young and furthers the goal of encouraging free communication between children and adults. *Jade G.*, ¶19.

24.2.2 Statements of 13 and 14 Year Olds

24.2.2.1 Rebuttable Presumption of Inadmissibility

If a child is 13 or 14 years old, there is a rebuttable presumption that any confessions, statements or admissions made by the child to a person in a position of authority are inadmissible. §32A-2-14(F). Unlike Subsections C through E of §32A-2-14, which codify standards for determining the validity of a waiver of constitutional rights and apply to state actors, Subsection F is not limited to custodial questioning. Subsection F applies to statements by a child to any adult in a position of authority, regardless of whether the adult is acting on behalf of the state. A person in a position of authority has been described as broad enough to include parents, other adult relatives, employers, private security guards or teachers. *See State v. Adam J.*, 2003-NMCA-080, ¶¶16, 17 (Alarid, J., specially concurring).

24.2.2.2 Purpose of Presumption

According to the Court of Appeals, limiting the admissibility of statements made by a 13 or 14 year old child reflects the Legislature's expectation that most children of that age are not capable of making a knowing, intelligent, and voluntary waiver, and its attempt to draw a line based on age between children who are too young to waive their rights and children who are not. *State v. Adam J.*, 2003-NMCA-080, ¶8. *See also State v. Jonathan M.*, 109 N.M. 789, 791 P.2d 64 (1990) (decided under former code).

24.2.2.3 Factors to Overcome Presumption

When determining whether the state has rebutted the presumption of inadmissibility of such statements, the child's maturity and intelligence are appropriate factors to consider. If the state fails to prove that the child is more intelligent or mature than the average 13 or 14 year old, then the state cannot overcome the presumption. In other words, the state must prove that the child

had a greater ability to give a knowing, intelligent, and voluntary waiver than the average 13 or 14 year old. The children's court may consider the personal traits of the child, such as the child's background, maturity, intelligence, ability to understand and react to new situations, and other relevant personal factors in making its determination of whether the child differs from the expectations adopted in the presumption and is therefore capable of making a knowing, intelligent, and voluntary waiver. *State v. Adam J.*, 2003-NMCA-080, ¶¶6, 11, and 8.

24.2.3 Statements Made During Police Questioning

24.2.3.1 Enhanced Protection for Children Subject to Police Questioning

Subsection C of §32A-2-14 provides that no person subject to the provisions of the Delinquency Act who is "alleged" or "suspected" of being a delinquent child may be interrogated or questioned without first advising the child of his or her constitutional rights and securing a knowing, intelligent, and voluntary waiver. A person is "alleged" to be a delinquent child when formal charges have been filed, and a person is "suspected" of being a delinquent child when the child is seized pursuant to an investigatory detention and not free to leave. *State v. Javier M.*, 2001-NMSC-030, ¶38.

In contrast, in criminal proceedings defendants need not be advised of their rights until they are subject to custodial interrogation. The Supreme Court has found that the distinction between children and adults is warranted because a child's possible immaturity makes him or her especially susceptible to intimidation during an investigatory detention and likely to feel pressures similar to those experienced by adults during custodial interrogation. *Javier M.*, 2001-NMSC-030, ¶37.

24.2.3.2 When *Miranda* Warnings Not Required

The Court of Appeals has held that police officers could ask questions about needles or weapons prior to a pat-down search to assure safety of officers without giving the individual a *Miranda* warning, provided that the officer's question was to protect the officer and arrestee from physical injury and was not intended to confirm or dispel the officer's suspicions of whether a child committed a delinquent act. *State v. Gerald B.*, 2006-NMCA-022. In *Gerald B.*, the appellate court also held that a child who volunteered that he possessed marijuana in response to the police officer's valid inquiry about needles was not entitled to suppression of the statements or the marijuana. *Id.* ¶2. (The pat-down search itself was not challenged.)

24.2.3.3 Knowing, Intelligent and Voluntary Waiver Required

Section 32A-2-14(D) provides that no statement or confession by a child may be introduced at a trial or hearing on delinquency unless the state proves that the statement or confession offered in evidence was elicited only after a knowing, intelligent, and voluntary waiver of the child's constitutional rights. In determining whether the child knowingly, intelligently, and voluntarily waived his or her rights, the court must consider the following factors:

- the age and education of the child;

- whether the child was in custody;
- the manner in which the child was advised of his rights;
- the length of questioning and circumstances under which the child was questioned;
- the condition of the quarters where the child was being kept at the time he or she was questioned;
- the time of day and the treatment of the child at the time of questioning;
- the mental and physical condition of the child at the time of questioning; and
- whether the child had the counsel of an attorney, friends, or relatives at the time of being questioned.

§32A-2-14(E). This list of factors is essentially a codification of the totality-of-circumstances test used to determine whether an adult defendant gave a knowing and voluntary confession, but emphasizes factors that may be particularly relevant for a juvenile, such as the presence of a relative or friend. *State v. Javier M.*, 2001-NMSC-030, ¶27 (citing *State v. Martinez*, 1999-NMSC-018, ¶18; *State v. Jason F.*, 1998-NMSC-010, ¶18) (citing *State v. Setser*, 1997-NMSC-004, ¶13).

Applying the factors in §32A-2-14(E), the New Mexico Supreme Court has ruled that a juvenile, even one with disabilities or without a parent or attorney present during the questioning, can knowingly, intelligently, and voluntarily waive constitutional rights. *See, e.g., State v. Setser*, 1997-NMSC-004, ¶14 (finding a valid waiver of right).

Practice Note. The factors set forth in §32A-2-14(E) relating to whether a child knowingly and intelligently waived his constitutional rights during police questioning apply to serious youthful offender proceedings. *See State v. Martinez*, 1999-NMSC-018, ¶17. Application of these factors to serious youthful offenders in district court makes little practical difference, however, because Subsection E is essentially a codification of the totality-of-the-circumstances test with emphasis on factors particularly relevant to juveniles. *Id.* ¶18.

24.2.3.4 Application of Factors in Case Law

The following case law addresses the admissibility of a child's statements and whether a child has knowingly, intelligently, and voluntarily waived the child's rights under §32A-2-14(E).

Express waiver not required:

State v. Martinez, 1999-NMSC-018, ¶19 (citing *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979)). The state need not prove that a child expressly waived his rights for such a waiver to be valid under *Miranda* and state law. The children's court may evaluate the particular facts and circumstances of the interrogation -- and the course of conduct -- when determining whether the waiver is knowing and voluntary.

Presence of Attorney or Parent Not Required:

State v. Martinez, 1999-NMSC-018, ¶24. A parent, friend, relative, or attorney for the child is not required to be present in order for a waiver of rights to be valid. The presence or absence of such a person is “merely one of the factors relevant in determining the validity of a waiver of rights.” In *Martinez*, the Court found that a child who was 17 years old at the time of questioning validly waived his rights even though a parent or attorney was not present and his mother was misled as to the nature of the charge.

State v. Lasner, 2000-NMSC-038. In *Lasner*, a 16 year old accused of first degree murder tried to suppress a confession given during custodial interrogation. The child argued that he was a minor, that a special form used by the police to advise juveniles of their rights was not used, that he was not informed of his right to have a lawyer, that the questioning occurred at 3:00 a.m. at the police station while he was in handcuffs, and that the tape recorder was turned off at a point during the interrogation where he might have vacillated about understanding his rights. The Supreme Court rejected the child’s arguments and found that he had validly waived his rights. The Court regarded the child’s association with gangs and previous experience with the court system, including being represented by lawyers and being questioned in the past, as persuasive factors in determining that he had voluntarily waived his constitutional rights. The Court also found the child’s age and eleventh grade education to be important when determining that he knowingly and voluntarily waived his rights. The Court found a valid waiver even though there was evidence that, at the time of the interrogation, the child’s mother knew he was in police custody and was attempting to contact an attorney. The Court noted that the Legislature had not required that parents be notified of a custodial interrogation. *See id.* ¶11.

Age as a Factor:

State v. Jonathan M., 109 N.M. 789, 791 P.2d 64 (1990). In *Jonathan M.*, the Supreme Court was considering whether certain statements by a child under the age of fifteen could be admitted under a statute that, at the time, prohibited the admission of confessions, statements or admissions against a child under the age of fifteen. It held that the plain meaning of the statute precluded admission of the statements. The statute has since been changed but at the time the Court observed:

[c]hildren of tender years lack the maturity to understand constitutional rights and the force of will to assert those constitutional rights. Children are encouraged to respect and obey adults and should not be expected to assert their constitutional rights even under the most perfunctory questioning by any adult, particularly an adult of authority. By prohibiting the admission of statements made by children under age fifteen, Section 32-1-27(F) encourages children to freely converse with adults without fear that their statements will be used against them at a later date. In contrast, a adult or a child over age fifteen was unlikely to make an involuntary statement in a noncustodial, noncoercive atmosphere or after receiving *Miranda* warnings. being advised of his rights.

109 N.M. at 791, 791 P.2d at 66. *See also, e.g., State v. Setser*, 1997-NMSC-004¶14 (finding that a 16 year old had sufficient intelligence to understand her rights and the repercussions of a

waiver) and *State v. Jones*, 566 N.E.2d 317, 324-25 & n. 4 (Minn. 1997) (finding that the age of 17 ½ weighed in favor of concluding that a waiver was knowing and intelligent).

Mental Problems and Low Intelligence Insufficient to Prove Valid Waiver:

State v. Setser, 1997-NMSC-004. Applying the factors in §32A-2-14(E), the Supreme Court ruled that a juvenile, even one with disabilities or without a parent or attorney present during the questioning, can knowingly, intelligently, and voluntarily waive his or her constitutional rights. In *Setser*, a 16 year old convicted of two counts of first degree murder appealed her conviction partly on the basis that the trial court erred in admitting two confessions.

At trial, the child attempted to have the confessions suppressed, claiming that she lacked the capacity to waive her *Miranda* rights. The child had a long history of abuse and mental problems, and drug and alcohol abuse. There was also evidence that the respondent had a low IQ and was passive and easily dominated. However, after having her rights individually read to her and being asked whether she understood each one, the juvenile consented to police questioning and refused to have a parent or attorney present. The Court applied the criteria in §32A-2-14(E) and found that, even though the child suffered from some conditions that affected her cognitive abilities, there was no evidence that she lacked sufficient intelligence to understand her rights and the repercussions of waiving those rights. *Setser*, 1997-NMSC-004, ¶13-145.

Previous Contacts With Police:

State v. Martinez, 1999-NMSC-018, ¶24. The court considered the child's previous contacts with law enforcement to support the conclusion that the child knowingly and voluntarily waived his rights, and as refuting the assertion that the statements were the product of a coercive environment. *See also Lasner*, 2000-NMSC-038, ¶23.

24.2.3.5 Suppression of Statements

If the state fails to prove that the child was advised of his or her constitutional rights and that a knowing, intelligent, and voluntary waiver of those rights was secured prior to questioning, then any statement or confession obtained as a result of the detention or seizure is inadmissible in any delinquency proceeding. §32A-2-14(D); *see also State v. Javier M.*, 2001-NMSC-030.

24.2.3.6 Corroboration Required

Extrajudicial admissions or confessions of a child, even if otherwise admissible, must be corroborated by other evidence and cannot on their own be used to support a finding that a child committed delinquent acts alleged in the petition. §32A-2-14(G).

24.2.3.7 Competency to Confess and Testify

The question of a child's competency to confess is separate from the issue of the child's ability to knowingly and voluntarily waive his or her constitutional rights. Rule 11-601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." The child has the burden of proving that he or she is incompetent at the time of confession. In

contrast, the state must prove by a preponderance of the evidence that a child's confession was given voluntarily. *State v. Jason F.*, 1998-NMSC-010, ¶17.

The test for mental competency to make a confession is whether a defendant “‘had sufficient mental capacity at the time to be conscious of what he [or she] was doing, to retain memory of his [or her] actions, and to relate with reasonable accuracy the details of his [or her] actions.’” *Jason F.*, 1998-NMSC-010, ¶18 (citations omitted).

The test for a knowing and intelligent waiver of constitutional rights in §32A-2-14(E) incorporates the principle of competency, in that the mental condition of the child at the time of the confession is one of the factors to be considered. However, under the test in Subsection E, a confession is not involuntary solely because of a child's mental state. The test for a knowing and voluntary waiver of constitutional rights under Subsection E includes other elements, including an element of police overreaching. *Jason F.*, 1998-NMSC-010, ¶¶18-19 (citing *State v. Fekete*, 120 N.M. 290, 299, 901 P.2d 708, 717 (1995)).

Chapter 27 of the New Mexico Child Welfare Handbook (<http://childlaw.unm.edu>) discusses in some detail issues concerning the competency of a minor to testify.

24.3 Fingerprinting or Photographing a Child

The police cannot fingerprint or photograph for identification purposes a child under the age of 13 alleged or adjudicated to be a delinquent child without obtaining a court order. §32A-2-14(I). A child is “alleged” to be a delinquent child, triggering the requirement of a court order, once a formal petition alleging delinquency has been filed in the children's court. *State v. Jade G.*, 2007-NMSC-010, ¶¶1, 29. In *Jade G.*, the Supreme Court found that the fingerprints of a 12 year old child were admissible because they were obtained before a formal delinquency petition was filed. *Id.*

24.4 Evidence of Prior Adjudications

24.4.1 Admissibility Under Delinquency Act

The Delinquency Act provides that a juvenile disposition and any evidence given in a court hearing in court are not admissible as evidence against the child in any case or proceeding in any other tribunal whether before or after reaching the age of majority, except in sentencing proceedings after conviction of a felony and then only for purpose of a presentence study and report. §32A-2-18(A).

If a judgment in a youthful offender or serious youthful offender proceeding results in an adult sentence, a record of the judgment may be admissible in any other case or proceeding involving the offender in any other court. §32A-2-18(B). The determination becomes a conviction. §32A-2-18(C).

24.4.2 Admissibility Under Rule 11-609

24.4.2.1 Respondent Child as Witness

Rule 11-609 governs the impeachment of witnesses by evidence of conviction of crime. A judgment resulting in a juvenile disposition is not a criminal conviction and may not be used to impeach a respondent child's testimony under Rule 11-609. *See* §32A-2-18(A); *State v. Sena*, 2008-NMCA-083, ¶10. Rule 11-609(D) itself states explicitly that evidence of juvenile adjudications is generally not admissible under the rule.

24.4.2.2 Witnesses Other Than Accused

While evidence of prior juvenile adjudications is not admissible against the respondent child under Rule 11-609, in a criminal case, the court may allow evidence of a juvenile adjudication of a witness *other than the accused* if:

- conviction of the offense would be admissible to attack the credibility of an adult (*see* §24.4.2.3 below); and
- the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. Rule 11-609(D).

24.4.2.3 Evidence of Prior Convictions to Attack Credibility of Adult Witness Other Than Accused

Under Rule 11-609(A), the district court may admit evidence that a witness other than the accused has been convicted of a crime for the purpose of attacking the credibility of an adult witness if, subject to Rule 11-403 (exclusion of relevant evidence based on prejudice, confusion or waste of time):

- the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted; and
- the court finds that the probative value of admitting such evidence outweighs its prejudicial effect to the accused. Rule 11-609(A).

However, regardless of the punishment, the court may admit evidence that a witness has been convicted of a crime for the purpose of attacking the witness' character for truthfulness if it can readily be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. Rule 11-609(A).

Evidence of a conviction for the purpose of attacking the credibility of an adult witness is not admissible under Rule 11-609 if:

- more than 10 years has elapsed since the date of the conviction or the release of the witness from confinement imposed as a result of that conviction, whichever is the later date; or

- a conviction has been pardoned or annulled, or a certificate of rehabilitation has been issued, and the circumstances surrounding the conviction otherwise meet the criteria in the rule. Rule 10-609(C).

Practice Note. Query whether a juvenile disposition, which is not a conviction of a crime under Children’s Code §32A-2-18, counts as a conviction under this rule. Similarly, it is not clear how a disposition, once sealed under §32A-2-26 and Rule 10-262, would be used under this rule.

24.4.3 Specific Instances of Conduct

While evidence of a prior juvenile adjudication is not admissible against a respondent child under Rule 11-609, an inquiry into the conduct underlying an adjudication may be permissible to attack or support the credibility of a witness, including the respondent. In a 1981 decision, the Court of Appeals concluded that Rule 11-608 (Evidence of character and conduct of witness) allowed inquiry on cross-examination into specific acts committed by the defendant as a juvenile. In the case, the prosecutor asked about specific instances of misconduct but did not ask about juvenile adjudications, and no evidence of juvenile adjudications was presented. *State v. Wyman*, 96 N.M. 558, 559, 632 P.2d 1196, 1197 (Ct. App. 1981).

In *Wyman*, the defendant argued that the trial court impermissibly permitted the prosecutor to cross-examine the defendant concerning specific instances of misconduct committed when defendant was a child. Defendant argued that the purpose of Rule 11-609, which provides that “[e]vidence of juvenile adjudications is generally not admissible under this rule,” is to exclude questioning about specific conduct as well as the adjudication, and the questions impermissibly circumvented Rule 11-609(C). The Court of Appeals rejected the defendant’s argument, finding that “[s]pecific conduct, admissible on cross-examination to attack credibility, is not to be excluded because an adjudication based on that conduct is excluded.” *Wyman*, 96 N.M. at 559-60, 632 P.2d at 1197-98.

24.4.4 Rule 11-404: Character Evidence

Rule 11-404 permits a defendant in a criminal case to offer evidence of a pertinent trait of character to prove action in conformity therewith, and permits a prosecutor to offer evidence to rebut the same. However, Rule 11-405 limits the methods that may be used to prove character. The prosecution may not introduce a prior juvenile judgment and disposition to rebut evidence of a good character trait offered by defendant pursuant to Rule 11-404(A)(1). In *State v. Sena*, the Court of Appeals ruled that Rule 11-405 did not permit a juvenile judgment and disposition to be admitted into evidence to refute a defendant’s testimony that he had not been convicted of a crime. 2008-NMCA-053, ¶12.

24.4.5 Rule 11-403: Prejudicial Effect of Testimony of Probation Officer

Rule 11-403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. In *State v. Guess*, the Court of Appeals found that the trial court abused its discretion by allowing a juvenile probation officer to testify as to his opinion of the defendant's reputation for truthfulness. 98 N.M. 438, 440-441, 649 P.2d 506, 508-509 (Ct. App. 1982).

As a condition of testifying, the trial court in *Guess* required that the witness not disclose that he had been the defendant's juvenile probation officer or that the defendant had a juvenile record. The Court of Appeals found that the testimony, though relevant, should have been excluded because the testimony could have been otherwise obtained, and its probative value was substantially outweighed by the danger of unfair prejudice. The *Guess* court stated that allowing the witness to testify interfered with the defendant's right to cross-examine the probation officer, as any extensive questioning might reveal the nature of the defendant's relationship with the probation officer and the fact that the defendant had prior juvenile adjudications. The Court expressed its concern "with the unnecessary but implicit exposure of defendant's past juvenile record as a result of the State's choice of witness, and the resulting lack of choice to defendant to cross-examine." *Guess*, 98 N.M. at 442, 649 P.2d at 510.

Summary of Admissibility of Prior Juvenile Adjudications:

The Accused:

General Rule: Evidence of prior juvenile adjudications is not admissible against the accused in children's court or district court.

Exceptions:

- In delinquency or criminal cases, inquiry into the specific acts underlying a juvenile adjudication is permissible against the accused (or any other witness) for impeachment purposes under the terms of Rule 11-608(B); and
- In criminal cases and cases in which a juvenile is subject to adult sanctions, evidence of prior juvenile adjudications may be used for the purpose of a presentence study and report after conviction of a felony.

Witnesses Other Than The Accused:

General Rule: Evidence of prior juvenile adjudications of witnesses other than the accused is admissible for impeachment purposes under the terms of Rule 11-609(D), but only in criminal cases.

24.5 Rule 11-410: Admissions and No Contest Pleas

Under Rule 11-410, evidence of an admission in a children's court proceeding, later withdrawn, or a plea of no contest, or an offer to plead guilty or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

24.6 Privileges and Evidentiary Immunities

Even though the Rules of Evidence do not apply in detention and dispositional hearings in children's court, the rules on privileges apply to all stages of all actions, cases, and proceedings. Rule 11-1101(C).

24.6.1 Rule 11-509(B): Information Disclosed During Preliminary Inquiry

Rule 11-509(B) provides in relevant part that “[a] child alleged to be delinquent or in need of supervision . . . has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, either oral or written, between the child, parent, guardian or custodian and a probation officer or a social services worker which are made during the course of a preliminary inquiry.” This privilege extends to communications between a child, parent, guardian, or custodian and probation officer or social services worker made during the course of a preliminary inquiry. The child's attorney, probation officer, or social services worker may claim the privilege on behalf of the child, parent, guardian, or custodian. Rule 11-509(C).

24.6.2 Rule 11-503: Lawyer/Client Privilege

A child has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Rule 11-503. If a child has family members or other persons participate in discussions with the lawyer, it does not generally affect the applicability of the attorney-client evidentiary privilege if the presence of the third party is necessary to assist in the child's representation. *See* Committee Commentary to Rule 16-114 of the Rules of Professional Conduct on clients with diminished capacity, ¶3).

24.6.3 Rule 11-504: Physician-Patient/Psychotherapist-Patient Privilege

Rule 11-504(B) provides that

[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, including drug addiction, among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

Generally, statements made by persons to their physicians, therapists, or other health/mental health care providers are done with the expectation of confidentiality and this privilege supports that expectation. The communications must be intended to be confidential and must be for the purpose of diagnosis and treatment. The communications can include family members if they

are participating in the diagnosis and treatment. Rule 11-504(B). The child patient or the child patient's guardian may claim the privilege, or the person who was the physician or psychotherapist may claim the privilege on behalf of the child patient. Rule 11-504(C).

There is an exception for court-ordered examinations of the child. Communications made in the course of a court-ordered examination are not privileged with respect to the particular purpose for which the examination is ordered unless the court orders otherwise. Rule 11-504(D)(2).

The children's court rule on insanity and specific intent provides that the children's court judge may order a mental examination of the child upon motion and upon good cause shown. Rule 10-241(B). A statement made by a child during a mental health examination or treatment subsequent to the commission of an alleged delinquent act is only admissible before or at adjudication on the issue of the child's sanity, ability to form specific intent, or competency to participate in the proceedings. Rule 10-241(D); *see also* Rule 5-602(E).

There is no privilege as to communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense. Similarly, there is no privilege, after the patient's death, in a proceeding in which a party relies upon the condition as an element of the party's claim or defense. Rule 11-504(D).

Communications relevant to any information that a doctor, psychotherapist, or patient is required by statute to report to a public employee or state agency are also exceptions to the rule on privileges. *See* Rule 11-504(D).

24.7 Pre-Trial Motions and Notices

If required under the Children's Court Rules or the Children's Code, the following notices and motions must be filed at the times specified below:

- **Notice of insanity defense** must be filed within 10 days after service of petition or 10 days after an attorney is appointed, whichever is later, unless the time frame is waived upon good cause shown. Rule 10-241(A) NMRA.
- **Notice of incapacity to form specific intent** must be filed within 10 days after service of petition or 10 days after an attorney is appointed if the child intends to call a witness on the issue of whether the child was incapable of forming specific intent. Rule 10-241(A) and (E).
- **Notice of witnesses** that the parties intend to call at the hearing must be provided under the terms of Rules 10-231 and 10-232. *See also* Rules 5-501 and 5-502; *State v. Setser*, 1997-NMSC-004, ¶19 (finding no prejudice in failing to disclose the calling of a witness to respondent and no denial of right of confrontation).

Other disclosures and information must be provided by the state and the respondent child pursuant to the terms of Rules 10-231 and 10-232. *See* Chapter 23, Discovery and Disclosure.

Notice to offer evidence of the victim's past sexual conduct pursuant to §§30-9-11 to 30-9-15 must be given by the respondent child by filing a written motion prior to trial. The court must hear the motion prior to trial at an in camera hearing to determine whether such evidence is admissible under Rule 11-413(A). If new information that the child proposes to offer under Rule 11-413(A) is discovered prior to or during the trial, the judge must order an *in camera* hearing to determine whether the proposed evidence is admissible. If the evidence is deemed admissible, the court will issue a written order stating what evidence may be introduced by the child and stating the specific questions to be permitted. *See* Rule 11-413.

24.8 Videotaped Depositions

24.8.1 Videotaped Depositions under Rule 10-243

24.8.1.1 Prerequisites

Under certain circumstances, a videotaped deposition of any alleged victim of sexual offenses who is under the age of 16 may be used in lieu of direct testimony at trial and admitted into evidence at trial. Rule 10-234. Rule 10-234(B) describes this as an additional exception to the hearsay rule as set forth in the Rules of Evidence. The prerequisites for taking a videotaped deposition and related requirements are discussed in Chapter 23, Discovery and Disclosure.

24.8.1.2 Admissibility

All or part of a videotaped deposition of a child under 16 years of age taken pursuant to Rule 10-234(A) may be shown to the judge or the jury and admitted as evidence at the adjudicatory hearing of a respondent child who is charged with criminal sexual penetration or criminal sexual contact on a child under 16 years of age if:

- the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;
- the deposition was presided over by a children's court judge and the child was present and represented by counsel or waived counsel; and
- the child was given an adequate opportunity to cross examine the child, subject to such protection of the child as the judge deems necessary. Rule 10-234(B).

The Court of Appeals has held that the procedure for videotaped depositions is consistent with a defendant's Sixth Amendment right of confrontation. *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

24.8.1.3 Protective Order

Videotaped depositions admitted into evidence as part of the court record are subject to a protective order issued by the court for the purpose of protecting the victim's privacy. §30-9-17(E); Rule 10-138.

24.8.2 Videotaped Depositions under Uniform Act

During the 2011 session, the Legislature passed and the Governor signed the Uniform Child Witness Protective Measures Act, which takes effect in July of 2012. The Act sets forth standards and procedures for allowing a child witness in particular circumstances to testify by alternative methods in criminal and civil proceedings. Delinquency proceedings are included within the definition of criminal proceedings for the purposes of the Act. *See* 2011 N.M. Laws, Ch. 98 (HB 196), codified at §§38-6A-1 through 38-6A-9 (effective July 1, 2012).

Under this new law, the court may allow a child witness under the age of 16 to testify by videotaped deposition upon a showing that the child witness may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. A number of factors must be considered by the court when deciding whether to permit an alternative method. §§38-6A-5, 38-6A-6. *See* Handbook §23.1.3 for more information.

As noted in Chapter 23, it is too early to know whether the Supreme Court will adopt rules on the new law for children's court.

24.8.3 Sixth Amendment Considerations

The children's court must carefully consider the respondent's Sixth Amendment right to confrontation in light of any unreasonable mental or emotional harm the victim will suffer if required to testify in open court in the respondent's presence. If the judge finds that the harm to the victim outweighs the respondent's right to a face-to-face confrontation and exercises his or her discretion to order protective measures, the measures must be reasonable and necessary to prevent trauma to the victim and there must be individualized findings to this effect. *State v. Benny E.*, 110 N.M. 237, 242, 794 P.2d 380, 385 (Ct. App. 1990) (*citing State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App. 1988)).

The determination must be supported by substantial evidence. *See Benny E.*, 110 N.M. at 241, 794 P.2d at 384. Otherwise, the child's right of confrontation requires that he or she be permitted to confront each of the witnesses against him or her, including the child victim. *Id.*

The following cases weigh the defendant's or respondent child's Sixth Amendment right of confrontation against the policy behind allowing videotaped depositions. It should be noted that they predate *Crawford v. Washington*, 541 U.S. 36 (2004), discussed later in this chapter.

In *State v. Herrera*, 2004-NMCA-015, the defendant challenged the district court's admission of a deposition tape without making findings of fact or otherwise weighing his right of confrontation against the potential harm that would result from a face to face encounter with the victim. The Court of Appeals found that defendant implicitly waived his right to confront the child witnesses against him when he did not file a response to the State's motion for a videotaped deposition, did not object when the videotaped deposition was taken or admitted as evidence, and when he relied on the deposition tape in his opening and closing arguments.

In *State v. Fairweather*, 116 N.M. 456, 461-463, 863 P.2d 1077, 1082-1084 (1993), the defendant was not permitted to be present during the videotaped depositions of two child victims. He was permitted to view their testimony on a monitor, and his attorney was present and cross-examined the victims. He was not able to speak with his attorney during the depositions, but was able to have messages handed to him. The defendant claimed that because he was not able to converse with his trial counsel simultaneously during the questioning of the boys during their videotaped testimony, he was denied effective assistance of counsel as well as the right to confront the witnesses against him. The Supreme Court rejected his claim because defendant failed to show how he was prejudiced by his exclusion from the witness's presence or the restriction placed on his counsel.

The Court also stated that the reason that a trial judge must make individualized findings justifying a deviation from the standard procedure of face to face confrontation in front of a jury is so that an appellate court may review those findings in determining whether the trial court properly balanced the defendant's Sixth Amendment right of confrontation with the need for protection of the child.

In *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990), a child was charged with criminal sexual contact with his eight year old sister. At trial, the victim testified in chambers with only counsel and the judge present and the accused child observed the victim testify on a video monitor located in another room. The respondent child challenged the procedure as violating his right of confrontation of the victim. The reviewing court found that there was sufficient evidence on the record, collected at a pretrial hearing, that the victim would be emotionally or mentally harmed if required to testify in the respondent child's presence. In addition, the respondent child offered no evidence to rebut the doctor's testimony. However, the Court failed to make individualized findings that the victim needed special protection. *Id.* at 241. The Court of Appeals found that "[a]bsent findings indicating the trial court was persuaded and why, the decision to deny a defendant his or her right of confrontation cannot be adequately reviewed on appeal." The Court remanded the case for individualized findings by the court regarding the victim's need for special protection. *Id.* at 242.

In *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App. 1988), the defendant challenged the procedure for taking videotaped depositions of five child victims as a violation of his Sixth Amendment right of confrontation. The defendant's counsel, counsel for the state, and the trial court judge were present at the deposition. The defendant was permitted to observe the deposition on a television monitor from a control booth, and defendant and his attorney were equipped with headsets and microphones for two-way communication. The Court of Appeals found that despite the absence of a face-to-face meeting between the defendant and his accusers, there was no denial of the right to confrontation. The court found that the deposition was taken in defendant's presence within the meaning of the statute and rule which are aimed at protecting children from psychological trauma. The court found that the trial court performed "a careful, informed weighing and balancing based on particularized evidence" which supported the showing that the harm to the victim outweighed the defendant's right to a face-to-face meeting.

24.9 Other Hearsay in Children's Court

24.9.1 Rule 11-803: Excited Utterances

Courts have upheld statements made by children under the excited utterance exception to the hearsay rule even when there has been a significant time lapse between the triggering event and the statement. While acknowledging that time is an important factor in determining whether the excited utterance exception applies, the Court of Appeals has stated that “admissibility depends more on circumstances than on time, and each case must depend on its own circumstances.” *In the Matter of Troy P.*, 114 N.M. 525, 529, 842 P.2d 742, 746 (Ct. App. 1992).

Courts have recognized that children react to traumatic events differently than adults, and have admitted spontaneous utterances made well after the event when the declarant was subject to rekindled excitement. For example, courts have upheld the admissibility of excited utterances naming the defendant made after the event, such as those made when a child awakens in the middle of the night. *See Troy P.*, 114 N.M. at 530, 842 P.2d at 747 (citing *George v. State*, 813 S.W.2d 792, 795-96 (Ark., modified, 818 S.W.2d 951 (Ark. 1991)); *State v. Boston*, 545 N.E.2d 1220, 1231 (Ohio 1989); *State v. Apodaca*, 80 N.M. 244, 453 P.2d 764 (Ct. App. 1969) (upholding child's statements under common law).

24.9.2 Rule-11-807: Residual Exception

Rule 11-807 contains the residual exception to the hearsay rule. This rule provides that a statement not specifically covered by Rule 11-803 or Rule 11-804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court makes the findings enumerated therein.

In *State v. Troy P.*, the Court of Appeals found that the trial court's admission of a videotape of a child talking to a social worker concerning allegations of sexual abuse by the respondent child under the residual exception violated the respondent child's right to confrontation and was reversible error. 114 N.M. 525, 528, 842 P.2d 742, 745 (Ct. App. 1992). The trial court had admitted the evidence under the residual exception to the hearsay rule contained in SCRA 1986, 11-804(B)(6), an earlier version of Rule 11-807. The defense was never given the opportunity to cross-examine the girl, either outside or in the presence of the jury. *Troy P.*, 114 N.M. at 529, 842 P.2d at 746. The Court of Appeals considered the social worker to have used suggestive interviewing techniques and pointed out the danger of such techniques in child sexual abuse cases. *Id.*, at 528., 842 P.2d at 745. The Court commented on how courts have been especially zealous in guarding the right to confront a child making allegations of sexual abuse when the child's statement was made with only a detective, social worker, or other type of skilled questioner asking questions.

24.10 The Right of Confrontation

24.10.1 *Crawford* and Testimonial Hearsay Evidence

Under the Confrontation Clauses of the Sixth Amendment to the U.S. Constitution (applied to states through the 14th Amendment) and Art. II, §14 of the New Mexico Constitution, criminal defendants have a right to cross-examine witnesses against them. This right may be compromised when a hearsay statement is admitted into evidence without the declarant being available for cross-examination. Consequently, the U.S. Supreme Court has ruled that when hearsay evidence offered against a criminal defendant is testimonial and the declarant is unavailable to testify, the federal Confrontation Clause prohibits admission of the evidence unless the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36 (2004).

The Supreme Court stated in *Crawford* that the “core class” of testimonial statements requiring the opportunity for cross-examination may include *ex parte* in-court testimony (or its functional equivalent) and extra-judicial statements contained in formalized testimonial materials.

Examples may include:

- affidavits;
- depositions;
- statements made while in police custody;
- statements made in response to police interrogation;
- confessions;
- prior testimony at a preliminary hearing, before a grand jury or during a former trial;
- similar pretrial statements that declarants would reasonably expect to be used in a prosecution; and
- statements made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for use at a later trial.

Since *Crawford*, New Mexico’s appellate courts have held hearsay evidence to be testimonial under the *Crawford* decision in a number of cases. See e.g., *State v. Walters*, 2007-NMSC-050; *State v. Romero*, 2007-NMSC-013; *State v. Forbes*, 2005-NMSC-027; *State v. Alvarez-Lopez*, 2004-NMSC-030; *State v. Johnson*, 2004-NMSC-029; *State v. Henderson*, 2006-NMCA-059; and *State v. Duarte*, 2004-NMCA-117.

In four of these cases, the Supreme Court or the Court of Appeals held that admission of an unavailable accomplice’s statement violated the defendant’s confrontation rights because the statements were made while in police custody. According to the courts, statements made during a custodial interview fall “squarely within the class of ‘testimonial’ evidence” described by *Crawford*. *Johnson*, 2004-NMSC-029, ¶7; see also *Forbes*, 2005-NMSC-27, ¶13; *Alvarez-Lopez*, 2004-NMSC-030, ¶24; and *Duarte*, 2004-NMCA-117, ¶13. Similarly, in a trial of multiple defendants, the statements made by the various defendants to the police were testimonial; “[t]he interrogation of the codefendants constituted an effort by the police to ‘prove past events potentially relevant to later criminal prosecution.’ ” *Walters*, 2007-NMSC-050, ¶23.

The preliminary hearing testimony of an unavailable witness is also considered testimonial. *State v. Henderson*, 2006-NMCA-059, ¶14. However, in *Henderson*, the court held that introduction of the testimonial evidence did not violate the Confrontation Clause because the defendant had a prior opportunity to cross-examine the statement being offered into evidence at trial. *Id.* ¶16.

In *State v. Bullcoming*, the New Mexico Supreme Court reversed its holding in *State v. Dedman*, 2004-NMSC-037, and held that a blood alcohol content report was testimonial evidence subject to the Confrontation Clause, in light of the U.S. Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). *State v. Bullcoming*, 2010-NMSC-007. However, the analyst who prepared the report had not testified at trial. The New Mexico Supreme Court decided that this did not bar admission of the report because "the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation." *Id.* ¶1. The U.S. Supreme Court, in a plurality decision, reversed. Rejecting the "mere scrivener" rationale, the Court held that it was a violation of the Confrontation Clause to have a surrogate provide testimony as to what the original analyst did or observed. *Bullcoming v. New Mexico*. 131 S. Ct. 2705, 2716 (2011).

The New Mexico Supreme Court has found that chemical forensic reports are also testimonial evidence subject to the Confrontation Clause. *State v. Aragon*, 2010-NMSC-008.

24.10.2 Nontestimonial Hearsay Evidence

In *Crawford*, the U.S. Supreme Court gave examples of types of hearsay that are normally not testimonial. These may include certain business records, for example, or statements made in furtherance of a criminal conspiracy. *Crawford v. Washington*, 541 U.S. 36, 56 (2004). In *Davis v. Washington*, the Court held that statements made in the course of a police operator's interrogation during a 911 call were not testimonial since the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. *Davis v. Washington*, 547 U.S. 813, 828-29 (2006).

New Mexico appellate courts have not been called upon to apply the *Crawford* analysis in a delinquency case. However, *In re Gault* extended to juveniles the Sixth Amendment right of confrontation. 387 U.S. 1, 56 (1968). *See* Chapter 1 of this Handbook for a further discussion of *In re Gault*, and Chapter 2 for a discussion of the right of confrontation. The *Crawford* analysis would thus appear to apply to the admission of hearsay evidence in a delinquency case. *Cf. In the Matter of Pamela A.G.*, 2006-NMSC-019, ¶12 (declaring that the Sixth Amendment right of confrontation as applied in *Crawford* does not apply in civil cases).

To summarize, before admitting hearsay evidence in a criminal case, New Mexico courts must now consider whether the hearsay in question is "testimonial." If the hearsay statement is testimonial and the declarant is unavailable to testify, the Confrontation Clause prohibits the statement's admission unless the defendant had an opportunity to cross-examine the declarant prior to trial. If the hearsay is not testimonial, then the evidentiary rules on hearsay govern its admissibility.

24.11 Rape Shield Law and Right of Confrontation

Rule 11-413(A) provides:

In prosecutions under Sections 30-9-11 to 30-9-15 NMSA 1978, evidence of the victim's past sexual conduct, opinion evidence thereof or of reputation for past sexual conduct shall not be admitted unless, and only to the extent that the court finds, that evidence of the victim's past sexual conduct is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

The purpose of Rule 11-413 NMRA and §30-9-16, otherwise referred to as New Mexico's rape shield statute, is “ ‘to emphasize the general irrelevance of a victim's sexual history, not to remove relevant evidence from the jury's consideration.’ ” *State v. Stephen F.*, 2008-NMSC-037, ¶7 (citing *Johnson*, 1997-NMSC-036, ¶21 (internal citation omitted)). While the rape shield law and rule aim at protecting a victim's privacy, the Sixth Amendment right of confrontation acts as a limitation on that protection. If application of the rape shield law or rule in a particular case would conflict with the respondent child's confrontation rights and prevent a full and fair defense, the statute and rule must yield to the child's right of confrontation. *See id.*

In order to introduce evidence of a victim's past sexual conduct, the respondent child “must establish a valid theory of relevance and must support that theory with adequate facts showing a nexus between his proffered evidence and his theory.” *State v. Stephen F.*, 2008-NMSC-037, ¶36. As noted in subchapter 24.7 above, the respondent must file a written motion prior to trial if the respondent plans on offering such evidence.

New Mexico courts apply a five factor framework originating from *State v. Johnson*, 1997-NMSC-036, to aid in determining whether the defendant has sufficiently established his or her theory of relevance to preserve his or her constitutional right to present evidence otherwise excluded by the rape shield law and rule.

In *State v. Stephen F.*, the New Mexico Supreme Court applied the *Johnson* framework to a delinquency case. The factors are:

- Whether there is a clear showing that the complainant committed the prior acts;
- Whether the circumstances of the prior acts closely resemble those of the present case;
- Whether the prior acts are clearly relevant to a material issue, such as identity, intent, or bias;
- Whether the evidence is necessary to the defendant's case; and
- Whether the probative value of the evidence outweighs its prejudicial effect.

Stephen F., 2008-NMSC-037, ¶8 (citing *Johnson*, 1997-NMSC-036, ¶¶27-28).

While a showing under this framework establishes a constitutional right to present evidence otherwise excluded by the rape shield law, the factors are only guidelines, not rigid requirements.

The five factors merely assist the trial court in exercising its discretion to admit the evidence. *Stephen F.*, 2008-NMSC-037, ¶14.

24.12 Questioning of Witness by Court

Rule 11-614 governs the calling and interrogation of witnesses by the court. The rule provides that the court may on its own motion or at the suggestion of a party call witnesses and all parties are entitled to cross-examine the witnesses called. Rule 11-614(A). While the rule seems to place no restraints on the calling of witnesses, the New Mexico Supreme Court has found that the court should rarely call witnesses in a criminal trial because the court must be extremely careful to preserve an attitude of impartiality. *See City of Portales v. Bell*, 72 N.M. 80, 380 P.2d 826 (1936).

The court is authorized to interrogate witnesses, whether called by itself or by a party, provided that in jury trials, the court's questioning must be cautiously guarded so as not to constitute an implied comment. Rule 11-614(B). Parties may object to the court's calling of witnesses or interrogation at the time or at the next available opportunity when the jury is not present.

The Court of Appeals held under an earlier version of Rule 11-614 (SCRA 1986, 11-611) that it was permissible for the children's court judge to question a child witness using a drawing. *State v. Benny E.* involved a 15 year old child accused of criminal sexual contact of a minor. The judge drew a stick figure of person in order to have the victim demonstrate what she meant by "private parts." The Court found that since the use of the drawing effectively led the victim to testify that private parts referred to her groin or primary genital area, such use was permissible because it was necessary to develop the witness's testimony. 110 N.M. 237, 244, 794 P.2d 380, 387 (Ct. App. 1990).

CHAPTER 25

INSANITY, LACK OF CAPACITY, ALIBI AND ENTRAPMENT DEFENSES

This chapter covers:

- Insanity defense
- Incapacity to form a specific intent
- Alibi and entrapment defenses

25.1 Insanity Defense

25.1.1 Insanity Compared With Incompetency

The issue of insanity, like the issue of incompetency, focuses on the child's mental state. However, insanity and incompetency are distinguishable. Insanity describes the child's mental condition at the time of the crime. In contrast, incompetency refers to the child's mental condition at the time of trial. While insanity is a defense in a criminal trial or delinquency adjudication, incompetency is a total bar to standing trial. Competency to stand trial is discussed in Chapter 26 of this Handbook.

25.1.2 Formal Notice Required; Deadline

The child must give notice of the defense of insanity within:

- 10 days after service of the petition; or
- 10 days after an attorney is appointed or enters an appearance on behalf of the child,

whichever is later. The court may waive this deadline upon good cause shown. Rule 10-241(A).

Youthful Offender Note. Rule 5-602(A) is the applicable rule for raising the insanity defense in a youthful offender proceeding. While Rule 10-241 and Rule 5-602 have similar language, the time frames for giving notice are different. The time frame for filing the notice under the Children's Court Rules is triggered by the filing of the petition, whereas the time frame for filing the notice under the Rules of Criminal Procedure is tied to the arraignment date, and is generally required within twenty days.

Note that the children's court attorney (CCA) is required to file a notice of intent to invoke adult sanctions on a youthful offender, which triggers application of the Rules of Criminal Procedure, within the same time frame as defense counsel is required to file a notice of insanity defense under the Children's Court Rules.

25.1.3 Mental Examination

25.1.3.1 Court May Order Exam

Under §32A-2-17(B), when there are indications that the child may have a mental disorder or developmental disability, the court, on motion by the CCA or counsel for the child, may order the child to be examined at a suitable place by a physician or psychiatrist, a licensed psychologist, a licensed professional clinical counselor, or a licensed independent social worker prior to a hearing on the merits of the petition. The examination made prior to the hearing or as part of the predisposition study and report would be conducted on an outpatient basis, unless the court finds that placement in a hospital or other appropriate facility is necessary. *Id.*

Practice Notes: Section 32A-2-32 specifically provides that that social records, behavioral health screenings, diagnostic evaluations, and psychiatric reports are confidential and may not be disclosed directly or indirectly to the public.

Also, if the exam has been ordered for purposes of the defense prior to adjudication, it is likely that the report would only be disclosed to other parties or the court if the child's counsel decided to use it in court, in which case the disclosure requirements of Rule 10-232 must be met.

25.1.3.2 Good Cause Required

The Children's Court Rules addressing the insanity defense require a showing of good cause before the court may order a mental examination of the child. Rule 10-241(B) provides that "[u]pon motion and upon good cause shown the children's court judge shall order a mental examination of the respondent child." *See also* Rule 5-602(C). While the requirements of the Children's Court and District Court rule have mandatory language, requiring a showing of good cause effectively invokes the court's exercise of its discretion. *See State v. Garcia*, 2000-NMCA-014, ¶27.

The following are examples of cases that do not rise to the level of good cause for a mental examination in the criminal context:

- In *State v. Jaramillo*, 88 N.M. 179, 180, 538 P.2d 1201, 1202 (Ct. App. 1975), the Court of Appeals ruled that the defendant's motion for a psychiatric examination in order to evaluate a possible insanity defense was properly denied where the record did not show any attempt by the defendant to show good cause for a mental examination.
- In *State v. Chacon*, 100 N.M. 704, 706, 675 P.2d 1003, 1005 (Ct. App. 1983), the Court of Appeals found that counsel's conclusions about defendant's alcoholism and refusal to plea bargain, with nothing more, was insufficient to show good cause for ordering a mental examination, in this case to show incompetency.
- In *State v. Flores*, 2005-NMCA-135, ¶¶27-29, the Court of Appeals ruled that unsubstantiated assertions and opinion regarding a defendant's competency alone without more evidence are insufficient to demonstrate good cause for a mental examination.

25.1.3.3 Motion Not Constructive Notice of Insanity Defense

In the criminal context, courts have ruled that motions for psychiatric examinations cannot be interpreted as giving notice within the time provided by the Rules of Criminal Procedure for raising an insanity defense. *See State v. Silva*, 88 N.M. 631, 545 P.2d 490 (Ct. App. 1976), as well as *State v. Young*, 91 N.M. 647, 650, 579 P.2d 179, 182 (Ct. App. 1978) (concerning motion for mental examination to determine competency). In *Silva*, the defendant argued that his motion for a psychiatric examination, which stated that counsel needed a mental examination for determining whether defendant was sane when he committed the acts resulting in criminal charges, constituted constructive notice of an insanity defense. The Court of Appeals rejected his argument, finding that the motion could not be construed as giving notice that an insanity defense would be raised. 88 N.M. at 326, 545 P.2d at 491.

25.1.4 Determination of Issue of Insanity

The children's court judge determines the issue of insanity in judge trials, and the jury determines the issue by a special verdict in jury trials. *See* Rule 10-241(C).

25.1.5 Elements of the Defense

Practice Note. Instructions for the use of UJIs in delinquency proceedings can be found in Rules 14-9001 through 14-9004. They include substituting the word “child” for “defendant.”

The uniform jury instructions for criminal cases (UJIs) set forth the elements of the defense of insanity. According to UJI 14-5101, the defendant was insane at the time of commission of the crime if, because of a “mental disease,” the defendant:

- did not know what he or she was doing or understand the consequences of his or her act;
- did not know that his or her act was wrong; or
- could not prevent himself or herself from committing the act.

The UJI defines a “mental disease” as “a specific disorder of the mind that both substantially affects mental processes and substantially impairs behavior controls. This specific disorder must also be a long-standing disorder. It must extend over a considerable period of time, as distinguished from a momentary condition arising under the pressure of circumstances.”

The term “mental disease” “does not include a personality disorder or an abnormality manifested only by repeated criminal conduct or by other anti-social conduct.” UJI 14-5101.

25.1.6 Burden of Proof

25.1.6.1 Child's Initial Burden

In criminal trials, a defendant must offer evidence tending to show his insanity at the time of the offense in order to create a jury question on the issue of insanity. *State v. Wilson*, 85 N.M. 552,

555, 514 P.2d 603, 606 (1973); *see also State v. James*, 85 N.M. 230, 232, 511 P.2d 556, 558 (Ct. App. 1973) (defendant must offer evidence to raise a reasonable doubt as to his sanity in order to shift the burden to the state to prove sanity). To establish the defense of insanity, a defendant has the burden of introducing at least some competent evidence to support his claim. *State v. Najjar*, 104 N.M. 540, 543, 724 P.2d 249, 252 (Ct. App. 1986). Evidence adduced by the state tending to show the defendant's insanity is sufficient to raise a judge or jury question on this issue. *See Wilson*, 85 N.M. at 555, 414 P.2d at 606.

Determining whether there is sufficient evidence of insanity to permit the jury to consider the question as a factual question is, in the first instance, a question of law for the court. *State v. Murray*, 91 N.M. 154, 155, 571 P.2d 421, 422 (Ct. App. 1977). In jury trials, if the trial court determines that there is sufficient evidence to raise an issue of defendant's sanity, the issue is submitted to the jury for decision, but the evidence may be so clear that the trial court may rule as a matter of law that the defendant was insane. *Id.*

25.1.6.2 Presumption of Sanity

If the judge finds that there is sufficient evidence present on the record to raise a reasonable doubt as to the child's sanity, the burden is on the state to prove beyond a reasonable doubt that the child was sane at the time the offense was committed. *See Rule 14-5101*. There is a presumption of sanity on which the state may rely in making this showing. Indeed, this presumption means that the state is not required to offer evidence of sanity in order to establish that child was sane at the time of committing the offense. *See State v. Wilson*, 85 N.M. at 555, 514 P.2d at 606. Except in a case where the evidence of insanity is so clear that it requires a directed verdict, the presumption abides with the state throughout the case and continues until after the child has made a sufficient showing to procure insanity instructions at trial.

25.1.7 Expert Testimony

In criminal cases, expert testimony on the issue of insanity is not binding on the fact finder and the jury may believe or disbelieve expert testimony as it chooses. Such evidence presents a question of fact which the judge or jury properly decides. *State v. Noble*, 90 N.M. 360, 364, 563 P.2d 1153, 1157 (1977). The judgments of experts or inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive. *State v. James*, 85 N.M. 230, 232-33, 511 P.2d 556, 558-59 (Ct. App. 1973). The jury is not required to accept expert testimony and may reject contradictory non-expert opinion. 85 N.M. at 232, 511 P.2d at 558.

25.1.8 Consequences of Judgment of Insanity

If the judge or jury determines that a child was insane at the time that he or she committed the offense, the child must be discharged on the ground of insanity, and a judgment dismissing the petition with prejudice is entered. Commitment proceedings for the child due to any mental disorder or developmental disability are "pursuant to law," namely the Children's Mental Health and Developmental Disabilities Act. *See Rule 10-241(C)*. This Act is described in Chapter 27 of the Handbook.

25.2 Incapacity to Form Specific Intent

25.2.1 Generally

The defense of lack of capacity to form specific intent applies only in cases in which intent is a specific element of the crime. For instance, the crimes of first degree murder, burglary, and attempt are intent crimes. “The defense requires ‘evidence of the condition of the mind of the accused at the time of the crime, together with the surrounding circumstances,... to prove that the situation was such that’ the defendant was unable to form specific intent, and thus lacked ‘any deliberate or premeditated design.’ ” *State v. Boyett*, 2008-NMSC-030, ¶27 (citation omitted).

The defense may apply:

- when the defendant was intoxicated from the use of alcohol or drugs; or
- when the defendant suffered from a mental disease or disorder.

Id. ¶27.

25.2.2 Notice

If the child plans on calling an expert witness on the issue of whether the child was incapable of forming the specific intent required as an element of an alleged delinquent act, she must give notice in the same manner and time as notice of insanity as a defense. Rule 10-241(E). Accordingly, the child must give notice within 10 days after service of the petition or within 10 days after an attorney is appointed or enters an appearance on behalf of the child, whichever is later. Upon good cause shown, the court may waive this time requirement. Rule 10-241(A).

Youthful Offender Cases: The corresponding rule applicable to youthful offender and serious youthful offender proceedings is Rule 5-602(F) of the Rules of Criminal Procedure. While the rules are similar, the time frame for filing the notice in the Children’s Court Rule is triggered by the filing of the petition, whereas the time frame for filing the notice under the criminal rules is tied to the date of arraignment. Also, under the criminal rules, the time frame is generally 20 days rather than 10 days.

25.2.3 Mental Examination

Under §32A-2-17(B) of the Delinquency Act, when there are indications that the child may have a mental disorder or developmental disability, the court, on motion by the CCA or counsel for the child, may order the child to be examined at a suitable place by a physician or psychiatrist, a licensed psychologist, a licensed professional clinical counselor, or a licensed independent social worker prior to a hearing on the merits of the petition. The examination made prior to the hearing would be conducted on an outpatient basis, unless the court finds that placement in a hospital or other appropriate facility is necessary. *Id.* The Children’s Court Rules require that the movant show good cause for the judge to order a mental exam. *See* Rule 10-241(B) as well

as Rule 5-602(C). The good cause requirement is discussed earlier in this chapter in connection with the insanity defense.

Practice Notes: As noted above, §32A-2-32 specifically provides that that social records, behavioral health screenings, diagnostic evaluations, and psychiatric reports are confidential and may not be disclosed directly or indirectly to the public.

Also, if the exam has been ordered for purposes of the defense prior to adjudication, it is likely that the report would only be disclosed to other parties or the court if the child's counsel decided to use it in court, in which case the disclosure requirements of Rule 10-232 must be met.

25.2.4 Determination of the Issue

The Children's Court judge determines the issue of lack of capacity to form specific intent in judge trials, and the jury determines the issue by a special verdict in jury trials. Rule 10-241(C).

25.2.5 Burden of Proof

To establish the defense of lack of capacity, the child has the burden of introducing at least some competent evidence to support his claim. *See State v. Najar*, 104 N.M. 540, 543, 724 P.2d 249, 252 (Ct. App. 1986). When an inability to form specific intent defense is based on a mental disease or disorder, "an instruction 'is proper only when there is evidence that reasonably tends to show that the defendant's claimed mental disease or disorder renders the defendant incapable of forming specific intent at the time of the offense.' " *State v. Boyett*, 2008-NMSC-030, ¶30 (quoting *State v. Balderama*, 2004-NMSC-008, ¶38).

While expert testimony is not categorically required to support a lack of specific intent claim, non-expert testimony does not always suffice. *Boyett* at ¶28 (non-expert testimony may not always be adequate to support a claim of lack of capacity to form specific intent). In *Boyett*, the Supreme Court observed that "[w]hen understanding the purported cause of a defendant's inability to form specific intent goes beyond common knowledge and experience and requires scientific or specialized knowledge, lay witnesses are not qualified to testify and expert testimony is required." *Id.*

In *Boyett*, defendant argued that his organic brain damage caused his inability to form the specific intent to commit murder. Defendant on appeal challenged the trial court's failure to instruct the jury on the issue due to the defendant's failure to proffer expert testimony on the issue. The Supreme Court stated that in many cases, the connection between a defendant's medical condition and its effect on his or her ability to form specific intent must be established by expert testimony because the question often involves complex medical issues beyond the scope of common knowledge and experience. The Court determined that the trial court's conclusion that expert testimony was necessary to link the defendant's brain injury to his inability to form the required intent was not erroneous. *Boyett*, ¶28 & n.1 (also noting that Rule

11-701(C), which was promulgated after defendant's trial, adopts the common law principle that lay witnesses may not testify to matters requiring scientific or specialized knowledge).

25.2.6 Elements

25.2.6.1 Homicide Cases

UJI 14-5110 is the jury instruction that covers inability to form a deliberate intention to take away the life of another. It is to be used only for willful and deliberate murder [UJI 14-201], when the child has relied on the defense of 'diminished responsibility' or "inability to form specific intent." UJI 14-5110, n.1.

The instruction applies when:

- the child was intoxicated from the use of alcohol or drugs; or
- the child suffered from a mental disease or disorder.

See UJI 14-5110, n.2. If the judge determines that the child has made a prima facie case of lack of capacity to form a specific intent, the state has the burden of proving beyond a reasonable doubt that the child was capable of forming a deliberate intent to take the life of another. If the judge or jury has a reasonable doubt as to whether the child was capable of forming such an intention, the judge or jury must find the child not guilty of first degree murder by deliberate killing. *See* UJI 14-5110.

25.2.6.2 Crimes Other Than Homicide

UJI 14-5111 is the jury instruction on inability to form the intent to do a further act or achieve a further consequence. The instruction is used for the intoxication or mental disease defense for a crime, other than a homicide crime, that includes an element of intent to do a further act or achieve a further consequence.

The burden is on the state to prove beyond a reasonable doubt that the child was capable of forming the intent required to commit the offense charged. If the judge or jury has a reasonable doubt as to whether the child was capable of forming the requisite intent, the judge or jury must find the child not guilty of the offense charged. *See* UJI 14-5111.

25.2.7 Expert Testimony

Expert testimony on the issue of lack of specific intent is not binding on the fact finder and the jury may believe or disbelieve expert testimony as it chooses. Such evidence presents a question of fact which the judge or jury properly decides. *State v. Noble*, 90 N.M. 360, 364, 563 P.2d 1153, 1157 (1977) (addressing the need for expert testimony in the context of an insanity defense). The judgments of experts or inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive. *State v. James*, 85 N.M. 230, 232-33, 511 P.2d 556, 558-59 (Ct. App. 1973). The jury is not required to accept expert testimony and may reject contradictory non-expert opinion. *Id.* at 232; 511 P.2d at 558.

25.2.8 Consequences of Finding of Specific Intent

If the judge or jury finds that the child lacked the specific intent required as an element of the delinquent act, then the child is not guilty of the offense charged.

25.3 Alibi and Entrapment Defenses

“Alibi is a shorthand description for a defense that rests on the fact that the accused was elsewhere at the time the alleged offense took place.” *State v. McCarty*, 107 N.M. 651, 652, 763 P.2d 360, 362 (1988). The purpose of the notice of alibi rule is “to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.” *State v. Watley*, 109 N.M. 619, 622, 788 P.2d 375, 378 (Ct. App. 1989).

Entrapment generally occurs if the intent to commit the crime originated not with the defendant, but with the creative activities of law enforcement officers. “The focal issue in entrapment is the intent or predisposition of the defendant to commit the crime.” *State v. Hogervorst*, 90 N.M. 580, 585, 566 P.2d 828, 833 (Ct. App. 1977).

25.3.1 Notice to Children’s Court Attorney

Upon the written request of the CCA, a child who intends to offer evidence of an alibi or entrapment defense must serve written notice on the CCA of the child’s intention to introduce such evidence. The request by the CCA must specify as particularly as is known to the CCA, the place, date, and time of the commission of the delinquent act charged. The notice by the child must be served on the CCA not less than 10 days before the adjudicatory hearing or such time as the court directs. Rule 10-233(A).

25.3.2 Content of Notice

A notice of alibi or entrapment defense must contain the following:

- specific information as to the place at which the child claims to have been at the time of the alleged offense; and
- as particularly as known to the child or the child’s attorney, the names and addresses of the witnesses by whom the child proposes to establish such alibi or raise an issue of entrapment. Rule 10-233(B).

25.3.3 Notice of Rebuttal Witnesses

Not less than five days after receipt of the child’s alibi witness list or at such other time as the children’s court may direct, the CCA must serve on the child the names and addresses, as particularly as known to the CCA, of the witnesses the state proposes to offer in rebuttal to discredit the child’s alibi or claim of entrapment at the adjudicatory hearing. Rule 10-233(B).

25.3.4 Continuing Duty to Give Notice

The child and the CCA are under a continuing duty to promptly disclose the names and addresses of additional witnesses that come to the attention of either party subsequent to the filing of their respective witness lists as provided in the rule. Rule 10-233(C).

25.3.5 Failure by Child to Give Notice

If the child fails to serve a copy of notice of alibi as required under Rule 10-233, the children's court may exclude evidence offered by the child for the purpose of proving the alibi, except the child's testimony. If the child gives notice of an alibi or entrapment defense, the court may exclude the testimony of any witness offered by the child for the purpose of proving the alibi or entrapment if the name and address of the witness was known to the child or the child's attorney but was not included in the notice. Rule 10-233(D).

In *McCarty v. State*, 107 N.M. 651, 655, 763 P.2d 360 (1988), the Supreme Court pointed out that preclusion of testimony "constitutes a conscious mandatory distortion of the fact-finding process whenever applied," and "[b]efore a defendant's sixth amendment rights are derogated as a sanction for noncompliance, a trial judge must exercise his discretion within recognized parameters . . . [and] must consider other available ways to enforce a criminal discovery rule."

The Court held that in deciding whether or not to admit alibi evidence when the defendant has failed to serve a proper notice, the trial court should balance the potential for prejudice to the prosecution against the impact on the defense, and whether the evidence might have been material to the trial's outcome. *Id.* The judge should also consider the necessity to enforce the rule to preserve the integrity of the trial process and whether noncompliance was a willful attempt to prevent the state from investigating necessary facts. *State v. Watley*, 109 N.M. 619, 621, 788 P.2d 375, 377 (Ct. App. 1989).

25.3.6 Failure by CCA to Give Notice

If the CCA fails to file a list of witnesses and serve a copy on respondent child as provided in Rule 10-233, the children's court may exclude evidence offered by the state to contradict the child's alibi or entrapment evidence. If the CCA gives notice of witnesses that the state proposes to offer to discredit the child's alibi or claim of entrapment, the children's court may exclude the testimony of a witness if the name and address of the witness was known to the CCA but not stated in the notice. Rule 10-233(D).

25.3.7 Waiver of Notice Requirements

For good cause shown, the court may waive the notice requirements in Rule 10-233. Rule 10-233(D).

25.3.8 Notice Inadmissible

Neither the fact that a notice of alibi was given nor the content of the notice are admissible as evidence in the adjudicatory hearing. Rule 10-233(E).

Youthful Offender Cases: Rule 5-508 of the Rules of Criminal Procedure is the corresponding rule that applies to youthful offender and serious youthful offender proceedings. The requirements of Rule 5-508 mirror the requirements of Rule 10-233.

25.3.9 Determination of the Issue

25.3.9.1 Child's Initial Burden

The child must put forth some evidence consistent with an alibi or entrapment defense to be entitled to an alibi or entrapment jury instruction. *State v. Martinez*, 122 N.M. 476, 927 P.2d 31, 32 (Ct. App. 1996).

25.3.9.2 Elements of Alibi and Entrapment

UJI 14-5150 contains the alibi uniform jury instruction. If, after a consideration of all the evidence, the judge or jury has a reasonable doubt that the child was present at the time the delinquent act was committed, then the jury or judge must find that the child did not commit a delinquent act. (See Rule 14-9001 regarding the changes in language required when a UJI is used in a delinquency proceeding.)

UJIs 14-5160 (Entrapment, Unfair Inducement, Not Predisposed) and 14-5161 (Entrapment; Law Enforcement; Unconscionable Methods and Illegitimate Purposes) contain the entrapment jury instructions. The footnotes to the instructions explain when each applies.

The *Vallejos* case sets forth the law on entrapment in New Mexico. See *In re Alberto L.*, 2002-NMCA-107, ¶7 (citing *State v. Vallejos*, 1997-NMSC-040).

CHAPTER 26

COMPETENCY TO STAND TRIAL

This chapter covers:

- The requirement that a child be competent to stand trial
- The procedure for raising competency
- The procedure for determining competency
- Treating to competency
- Dismissal

26.1 Right Not to Be Tried While Incompetent

A child has a substantive right not to be tried while incompetent. *See In the Matter of Daniel H.*, 2003-NMCA-063, ¶¶19, 26. The law has long acknowledged that persons who, as a result of their mental condition, lack the capacity to understand the nature and object of the proceedings against them, to consult with counsel, and to assist in preparing their defense, may not be subjected to a trial. *State v. Flores*, 2005-NMCA-135, ¶15 (*citing Drope v. Missouri*, 420 U.S. 162, 171 (1975)). The New Mexico Supreme Court has recognized that “it is a violation of due process to prosecute a defendant who is incompetent to stand trial.” *State v. Rotherham*, 122 N.M. 246, 252, 923 P.2d 1131, 1137 (1996).

26.2 Issue May Be Raised At Any Time

A child’s competency to stand trial or participate in his or her own defense may be raised by a party or the court at any stage of the proceedings. §32A-2-21(G); Rule 10-242(A).

26.3 Reasonable Doubt as to Competency Determined by Judge

Once the issue of competency is raised, the judge determines whether there is evidence that raises a reasonable doubt as to the child’s competency to stand trial. Rule 10-242(C); *State v. Sena*, 92 N.M. 676, 679, 594 P.2d 336, 339 (Ct. App. 1979) (there must be a sufficient basis for the question or issue before the judge is required to consider the issue). In determining whether a reasonable doubt concerning the child’s competency has been raised, the judge weighs the evidence and draws his or her own conclusions from the evidence. *State v. Rael*, 2008-NMCA-067, ¶6. If challenged on appeal, the judge’s determination of whether a reasonable doubt exists as to child’s competency is reviewed for abuse of discretion. *Id.*

In *State v. Flores*, defense counsel requested shortly before trial that the court find the defendant incompetent to stand trial. Counsel used her own experience with defendant as the basis of the

request. The Court of Appeals ruled that unsubstantiated assertions and opinions regarding a defendant's competency alone, without other evidence, are insufficient to raise a reasonable doubt sufficient to require consideration of the issue by the judge or jury. They are also insufficient to demonstrate good cause for a mental examination. 2005-NMCA-135, ¶¶27-28.

However, the *Flores* court expressly acknowledged that the testimony of experts is not required to support a contention of incompetency. Non-experts who have observed a defendant and who have knowledge of that defendant's mental state can form the basis for a further determination by the court as to the need for an evaluation. For instance, “a defendant could offer an affidavit from someone who has observed the defendant and formulated an opinion about his or her competency, such as a corrections officer or defense counsel’s paralegal.” *Id.* ¶31 (citation omitted).

26.4 Competency Hearing

No competency hearing is required when there is minimal or no evidence of incompetency. *State v. Flores*, 2005-NMCA-135, ¶20 (citing *United States v. Crews*, 781 F.2d 826, 833 (10th Cir. 1986)). However, if there is a reasonable doubt as to the child’s competency, the children’s court is required to conduct a hearing. See *Drope v. Missouri*, 420 U.S. 162, 180-181 (1975).

26.5 Determination of the Issue

If prior to the adjudicatory hearing the judge decides that a reasonable doubt has been raised, the judge may determine the issue of competency without a jury or may, in his or her discretion, submit the issue to a jury other than the jury sitting at the adjudicatory hearing. Rule 10-242(C).

If the competency issue is raised during the adjudicatory hearing and the judge finds there is a reasonable doubt as to the child’s competency, the judge in a nonjury case will determine the issue. In a jury case, the judge will instruct the jury on the issue. Rule 10-242(C).

If the child has been previously found to be competent to stand trial in the proceeding, the competency issue may be redetermined only if the children’s court judge finds that there is evidence not previously submitted that raises a reasonable doubt as to the child’s competency to participate in the proceedings. Rule 10-242(C); see also *State v. Rael*, 2008-NMCA-067, ¶25 (decided under criminal rules).

26.6 Competency Evaluation

Upon motion and good cause shown, the children’s court judge must order a mental examination of the child before making any determination of competency. Rule 10-242(B); see also Rule 5-602(C) (mental examination upon motion and good cause in criminal rules). Presumably, if the judge finds that there is evidence raising a reasonable doubt as to the child’s competency, then that constitutes good cause to order a mental evaluation. See *State v. Flores*, 2005-NMCA-135, ¶¶27-28.

Statutory Note. The Mental Illness and Competency statute, §31-9-1.1, which applies to criminal proceedings, requires that “[t]he defendant’s competency shall be professionally evaluated by a psychologist or psychiatrist or other qualified professional recognized by the district court as an expert and a report shall be submitted as ordered by the court.” The Rules of Criminal Procedure provide that if a reasonable doubt as to defendant’s competency to stand trial is raised prior to trial, the court *is required* to order defendant evaluated as provided by law, and the court, within 60 days after receiving an evaluation, may, without a jury, determine the issue of defendant’s competency to stand trial, or may in its discretion submit the issue of defendant’s competency to stand trial to a jury, other than the trial jury. Rule 5-602(B)(2)(a). The Children’s Code does not specify whether a professional evaluation is required before determining competency in Children’s Court proceedings.

While the Children’s Court rule has mandatory language, requiring a showing of good cause effectively invokes the court’s exercise of its discretion. *State v. Garcia*, 2000-NMCA-014, ¶28 (holding in the criminal context that court did not abuse its discretion when it refused to allow a second “independent” evaluation by an expert chosen by the state).

The following cases are examples of what does not rise to the level of good cause for a mental examination in the adult criminal context:

- In *State v. Jaramillo*, 88 N.M. 179, 538 P.2d 1201 (Ct. App. 1975), the Court of Appeals ruled that the defendant’s motion for a psychiatric examination was properly denied where the record did not show any attempt by the defendant to show good cause for a mental examination.
- In *State v. Chacon*, 100 N.M. 704, 706, 675 P.2d 1003, 1005 (Ct. App. 1983), the Court of Appeals found that counsel’s conclusions about defendant’s alcoholism and refusal to plea bargain, with nothing more, were insufficient to show good cause for ordering a mental examination to show incompetency.
- In *State v. Flores*, 2005-NMCA-135, ¶¶27-28, the Court of Appeals found that counsel’s unsubstantiated assertions and opinion regarding a defendant’s competency alone without more evidence are insufficient to demonstrate good cause for a mental examination.

The court may order periodic judicial reviews pending completion of the competency evaluation, and at each judicial review the child’s attorney is required to advise the court of the status of the evaluation. Rule 10-243(A)(3).

26.7 Suspension of Proceedings

If the judge or a party raises an issue of the child’s competency to stand trial, the proceedings are suspended until the court enters an order finding the child competent to stand trial. In that case, the time frame for holding an adjudicatory hearing begins from the date an order is entered finding the child competent to participate in the adjudicatory hearing. Rule 10-243(A)(3). If a child is found incompetent to stand trial, but later found to be competent, the time frame for the adjudicatory hearing runs from the date the order is entered finding the child competent. Rule 10-243(A)(4).

26.8 Legal Standard for Competency

26.8.1 Burden of Proof for Initial Determination

While the Children's Code and Rules are silent on the burden of proof for a competency determination in Children's Court, the standard used in adult criminal proceedings likely applies. It is well established in case law that a defendant is presumed competent to stand trial and that the defendant bears the burden of proving by a preponderance of the evidence that he or she is mentally incompetent to stand trial. *State v. Chavez*, 2008-NMSC-1, ¶11 (*citing Chapman I*, 101 N.M., 478, 479, 684 P.2d. 1143, 1144); *State v. Chapman*, 104 N.M. 324, 327-28, 721 P.2d 392, 395-96 (1986) ("*Chapman II*"); Rule 14-5104 (jury instruction on determination of present competency).

Substantial evidence must be presented to support such a determination. *Chapman I*, 101 N.M. at 479, 684 P.2d at 1144. If the issue is to be decided by a jury, the verdict need not be unanimous as competency proceedings are considered civil in nature. UJI 14-5104 (Committee Commentary).

26.8.2 Burden of Proof for Re-Determination of Competency

Once there is a finding of incompetency, and there is a claim that the child has been treated to competency, the state has the burden of overcoming a presumption of incompetency by a preponderance of the evidence. This redetermination of competency does not place a higher burden of proof on the state than the burden that was placed on the child to prove incompetency initially. *See State v. Chavez*, 2008-NMSC-1, ¶¶12, 21.

26.8.3 Criteria for Determining Competency

26.8.3.1 UJI 14-5104

The uniform jury instruction (UJI) on the determination of present competency, which applies to both criminal and delinquency proceedings, contains the standard of proof for establishing a defendant's competency to stand trial:

[A] person is competent to stand trial if he:

- understands the nature and significance of the criminal proceedings against him;
- has a factual understanding of the criminal charges; and
- is able to assist his attorney in his defense.

UJI 14-5104.

26.8.3.2 Dusky Standard

The standard set forth in New Mexico's jury instructions is based on the standard applied by the U.S. Supreme Court in *Dusky v. United States*. See UJI 14-5104 (Use Note). In *Dusky*, the Supreme Court found that a person is competent to stand trial when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and ... he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). See also *State v. Rotherham*, 122 N.M. 246, 252, 923 P.2d 1131, 1137 (1996), in which the New Mexico Supreme Court held that an accused must have the capacity to assist in his own defense and to comprehend the reasons for punishment.

26.8.3.3 Actual Abilities

The test for competency depends on actual abilities. The fact that a child has received mental health treatment or has been admitted to a mental institution does not create a sufficient basis for finding a child incompetent. §32A-6A-5 (providing in relevant part that "[t]he fact that a child has received treatment or habilitation services or has been accepted at or admitted to a hospital or institutional facility shall not constitute a sufficient basis for a finding of incompetence").

In *State v. Rael*, the Court of Appeals stated that a person found to have mild mental retardation is not necessarily incompetent to stand trial. 2008-NMCA-067, ¶7. The Court found that the testimony indicated that the defendant had an understanding of the charges against him and that he could go to jail if he were found guilty. The Court also noted that the defendant was able to some extent describe courtroom procedure, and functions reasonably well in daily life. *Id.* ¶15.

26.8.3.4 Application of Competency Standard to Juveniles

One of the questions that arises when a juvenile's competency to stand trial is at issue in children's court is whether a child can be found incompetent based on developmental immaturity without suffering from a serious mental illness or developmental disability. New Mexico statutes and rules do not define the terms "competency" or "incompetency" in either a juvenile or adult context. See §§ 31-9-1 through 31-9-2 (mental illness and competency) and §§ 32A-6-1 *et seq.* (children's mental health and developmental disabilities). UJI 14-5104 does not mention mental illness or developmental disability. Compare *In re Hyrum H.*, discussed directly below.

A handful of cases in other jurisdictions have addressed the issue of whether a child can be found incompetent due to developmental immaturity alone, and whether juvenile court requires the same degree of ability for competence as adult court. The holdings of some of those cases are summarized below.

Timothy J. v. Superior Court of Sacramento County, 150 Cal. App. 4th 847 (Cal. App. 2007). The California Court of Appeals addressed the issue of whether a minor must have a mental disorder or developmental disability under applicable California law to be found incompetent, or whether a minor may base his or her claim of incompetency on age-related developmental immaturity. The Court construed the California rule, which directed the Court to stay the proceedings and conduct a competency hearing if there was reason to doubt the child was

capable of understanding or cooperating with his or her attorney, as consistent with the constitutional test of competency stated in *Dusky*. The Court held that the rule does not require that a minor suffer from a mental disorder or developmental disability before a juvenile court may hold a hearing and determine that a minor is incompetent to stand trial.

In re Hyrum H., 131 P.3d 1058 (Ariz. App. Div. 1 2006). The Arizona Court of Appeals upheld the trial court's determination that the defendant juvenile was incompetent to stand trial even though there was no underlying disease, defect, or disability. Under Arizona's competency definition for children, a juvenile is incompetent if the juvenile "does not have sufficient present ability to consult with the juvenile's lawyer with a reasonable degree of rational understanding or who does not have a rational and factual understanding of the proceedings against the juvenile." The court noted that Arizona's competency definition for adults includes language requiring that the defendant's incompetency result from a mental illness, defect, or disability. "In contrast, the plain language of the juvenile incompetency definition does not require an incompetent child to be mentally ill or disabled."

Tate v. Florida, 864 So.2d 44 (Fla. App. 4th Dist. 2003). Relying on factors such as the defendant's extremely young age and lack of previous exposure to the judicial system, the Florida Court of Appeals held that a competency evaluation was required under the Constitution for a twelve year old charged with first degree murder. The Court stated that even if a child of Tate's age is considered to have the capacity to understand less serious charges, or commonplace juvenile proceedings, a hearing is necessary to determine whether Tate could meet competency standards related to a first-degree murder charge which involves profound decisions regarding strategy, disclosures, plea offers, and deciding whether to waive important rights. The Court additionally noted that issues concerning defendant's competency were readily apparent throughout the hearing, and the defendant's immaturity and developmental delays were at the heart of his defense.

In re Carey, 615 N.W.2d 742 (Mich. Ct. App. 2000). The Michigan Court of Appeals ruled that juveniles have a due process right not to be subjected to the adjudicative phase of juvenile proceedings while incompetent. In the absence of juvenile procedures, it also decided that the state Mental Health Code provisions for competency determinations, which apply only to defendants in criminal proceedings, could serve as a guide for juvenile competency determinations. However, "in juvenile competency hearings, competency evaluations should be made in light of juvenile, rather than adult, norms," noting that "[a] juvenile need not be found incompetent just because, under adult standards, the juvenile would be found incompetent to stand trial in a criminal proceeding."

In the Matter of W.A.F., 573 A.2d 1264 (D.C. App. 1990). The D.C. Court of Appeals held that the *Dusky* standard applied to determinations of a juvenile's competency to stand trial, and not the standard in the juvenile code, which required a juvenile to be found incompetent to participate in proceedings by reason of mental illness or at least moderate mental retardation. The Court held that the juvenile system does not adequately protect the right not to be tried while incompetent, which is a due process right, so the *Dusky* standard applies. The Court reversed the district court's decision, which was based on the view that the standard for juvenile incompetency was intended to be identical to the standard for commitment of mentally retarded

juveniles. The district judge thought that these standards should be consistent to ensure that a juvenile offender would receive treatment either as a result of a juvenile delinquency disposition or through a facility for the mentally retarded. Otherwise, it was possible that the child could be found incompetent to stand trial, but not subject to civil commitment and released from custody. The appellate court stated that this was a laudable effort to ensure that the appellant would not fall through the cracks of the statutory scheme, but nonetheless found that the district court's ruling infringed on the child's right not to be tried while incompetent.

26.9 Procedure Upon Finding Incompetency

26.9.1 Misdemeanors; Dismissal With Prejudice

If the court finds the child incompetent and the child has been accused of an offense that would be a misdemeanor if the child were an adult, the court must dismiss the delinquency petition with prejudice. The court may also recommend that the CCA initiate proceedings under the Children's Mental Health and Developmental Disabilities Act (CMHDD Act), §§32A-6A-1 through 32A-6A-30, which was significantly revised in 2007. §32A-2-21(G); Rule 10-242(D). *See also* Chapter 27, which summarizes the Act.

26.9.2 All Other Cases; Dismissal Without Prejudice

In all other cases in which a respondent child is found incompetent to stand trial, the court must stay the proceedings until the child becomes competent to participate in the proceedings, provided that the proceedings may not be stayed for more than one year. If at any time during the year, the court finds that the child cannot be treated to competency, then the court must dismiss without prejudice at that time. §32A-2-21(G); Rule 10-242(D).

26.9.3 Treatment to Competency and Conditions of Release

When appropriate, if the court finds a child is incompetent, it may order treatment to enable the child to attain competency to stand trial and may amend the conditions of release. §32A-2-21(G) Rule 10-242(D)(3). In *State v. Cantrell*, 2008-NMSC-016, a criminal case, the New Mexico Supreme Court ruled that ordering defendant to submit to involuntary antipsychotic drug treatment for the sole purpose of establishing defendant's competency to stand trial did not violate defendant's due process rights. The Court adopted a four factor balancing test from the U.S. Supreme Court's opinion in *Sell v. United States*, 539 U.S. 166 (2003), to determine whether ordering defendant to submit to drug treatment to establish defendant's trial competency violates defendant's due process rights. *Cantrell*, 2008-NMSC-016, ¶25. New Mexico courts have not addressed in a juvenile context the issue raised in *Cantrell*.

26.9.4 Review of Competency Every 90 Days

If the court has found a child incompetent to stand trial, the child's competency must be reviewed every ninety days for up to one year. §32A-2-21(G); Rule 10-242(D).

Rule 5-602(D) is the corresponding criminal rule. It provides that, upon committing a defendant to undergo treatment to attain competency to stand trial, the court, not less than once every twelve months, must review the progress of the defendant in attaining competency to stand trial.

26.9.5 Dismissal Without Prejudice After 1 Year; CMHDD Act Proceedings

The court must dismiss the petition without prejudice if, after one year, the child remains incompetent to stand trial and unable to participate in his or her own defense. Upon dismissal, the court may recommend that the CCA initiate proceedings under the CMHDD Act. §32A-2-21(G); Rule 10-242(D). Involuntary residential treatment may only occur pursuant to the provisions of the CMHDD Act. §32A-2-21(H).

Involuntary residential treatment under the CMHDD Act is an option when the child has a mental disorder or developmental disability and meets certain other criteria. §32A-6A-22(K). It may not be an option if the child is found incompetent to stand trial because of the child's developmental immaturity and there is no mental disorder or developmental disability involved. *See* §26.8.3.4 above, summarizing the decision in *In the Matter of W.A.F.*, which touched upon this issue.

Statutory Note. Rule 5-602(B) and NMSA Chapter 31, Article 9, Mental Illness and Competency, govern competency determinations in criminal proceedings. If a defendant is found incompetent to stand trial, Rule 5-602(B) permits the court to order treatment to attain competency and to order the defendant detained in a secure facility if there is clear and convincing evidence that the defendant is dangerous. The “dangerousness” provision in the criminal rule is absent from the Children’s Court Rules and relevant statutes.

Dangerousness is not a term used in the CMHDD Act. However, if the person seeking involuntary placement believes the child is likely to cause serious bodily harm to self or to others during the time it takes to have the hearing, the child may be admitted to residential care on an emergency basis. *Compare* §32A-6A-22(K) and (N).)

CHAPTER 27

MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES

This chapter describes:

- The Children’s Mental Health and Developmental Disabilities Act.
- The Act’s relationship to proceedings under the Delinquency Act.

27.1 Purpose of Act

The Children’s Mental Health and Developmental Disabilities Act (CMHDD Act), §§32A-6A-1 through 32A-6A-30, is the article of the Children’s Code governing the provision of mental health care and rehabilitation services to children with developmental and mental health needs. The Act was repealed and replaced in 2007 and significant changes were made to its provisions. This chapter describes the Act as changed in 2007.

The purposes of the CMHDD Act are to:

- provide children with access to appropriate assessments, services and treatment;
- provide children with access to a continuum of services to address their habilitation and treatment needs;
- provide children with access to services for identification, prevention and intervention for developmental and mental health needs;
- promote delivery of services in a culturally appropriate, responsive and respectful manner;
- protect the substantive and procedural rights of children regardless of service setting; and
- encourage support for family as critical members of the treatment or habilitation team whenever clinically appropriate. §32A-6A-2.

The provisions of the Act apply to children who receive mental health or rehabilitation services whether or not they are in the juvenile justice system. §32A-6A-3. However, many of the children in the juvenile justice system have developmental and mental health needs.

27.2 Relationship to Delinquency Proceeding

The CMHDD Act outlines the rights of children and youth when receiving mental health or habilitation services regardless of setting. It also sets forth the procedures required for placing children with mental health problems or developmental disabilities in residential treatment facilities, as described later in this chapter. The Delinquency Act in turn authorizes certain actions in connection with the need for diagnosis or treatment of children subject to the Act,

sometimes cross-referencing the CMHDD Act:

- **Section 32A-2-10, Release or delivery from custody:** A person taking a child into custody may deliver the child to an evaluation facility, if available, if that person has reasonable grounds to believe the child presents a likelihood of serious harm to the child's self or others or is suffering from some other serious mental condition or illness that requires prompt treatment or prompt diagnosis.

Compare this with §32A-6A-19 of the CMHDD Act, which authorizes a peace officer to detain and transport a child for emergency mental health evaluation and care in certain situations, including where, based on personal observation and investigation, the officer has reasonable grounds to believe that the child, as a result of a mental disorder, presents a likelihood of serious harm to self or others and that immediate detention is necessary to prevent such harm.

- **Section 32A-2-17, Predisposition studies; report and examination:** (A) Where there are indications that the child may have a mental disorder or developmental disability, the court, on motion of the children's court attorney (CCA) or counsel for the child, may order the child to be examined by a mental health professional prior to a hearing on the merits of the petition. The examination made prior to the hearing or as a part of the predisposition study and report must be conducted on an outpatient basis, unless the court finds placement in a hospital or other appropriate facility necessary. (D) The court may order a child who has been adjudicated delinquent to be administered a pre-dispositional evaluation by a professional designated by the department for purposes of diagnosis. The preference is for performing the evaluation in the child's community.
- **Section 32A-2-20, Disposition of a youthful offender:** In order to invoke an adult sentence, the court must make two essential findings: The child is not amenable to treatment or rehabilitation as a child in available facilities; and the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders.
- **Section 32A-2-21, Disposition of a child with a mental disorder or developmental disability in a delinquency proceeding.** (A)-(F) If in a hearing at any stage of a proceeding on a delinquency petition, the evidence indicates that the child has or may have a mental disorder or developmental disability, the court may order the child detained under the Delinquency Act and initiate proceedings for the involuntary commitment of the child under the CMHDD Act. The child may remain in the residential facility pending disposition of the delinquency petition and the department will retain legal custody during that period. (G) If a child is found incompetent to stand trial, the court may recommend that the CCA initiate proceedings under the CMHDD Act.

27.3 Definitions

In general, habilitation refers to the services provided to children with developmental disabilities that are aimed at enabling the child to attain, maintain or regain maximum functioning or independence. §32A-6A-4(K). Treatment refers to behavioral health services provided to enable the child to attain, maintain or regain maximum functioning. §32A-6A-4(DD).

27.4 Rights Regardless of Setting

Children receiving treatment and habilitation services in New Mexico have certain rights regardless of setting (such as community outpatient services, treatment foster care, or residential services).

- Children have a right to individualized treatment or habilitation services based on an individualized treatment or habilitation plan. §32A-6A-7.
- Seclusion and restraint are generally prohibited and are limited to emergency use only. In those emergencies, providers must follow the protocol set forth in the Act. §§32A-6A-9, 32A-6A-10, and 32A-6A-11.
- The aversive interventions listed in the Act are also prohibited. §32A-6A-4(A) and §32A-6A-8.

27.5 Consent

The CMHDD Act as amended in 2007 clarifies issues related to consent to treatment or rehabilitation services, medication and residential treatment.

The law provides that the informed consent of the child's legal custodian is required before treatment or habilitation is provided to a child under 14, except that the child may initiate and consent to an initial assessment with a clinician for medically necessary early intervention services. Such services are limited to verbal therapy and limited to two calendar weeks. §32A-6A-14. This exception allows younger children to access mental health professionals for a short initial assessment of need.

A child aged 14 or older is presumed to have capacity to consent to treatment and habilitation services, and a child with capacity has the right to consent. §32A-6A-15(A). A child aged 14 or older with capacity may consent to psychotropic medication but the legal custodian must be notified. §32A-6A-15(B). A child aged 14 years or older may consent to residential treatment but the legal custodian must also consent to such treatment. §32A-6A-21(B).

Capacity Defined. The term “capacity” is important and is defined to mean the ability to

- understand and appreciate the nature and consequences of proposed health care, including its significant benefits, risks and alternatives to proposed health care; and
- make and communicate an informed health care decision. §32A-6A-4(C).

A process is also set forth in the CMHDD Act to allow a legal custodian to make a treatment or habilitation decision for a child aged 14 or older who does not have capacity, so long as the child does not object to the decision or the custodian's assumption of that authority. §32A-6A-16(A). However, the legal custodian cannot consent to residential treatment without the proper consent of the child. *Id.* If the child does not agree to allow the legal custodian to consent to services and the child does not have capacity to consent, the procedures in the Act for obtaining a treatment guardian must be followed. §32A-6A-16(A); §32A-6A-17.

A child aged 14 or older who has capacity may refuse treatment recommended by a mental health or developmental disabilities professional. The child may not be determined to lack capacity solely on the basis that the child chooses not to accept recommended treatment. 32A-6A-16(C).

Practice Note. It is important to understand who has the right to consent to services – the child or the legal custodian. The presumption is that children aged 14 years of age or older have the right to consent to their own mental health or habilitation services. If there is concern about the child's capacity, it is important to address those concerns by using the procedures set forth in the Act.

Children aged 14 years of age or older with capacity to consent have the right to consent to release of their confidential mental health or habilitation records. §32A-6A-24(C). However, there are some instances when a child's consent to release of records is not required. For example, when a clinician determines that release without consent of the child aged 14 or older will not cause substantial harm to the child, then a summary of the child's assessment, treatment plan, progress, discharge plan and other information essential to the child's treatment may be released to the child's legal custodian. §32A-6A-24(D)(3). A primary caregiver may also be provided with information necessary for the continuity of treatment without the child's consent. §32A-6A-24(D)(4). Finally, a court may order release of records for good cause shown as long as specific findings required by the Act are made. §32A-6A-24(D)(7).

The Delinquency Act makes it clear that the disclosure of any mental health and developmental disability records that are in the child's delinquency records may only be made in accordance with the CMHDD Act. §32A-2-32(B).

27.6 Out of Home Placement

Children who are placed in out of home placements have specific rights regarding their care. §32A-6A-12. Children in treatment foster care or other out of home placements that are not residential treatment or habilitation programs, as defined in the CMHDD Act, are afforded basic rights under the Act, including the rights listed in §27.8.2 below. They can also access the state's protection and advocacy system, or may obtain representation of other attorneys to assist them to enforce any rights under the Act. §32A-6A-13(C). However, children are only provided with a court-appointed guardian ad litem or attorney paid by the state when placed in the most restrictive residential treatment or habilitation program as defined under the Act or when they are subject to a petition for a treatment guardian. §32A-6A-13(A), (B).

27.7 Process for Placement in Residential Treatment or Habilitation Program

When children are placed in the most restrictive residential treatment or habilitation programs, they are afforded additional rights under the CMHDD Act. The term “residential treatment or habilitation program” is defined as the diagnosis, evaluation, care, treatment or habilitation rendered in a mental health or developmental disabilities facility when the child resides on the premises and where one or more of the following measures is available for use:

- a mechanical device to restrain or restrict the child’s movement;
- a secure seclusion area from which the child is unable to exit voluntarily;
- a facility or program designed for the purpose of restricting the child’s ability to exit voluntarily; or
- the involuntary emergency administration of psychotropic medication. §32A-6A-4(AA).

According to the CMHDD Act, the habilitation or treatment of a child must be consistent with the least restrictive means principle, which is defined in §32A-6A-4. This means that the treatment or habilitation and the conditions of treatment or habilitation, separately or in combination:

- are no more harsh, hazardous or intrusive than necessary to achieve acceptable treatment objectives for the child;
- involve no restrictions on physical movement and no requirement for residential care, except as reasonably necessary for the administration of treatment or for the protection of the child or others from physical injury; and
- are conducted at the suitable available facility closest to the child’s place of residence. §32A-6A-4(M).

Placement in a residential treatment or habilitation program can be either voluntary or involuntary. §§32A-6A-20, 32A-6A-21, and 32A-6A-22. In both cases, the Act requires that certain procedures be followed.

As a general rule, when involuntary placement is needed for a child in a delinquency proceeding, the CCA within the district attorney’s office will be asked to file a petition. See, e.g., §32A-1-6(E) and §32A-2-21.

It is important to note that children subject to the Delinquency Act who receive residential treatment enjoy all of the substantive and procedural rights set forth in the CMHDD Act. §32A-2-21(F).

27.8 Voluntary Placement

27.8.1 Children Under Age Fourteen

A child under the age of 14 can be admitted to a residential program with the informed consent of the child's legal custodian for up to 60 days. §32A-6A-20(B). For children placed in the legal custody of the state under the Delinquency Act, this means that CYFD, as legal custodian, would provide the consent.

All children under the age of 14 being admitted to residential programs have a guardian ad litem (GAL) appointed by the court for them. §32A-6A-20(G). The GAL has the duty to inform the child of his or her rights, which are set forth in §32A-6A-21(I) and §32A-6A-12.

The GAL must determine within seven days after admission whether the legal custodian has consented to the residential placement, whether the admission is in the child's best interest, and whether the placement is consistent with the least restrictive means principle. The GAL, representing the child's best interests, has the duty of certifying to the court whether admission to the facility is appropriate. §32A-6A-20(G) and (H); Form 10-493. The admission will be considered appropriate if the GAL certifies that:

- The child's legal custodian understands and consents to the admission;
- The admission is in the child's best interests; and
- The admission is appropriate for the child and consistent with the least restrictive means principle.

If the GAL makes this certification to the court, the placement remains in effect and is considered voluntary even if the child disagrees with the placement.

Placements must be reviewed at least every 60 days, following the procedures and timelines set forth in the CMHDD Act. If the child's physician or licensed psychologist determines that it is in the child's best interest to continue the admission, the residential treatment or habilitation program will notify the GAL, who will then personally meet with the child, the child's legal custodian, and the child's clinician. It is then the GAL's duty to ensure that the legal custodian understands and consents to the program and to make the same type of certification as was made at the time of the initial admission. §32A-6A-20(K).

If the GAL does not feel he or she can certify that the admission (or continued admission) is appropriate, the child must be released or involuntary placement procedures initiated. §32A-6A-20(L). Involuntary placement is described in §27.9 below.

27.8.2 Children Age Fourteen or Older

Under the CMHDD Act, a child fourteen years of age or older may voluntarily admit him or herself to a residential treatment or habilitation program, with the informed consent of the child's legal custodian. §32A-6A-21. Instead of a GAL, the law requires that the child have an attorney, who is his or her own attorney, not the attorney for the parent or other legal custodian. If the legal custodian does not obtain an attorney for the child, the court will appoint one. §32A-6A-21(D). Even if the legal custodian obtains the attorney, the attorney represents the child, not the legal custodian. It is important to note that the attorney takes direction from the child as client and advocates for the child's wishes.

Because children 14 years of age or older have the independent right to consent to residential placement, the child's attorney must meet with the child and determine, within seven days after admission, whether or not the child consents to the placement. At the meeting, the attorney must first explain to the child:

- the child's right to an attorney;
- the child's right to terminate his voluntary admission and the procedures to effect termination;
- the effect of terminating the child's voluntary admission and the options of the physician and other interested parties to the petition for involuntary admission; and
- the child's rights under the CMHDD Act, including the right to:
 - legal representation;
 - a presumption of competence;
 - receive daily visitors of the child's choice;
 - receive and send uncensored mail;
 - have access to telephones;
 - follow or abstain from the practice of religion;
 - a humane and safe environment;
 - physical exercise and outdoor exercise;
 - a nourishing, well-balanced, varied and appetizing diet;
 - medical treatment;
 - educational services;
 - freedom from unnecessary or excessive medication;
 - individualized treatment and habilitation; and
 - participation in the development of the individualized treatment plan and access to that plan on request.

§§32A-6A-21(I) and §32A-6A-12.

If the attorney determines that the child understands his or her rights and voluntarily and knowingly desires to remain as a patient in the residential program, the attorney will so certify on a form designated by the Supreme Court within seven days of the child's admission. §32A-6A-21(J); Form 10-494. A child voluntarily admitted has the right to immediate discharge upon his or her request, except in those situations in which involuntary placement proceedings are

commenced. The child is considered to have made a request for discharge when he or she informs the director, physician or any other member of the program staff that he desires to be discharged; this request need not be in writing. §32A-6A-21(L).

As in the case of younger children, a child 14 years of age or older who is voluntarily admitted to a treatment or habilitation program must have his or her voluntary admission reviewed every sixty days. The procedures for this review are also similar.

27.9 Involuntary Placement

Any person who believes that a child, as a result of a mental disorder or developmental disability, is in need of residential services may request that a CCA file a petition with the court for the child's involuntary placement. §32A-6A-22(D). When a child asks to be discharged from a voluntary program and the director, a physician or a licensed psychologist in the program thinks that involuntary placement is needed, the request to the CCA must be made the first business day after the child requests discharge. §32A-6A-21(L). The district attorney is the CCA for this purpose. §32A-1-6(E).

Upon receiving the petition, the court will appoint counsel for the child if the child does not already have an attorney or GAL. The attorney or GAL will represent the child at all stages of the proceeding. §32A-6A-13(A). "Only an attorney with appropriate experience shall be appointed as an attorney or a guardian ad litem for the child." §32A-6A-13(B).

The involuntary placement hearing must be held within seven days of an emergency admission or within five days from a child's declaration that he or she desires to terminate his or her voluntary admission. §32A-6A-22(G); §32A-6A-21(L). Seven days in this context means seven working days. Rule 10-107 of the Children's Court Rules and Rule 1-006 of the Rules of Civil Procedure both provide that weekends and holidays do not count when the period of time required for an action is less than eleven days. (**Note:** In a case involving the adult version of the CMHDD Act, the New Mexico Supreme Court held that the seven day rule was not jurisdictional and that the hearing could be postponed for good cause shown. *NM Dept. of Health v. Compton*, 2001-NMSC-032, ¶18 n.3 and ¶24.)

The court may order involuntary placement only if it is shown by clear and convincing evidence:

- that as a result of mental disorder or developmental disability the child needs the treatment or habilitation services proposed;
- that as a result of mental disorder or developmental disability the child is likely to benefit from the treatment or habilitation services proposed;
- that the proposed involuntary placement is consistent with the treatment or habilitation needs of the child; and
- that the proposed involuntary placement is consistent with the least restrictive means principle. §32A-6A-22(K).

The court must include in its findings a statement of the legal custodian's opinion about whether

the child should be involuntarily placed, a statement of the efforts made to ascertain that opinion, or a statement explaining why it was not in the child's best interest to have the legal custodian involved. §32A-6A-22(J).

If the court decides that the child does not meet the criteria for involuntary placement, the child must be released from the residential treatment facility, but the court may order the child to undergo nonresidential treatment as may be appropriate and necessary or it may order no treatment. §32A-6A-22(L).

Every child in involuntary placement has the right to periodic review, including a new hearing, at the end of each placement period. An involuntary placement period may not exceed 60 days. §32A-6A-22(M).

27.10 Forms

The Supreme Court has adopted several forms for use in cases under the CMHDD Act. As of April 2011, the forms available in the Children's Court Rules and Forms are forms adopted in 2002, prior to the 2007 amendments. *See* Forms 10-491 through 10-495.

CHAPTER 28

CONFIDENTIALITY OF JUVENILE RECORDS

This chapter covers the following topic areas related to the confidentiality of information pertaining to a juvenile:

- Records deemed confidential under Delinquency Act
- Disclosure of information on public access web sites
- Sealing of juvenile records
- Prior juvenile dispositions
- Hearings
- Motor Vehicle Code violations
- Federal law

28.1 Summary of Confidentiality-Related Requirements Under the Delinquency Act

The Delinquency Act mandates that certain types of records related to children involved in the juvenile justice system be kept confidential. In summary, the Delinquency Act places the following restrictions on disclosure of juvenile delinquency records:

- Records pertaining to the child, as described in §32A-2-32, may only be disclosed to the persons enumerated in that section;
- Juvenile delinquency related information or records may not be disclosed on public access web sites, §32A-2-32.1; and
- Delinquency records of the court, CYFD, and other agencies must be sealed if the procedures and standards in §32A-2-26 are met.

The following records and information are specifically made public:

- Traffic offenses are subject to the reporting requirements of the Vehicle Code and are not subject to the Delinquency Act's confidentiality provisions. §32A-2-29.
- Delinquency hearings are open to the general public unless the judge finds that exceptional circumstances warrant closing the hearing, in which case only the parties, their counsel, witnesses, the news media, and other persons approved by the court may be present. §32A-2-16.

28.2 Records Deemed Confidential Under Delinquency Act

28.2.1 §32A-2-32

Section 32A-2-32 is the statute on confidentiality in the Delinquency Act. It provides that:

[a]ll records pertaining to the child, including all related social records, behavioral health screenings, diagnostic evaluations, psychiatric reports, medical reports, social studies reports, records from local detention facilities, client-identifying records from facilities for the care and rehabilitation of delinquent children, pre-parole or supervised release reports and supervision histories obtained by the juvenile probation office, parole officers and the juvenile public safety advisory board or in possession of the department, are confidential and shall not be disclosed directly or indirectly to the public.

This provision is generally interpreted to mean that records obtained by probation, parole and the juvenile public safety advisory board or in the possession of CYFD are confidential. The position of the comma before “are confidential” suggests the possibility of reading the sentence as: “All records pertaining to the child ... are confidential and shall not be disclosed directly or indirectly to the public.” However, the statute is not being construed to include legal records, such as pleadings, court orders, and transcripts.

28.2.2 Records Defined

Subsection A of §32A-2-32 expressly provides that “all records pertaining to the child” include the following related records:

- social records;
- behavioral health screenings;
- diagnostic evaluations;
- psychiatric reports;
- medical reports;
- social studies reports;
- records from local detention facilities;
- client-identifying records from facilities for the care and rehabilitation of delinquent children; and
- pre-parole or supervised release reports and supervision histories obtained by the juvenile probation office, parole officers and the juvenile public safety advisory board or in possession of the department.

The statute formerly applied only to “all social records pertaining to the child, including all related diagnostic evaluations” In 2009 the Legislature amended the statute to move the word “social” so that now the statute applies to “all records pertaining to the child, including all related social records, behavioral health screenings, diagnostic evaluations” What other records are included in the term “all records” is not clear.

28.2.3 Exceptions to Non-Disclosure

A child's records, other than mental health and developmental disabilities records, may be disclosed to the following individuals or entities, provided that the agency, person, or institution receiving the information does not re-release the information without proper consent or as otherwise provided by law:

- court personnel;
- the child's CASA;
- the child's attorney or guardian ad litem representing the child in any matter;
- CYFD personnel;
- corrections department personnel;
- law enforcement officials when the request is related to the investigation of a crime;
- district attorneys or children's court attorneys;
- a state government social services agency in any state;
- those persons or entities of a child's Indian tribe specifically authorized to inspect such records under the Indian Child Welfare Act or its regulations;
- tribal juvenile justice system and social services representatives;
- a foster parent, if the records are those of a child currently placed with the foster parent or of a child being considered for placement with that foster parent, and if the records disclose information that is necessary for the child's treatment or care. Only information necessary for the treatment and care of the child may be disclosed;
- school personnel involved with the child if the records concern the child's educational needs and are necessary for educational planning. Only that information necessary to provide for the educational needs of the child may be disclosed;
- health care or mental health professionals involved in the evaluation or treatment of the child, the child's parents, guardians, or custodian, or other family members;
- representatives of the protection and advocacy system;
- the child's parent, guardian, or legal custodian, when the disclosure is necessary for the child's treatment or care. The disclosure may only include information necessary to the child's treatment or care; and
- any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court who agrees not to otherwise release the records; and
- the child, if fourteen years of age or older.

As mentioned above, the agency, person, or institution receiving information may not re-release the information without proper consent or as otherwise provided by law. §32A-2-32(C).

28.2.4 Consent to Disclosure and Redaction of Information

The child may consent to disclosure of his or her confidential records to other persons or entities not listed in §32A-2-32(C) by signing a release of information. However, all victim or witness identifying information must be redacted or otherwise deleted. §32A-2-32(D) (as amended in 2009).

28.2.5 Mental Health and Developmental Disability Records

Section 32A-2-32(B) provides that the disclosure of mental health and developmental disability records is governed by the Children's Mental Health and Developmental Disabilities Act. Section 32A-6A-24 of that Act contains detailed provisions governing the disclosure of confidential information related to the child. *See* Chapter 27 of this Handbook on the CMHDD Act.

28.2.6 Sanctions for Unauthorized Disclosure

The Delinquency Act provides that whoever intentionally and unlawfully releases any information or records closed to the public or releases or makes other unlawful use of records in violation of §32A-2-32 is guilty of a petty misdemeanor. §32A-2-32(E).

28.2.7 Relationship to Rule 10-166

In 2010, the Supreme Court adopted rules to govern the public inspection and sealing of court records. Rule 10-166 provides for public inspection and sealing of court records in Children's Court; the rule is similar but not identical to rules adopted at the same time for the Rules of Civil Procedure and the Rules of Criminal Procedure.

Rule 10-166(A) states the presumption that court records are subject to public access unless sealed by order of the court or protected from disclosure under other provisions of the rule. Subsection C lists a number of statutes that provide for confidentiality of records and provides that the records listed in these provisions are "automatically sealed" under Rule 10-166. The records protected under §32A-2-32 are now on this list.

28.3 Disclosure of Information on Public Access Web Sites

The Children's Code limits disclosure by state agencies and other political subdivisions of certain information related to juveniles on public access web sites. Section 32A-2-32.1 provides that a state agency or political subdivision of the state, including a school district, county, and a municipality or home-rule municipality, may not disclose on a public access web site maintained by it any information concerning the following:

- an arrest or detention of a child;
- delinquency proceedings;
- an adjudication of a child;
- an adult sentence imposed on a child, except information required to be disclosed pursuant to the Sex Offender Registration and Notification Act (SORNA), §§29-11A-1 *et. seq.*, or
- social records pertaining to a child as provided in §32A-2-32.

§32A-2-32.1.

28.4 Sealing of Juvenile Records

Section 32A-2-26 of the Delinquency Act sets forth the circumstances under which juvenile records maintained by the court, CYFD, and other agencies may be sealed. This sealing is different from confidentiality in that, once records are sealed under §32A-2-26, proceedings in the case are treated as if they never occurred, and all index references must be deleted. If an inquiry is made regarding the individual's records, the persons to whom the sealing order was directed must reply that no record exists with respect to the person. The person whose records are the subject of the sealing order may reply that no such record exists. §32A-2-26(C); Rule 10-420. *See* Chapter 29, Sealing of Records.

28.5 Prior Juvenile Dispositions

If a person is adjudicated as a delinquent child and given a juvenile disposition, then the juvenile disposition and any evidence given in a court hearing is not admissible as evidence against the child in any case or proceeding in any other tribunal whether before or after reaching the age of majority. The exception is for sentencing proceedings after conviction of a felony and then only for the purpose of a presentence study and report. The disposition is not deemed a conviction of a crime and does not impose any civil disabilities ordinarily resulting from conviction of a crime. The judgment does not operate to disqualify the child in any civil service application or appointment. §32A-2-18(A).

If a youthful offender or serious youthful offender is given an adult sentence, a record of the judgment may be admissible in another case or a proceeding in another court involving the offender. §32A-2-18(B). The determination of guilt at trial becomes a conviction for purposes of the Criminal Code. §32A-2-18(C).

28.6 Hearings

Adjudicatory hearings in delinquency cases are open to the public unless the court in its discretion, after a finding of exceptional circumstances, deems it appropriate to close the hearing. §32A-2-16(B). If the judge finds that exceptional circumstances exist to close the hearing, only the parties, their counsel, witnesses, and other persons approved by the court may be present.

If the hearing is closed, the court may admit those persons who the court finds have a proper interest in the case or the court's work, on the condition that they refrain from divulging any information concerning the exceptional circumstances that resulted in the need for a closed hearing. Representatives of the news media are allowed to attend closed hearings under the same condition, and subject to such enabling regulations as the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Delinquency Act. §32A-2-16(B).

Any person granted admission to a closed hearing who intentionally divulges information in violation of this prohibition is guilty of a petty misdemeanor. §32A-2-16(C).

28.7 Motor Vehicle Code Violations

28.7.1 Traffic Offenses Exempted

The Delinquency Act provides that if the municipal, magistrate, or metropolitan court finds a child guilty of one or more traffic offenses, or the children's court adjudicates a child delinquent for a traffic offense, the traffic offenses are subject to the reporting requirements and the suspension and revocation provisions of the Motor Vehicle Code. §32A-2-29(E). Section 32A-2-29(E) also provides that these offenses are not subject to the confidentiality provisions of the Delinquency Act. This likely refers to §32A-2-32, which is entitled "Confidentiality; records."

28.7.2 Motor Vehicle Code Reporting Requirement

Section 66-8-135 of the Motor Vehicle Code addresses reporting-related requirements. It requires judges to keep records of traffic complaints, citations, and other forms of traffic charges filed in the judge's court and every official action and disposition of the charge by that court. Every trial court judge, "including children's court judges," is required to forward an abstract of certain information related to traffic offenses handled in their court to the Taxation and Revenue Department, which must in turn make records of convictions by a court of law open to public inspection for 3 years from the date of their receipt, or 55 years if the convictions are under §§66-8-101 through 66-8-112. §66-8-135(G). It is not clear how this provision is to be reconciled with sealing of records under §32A-2-26, or whether it would ever conflict with §32A-2-32 or Rule 10-166.

28.8 Protective Orders

With regard to discovery in children's court, Rule 10-138 authorizes the issuance of protective orders as justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals. Chapter 23 of this Handbook discusses protective orders in further detail.

28.9 Federal Laws

Practitioners and other persons who have access to a child's records should be aware of federal laws that may impact the confidentiality of juvenile records. These include but are not limited to the following:

- The Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, popularly known as HIPAA. The regulations under HIPAA, 45 CFR Part 162, protect the privacy of individually identifiable health information and set forth requirements that must be met for disclosure.
- The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g. FERPA and its implementing regulations at 34 CFR Part 99 protect the privacy of student education records and set forth the requirements for disclosure.

- The Public Health Services Act prohibits the disclosure of certain information related to an offender who is participating in a drug or alcohol rehabilitation program that is subject to Federal regulations. 42 U.S.C. §290dd-2.

A detailed description of federal requirements is beyond the scope of this Handbook but practitioners and others interested in accessing health, treatment, or school related records should be aware that health care and treatment facilities and schools will have confidentiality requirements based on these laws.

CHAPTER 29

SEALING OF RECORDS

This chapter covers:

- Automatic sealing of court and CYFD records
- Sealing by motion
- Effect of sealing order
- Inspection and release of information
- Possible exceptions to sealing of records

29.1 Overview

Section 32A-2-26 of the Delinquency Act provides for the sealing of a child's delinquency records automatically and by motion. This was extensively amended in 2009. Most of the amendments, except as noted, pertain to the automatic sealing of records.

The corresponding children's court rule is Rule 10-262. The rule applies primarily to automatic sealing of records but had not been amended to reflect the 2009 changes to the statute when this Handbook went to press. Proposed amendments were pending in early 2011.

The general provisions of the Children's Court Rules also contain a rule on sealing of court records, namely Rule 10-166. However, by its own terms, Rule 10-166 does not apply to court records sealed under §32A-2-26 and Rule 10-262. *See* Rule 10-166(A).

29.2 Automatic Sealing

29.2.1 Automatic Sealing of Court Records

Section 32A-2-26, amended in 2009, provides that “[a] child *who is determined by the court not to be a delinquent offender* shall have the child's files and records in the instant proceeding automatically sealed by the court upon motion by the Children's Court Attorney (CCA) at the conclusion of the proceedings.” §32A-2-26(H) (emphasis added).

Rule 10-262(A) also requires the CCA to present the court with an order sealing the files and records in the case in a form prescribed by the Supreme Court “[w]hen a petition for delinquency has been filed that does not result in an adjudication of delinquency.” The court is required to enter the order upon conclusion of the case.

Note that the clause in the Delinquency Act referring to the sealing of records of “[a] child *who is determined by the court not to be a delinquent offender*” has not changed in the 2009 amendments. Thus, the committee commentary to Rule 10-262, which discusses the circumstances under which the records of a child “who is determined by the court not to be a delinquent offender” should be sealed, remains relevant when determining whether a court’s files and records must be automatically sealed under §32A-2-26.

The committee commentary directs the CCA to move for an order sealing records when:

- the child has satisfied the conditions of a time waiver;
- the child has completed the terms of a consent decree;
- the child has been acquitted or the case has otherwise been dismissed; or
- a ruling has been made on appeal that concludes the case without an adjudication of delinquency.

See Rule 10-262 (Committee Commentary).

The commentary acknowledges that, while these circumstances do not always result in a formal order of dismissal or a formal determination that the child is not delinquent, a dismissal nonetheless operates as an adjudication on the merits, and concludes that the CCA should ensure that sealing orders are presented when any of the above listed circumstances occur.

Under another provision of the statute as amended in 2009, the Children, Youth and Families Department (CYFD or department) is required to seal the records for a child who has been the subject of a petition under the Delinquency Act and notify the court, among others that the child’s records are “subject to sealing.” These actions are required when the child turns eighteen or at the end of legal custody and supervision, whichever is later.

Rule 10-262(B), based on the pre-2009 statute, provides that, when a person has been released from court-ordered supervision and CYFD has not received any new allegations of delinquency for two years since the person’s release, the department must notify the court that two years have elapsed and present the court with an order sealing the files and records in the case, which the court is required to enter. These provisions have not been amended since the statute was revised in 2009. Proposed amendments to Rule 10-262 were pending as of April 2011.

29.2.2 Automatic Sealing of CYFD Records

The 2009 amendments to the Delinquency Act require CYFD to seal its records when a child reaches the age of 18, or at the expiration of the disposition, whichever occurs later. §32A-2-26(G). CYFD is required to notify the CCA, the child’s attorney, and the referring law enforcement agency that the child’s records are subject to sealing. §32A-2-26(G).

If the child was the subject of a petition, CYFD must seal its records when the child turns eighteen or at the expiration of legal custody and supervision, whichever occurs later. The department is also required to notify the child (now an adult) that the department’s records have

been sealed. It must notify the CCA, the child's attorney, and the referring law enforcement agency that the child's records are subject to sealing. §32A-2-26(F).

29.3 Sealing by Motion

29.3.1 Motion of Court or Child

A person who has been the subject of a delinquency petition, or a person filing on his or her behalf, may move the court for an order vacating its findings, orders, and judgments on a delinquency petition, and sealing the legal and social files and records of the court, probation services, and any other agency in the case. If requested in the motion, the court must also order law enforcement files and records sealed. §32A-2-26(A).

29.3.2 Criteria for Sealing by Motion

The court will enter an order sealing a respondent child's files and records, and vacating its findings, orders, and judgments on the petition, if the court finds that:

- 2 years have elapsed since the final release of the person from legal custody and supervision, or 2 years have elapsed since the entry of any other judgment not involving legal custody or supervision;
- the person has not, within the past 2 years, been convicted of a felony or of a misdemeanor involving moral turpitude or been found delinquent by a court and no proceeding is pending seeking such a conviction or finding; and
- the person is 18 years of age or older or the court finds that good cause exists to seal the records prior to the child's eighteenth birthday.

§32A-2-26(A). The Legislature added in 2009 the requirement that the person be 18 years or older, unless the court finds that good cause exists to seal the records earlier.

29.4 Children's Court Form 10-420: Sealing Order

Children's Court Rule 10-420 contains a form of sealing order. Proposed amendments to the form were pending in early 2011.

29.5 Recipients of Sealing Order

Both Form 10-420 and Rule 10-262(C) require that the clerk of the court deliver or mail copies of any sealing order to the following persons:

- the Children's Court Attorney;
- CYFD and any other authority granting release;
- the law enforcement officer, department and central depository having custody of the law enforcement files and records;
- any other agency having custody of records or files subject to the sealing orders;

- counsel of record at the time of disposition; and
- the person who is the subject of the sealing order, at his or her last known address.

The committee commentary to Rule 10-262 “encourages all recipients of any sealing order under this rule to ensure that the order is given to the proper person responsible for sealing within the recipient’s agency.”

Note again that proposed amendments to the rule and form were pending as of April 2011.

29.6 Effect of Sealing Order

Upon the entry of the sealing order, the files and records of the case are sealed, proceedings in the case are treated as if they never occurred, and all index references must be deleted. If an inquiry is made regarding the respondent’s records, the persons to whom the sealing order was directed must reply that no record exists with respect to the person. The person whose records are the subject of the sealing order may reply that no such record exists but does not have to do so. §32A-2-26(C); Rule 10-420.

29.7 Files and Records Defined

The term “files and records” includes all forms of such documents, including electronic and paper versions. *See* Rule 10-262 (Committee Commentary).

29.8 Inspection and Release of Information

After the entry of a sealing order, the court may permit inspection of the files and records or release of information in the records included in the sealing order under the following circumstances:

- upon motion by the person who is the subject of the records and only to those persons named in the motion; and
- in its discretion, in an individual case, to any clinic, hospital, or agency that has the person under care or treatment or to other persons engaged in fact finding or research. §32A-2-26(D).

The court also has the discretion to set aside the sealing order if the person whose records are subject to the sealing order is found to be delinquent, in need of services, or convicted of a crime after entry of the sealing order. §32A-2-26(E).

In addition, after sealing, CYFD may store and use a person’s records for research and reporting purposes, subject to the confidentiality provisions in §32A-2-32, and other applicable state and federal laws. §32A-2-26(I)

29.9 Possible Exceptions to Sealing

29.9.1 Juveniles Given Adult Sentences

Subsections A and F of §32A-2-26 of the Children's Code pertain to sealing of records by motion and automatic sealing respectively. They both apply to "a person who has been the subject of a delinquency petition." Under this definition, the provisions of the Delinquency Act on sealing of records may be interpreted to apply to youthful offenders given adult sentences because their proceedings were likely initiated by petition.

However, unlike juvenile dispositions, which are not deemed criminal convictions and are not generally admissible as evidence against the child in other cases, judgments conferring adult sentences on juveniles are admissible and determinations of guilt at trial are treated as convictions for the purpose of the criminal code. §32A-2-18. Also, §32A-2-26 places responsibilities on CYFD, and yet adult sentences are handled by the Department of Corrections, not CYFD. *See* §32A-1-4, Definitions. The sealing of records statute is less than clear.

29.9.2 Motor Vehicle Code Related Offenses

The Delinquency Act provides that if the municipal, magistrate, or metropolitan court finds a child guilty of one or more traffic offenses, or the children's court adjudicates a child delinquent for a traffic offense, the offense is subject to the reporting requirements and the suspension and revocation provisions of the Motor Vehicle Code. §32A-2-29(E). Such offenses are not subject to the confidentiality provisions of the Delinquency Act. *Id.*

The Motor Vehicle Code requires records of traffic offenses to be available for public inspections for at least 3 years. Section 66-8-135 requires judges to keep records of traffic complaints, citations, and other forms of traffic charges filed in the judge's court and every official action and disposition of the charge by that court. Judges, "including children's court judges," must forward an abstract of certain information related to traffic offenses to the Department of Taxation and Revenue. Taxation and Revenue must in turn keep records of convictions by a court of law open to public inspection for 3 years from the date of their receipt, or 55 years if the convictions are under §§66-8-101 through 66-8-112. §66-8-135(G).

As explained above, the Delinquency Act authorizes an adjudicated delinquent child's records to be sealed after a certain period of time or after a certain age. §32A-2-26. Resolving the relationship between these provisions and the motor vehicle statutes is beyond the scope of this Handbook.

CHAPTER 30

PROBLEM-SOLVING COURTS AND OTHER PROGRAMS

This chapter covers:

- Therapeutic or problem-solving courts in New Mexico
- Other court-sponsored programs.

30.1 Problem-Solving Courts

30.1.1 Overview

Problem-solving courts, sometimes referred to as therapeutic or treatment courts or alternative sentencing programs, are rehabilitative programs fashioned by courts throughout the state. The most common problem-solving court in New Mexico is drug court, and there are a number of drug courts around the state that work with youth who become involved in the juvenile justice system.

In 2003, the Supreme Court recognized the need for centralized operational and financial oversight of the state's growing number of drug court programs and issued an order establishing the New Mexico Drug Court Advisory Committee as a permanent committee. In 2004, the Committee created a set of drug court standards for the state's programs. Currently, the Committee is supported in its work by a statewide drug court coordinator and staff at the Administrative Office of the Courts. The office produces a regular newsletter, offers training, and provides information on other training and funding opportunities. New Mexico also receives guidance from the State and National Associations of Drug Court Professionals and the National Drug Court Institute.

Problem-solving courts in New Mexico use the collaborative treatment-based drug court model to work with repeat offenders whose criminal or delinquency activity is driven by underlying substance abuse or mental illness. These programs serve as alternatives to incarceration and focus on the successful rehabilitation of participants through early, continuous, and intense judicial oversight, treatment, mandatory periodic drug testing, and use of appropriate sanctions, incentives, and other community-based rehabilitation services. Of the 50 problem solving court programs in New Mexico, 17 are juvenile programs.

Juvenile drug court functions as a docket within the children's court. Selected delinquency cases, and in some instances, status offenders, are referred to juvenile drug court for handling by a designated judge. The youth referred to this docket are identified as having problems with alcohol or other drugs. The juvenile drug court judge maintains close oversight of each case

through regular status hearings with the parties involved. The judge both leads and works as a member of a team that comprises representatives from treatment, juvenile justice, social and mental health services, school and vocational training programs, law enforcement, probation, the prosecution, and the defense. Over the course of a year or more, the team meets frequently (often weekly), determining how best to address the substance abuse and related problems of the youth and his or her family that have brought the youth into contact with the justice system. See New Mexico Supreme Court website, <http://joo.nmcourts.gov/joomla/pscourts>, for more information.

30.1.2 Statutory Authority

The Delinquency Act does not expressly authorize specialized treatment/rehabilitative programs for juveniles adjudicated delinquent. However, the purpose of the Children's Court is "first to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of the Children's Code." §32A-1-3(A). Furthermore, the children's court has some ability to fashion equitable-type remedies under its authority to impose conditions of release pending adjudicatory hearing on a delinquency petition or pending sentencing, and pursuant to the court's power to impose conditions of probation. It is under these powers that children's courts have required participation in therapeutic courts. §§32A-2-19(B), 32A-2-13; Rule 10-225(C); *State v. Steven B.*, 2004-NMCA-086, ¶19 (Ct. App. 2004); (finding that the Legislature gave the court broad discretion to impose conditions of probation); *In the Matter of Angela R.*, 105 N.M. 133, 137, 729 P.2d 1387, 1391 (Ct. App. 1986).

While several appellate cases have addressed challenges to therapeutic courts, failure to properly preserve the issues for appellate review has made review difficult. In *State v. Lucero*, the Court of Appeals articulated why preservation issues commonly arise in appeals to alternative sentencing programs.

Preservation issues arise with respect to alternative sentencing programs such as in this case because of the timing of the placement in a program. When a defendant has been convicted and there is the prospect of avoiding incarceration with the use of an alternative program, the defendant is frequently eager to participate in the program. At that time, the defendant does not have the impetus to challenge the program or its procedures. Later if the program does not work out after the defendant has participated in it, and the defendant wishes to assert challenges, it may be too late to preserve the issues because the program has progressed or because the defendant has received the benefit of the program.

State v. Lucero, 2007-NMCA-127, ¶16.

In *State v. Steven B.* the Court of Appeals refused to review the validity of a grade court program as a whole because there were no objections to grade court when it was included as a condition of release or probation. The Court noted that "there is no comprehensive explanation of how grade court operates ... and no specific objection to the imposition of grade court as a condition of release or that the Code does not authorize this type of rehabilitative program. As a result, there is nothing for this Court to review as relates to the program itself." 2004-NMCA-086, ¶10.

30.1.3 Contempt Power

The contempt power is available subject to due process and equal protection. The case law with regard to juveniles has primarily involved challenges to grade court. While grade court is not under the same standards as drug courts, the case law is instructive.

In *State v. Steven B.*, the Court of Appeals reviewed the issue of whether “the children’s court may use its contempt power as an alternative to probation revocation to detain a child who is on probation for violation of grade court requirements.” The Court of Appeals found that the children’s court’s imposition of two weekends of detention for violation of the grade court order was not an abuse of discretion and did not exceed the scope of the court’s contempt power because “detention furthers the purposes and directives of the Code.” 2004-NMCA-086, ¶¶16, 19. *Cf. State v. Henry Don S.*, 109 N.M. 777, 779, 790 P.2d 1058 (Ct. App. 1990) (self executing provision in probation order sending child to detention for violating condition of probation was invalid).

However, the Court of Appeals acknowledged in *Steven B.* that authorizing the court to order detention for violation of a grade court order pursuant to its contempt power gives the appearance of almost “routinizing contempt,” and noted concern with the potential for the power to be abused. 2004-NMCA-086, ¶18.

In *Steven B.*, counsel argued that the children were deprived of their right to notice and a hearing on their grade school violations. However, the Court noted that counsel appeared and responded to the violations, failing to object to either notice or hearing, and decided that the due process arguments were not preserved. *Id.* ¶7.

30.2 Other Court Sponsored Programs in New Mexico

As noted, there are many problem-solving courts operating throughout New Mexico, and many have been praised for their novel approach to addressing problems in the community. In addition, the judiciary and their staff, attorneys, juvenile probation officers, juvenile detention center staff and other members of the juvenile justice community have developed a number of other innovative programs. Grade Court in the Eleventh Judicial District, San Juan County, and the Program for the Empowerment of Girls in the Second are two excellent examples, as are the juvenile justice continuum programs around the state. *See* Appendix E, Resource Directory, for more information. The state’s budget woes are impacting a number of drug court and other programs but they remain hopeful means of addressing the needs of court-involved youth.

CHAPTER 31

SEX OFFENDER REGISTRATION

This chapter covers sex offender registration for juvenile offenders:

- New Mexico's Sex Offender Registration and Notification Act
- Federal Adam Walsh Act

31.1 New Mexico's Sex Offender Registration and Notification Act

31.1.1 Overview

The New Mexico Legislature amended the Sex Offender Registration and Notification Act (SORNA), §29-11A-1 *et seq.*, in 2008. The amendments more closely track the requirements of Federal law, which are discussed later in this chapter.

The state SORNA essentially requires sex offenders living, working, or attending school within New Mexico to register their name, date of birth, social security number, address, place of employment or school, type of sex offense conviction, and the date and place of the sex offense conviction, with the county sheriff for the county in which the sex offender resides, works, or attends school. The sex offender is required to renew his registration periodically. SORNA also requires a sex offender to disclose his status as a sex offender to any school where he is enrolled, or place where the offender is employed or volunteers. The law establishes criminal penalties for failing to comply with its registration requirements or for willfully or knowingly providing false information. §29-11A-4. The Department of Public Safety (DPS) is required to maintain a web site containing sex offender information that is accessible to the public.

31.1.2 SORNA's Application to Juveniles

31.1.2.1 Juveniles Given Adult Sentences

When the Legislature amended SORNA in 2008, it deleted from the definition of sex offender the requirement that a sex offender be a person 18 years of age or older. *Compare* §29-11A-3 (2003) *with* §29-11A-3 (2007). However, the Act does not expressly state the circumstances under which juveniles may be subject to its requirements. Reading SORNA and related New Mexico laws together supports the conclusion that a child meets SORNA's definition of "sex offender" and is subject to SORNA's requirements only if he is a youthful offender who has been given an adult sentence for a sex offense in accordance with the Children's Code.

SORNA defines a "sex offender" as a person who has been *convicted* of a sex offense pursuant to state, federal, tribal or military law, and who satisfies the requirements for residing or staying in New Mexico enumerated in §29-11A-3(D). Under the Children's Code, a juvenile judgment

and adjudication is not deemed a conviction of a crime unless it results in an adult sentence. §32A-2-18(A). If the judgment does result in an adult sentence, the determination of guilt at trial becomes a conviction for purposes of the Criminal Code. §32A-2-18(C).

The conclusion that a juvenile is required to register under SORNA only if he has been given an adult sentence is consistent with the provision of the Children's Code added in 2007 that limits the information that may be disclosed on public access web sites. Section 32A-2-32.1 provides that state agencies and political subdivisions of the state may not disclose information on their public access web sites relating to:

- an arrest or detention of a child;
- delinquency proceedings for a child;
- an adjudication of a child;
- *an adult sentence imposed on a child, except information required to be disclosed under SORNA*; or
- social records pertaining to a child.

§32A-2-32.1 (emphasis added). The exception for information required to be disclosed under SORNA applies only to situations in which an adult sentence has been imposed, confirming that juvenile dispositions do not trigger registration requirements.

31.1.2.2 Publication of Sex Offender Information

SORNA §29-11A-5.1(E) appears to limit publication of sex offender information even for children given adult sentences. It provides that sex offender information may not be provided on the DPS web site regarding “a sex offender who was less than eighteen years of age when the sex offender committed the sex offense for which the sex offender was convicted as a youthful offender ... unless at the time of sentencing, the court made a finding that the sex offender is not amenable to treatment and is a danger to the community.” The finding that the sex offender “is a danger to the community” is not required to impose adult sanctions under the Children's Code. Hence, for a juvenile sex offender to be included on the DPS website, the children's court judge would have to make this additional finding at the time of sentencing.

31.1.3 Registration and Notice Requirements

Sections 29-11A-4 through 29-11A-5 set forth the requirements for registering as a sex offender in New Mexico. If the child is required to register as a sex offender, the court must provide the child with written notice of his duty to register pursuant to SORNA, and must explain the written notice to the sex offender. The written notice must be included in the judgment and sentence forms provided to the sex offender.

The written notice must inform the sex offender of the requirements for registering, which are set forth in §29-11A-7(A). The offender must:

- register with the sheriff for the county in which the sex offender will reside or, if the sex offender will not have an established residence, with the sheriff for each county in which the sex offender will live or be temporarily located;
- report subsequent changes of address;
- notify the sheriff of the county in which the sex offender resides if the sex offender intends to move to another state so that the sheriff can inform DPS, which will notify the other state and obtain information about the registration requirements in that state for the offender;
- disclose his status as a sex offender in writing when he begins employment, begins a vocation or enrolls as a student at an institution of higher education in New Mexico, and provide written notice of any change regarding employment, vocation, or enrollment status to the sheriff for the county in which the institution is located and to the law enforcement entity and registrar for the institution;
- disclose his status as a sex offender in writing when enrolling as a student at a private or public school in New Mexico, and provide written notice of any change in his enrollment status, to the sheriff for the county in which the school is located, and to the principal of the school;
- disclose his status as a sex offender in writing to his employer, supervisor or other person similarly situated when he begins employment, a vocation, or volunteers his services, regardless of whether the sex offender receives payment or other compensation; and
- read and sign a form that indicates that the sex offender has received the written notice and that a responsible court officer, designated by the chief judge for the judicial district, has explained the written notice to the sex offender.

Under §29-11A-7(B), the Corrections Department, the jail, or the detention center is also required to provide written notice to the sex offender of his duty to register. When the sex offender is released, these entities or the court must provide written notice to the sheriff of the county in which the sex offender is released and to DPS. §29-11A-7(C).

31.1.4 Penalties for Failure to Register

A sex offender who willfully or knowingly fails to comply with SORNA's registration requirements or willfully or knowingly provides false information when complying is guilty of a fourth degree felony and sentenced pursuant to §31-18-15. An offender who does this again after a first or subsequent conviction for such a violation is guilty of a third degree felony. The willful failure to comply or providing of false information is deemed part of a continuing transaction or occurrence. However, a conviction for this crime is not considered a felony for purposes of the imposition of sentencing enhancements under §31-18-17. A sex offender who fails to notify the county sheriff that he plans to move out of state is guilty of a fourth degree felony. §§29-11A-4 and 29-11A-4.1.

31.1.5 Local, State and National Registries

SORNA requires the sheriff of each county to maintain a local registry of sex offenders who are required to register and to share that information with DPS, which maintains a central registry. SORNA also requires DPS to participate in the national sex offender registry administered by the

U.S. Department of Justice (DOJ). The sheriff is required to forward registration information obtained from sex offenders to DPS no later than ten working days after the information is received. §29-11A-5.

31.1.6 Public Access to Sex Offender Information

If a sex offender is convicted of one of the following categories of sex offenses, the county sheriff must forward registration information obtained from the sex offender to the District Attorney for the judicial district in which the sex offender resides and if the sex offender is a resident of a municipality, the chief law enforcement officer for the municipality in which the sex offender resides:

- aggravated criminal sexual penetration or criminal sexual penetration in the first, second or third degree, §30-9-11;
- criminal sexual contact of a minor in the second, third or fourth degree, §30-9-13;
- sexual exploitation of children, §30-6A-3;
- sexual exploitation of children by prostitution, §30-6A-4;
- attempt to commit any of these offenses, §30-28-1.

§29-11A-5.1(A). Within 7 days of receiving the information the county sheriff must contact every licensed daycare center, elementary school, middle school, and high school within a one-mile radius of the sex offender's residence and provide them with the sex offender's releasable registration information.

A person who wants to obtain information regarding the above sex offenders may in turn request the information from the public officials listed in §29-11A-5.1(B). The public official receiving the request must provide the information, with the exception of the sex offender's social security number and DNA information, which is not releasable, within a reasonable period of time, and no later than 7 days after receiving the request.

As noted earlier, DPS must establish and manage an internet web site that provides the public with registration information regarding sex offenders. However, in order for information pertaining to juvenile sex offenders to be published on the web site maintained by the DPS, the judge must make certain findings. Sex offender information may not be provided on the web site unless the offender was adjudicated as a youthful offender and the court makes a finding that the offender is not amenable to treatment and is a danger to the community. §29-11A-5.1(E); §32A-2-32.1.

31.1.7 Immunity from Causes of Action under SORNA

Nothing in SORNA creates a cause of action on behalf of a person against a public employer, public employee, or public agency responsible for enforcement of the law, so long as the entity is in compliance with SORNA. §29-11A-8.

31.1.8 State Preemption Relative to Local Governments

SORNA preempts the field of sex offender registration and notification as between the state and local governments. Cities, counties, home rule municipalities and other political subdivisions are prohibited from adopting ordinances on sex offender registration and notification. Section 29-11A-9 should be consulted with regard to ordinances adopted before January 18, 2005.

31.1.9 Application of SORNA to Indians Residing In Indian Country

In *State v. Atcitty*, 2009-NMCA-086, ¶36, the Court of Appeals held that the state has no basis to enforce the requirements of the New Mexico SORNA against Indians who:

- were convicted of sex offenses in federal court;
- are living in Indian country situated within New Mexico; and
- are neither working or attending school outside of Indian country.

The Court conducted a detailed analysis of a state's ability to exercise regulatory authority under laws like the state SORNA in Indian country, and the requirements applicable to Indian tribes under the recently enacted Federal Adam Walsh Act. It concluded that the state's application of the state sex offender registration statute to the Indian defendants was not authorized by federal law and thus infringed on the Navajo Nation's tribal sovereignty. The convictions of the defendants for failure to register were reversed. *Id.* ¶37.

31.2 Federal Adam Walsh Act

31.2.1 Overview of the Act

Title I of the Adam Walsh Child Protection and Safety Act of 2006, also known as the Sex Offender Registration and Notification Act, was signed into law on July 27, 2006. It is codified mostly at 42 U.S.C. §16911. This federal SORNA replaces the Jacob Wetterling sex offender registration requirements that were enacted during the 1990s and established a baseline for state sex offender registration programs, including the "Megan's Law" public notification requirements. Because it has the same name as the New Mexico statute, the federal SORNA will be referred to in this chapter as the Adam Walsh Act or the Act.

It is important to note that the Adam Walsh Act does not impose registration requirements directly on the state. Rather, a state's failure to come into substantial compliance or "substantial implementation" with the Act's requirements will result in an annual 10% reduction in Byrne Grants, which are law enforcement grants.

The Adam Walsh Act:

- establishes a new federal felony offense for failing to register as a sex offender as required by the Act;

- establishes a baseline sex offender registry standard for the jurisdictions to achieve, but the states are free to enact more stringent requirements;
- now requires certain juveniles to register as sex offenders;
- classifies sex offenders by three tiers depending on the severity of their offense, with the Tier III classification being applied to the most serious offenders and generally requiring Tier III offenders to register for life.
- applies retroactively to certain offenders convicted prior to the Act's effective date.

The Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) office, which is part of the DOJ, will review state legislation on sex offender registration and notification to determine whether it complies with the requirements of the Adam Walsh Act. The DOJ has issued guidelines to help in interpreting Adam Walsh. The National Guidelines for Sex Offender Registration and Notification, issued on July 2, 2008 are available at 73 Fed Reg. 38030. Supplemental guidelines issued January 11, 2011, can be found at 76 Fed. Reg. 1630. Both can be accessed through the SMART office website, www.ojp.usdoj.gov/smart/.

31.2.2 Application to Juveniles

The Adam Walsh Act requires that states, as a condition of receiving certain federal funds, require that juveniles convicted of sex offenses register:

- if the juvenile is sentenced as an adult; or
- if the juvenile is fourteen years old or older and is convicted of an offense similar to or more serious than the federal aggravated sexual assault statute, 18 U.S.C. §2241, or an attempt or conspiracy to commit such an offense.

The guidelines for state implementation of the Adam Walsh Act issued by the Justice Department on July 2, 2008, provide that in order to minimally comply, the state must apply the Act's requirements to juveniles at least 14 years old at the time of the offense who are adjudicated delinquent for committing, or attempting or conspiring to commit, offenses under laws that cover:

- engaging in a sexual act with another by force or the threat of serious violence; or
- engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim.

For the purpose of applying the Adam Walsh Act to juveniles, "sexual act" should be interpreted to include any degree of genital or anal penetration, and any oral-genital or oral-anal contact. 73 Fed. Reg. 38050

Juveniles who are required to register on the basis of a juvenile delinquency adjudication are considered Tier III offenders. Tier III offenders required to register on the basis of a juvenile adjudication may terminate their registration after 25 years if they have maintained a clean record. Other Tier III offenders must register for life. 73 Fed. Reg. 38068. The supplemental guidelines issued on January 11, 2011 address, among other things, the public notification of juveniles adjudicated delinquent for serious sex crimes. 76 Fed. Reg. 1630.

The Adam Walsh Act contains no provisions for a risk assessment hearing for juveniles adjudicated delinquent and subject to registration, and there are no exceptions for intrafamilial cases of sex abuse. The only exception is “consensual” sexual activity between a victim who is at least 13 years old and an offender who is no more than four years older than the victim.

The provisions on juveniles are controversial because of research indicating that there is a marked difference between juveniles and adults in their amenability to sex offender treatment. Juveniles are considered to have more potential than adults for benefiting from treatment programs. *Practitioner’s Guide to the Adam Walsh Act*, p. 3, published by the National Center for Prosecution of Child Abuse, www.ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf.

31.2.3 Retroactive Application

A significant aspect of the Adam Walsh Act as a legal matter is its retroactivity provisions. In December 2010, the Department of Justice finalized an interim rule that makes it clear that the requirements of the Act apply to sex offenders convicted before the enactment of the Act. 75 Fed. Reg. 81849.

31.2.4 State Requirements and “Substantial Implementation”

As discussed, a state must demonstrate that it has substantially implemented the requirements of the Adam Walsh Act, or it will risk losing 10% of its Byrne Grant funding. Opponents of the Act argue that the cost to states of implementing the Act is more than 10% of a state’s Byrne funds, and different agencies and interest groups continue to debate the merits of compliance. New Mexico is one of 47 states and 184 Indian tribes that requested and received an extension to July 27, 2011 for demonstrating compliance.

The guidelines issued by the DOJ contain the analysis that the DOJ applies when determining whether a state has substantially implemented the requirements of the Act. Determining the extent to which New Mexico complies with the Act’s requirements requires an analysis that is beyond the scope of this handbook.

31.2.5 Indian Tribes and Adam Walsh

The Adam Walsh Act contains provisions for tribal participation in sex offender registration, and Tribes are facing issues similar to those of the states with regard to their participation. As noted above, most Indian tribes around the country requested and received extensions for demonstrating compliance.

CHAPTER 32

STATUS OFFENSES

This chapter covers:

- Meaning of status offense
- Requirements of federal law
- Children’s Shelter Care Act and FINCOS
- Specific status offenses

32.1 Overview

32.1.1 Definition of “Status Offense”

A “delinquent act” is “an act committed by a child that would be designated as a crime under the law if committed by an adult.” §32A-2-3(A). In contrast, the term status offense when applied to juveniles refers to an act that would *not* be a crime if committed by an adult, and is merely a crime due to the offender’s status as a child, such as truancy, running away from home, tobacco use, and curfew violations.

Although the term “status offense” is not used in the Children’s Code, it is used commonly in other states. Children, Youth and Families Department (CYFD) regulations also use the term. Under CYFD rules, “status offender” is defined as “a runaway, a truant, and/or a juvenile who has committed a status offense that is not classified a delinquent act (exception: out-of-state runaway juveniles as mandated by state and/or federal law).” See 8.14.14.7 (VV) and 8.14.15.7(VV) NMAC.

32.1.2 Non-Criminal Nature of Status Offenses

While some states treat status offenses as criminal acts, in New Mexico status offenses are not delinquent acts and therefore not subject to the Delinquency Act. In *ACLU v. City of Albuquerque*, the Supreme Court stated that the Legislature has clearly expressed its intent in the Children’s Code not to treat status offenses as criminal. Acts committed by children that would not be crimes if committed by adults cannot be punished by incarceration or other criminal sanctions. 1999-NMSC-044, ¶¶13, 15, 18. CYFD regulations also provide that juveniles charged with status offenses may not be held in a juvenile detention facility. 8.14.14.14(E) NMAC.

32.2 Requirements of Federal Law

Federal law imposes some restraints on treating status offenses as delinquent or criminal acts. The Federal Juvenile Justice and Delinquency Prevention Act (JJDPA) of 1974 is a major source of federal funding for improving states' juvenile justice systems. One of the primary purposes of the JJDPA is to ensure that status offenders are not placed in secure detention. In order to receive federal funds under the JJDPA, states cannot place status offenders in secure juvenile facilities for extended periods of time. *See* Chapter 34, Federal Laws.

32.3 Children's Shelter Care Act and FINCOS

The Children's Shelter Care Act, §§32A-9-1 *et seq.*, and the Families In Need of Court-Ordered Services Act (FINCOS), §§32A-3B-1 through 32A-3B-22, address children who have not committed "delinquent acts" but have committed status offenses or other acts against their own best interests. See discussion in *ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶21.

The Legislature enacted the Children's Shelter Care Act in part to help children who "are needlessly detained in secured facilities on charges for acts that would not be criminal if they were committed by an adult." §32A-9-2. The Act defines a "child in need of supervision" as a "child found by the children's court or family court division of the district court to:

- (1) have committed an offense applicable only to children or not classified as criminal; and
- (2) be in need of care or rehabilitation."

§32A-9-3(C). The Act was intended to establish and fund programs, placements, and services designed to serve as alternatives to the physical detention of children in need of supervision. The Act is also intended to apply to alleged delinquent children who would benefit from certain non-secured placements and who do not require secure detention. §32A-9-2.

FINCOS also addresses children who run away from home or who are habitually truant from school. The Children's Code considers such behavior, while not criminal, not to be in the best interests of the child, and authorizes government intervention when such behavior places a child in danger because of his or her surroundings. *See ACLU*, 1999-NMSC-055. FINCOS provides that runaways and truants, as defined in the Act, may be taken into protective custody by a law enforcement officer and detained in a community-based shelter care facility, including a shelter-care facility established by the Children's Shelter-Care Act. §32A-3B-6.

32.4 Specific Status Offenses

32.4.1 Truants

The Compulsory School Attendance Law, §22-12-1 *et seq.* (the Law), governs the terms and conditions of school attendance for persons under the age of eighteen in New Mexico. The Legislature amended provisions of the Law in 2009. The amendments create two classes of truants. Students who have ten days or more of unexcused absences in a school year are called

“habitual truants” while students who have five unexcused absences in a school year are “student[s] in need of early intervention.” §22-12-9.

The Law provides for intervention by the children’s court upon motion of CYFD when a child is a “habitual truant” and the student or family has refused family services to address the habitual truancy or CYFD has exhausted appropriate and available family services. §22-12-7(C); §32A-3B-11. If a child is a “student in need of early intervention,” the truancy is addressed informally without the court or CYFD’s intervention through conferences conducted between the school and the parents to discuss possible interventions. §22-12-8.

The Law makes parents responsible for the school attendance of their children and vests authority in the local school board or the governing body of a charter or private school to enforce the provisions of the law. §22-12-2. The local school board or governing body is responsible for initiating enforcement of the Law by giving parents written notice of habitual truancy and requiring a meeting between the parent and the school to develop intervention strategies focusing on keeping the student in school. §22-12-7(B).

If unexcused absences continue after the school has given the parent written notice, the school must report the student to probation services for an investigation as to whether an abuse and neglect petition shall be filed pursuant to the Abuse and Neglect Act or a petition should be filed under FINCOS. Probation services may send the parent written notice directing the parent and student to report to probation services to discuss services for the student or the family. If the child or family has refused family services or CYFD has exhausted appropriate and available family services, CYFD may initiate abuse and neglect or FINCOS proceedings. §22-12-7(C) and §32A-3B-11. The procedures for filing an abuse and neglect petition are discussed in the Child Welfare Handbook, as are the procedures for filing a petition under FINCOS.

If probation services files a petition alleging that the family is in need of court-ordered services under FINCOS, and the court makes a finding of habitual truancy, the 2009 amendments permit the court to order a habitual truant’s driving privileges to be suspended for a specified time not to exceed ninety days on the first finding of habitual truancy and not to exceed one year for a subsequent finding of habitual truancy, in addition to any other dispositions authorized under FINCOS. § 22-12-7(C).

32.4.2 Runaways

In 2007, a new section was added to Article 1 of the Children’s Code to address runaway children. Section 32A-1-21 provides that, whenever a law enforcement agency receives a report from a parent, guardian, or custodian that a child over whom the parent, guardian or custodian has custody has left home without permission and is believed to have run away, a law enforcement agent may help locate the child and:

- Return the child to the parent, guardian, or custodian unless safety concerns are present;
- Hold the child for up to six hours if the parent, guardian or custodian cannot be located, provided that no child shall be placed in a secured setting; or
- After the six hours has expired, follow the procedures outlined in FINCOS, §32A-3B-3.

32.4.3 Tobacco Use

Any minor who procures or attempts to procure tobacco for personal use or for use by others is subject to a fine of up to \$100 or forty-eight hours of community service. §30-49-3(B); §30-49-12. If the minor presents written, printed, or photostatic evidence of age or identity that is false for the purpose of procuring or attempting to procure tobacco products, the minor is subject to the same penalties. §30-49-6.

In contrast, the tobacco offenses enumerated in Subsection A of §30-49-12 of the Tobacco Products Act are applicable to all ages. Since these acts are prohibited regardless of the offender's age, they would constitute "delinquent acts" under the Delinquency Act.

32.4.4 Curfew Violations

The Supreme Court has invalidated attempts by local governments to impose criminal penalties and incarceration on children for curfew violations. In *ACLU v. City of Albuquerque*, the Court struck down Albuquerque's curfew ordinance, which subjected juveniles to fines and incarceration for curfew violations. The Court ruled that the Children's Code preempts the curfew ordinance because the ordinance creates criminal sanctions against children for violating the curfew when such behavior is not unlawful if committed by an adult. Only the Children's Code authorizes the imposition of criminal-type sanctions on juveniles. 1999-NMSC-044, ¶14.

However, protective custody under FINCOS may possibly be imposed for a violation of curfew violations. In *ACLU*, the Supreme Court did not rule out the possibility that a child could be taken into protective custody, provided that a fact-specific showing that one or more of the specific statutory conditions within §32A-3B-3 of FINCOS is met. These would include, for example, a showing that the child is endangered by his or her surroundings and removal is necessary to ensure the child's safety. *ACLU*, ¶33, citing §32A-3B-3(A)(4)).

32.4.5 Minor Traffic Offenses

Traffic offenses that are not classified as delinquent acts under §32A-2-3(A)(1) are tried in municipal, magistrate, or metropolitan court. However, if the children's court acquires jurisdiction over a delinquent child under §32A-2-3 for another type of offense, it also has exclusive jurisdiction over the traffic offenses alleged to have been committed by the child arising out of the same occurrence. §32A-2-29(B) (2009). Only the children's court may incarcerate a child for Motor Vehicle Code or municipal traffic code violations. §32A-2-29(F).

32.5 Underage Alcohol Use Not Status Offense

Possession of alcohol is not considered a status offense because an adult between 18 and 21 years of age can be found guilty of possession of alcoholic beverages, and thus possession of alcohol may be characterized as a delinquent act under the Code. *State v. Doe*, 88 N.M. 137, 139, 537 P.2d 1399, 1401 (1975); §32A-2-3(A)(2) (classifying the "buying, attempting to buy, receiving, possessing or being served any alcoholic liquor or being present in a licensed liquor established" as a delinquent act).

CHAPTER 33

INTERSTATE COMPACT ON JUVENILES

This chapter covers:

- overview of the Interstate Compact on Juveniles
- the purpose of the compact
- the Interstate Commission for Juveniles
- the Interstate Council for Juveniles
- applicability and operation
- New Mexico contact and other resources

33.1 Overview

The Interstate Compact on Juveniles (ICJ) is an agreement among the states that regulates the interstate movement of children who are under court supervision or who have run away from home and moved to another state.

Prompted by media attention directed at the plight of runaways in America, a group of organizations developed the compact with the purpose of establishing a uniform set of procedures to facilitate the return of youth who ran away from home to other states and ensure that juvenile offenders who cross state lines can be supervised in other states. *See* the Office of Juvenile Justice and Delinquency Prevention (OJJDP) Fact Sheet, Interstate Compact on Juveniles, Christopher Holloway, available at www.ncjrs.gov/pdffiles1/ojjdp/fs200012.pdf.

The ICJ was first approved by the developing organizations in 1955 and ratified by all 50 states, the District of Columbia, the Virgin Islands, and Guam by 1986. A new compact was developed between 2000 and 2002, and adopted by New Mexico in 2003 via the promulgation of §32A-10-9, which includes the full text of the compact. Indeed, New Mexico was the first state to adopt the new compact.

The original compact was automatically repealed upon approval of the new compact by the 35th state in August 2009. The new compact is now effective and has been adopted by 46 states. The compact is more focused on public safety than the original and is designed to create a more effective way of transferring and keeping track of juveniles between states.

Some of the new provisions are:

- the establishment of an independent authority to administer ongoing compact activity, including a provision for staff support;
- gubernatorial appointments of representatives for all member states on a national governing commission;
- rulemaking authority and power to impose significant sanctions for noncompliance;
- a mandatory funding mechanism to support compact operations; and
- requirements for the collection of standardized information.

See http://www.csg.org/programs/policyprograms/NCIC/interstatecompact_juveniles.aspx.

33.2 Purpose

The purposes of the compact are listed in Article 1 and are to:

- ensure that adjudicated juveniles and status offenders are provided adequate supervision and services in the receiving state as ordered by the judge or parole authority in the sending state;
- ensure that the public safety interests of the citizens, including victims, in both the sending and receiving states are adequately protected;
- return juveniles who have run away, absconded or escaped from supervision or have been accused of an offense to the state requesting their return;
- make contracts for the cooperative institutionalization in public facilities in member states for delinquent youth needing special services;
- provide for the effective tracking and supervision of juveniles;
- equitably allocate the costs, benefits, and obligations of the compacting states;
- establish procedures to manage the movement between states of juvenile offenders released to the community under the jurisdiction of the court or supervising state agency;
- ensure immediate notice to jurisdictions where defined offenders are authorized to travel or to relocate across state lines;
- establish procedures to resolve pending charges against juvenile offenders prior to transfer or release to the community under the terms of this compact;
- establish a system of uniform data collection on information pertaining to juveniles subject to this compact that allows access by authorized juvenile justice and criminal justice officials, and regular reporting of compact activities to heads of state executive, judicial and legislative branches and juvenile and criminal justice administrators;
- monitor compliance with rules governing interstate movement of juveniles and initiate interventions to address and correct noncompliance;
- coordinate training and education regarding the regulation of interstate movement of juveniles for officials involved in that activity; and

- coordinate the implementation and operation of the compact with the Interstate Compact on the Placement of Children, §32A 11-1 *et seq.*, the Interstate Compact for Adult Offender Supervision, §31-5-20, and other compacts affecting juveniles, particularly in those cases where concurrent or overlapping supervision issues arise.

§32A-10-9 (ICJ, Art. 1, §B).

33.3 Interstate Commission for Juveniles

The revised compact creates an Interstate Commission for Juveniles (Commission), which is made up of commissioners appointed by each of the participating states. §32A-10-9 (ICJ, Art. III, §B). The Commissioner for New Mexico is Dale Dodd, a designee of the Secretary of the Children, Youth, and Families Department (CYFD).

The primary duties of the Commission include the following:

- To promulgate rules to implement the compact's provisions, which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in the compact;
- To oversee and coordinate the interstate movement of juveniles subject to the terms of the compact and by-laws and rules adopted by the Commission;
- To enforce compliance with compact and rule provisions; and
- To coordinate education, training and public awareness regarding the interstate movement of juveniles for officials involved in such activity and establish uniform standards for the reporting, collecting and exchanging of data.

See §32A-10-9 (ICJ, Art. IV).

33.4 State Council for Juvenile Supervision

The compact requires each member state to create a State Council for Interstate Juvenile Supervision. While each state may determine the membership of its own state council, the council must include at least one representative from each of the following:

- the legislative branch;
- the judicial branch;
- the executive branch;
- victims groups, and
- the compact administrator, deputy compact administrator or designee.

Each state council advises and may exercise oversight and advocacy concerning that state's participation in Interstate Commission activities and other duties as may be determined by that state. These may include developing policy concerning the operations of and procedures for the compact within the state. §32A-10-9 (ICJ, Art. IX). Despite being the first state to enter the compact, New Mexico has not yet formed its State Council.

33.5 Applicability and Operation

33.5.1 Overview

It is the responsibility of the Interstate Commission for Juveniles to promulgate by-laws and regulations. The situations covered by the rules and by-laws adopted by the Commission include but are not limited to the following:

- cooperative supervision of juveniles on probation or parole;
- return of juveniles on probation or parole who have absconded to another state or who have escaped to another state from a juvenile correctional facility;
- return from another state of an alleged delinquent to the state where the act of delinquency is alleged to have occurred; and
- return from another state of a runaway to the state of residence.

An extensive set of regulations went into effect on January 1, 2011. These can be found on the Commission's web site, <http://www.juvenilecompact.org>, along with training materials on the new rules, a bench book, lists of the commissioners and staff around the country, and other information. ICJ Transition Rule 9-101, which governs the transactions between signatory and non-signatory states, and determines which rules to apply, is scheduled to be in effect until June 30, 2011.

A two page quick reference guide to compact operations can be found at: <http://www.juvenilecompact.org/LinkClick.aspx?fileticket=IX0KorOhR6s%3D&tabid=631> (hereinafter "Quick Reference Guide").

33.5.2 Cooperative Supervision

The ICJ provides procedures for cooperative supervision when a juvenile on probation or parole in a state wishes to relocate to another state within the compact. The ICJ is the only legal means for transferring supervision of juveniles on probation or parole to another state.

Before a sending state (the state where a juvenile is on probation or parole) may refer a case for cooperative supervision in another state, the juvenile must:

- be under a court or agency's jurisdiction;
- have a placement resource in the receiving state willing to provide a stable home and participate in a home evaluation and all aspects of the juvenile's supervision; and
- be enrolled as a full-time student at a secondary school, accredited university or college, or state licensed training program.

The following paperwork is required:

- a cover letter;
- Form IV (Parole or Probation Investigation Request);

- Form IA/VI (Application for Services and Waiver);
- Form V (Report of Sending State Upon Parolee or Probationer Being Sent to Receiving State);
- petitions and/or arrest reports;
- adjudicatory and dispositional orders;
- conditions of supervision;
- legal and social history; and
- any other pertinent information.

The petitioning individual in the sending state must send all referral packets to the state ICJ office and allow a minimum of 6 weeks for a response from the receiving state. The sending state retains jurisdiction and the case remains active in the sending court or agency. If the juvenile moves to the receiving state prior to acceptance, the juvenile must sign Form VII (Travel Permit) and the juvenile's caseworker must maintain contact with the juvenile until approval is received. *See Quick Reference Guide.*

33.5.3 Absconders, Escapees and Juveniles Charged as Delinquent

The ICJ establishes procedures for the return of absconders, escapees, and juveniles charged as delinquents to their home state. Those terms are defined as follows:

- Absconder: a juvenile on probation or parole who hides, conceals, or absences him or herself with the intent to avoid legal process or authorized control.
- Escapee: a juvenile who has made an unauthorized flight from a facility or custody of an agency.
- Juvenile charged as delinquent: juveniles charged with violating any criminal law who leave the state prior to prosecution.

The ICJ is the only legal way of returning juveniles who have run away, escaped, or absconded from their home state or state of jurisdiction. The ICJ also provides for the return of juveniles who have been charged as delinquent and who have never resided in the demanding state.

The ICJ establishes a voluntary consent to return process. The judge must advise a juvenile of his or her rights under the ICJ and give the juvenile an opportunity to sign Form III, which is entitled "Consent for Voluntary Return." Once the juvenile and judge sign Form III, the court must forward the form to the demanding state's (state requesting return of juvenile) office. The juvenile must be returned within five (5) business days after the demanding state's ICJ office receives the completed Form III. If a juvenile refuses to consent to return, the juvenile must be returned to detention and the local ICJ office should be contacted for further guidance. *See Quick Reference Guide.*

33.5.4 Runaways

The ICJ provides a procedure for the return of non-delinquent juveniles who are within the juvenile jurisdictional age limit established by the home/demanding state and who have run away without the parent, guardian or custodial agency's consent. To qualify as a runaway, the juvenile must not be on probation or parole and must have no outstanding warrants. *See Quick Reference Guide.*

While under New Mexico law runaways are not generally permitted to be held in secure detention, there is an exception for interstate runaways subject to the ICJ. *Compare* 8.14.14.14(E) NMAC (providing that juveniles charged with status offenses may not be held in a juvenile detention facility) *with* 8.14.14.7 NMAC (defining status offenders in part as runaways who have not committed a delinquent act, with *the exception of* out-of-state runaways as mandated by Federal law). The ICJ is the only basis under which a runaway can be held in a juvenile detention facility in New Mexico.

33.6 Contact for New Mexico and Other Resources

Dale Dodd, the Commissioner for New Mexico, is also responsible for compact operations in the state. Any questions about individual cases or requests for general information and training should be directed to Mr. Dodd at:

Dale Dodd, ICJ Commissioner
CYFD Youth and Family Services
300 San Mateo Blvd, NE, Suite 710
Albuquerque NM, 87108
Phone: 505-841-4792
Fax: 505-841-6676
Email: dale.dodd@state.nm.us

In addition, the National Council of Juvenile and Family Court Judges, the American Probation and Parole Association and the Office of Juvenile Justice and Delinquency Prevention have joined with the Commission to produce a bench book on the compact for judges. This *Bench Book for Judges & Court Personnel* was published in early 2011 and is available for downloading from the Commission's website, <http://www.juvenilecompact.org>.

CHAPTER 34

FEDERAL LAWS AND JURISDICTION

This chapter covers two very different aspects of federal law:

- Federal laws specific to juvenile justice
- Federal jurisdiction over certain crimes by juveniles

34.1 Summary

Federal crimes committed by juveniles may be handled by the United States district courts. Examples include crimes committed in federally owned or controlled territory, mail theft, interstate transporting of a stolen automobile, certain violent offenses, and certain drug offenses. Certain crimes committed by Indian youth on Indian land will also be handled in federal court. In addition to this chapter, *see* Chapter 35, Tribal Considerations.

34.2 Federal Juvenile Delinquency Act

34.2.1 Generally

The Federal Juvenile Delinquency Act (Act) gives the federal courts jurisdiction over certain delinquent acts. The Act defines an act of “juvenile delinquency” as a violation of Federal law committed by a person prior to age 18 that would have been a crime if committed by an adult. 18 U.S.C. §5031. A person accused of an act of juvenile delinquency may be processed as a juvenile provided that the information is filed before the person has reached the age of 21. *See* CRS Report for Congress, *Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters* (Updated October 25, 2004), p. 5. Conduct that violates federal law often violates state law as well, and most criminal cases in which the federal courts share jurisdiction are prosecuted in state court. *Id.*

34.2.2 Types of Cases Prosecuted in Federal Court

Under the Act, federal prosecutors must restrict federal criminal proceedings to cases in which, after investigation, the Attorney General certifies that:

- the state does not have jurisdiction or refuses to assume jurisdiction;
- the state with jurisdiction does not have adequate services or programs for juvenile offenders; or
- the offense charged is a violent felony, drug trafficking or importation offense, or firearms offense, and a substantial federal interest exists warranting the exercise of federal jurisdiction.

18 U.S.C. §5032. If the Attorney General does not certify that one of these factors exists, then the case must be surrendered to the appropriate state court.

Unlike the statutes in some states, the New Mexico Children's Code does not expressly give the juvenile courts jurisdiction based on a violation of federal law. *See* CRS Report for Congress, p. 6; compare, for example, the definition of delinquent acts in §32A-2-3(A) with Ala. Code §12-15-102 ("Delinquent Act. An act committed by a child that is designated a violation, misdemeanor, or felony offense pursuant to the law of the municipality, county, or state in which the act was committed or *pursuant to federal law*."). However, as noted, conduct that violates federal law often violates state law as well.

34.2.3 Federal District Court Procedure

Juveniles are adjudicated in federal district court by a judge or magistrate in a closed hearing without a jury. Federal juvenile delinquency proceedings do not require a grand jury indictment, a public trial, or trial by jury.

During the dispositional hearing of a child who is adjudicated to have committed an act of juvenile delinquency, the judge may order the child to pay restitution, be released under suspended sentence, be placed on probation, or committed to a correctional facility. Juveniles under 18 years may be placed on probation or committed until they reach the age of 21. Juveniles between the age of 18 and 21 may be placed on probation for up to 3 years and confined for up to 5 years, depending on the severity of the offense. The term of any confinement may not exceed the term that might have been imposed on an adult for the same offense. 18 U.S.C. §5037.

34.2.4 Trying Juveniles as Adults in Federal Court

A child may be tried as an adult in federal district court under certain limited circumstances, including when a child insists on being tried as an adult and when a child is transferred from federal juvenile to federal criminal court. 18 U.S.C. §5032. To prosecute a child as an adult, the federal prosecutor must file a motion to transfer the child from juvenile to criminal court.

34.2.4.1 Mandatory Transfer

Once a motion is filed, a person alleged to have committed an offense prior to the age of 18 must be transferred to federal district court to be tried as an adult if:

- the offense charged would be a felony offense if committed by an adult and the offense has as an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that by its very nature involves a substantial risk that physical force against the person of another may be used in committing the offense, or if the offense is one of the enumerated offenses in 18 U.S.C. §5032; and
- the offense was committed by a juvenile 16 years of age or older who has previously been found to have committed one of the offenses set forth in 18 U.S.C. §5032, or an

offense in violation of a state felony statute that would have been such an offense if a circumstance giving rise to federal jurisdiction had existed.

34.2.4.2 Discretionary Transfer

Upon motion of the government, a person who allegedly committed an offense prior to the age of 18 *may*, in the federal court's discretion, be transferred to federal criminal court and tried as an adult if, after a hearing, the federal district court finds that the transfer would be in the interest of justice, and:

- the juvenile is 15 or older and is alleged to have committed an offense similar to those outlined above for mandatory transfer after his or her fifteenth birthday, regardless of the juvenile's prior record; or
- the juvenile is 13 or older and is alleged to have committed certain types of assault or homicide, or, while in possession of a firearm, robbery, bank robbery, or certain forms of aggravated sexual abuse, provided the juvenile is alleged to have committed the offenses after his or her thirteenth birthday.

18 U.S.C. §5032.

The discretionary transfer provisions for children between 13 and 15 years of age do not apply to any offenses for which federal jurisdiction is based solely on the occurrence of the crime in Indian Country, unless the tribe has expressly opted in and agreed to have juveniles of these ages transferred for adult prosecution. 18 U.S.C. §5032.

When deciding whether to permit a discretionary transfer to district court for trying a juvenile as an adult, the federal district court must consider certain statutory criteria. These include the age and social background of the juvenile, the extent and nature of the juvenile's prior delinquency record, the nature of the alleged offense, the juvenile's present intellectual development and psychological maturity, the nature of past treatment efforts and the juvenile's response to such efforts; and the availability of programs designed to treat the juvenile's behavioral problems. Additional factors that the federal court may consider are the extent to which the juvenile played a leadership role in an organization or otherwise influenced other persons to take part in criminal activities involving the use or distribution of controlled substances or firearms. Such factors weigh in favor of transfer to adult status. 8 U.S.C. §5032 ¶5; *see also* CRS Report for Congress, p. 12. n. 50.

34.2.4.3 Comparison with Adult Criminal Proceedings

Juveniles transferred for trial as adults in federal district court are essentially treated as adults with few distinctions afforded due to their age. CRS Report for Congress, p. 16. Unlike New Mexico, where juveniles sentenced as adults may receive more reduced sentences than adults (*see* §31-18-15.1(G)), the federal sentencing guidelines provide that a juvenile's youth is not ordinarily a valid ground for reduction of the otherwise applicable sentencing guidelines. *See* CRS Report for Congress, pp. 16-17.

34.2.5 Confidentiality of Records

Juvenile records in federal courts are sealed except for the following limited purposes:

- Judicial inquiries;
- Law enforcement needs;
- Juvenile treatment requirements;
- Employment in a position raising national security concerns; and
- Disposition questions from victims. *See* CRS Report for Congress, p. 16.

34.3 Federal Juvenile Justice and Delinquency Prevention Act

The Federal Juvenile Justice and Delinquency Prevention Act (JJDPA), enacted in 1974 and amended in 2002, provides the major source of federal funding for improving juvenile justice systems in the states. 42 U.S.C. §5601 *et seq.* While the Federal Juvenile Delinquency Act addresses delinquency proceedings in Federal court under the Federal system, the JJDPA seeks to apply certain principles to state delinquency proceedings and require certain core protections for children. Some of the policies expressed in the JJDPA are that children should not have contact with adults in jails and other institutional settings, and that status offenders should not be placed in secure detention. Legislation to reauthorize the JJDPA with amendments has been pending in Congress, which had not acted on the legislation by the end of 2010. The JJDPA and related funding continue under continuing resolutions.

The next several subsections describe some of the JJDPA's key areas of focus and protection, besides its prevention initiatives. When reviewing them, the reader should keep in mind that New Mexico has few status offenses and does not try juveniles as adults except in the case of older youth charged with first degree murder, although juveniles can receive adult sentences in certain circumstances. *See* earlier chapters of this Handbook.

34.3.1 Deinstitutionalization of Status Offenders

A status offense, as opposed to a delinquent act, is an act that would *not* be a crime if committed by an adult, and is merely a crime due to the offender's status as a child, such as truancy, running away from home, tobacco use, and curfew violations. Under the JJDPA, juvenile status offenders may generally not be held in secure detention or confinement, although certain status offenders may be detained for up to 24 hours. States are encouraged not to hold status offenders who have not committed delinquent acts in secure juvenile facilities for extended periods of time or in secure adult facilities for any period of time. Instead, status offenders should receive community-based services, such as day treatment or residential home treatment, counseling, mentoring, alternative education, and job development support.

34.3.2 Removal of Juveniles from Adult Jails and Lock-ups

States may not detain juveniles in adult jails and lock-ups except for up to six hours before or after a court hearing, or up to twenty-four hours plus weekends and holidays in rural areas. Juveniles may also not be subject to unsafe travel conditions. However, these protections do not

apply to children who are tried or convicted in adult criminal court of a felony offense. *See* Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §5601 *et seq.*, 42 U.S.C. §5633(a)(13)(A) and (B).

34.3.3 Sight and Sound Separation

Sight and sound contact with adults is prohibited for children who are placed in adult jails or lock-ups, except juveniles tried or convicted as adults. This means that children cannot be housed next to adult cells, share dining halls, recreation areas, or any other common spaces with adult inmates, or be placed in any other circumstances that could expose them to threats or abuse from adult offenders. *See id.*

Juvenile justice advocates are strongly urging Congress to amend the JJDPA to extend the jail removal and sight and sound protections of the Act to all youth, regardless of whether they are awaiting trial in juvenile or adult court. Fact Sheet: Jail Removal and Sight and Sound Core Protections, www.campaignforyouthjustice.org/documents/FactSheet-JailRemovalandSightandSoundcoreprotections.pdf.

34.3.4 Disproportionate Minority Confinement

Disproportionate Minority Confinement refers to indications from studies that minority youth receive tougher sentences and are more likely to be incarcerated than non-minority youth for the same offenses. The JJDPA requires states to assess and address the disproportionate confinement of minority juveniles in all secure facilities, by gathering information and assessing the reason for disproportionate minority confinement.

34.4 Juvenile Justice Advisory Committees

The JJDPA authorizes the formation of state advisory groups for each state. These are commonly called Juvenile Justice Advisory Committees and New Mexico is no exception. The New Mexico Juvenile Justice Advisory Committee (JJAC) is appointed by the Governor, administered and staffed by the Children, Youth and Families Department and charged with the responsibility to, in conjunction with CYFD, approve a state plan reflecting statewide goals, objectives, and priorities for the expenditure of federal funds received under the JDDPA. JJAC also provides assistance to the Governor, the legislature and entities created or funded pursuant to the JDDPA in developing new or improved approaches, policies or legislation designed to improve juvenile justice in New Mexico. §§9-2A-14 – 9-2A-16.

34.5 Resource Materials

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) maintains a website that includes further information on the Juvenile Justice and Delinquency Prevention Act, <http://www.ojjdp.gov>.

A number of non-governmental organizations also maintain information on the JJDPa. *See*, for example, “Juvenile Justice and Delinquency Prevention Act, Fact Sheet,” www.buildingblocksforyouth.org/issues/jjdp/factsheet.html.

CHAPTER 35

TRIBAL CONSIDERATIONS

This chapter covers:

- Tribal jurisdiction
- Tribal Law and Order Act
- Children's Code provisions on Indian children
- Intergovernmental Agreement between State and Mescalero Tribe

35.1 Jurisdictional Overview

Treaties and federal statutes allocate criminal jurisdiction among federal, state, and tribal courts more or less based on the following three factors:

- The nature of the offense;
- Where the offense was committed; and
- Whether the victim and offender are Indian or non-Indian.

The state has no jurisdiction over criminal acts by Indians on lands of the 19 Pueblos, two Apache Tribes and the Navajo Nation. As a general rule, the tribe has jurisdiction over minor crimes committed in Indian country by Indians, while major crimes are subject to federal court jurisdiction.

For crimes committed outside of Indian country, Indians are subject to state criminal jurisdiction to the same extent as non-Indians. *See discussion in State v. Quintana*, 2008-NMSC-012, ¶4. However, some treaty provisions, such as those addressing hunting and fishing rights, may exempt some tribal members from full application of state law with regard to a particular activity. *See American Indian Law Deskbook, Conference of Western Attorneys General* (2nd Ed. 1998), p. 87.

35.1.1 Tribal and State Jurisdiction

Treaties, federal statutes and case law govern questions regarding state court jurisdiction over Indians living in Indian country. *See State v. Romero*, 2006-NMSC-039, ¶7.

Tribal courts do not have jurisdiction over crimes committed in Indian country by non-Indians. *See Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). When a non-Indian commits an offense in Indian country and no federal statute otherwise applies, the state courts have exclusive jurisdiction if the victim is a non-Indian or the crime is victimless. *See Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1882) (holding that, absent treaty provisions to the contrary, the state has exclusive jurisdiction over a crime committed in

Indian country by a non-Indian against another non-Indian); *State v. Warner*, 71 N.M. 418, 421, 379 P.2d 66, 68 (1963) (holding that state courts could try cases involving crimes committed on Indian land by non-Indians). *See also, e.g., United States v. Wheeler*, 435 U.S. 313, 325 n. 21 (1978); *United States v. Antelope*, 430 U.S. 641, 643, n. 2 (1977); *Williams v. United States*, 327 U.S. 711, 714 (1946). By contrast, when a non-Indian commits an offense in Indian country against an Indian victim, the federal courts have jurisdiction pursuant to the Indian Country Crimes Act. 18 U.S.C. § 1152.

Notwithstanding the above, other federal statutes may confer jurisdiction on a state over offenses committed within Indian country. Public Law 280 conferred mandatory state criminal jurisdiction over crimes committed on Indian reservations in the following six states for all or a portion of Indian country within them: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. *See American Indian Law Deskbook*, p. 96. In addition, under Public Law 280, states could opt to assume criminal jurisdiction over tribal lands. *See id.*, at 96.

New Mexico never opted to assume criminal jurisdiction over tribal lands under P.L. 280, so any analysis of New Mexico state court jurisdiction need not consider P.L. 280. *See State v. Atcitty*, 2009-NMCA-086, ¶17. The State of New Mexico has no jurisdiction over crimes by Indians committed in Indian country.

35.1.2 Federal Jurisdiction over Crimes in Indian Country

Federal statutes establishing federal criminal jurisdiction over crimes committed in Indian Country include the Major Crimes Act, 18 U.S.C. §1153, and the Indian Country Crimes Act, 18 U.S.C. §1152. In brief, the Major Crimes Act establishes federal jurisdiction for certain offenses committed by Indians in Indian country, most of which are violent felonies with a maximum penalty of one year or more of imprisonment. The Indian Country Crimes Act establishes federal court jurisdiction for certain types of offenses committed by Indians against non-Indian victims and for all offenses committed by non-Indians against Indian victims.

The Indian Civil Rights Act, § 25 U.S.C. 1302(7), limited tribal court criminal jurisdiction to offenses with a maximum penalty of no more than one year of imprisonment. With the new federal Tribal Law and Order Act, signed into law in 2010 and discussed below, tribes will be able to increase their sentencing authority to a maximum of three years if they provide certain added protections to defendants, including the right to appointed counsel for indigent defendants.

35.1.3 Tribal Law and Order Act

In July 2010, the Congress passed the Tribal Law and Order Act (TLOA). The stated purpose of the TLOA is to:

- clarify the responsibilities of federal, state, tribal, and local governments with respect to crimes committed in Indian country;
- increase coordination and communication among federal, state, tribal, and local law enforcement agencies;
- empower tribal governments to provide public safety in Indian country;

- reduce violent crime in Indian country and combat sexual and domestic violence against American Indian and Alaska Native women;
- prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; and
- increase and standardize the collection of criminal data and the sharing of criminal history information among federal, state, and tribal officials responsible for responding to and investigating crimes in Indian country. P.L. 111-211, Sec. 202 (July 25, 2010).

As noted in §35.1.2.2 above, implementation will depend in part on the tribes' willingness to adopt certain protections for defendants.

The TLOA provisions impacting juveniles in the justice system include requiring the U.S. Secretary of the Interior and Attorney General, in consultation with tribal officials, to develop a long-term plan for the construction, renovation, and operation of Indian juvenile detention and treatment centers and alternatives to detention for juvenile offenders. P.L. 111-211, Sec. 241.

The TLOA also amends the Indian Tribal Justice Technical and Legal Assistance Act of 2000 to award grants to provide for licensed public defender services to represent all criminal defendants in tribal courts, and extends the authorization of appropriations for tribal justice support through fiscal year 2015. P.L. 111-211, Sec. 242.

In addition, the TLOA amends the Juvenile Justice and Delinquency Prevention Act of 1974, discussed in Chapter 34 of this Handbook in order to:

- authorize the Administrator of the Office of Juvenile Justice and Delinquency Prevention to include Indian tribes in the local juvenile delinquency incentive grant program;
- require the Administrator to make grants to Indian tribes to support and enhance tribal juvenile delinquency prevention services and the ability of Indian tribes to respond to, and care for, juvenile offenders and to encourage accountability of Indian tribes in preventing juvenile delinquency; and
- require one member of the Coordinating Council of Juvenile Justice and Delinquency Prevention to be appointed by the Chairman of the Senate Committee on Indian Affairs. P.L. 111-211, Sec. 246.

See Bill Summary and Status, 111th Congress (2009-2010, HR. 725) (CRS Summary).

35.2 New Mexico Children's Code

35.2.1 Indian Children and the Delinquency Act

The Delinquency Act recognizes the importance of working with the tribes and respecting cultural practices that may be important to Indian youth who become involved in the state juvenile justice system:

- If an Indian child is involved in a delinquency case, the juvenile probation officer (JPO) has the duty to identify the child as an Indian child and must take into consideration the

Indian child's cultural needs throughout the process to ensure that the Indian child will have reasonable access to cultural practices and traditional treatment. §32A-2-19(C).

- The JPO must notify an Indian child's tribe upon referral to the Children, Youth and Families Department (CYFD). *See* 8.14.2.9(E) NMAC, Social Services, Juvenile Justice, Probation and Aftercare. The JPO must also contact the Indian child's tribe to consult and exchange information for the purpose of preparing a predisposition report when commitment or placement of an Indian child is contemplated or has been ordered. *See id.* The predisposition report shall indicate the name of the person contacted in the Indian child's tribe and the results of the contact. §32A-2-5(B)(9).
- The children's court attorney must state in the delinquency petition whether the child is an Indian child. §32A-1-11(F).
- If not already identified as an Indian child, the judge must attempt to ascertain at the dispositional hearing whether respondent is an Indian child. When the child is an Indian child, the judge must consider the child's cultural needs in the dispositional judgment and provide reasonable access to cultural practices and traditional treatment. §32A-2-19(C).

35.2.2 Definition of "Indian Child" in the Children's Code

The Children's Code defines an "Indian child" as an unmarried person who is:

- less than 18 years old;
- a member of an Indian tribe or eligible for membership in an Indian tribe; and
- the biological child of a member of an Indian tribe. §32A-1-4(K).

The Children's Code in turn defines the "Indian child's tribe" as "(1) the Indian tribe in which an Indian child is a member or eligible for membership, or (2) in the case of an Indian child who is a member or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts. §32A-1-4(L).

35.3 Mescalero Apache Intergovernmental Agreement

The Children's Code provides for intergovernmental agreements (IGAs) between the state and tribes. Under §32A-1-8(E):

- A tribal court order pertaining to an Indian child in an action under the Children's Code will be recognized and enforced by the district court for the judicial district in which the tribal court is located;
- A tribal court order pertaining to an Indian child that accesses state resources will be recognized and enforced pursuant to the provisions of IGAs entered into by the Indian child's tribe and CYFD or another state agency;
- An Indian child residing on or off a reservation, as a citizen of this state, has the same right to services that are available to other children of the state, pursuant to IGAs;
- The cost of the services provided to an Indian child will be determined and provided for in the same manner as services are made available to other children of the state, utilizing tribal, state and federal funds and pursuant to IGAs;

- The tribal court, as the court of original jurisdiction, retains jurisdiction and authority over the Indian child.

The Legislature enacted §32A-1-8(E) to encourage state and tribal governments to work together to respond in culturally effective and relevant ways to the needs of court-involved Indian children, youth, and families. Although this provision was enacted several years ago, it has not been implemented by the state and tribes, with the exception of the efforts of the Mescalero Apache Tribe and CYFD.

With the aid of a \$50,000 grant from the New Mexico Juvenile Justice Advisory Committee, the Mescalero Apache Tribe and CYFD negotiated the first IGA under §32A-1-8(E) in order to establish opportunities for the tribe to access CYFD's juvenile justice services. The IGA was signed on January 7, 2008 by Mescalero President Mark R. Chino and CYFD Cabinet Secretary Dorian Dodson, and is meant to serve as a template for other tribes. See <http://www.aidainc.net>.

APPENDIX A

ACRONYMS

ADA	Americans with Disabilities Act
AWA	Adam Walsh Child Protection and Safety Act of 2006
CCA	Children's Court Attorney
CFBA	Client Family Baseline Assessment
CFR	Code of Federal Regulations
CMHDD Act	Children's Mental Health and Developmental Disabilities Act
CYFD	New Mexico Children, Youth and Families Department
DA	District Attorney
FINCOS	Families in Need of Court-Ordered Services
FINS	Families in Need of Services
GAL	Guardian ad Litem
ICWA	Indian Child Welfare Act
IGA	Intergovernmental Agreement (typically between CYFD and Indian Tribe)
JDAI	Juvenile Detention Alternatives Initiative
JJAC	Juvenile Justice Advisory Committee
JPO	Juvenile Probation Officer
JPPO	Juvenile Probation and Parole Officer (the title for JPOs before the 2009 amendments to the Children's Code)
NMAC	New Mexico Administrative Code
OJJDP	Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice

PD	Public Defender
PI	Preliminary Inquiry
RAI	Risk Assessment Instrument
SORNA	Sex Offender Registration and Notification Act (New Mexico) (SORNA is also the acronym for the federal Sex Offender Registration and Notification Act, which is Title I of the Adam Walsh Child Protection and Safety Act.)

APPENDIX B

GLOSSARY

SELECTED STATUTORY DEFINITIONS

Adult means a person who is eighteen years of age or older. §32A-1-4.

Child means a person who is less than eighteen years old. §32A-1-4.

Custodian means an adult with whom the child lives who is not a parent or guardian. §32A-1-4.

Delinquent Child: A child is adjudicated delinquent when the child commits an act that would be designated a crime if committed by an adult. §32A-2-3(A).

Delinquent Offender: A “delinquent offender” is a delinquent child who is subject to juvenile sanctions only and who is not a youthful offender or serious youthful offender. §32A-2-3(C).

Department, or **CYFD**, means the Children, Youth and Families Department, unless otherwise specified. §32A-1-4.

Guardian means a person appointed as a guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law. §32A-1-4.

Guardian ad litem or **GAL** means an attorney appointed by the children's court to represent and protect the best interests of the child in a court proceeding; provided that no party or employee or representative of a party to the proceeding shall be appointed to serve as a GAL. §32A-1-4.

Indian child means an unmarried person who is:

- (1) less than eighteen years old;
- (2) a member of an Indian tribe or is eligible for membership in an Indian tribe; and
- (3) the biological child of a member of an Indian tribe. §32A-1-4.

Indian child's tribe means:

- (1) the Indian tribe in which an Indian child is a member or eligible for membership; or
 - (2) in the case of an Indian child who is a member or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts.
- §32A-1-4.

Indian tribe means a federally recognized Indian tribe, community or group pursuant to 25 U.S.C. §1903(1). §32A-1-4.

Legal custody means a legal status created by order of the court or other court of competent jurisdiction or by operation of statute that vests in a person, department or agency the right to determine where and with whom a child shall live; the right and duty to protect, train and discipline the child and to provide the child with food, shelter, personal care, education and ordinary and emergency medical care; the right to consent to major medical, psychiatric, psychological and surgical treatment and to the administration of legally prescribed psychotropic medications pursuant to the Children's Mental Health and Developmental Disabilities Act; and the right to consent to the child's enlistment in the armed forces of the United States. §32A-1-4.

Parent or parents includes a biological or adoptive parent if the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child. §32A-1-4.

Serious youthful offender: A “serious youthful offender” is a person 15 to 18 years old who is charged, indicted, and bound over for trial for first degree murder. A serious youthful offender is not a delinquent child for purposes of the Delinquency Act. §32A-2-3(H).

Tribal court means:

- (1) a court established and operated pursuant to a code or custom of an Indian tribe; or
 - (2) any administrative body of an Indian tribe that is vested with judicial authority.
- §32A-1-4.

Tribal court order means a document issued by a tribal court that is signed by an appropriate authority, including a judge, governor or tribal council member, and that orders an action that is within the tribal court's jurisdiction. §32A-1-4.

Youthful offender: A “youthful offender” is a delinquent child subject to adult or juvenile sanctions who is 14 up to 18 years of age at the time of the offense and who is adjudicated for one of the following offenses:

- second degree murder;
- assault with intent to commit a violent felony;
- kidnapping;
- aggravated battery with a deadly weapon or in a manner which inflicts great bodily harm;
- shooting at a dwelling or occupied building or from a motor vehicle;
- dangerous use of explosives;
- criminal sexual penetration;
- robbery;
- aggravated burglary;
- aggravated arson; or
- abuse of a child that results in great bodily harm or death to a child. §32A-2-3(J)(1).

A juvenile adjudicated for any felony offense following three or more previous adjudications for separate felony offenses in the preceding three years is also a “youthful offender,” NMSA §32A-2-3(J)(2), as is a 14 year old who is adjudicated for first degree murder, NMSA §32A-2-3(J)(3).

APPENDIX C

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Juvenile Justice Program Inventory

The New Mexico Sentencing Commission, in a cooperative agreement with CYFD, maintains an inventory of programs and services available in New Mexico for both juveniles and adults needing services. The Juvenile Justice Program Inventory is a searchable statewide catalog of programs and can be accessed at www.nmjustice.net/nmsc/juvenile/. The programs and services can be viewed by city, county, or CYFD district.

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1. Juvenile Probation and Parole Offices

Juvenile Probation and Parole Office are listed by CYFD Regions

Region 1-NW	Counties: San Juan, McKinley, Cibola, Valencia and Sandoval Districts: 11 and 13 Cities: Farmington, Gallup, Grants, Los Lunas and Rio Rancho
Region 2-NE	Counties: Rio Arriba, Santa Fe, San Miguel, Mora, Guadalupe, Colfax, Union and Taos Districts: 1, 4 and 8 Cities: Espanola, Las Vegas, , Raton, Santa Fe, Santa Rosa and Taos
Region 3-Central	Counties: Bernalillo Districts: 2 Cities: Albuquerque
Region 4-SE	Counties: Chaves Curry, Eddy, Harding, Lea, Quay and Roosevelt Districts: 3, 6, 7 & 12 Cities: Artesia, Carlsbad, Clovis, Hobbs, Portales, Roswell and Tucumcari
Region 5-SW	Counties: Catron, Dona Ana, Grant, Hidalgo, Lincoln, Luna, Otero, Sierra, Socorro and Torrance Districts: 3, 6, 7 & 12 Cities: Alamogordo, Deming, Estancia, Las Cruces, Lordsburg, Ruidoso, Silver City, Socorro and T or C

Region 1 – NW

Farmington	San Juan County	District 11	851 Andrea Drive, Suite 2 Farmington, NM 87401	Main: 505-325-1631 Fax: 505-325-1695
Gallup	McKinley County	District 11	1720 East Aztec Suite B Gallup, NM 87301	Main: 505-722-4386 Fax: 505-722-3167
Grants	Cibola County	District 13	1019 E Roosevelt Ave. Grants, NM 87020	Main: 505-287-3148 Fax: 505-287-4071
Los Lunas	Valencia County	District 13	475 Courthouse Rd. Suite A Los Lunas, NM 87031	Main: 505-565-3380 Fax: 505-565-2408
Rio Rancho	Sandoval County	District 13	4359 Jager Dr. NE, Suite C Rio Rancho, NM 87144	Main: 505-771-5944 Fax: 505-867-6259

Region 2 – NE

Española	Rio Arriba County	District 1	912 North Railroad Española, NM 87532	Main: 505-753-7323 Fax: 505-747-1443
Santa Fe	Santa Fe County	District 1	1920 5th Street Santa Fe, NM 87505	Main: 505-476-2300 Fax: 505-476-2320
Las Vegas	San Miguel/Mora Counties	District 4	2518 Ridge Runner Rd P.O. Box 265 Las Vegas, NM 87701-0265	Main: 505-425-3543 Fax: 505-425-7927
Santa Rosa	Guadalupe County	District 4	244 So. Fourth Street, Ste 107 Santa Rosa, NM 88435	Main: 575-472-5392 Fax: 575-472-5393
Raton	Colfax/Union Counties	District 8	1900 Hospital Dr P.O. Box 1143 Raton, NM 87740	Main: 575-445-2379 Fax: 575-445-3249
Taos	Taos County	District 8	1308 Gusdorf Taos, NM 87571	Main: 575-758-3722 Fax: 575-758-5801

Juvenile Probation and Parole Offices (cont.)

Region 3 – Central

Albuquerque	Bernalillo County	District 2	5100 Second Street, NW Ste 700 Albuquerque, NM 87107	Main: 505-841-7623 Fax: 505-841-7652
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Region 4 – SE

Hobbs	Lea County	District 5	726 E. Michigan, Suite 100 Hobbs, NM 88240	Main: 575-397-2478 Fax: 575-397-2479
Clovis	Curry County	District 9	221 W. Llano Estacado, Suite 2 Clovis, NM 88101	Main: 575-762-3831 Fax: 575-762-5970
Portales	Roosevelt County	District 9	1223 W. Fir Portales, NM 88130	Main: 575-762-3831 Fax: 575-356-2601
Tucumcari	Quay/Harding Counties	District 10	107 West Aber Tucumcari, NM 88401	Main: 575-461-2321 Fax: 575-461-4821
Artesia	Eddy County	District 14	2215 W. Main Artesia, NM 88210	Main: 575-623-2920 Fax: 575-748-2697
Carlsbad	Eddy County	District 14	102 N. Canal Suite 400 Carlsbad, NM 88220	Main: 575-885-9293 Fax: 575-887-6804
Roswell	Chaves County	District 14	#4 Grand Ave Plaza, Suite C Roswell, NM 88201	Main: 575-623-2920 Fax: 575-624-6059

Region 5 – SW

Las Cruces	Dona Ana County	District 3	750-A Motel Blvd. Las Cruces, NM 88005	Main: 575-524-6360 Fax: 575-524-6013
Deming	Luna County	District 6	120 E Poplar Street Deming, NM 88030	Main: 575-546-3079 Fax: 575-544-4027
Lordsburg	Hidalgo County	District 6	524 DeMoss Lordsburg, NM 88045	Main: 575-546-3079 Fax: 575-542-9083
Silver City	Grant County	District 6	3082 32nd Street Bypass P.O. Box 1444 Silver City, NM 88062	Main: 575-538-2061 Fax: 575-538-5742
Estancia	Torrance County	District 7	214 S. 5th Street P.O. Box 348 Estancia, NM 87016	Main: 575-894-2780 Fax: 505-384-1827
Socorro	Socorro/Catron Counties	District 7	104 S. 6th Street Socorro, NM 87801	Main: 575-835-2121 Fax: 575-835-1395
T or C	Sierra County	District 7	161 New School Road T or C, NM 87901	Main: 575-894-2107 Fax: 575-894-0566
Alamogordo	Otero County	District 12	2220 Indian Wells, Suite B Alamogordo, NM 88310	Main: 575-437-0420 Fax: 575-437-3094
Ruidoso	Lincoln County	District 12	507 Mechem Drive Ruidoso, NM 88345	Main: 575-257-6491 Fax: 575-257-6492

2. Juvenile Detention Facilities

Bernalillo County Youth Services Center

5100 Second St. NW
Albuquerque, NM 87107
Phone: 505-468-7236
Fax: 505-462-9917
Website: <http://www.bernco.gov/>

POC: Linda Matteucci, Interim Director
Chris Sanchez, Asst. Dir. of Operations

Facility information: 78 bed facility, 5 holding cells.

Resident Programs & Services: Community Custody Program, Youth Reporting Center, APS School/CNM Courses, Medical and Dental Services, Children's Community Mental Health Clinic, Ayuda (Substance Abuse), Pet Therapy, Art Therapy, Ropes Course, Recreation, Special Events & Guest Speakers, School Nutrition Program, Vocational Training Program, Facility Service and Facility Laundry Programs, Music Concerts, GED Prep Courses, AA Meetings, Foster Grandparents Program, Parenting Classes, Religious Services, Computer Literacy Lab.

Chaves County Juvenile Detention Center

119 E. 4th Street
Roswell, NM 88203
Phone: 575-6234-6587
Fax: 575-624-6633
Website: http://www.co.chaves.nm.us/county/Departments/Detention/detent_juven.aspx

POC: David Garcia, Deputy Administrator
Email: dgarcia@co.chaves.nm.us

Facility information: 19 bed facility.

Resident Programs & Services: Misdemeanor Compliance, Community Service, Electronic Monitoring.

Curry County Juvenile Detention Center

700 N. Main Street, Suite 5
Clovis, NM 88101
Phone: 575-762-4272
Fax: 575-742-2574
Website: <http://www.currycounty.org/>

POC: Tori Sandoval, Detention Administrator
Email: tsandoval@currycounty.org

Facility information: 10 bed facility, 2 holding cells.

Counties Served: Curry, Lea, Quay and Roosevelt

Resident Programs & Services: Short term holding detention center before the juvenile goes to court

Juvenile Detention Facilities (cont.)

Dona Ana County Juvenile Detention Center

POC: Christopher Barela, D.C. Administrator

1850 Copper Loop
Las Cruces, NM 88005
Phone: 575-647-7600
Fax: 575-647-7625

Facility information: 50 bed facility.

Resident Programs & Services: The Las Cruces Public School District provides two full-time teachers for educational classes, religious programming, life-skills classes, recreational activities, commissary and library. Various counseling agencies are available.

Eddy County Juvenile Detention Center

POC: Shawn Funk, Acting Administrator

201 N. Main
Carlsbad, NM 88220
Phone: 575-887-7556
Fax: 575-887-1104

Facility information: 15 bed facility.

Resident Programs & Services: There is a Registered Nurse on duty 7 days per week, as well as holidays. The Medical Director is a State Licensed physician. Mental health services are provided by Carlsbad Mental Health Center. Dental services are also available.

Grant County Juvenile Detention Center

POC: Jim Moffett, Administrator

209 North Black Street
Silver City, NM 88061
Phone: 575-534-3803
Fax: 575-538-9377

Facility information: 4 bed facility, 2 holding cells.

Resident Programs & Services: Placement.

Lea County Juvenile Detention Center

POC: Jann Gartman, Warden

Email: jgartman@leacounty.net

1401 S. Commercial
Silver City, NM 88061
Phone: 575-396-8668
Fax: 575-396-5361

Facility information: 32 bed facility, 2 holding cells.

Resident Programs & Services: Classroom with a computer lab, open air recreation yards and a library.

Juvenile Detention Facilities (cont.)

Luna County Juvenile Detention Center

1700 East Fourth St. NE
Deming, NM 88030
Phone: 575-543-6700
Fax: 575-543-6760

POC: Richard Crowles

Facility information: 5 bed facility.

Resident Programs & Services:

McKinley County Juvenile Detention Center

2105 Hassler Valley Rd.
Gallup, NM. 87301
Phone: 505-863-1440
Fax: 505-863-1442
Website: <http://www.co.mckinley.nm.us/juvenile.htm>

POC: Johna Gonzales, Director
Email: jgonzales@co.mckinley.nm.us

Facility information: 34 bed facility.

Resident Programs & Services: Admission, Mental Health Services, Medical Care, Religious Services, Gender Specific Services, Education (Elementary through High School grades) through the McKinley County Schools, Alcoholics Anonymous Sessions, Substance Abuse Evaluation and Counseling as needed.

Quay County Juvenile Detention Center

323 West High Street
Tucumcari, NM 88401
Phone: 575-461-4664
Fax: 575-461-0139

POC: Anthony Elebario, Administrator
Email: anthony.elebario@quaycounty-nm.gov

Facility information: 10 bed facility, 1 holding cell.

Resident Programs & Services:

San Juan County Juvenile Detention Center

851 Andrea Drive
Farmington, NM 87401
Phone: 505.324.5800
Fax: 505.324.5880

POC: Traci Neff, Administrator
Email: tneff@sjcounty.net

Facility information: 47 bed facility, 3 holding cells.

Resident Programs & Services: Assessment center for prevention and intervention, emergency shelter care, intensive outpatient care, residential treatment, probation supervision, functional family therapy, alternative sanction programs, judicial services, drug court programs, and secure detention.

Juvenile Detention Facilities (cont.)

Santa Fe County Youth Development Program POC: Mark Caldwell, Administrator

4250 Airport Rd
Santa Fe, NM 87507
Phone: 505-424-5600
Fax: 505-324-5880

Website: <http://www.santafecounty.org/corrections/youthprogram>

Facility information: 63 bed facility.

Resident Programs & Services: Provides training and detention services for approximately 40 pre-adjudicated juveniles from Santa Fe and surrounding Counties, Pueblos, and the US Marshals Service. Education (Public Schools, GED, Community College), Vocational Training, Individual, Family and Group counseling, Life Skill Training (Anger Management, Conflict Resolution), Independent Living Skills, Native American Programming (Inipi/Sweat Lodge), Recreation, Religious Services, Medical, Dental, Mental Health Services and Community Volunteers.

Taos County Juvenile Detention Center POC: Lillian Baca, Administrator

105 Albright Street, Suite I
Taos, NM 87571
Phone: 575-737-6420
Fax: 575-737-6429

Website: <http://www.taoscounty.org/>

Facility information: 6 bed facility.

Resident Programs & Services: Education-provided and funded by the Taos Municipal Schools, Medical-provided by EMS, Religion-as requested by residents, Interaction-other agencies such as Law Enforcement, Court System, EMS, Juvenile Probation and Parole Department, and Juvenile Drug Court

Counties Served: Colfax, Union and San Miguel Counties and Taos Pueblo

3. CYFD Facilities

For more information about these facilities and the services available, contact CYFD Juvenile Justice Services at 505-827-7629.

SECURE FACILITIES

Albuquerque Boys Center (ABC)

Committed youth; male; low risk and needs; community-based
Albuquerque

Camino Nuevo Youth Center; New Mexico Girls School

Committed youth; male/female; high to low risk and needs; specialized programming
Albuquerque

J. Paul Taylor Center

Committed youth; male; high to low risk and needs
Las Cruces

San Juan Juvenile Detention Center (under contract)

Committed youth; males from northwest quadrant
Farmington

YDDC

Intake and diagnosis; high to low risk and needs
Albuquerque

REINTEGRATION FACILITIES

Albuquerque Reintegration Center

High to low risk and needs; probation/parole

Carlsbad Community Reintegration Center

Low-medium risk; probation/parole; community-based

Eagle Nest Reintegration Center

Low risk and needs; parole and committed youth; community-based

4. Children's Court Programs

Juvenile drug court programs are listed under Problem Solving Courts in this directory. This section offers examples of other court-sponsored programs.

Second Judicial District - Bernalillo County

Contact: Cindy Salazar, Special Programs Manager
Second Judicial District Court, Children's Court Division
505-841-7356 or albdcjs@nmcourts.gov

Program for the Empowerment of Girls (PEG): PEG is a court ordered female responsive domestic violence program. The mission of the PEG program is early intervention in the cycle of abuse and the empowerment of girls by providing the tools necessary to recognize and change self-defeating behaviors so that they may realize their potential. PEG Court is an intensive juvenile probation program serving girls between the ages of 13 and 18 who have a history of violence as a victim, witness or offender.

Children's Court Mentor Dinner Program: PEG and Drug Court participants are paired with an adult mentor to share a meal. The meal is in a group setting with a guest speaker who has some brief words of wisdom or encouragement to start off the dinner before allowing for quality one-on-one time between mentor and program participant. The adults involved pay for their meal as well as the meal of the participant they are sponsoring. The dinners are set for every other month on the 2nd Wednesday of the month.

Tom Cooper Literacy Program: The mission of the program is to address the literacy problem the youth who are referred to Children's Court. Court studies indicate a direct correlation between illiteracy and delinquent behavior. The Tom Cooper Literacy Program was developed under the belief that, if the court supports youth in improving their literacy, the youth are more likely to succeed in other educational pursuits, exhibit more positive and productive behavior and be less inclined to continue negative behavior.

Children's Court Programs (cont.)

Eleventh Judicial District – San Juan County

Program Manager: George H. DiRe

851 Andrea Drive

Farmington, NM 87401

(505) 326-2256

Fax: (505) 326-1179

Grade Court: The mission of Grade Court is to work with the juvenile justice system and the education system to reduce recidivism and the number of children committed to institutions by acknowledging the importance of educating youth in the community; and to increase the success and self-esteem of juvenile offenders through the power of hard work and education.

Goals and Objectives

1. To hold juvenile offenders accountable for their actions and to reinforce the ideal that education is essential for their success.
2. To develop basic tasks such as turning in daily homework and weekly progress reports that holds juveniles accountable for their academic progress, attendance and behavior at school.
3. To provide consistent monitoring of clear and relevant standards with immediate consequences for failure to comply with the conditions of the program such as daily school attendance and turning in daily and weekly progress reports signed by teachers and parents. Failure to comply with these conditions may result in weekend detention, Work Detail, Youth In Progress class, or an alternative sanction such as additional community service or an assigned report.
4. In order to complete the program, juveniles must get "C's" or better on two consecutive nine-week report cards, graduate from High School, or obtain their G.E.D. Each juvenile who successfully completes "Grade Court" is offered a full two-year tuition scholarship at San Juan College.

5. Problem-Solving Courts

Statewide Coordination and Training

Peter Bochert , Statewide Drug Court Coordinator	505-827-4834 aocpwb@nmcourts.gov
Angela Peinado , Statewide Program Manager	505-827-4729 aocaxp@nmcourts.gov
Eloisa Gonzales , Magistrate DWI/DC Program Supervisor	505-827-4812 aocexc@nmcourts.gov
Carmen Rodriguez , Administrative Assistant II	505-827-7967 aoccxr@nmcourts.gov

Administrative Office of the Courts

237 Don Gaspar

Santa Fe, New Mexico 87501

<http://joo.nmcourts.gov/joomla/pscourts/index.php/court-programs>

New Mexico Association of Drug Court Professionals

www.nmcourts.gov/pscourts

Juvenile Drug Court: Juvenile Drug Court is a docket within a juvenile court to which selected delinquency cases, and in some instances, status offenders, are referred for handling by a designated judge. The youth referred to this docket are identified as having problems with alcohol and/or other drugs. The juvenile drug court judge maintains close oversight of each case through regular status hearings with the parties involved. The judge both leads and works as a member of a team that comprises representatives from treatment, juvenile justice, social and mental health services, school and vocational training programs, law enforcement, probation, the prosecution, and the defense. Over the course of a year or more, the team meets frequently (often weekly), determining how best to address the substance abuse and related problems of the youth and his or her family that have brought the youth into contact with the justice system (BJA, 2003).

Guidance and Training at National Level

National Association of Drug Court Professionals

www.nadcp.org/

National Drug Court Institution

www.ndci.org/

Problem-Solving Courts (cont.)

Juvenile Drug Court

First Judicial District

Santa Fe/Española
P.O. Box 2268
Santa Fe, NM 87504

Program Director	Ginger Sloan	505-455-8191 Email: sfedgps@nmcourts.gov
Type of Cases		Post Adjudication
		Probation Violation

Drug Court	Every Tuesday at 4:30 pm in Santa Fe Every Wednesday at 4:00 pm in Rio Arriba
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Treatment Providers	Millennium Treatment Services Human Resource Development Associates	Brian Parkhill, Director 505-473-0571 Wayne Salazar 505-753-8933
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Program Components

Individual, group and family counseling; random drug testing; Alcoholics Anonymous and Narcotics Anonymous; acupuncture; relapse prevention; Moral Recognition Therapy; educational seminars; community service; GED tutoring at community college.

Problem-Solving Courts (cont.)

Juvenile Drug Court

Second Judicial District

Albuquerque
5100 Second Street
Albuquerque, NM 87107

Program Director		505-841-5914 Email:
Type of Cases		Post-Adjudication
		Probation/Probation Violation

Drug Court	Every Wednesday at 4:00 pm
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Treatment Providers	Youth & Family Counseling Center	Richard Frantis, Director 505-841-7374
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Program Components

Juvenile Drug Court has two tracks. Intensive Drug Court includes individual, family, group (recovery, MRT/cognitive behavioral, multi-family), parenting classes for client's parents, random drug testing, and service learning. The Fast Track Program is more therapeutically oriented and for younger clients with fewer referrals who are on a six month Consent Decree. The program's duration is a minimum of twelve weeks. Youth & Family Counseling provides the treatment component for both tracks.

Problem-Solving Courts (cont.)

Juvenile Drug Court

Third Judicial District

Las Cruces/Anthony
201 W. Picacho St., Suite A.
Las Cruces, NM 88005

Program Director	Katherine Cardon	575-528-8396 Email: lcrdkac@nmcourts.gov
Type of Cases		Post Adjudication
		Probation/Parole Violation
		Deferred Prosecution (Pre-Adjudication)

Drug Court	-Every Wednesday & Thursday at 4:30 pm in Las Cruces - Every Other Monday at 5:00 pm in Anthony	
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Treatment Providers	Families and Youth, Inc.	Louie Atencio, Outpatient Coordinator 575-541-0986
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Program Components

Individual, group and family counseling; Moral Recognition Therapy (cognitive behavioral); education component; aftercare component; referrals to the Young Fathers program; community service requirements; random drug and alcohol testing by the court employed surveillance officers; a rural court to serve the southern portion of Dona Ana County (Anthony, San Miguel, Chaparral, etc.). A Special Master is the primary judicial component.

Additional information

Previously designated as a Mentor Court by the National Association of Drug Court Professionals.

Problem-Solving Courts (cont.)

Juvenile Drug Court

Fourth Judicial District

Las Vegas/Mora
496 West National
Las Vegas, NM 87701

Program Director	Anna Lujan	505-425-7281 x 34 Email: lvedaml@nmcourts.gov
Type of Cases		Post Adjudication
		Probation Violation

Drug Court	Bi-Weekly on Wednesdays at 4:00 pm
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Treatment Providers	Human Resources development Associates	Walter Vigil, Executive Director 505-454-8349
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Program Components

The San Miguel and Mora County Juvenile Drug Courts are intensive outpatient programs consisting of four phases, which also include the aftercare component (minimum of eight weeks per phase). Drug and alcohol screening and assessments, individual therapy and treatment plans, group therapy (MRT and peer), random drug and alcohol testing, surveillance and home visits, case management, clinical supervision, family intervention, parent groups, community service, and job skills and development.

Problem-Solving Courts (cont.)

Juvenile Drug Court

Fifth Judicial District

Carlsbad	Roswell
P.O. Box 1060	P.O. Box
Carlsbad, NM 88220	Roswell, NM 88202

Program Director - Carlsbad	Victoria Henderson	575-361-8149 Email: victoria.henderson@state.nm.us
Program Director - Roswell	Christy Williams	575-623-2920 x103 Email: cindy.williams@state.nm.us
Type of Cases	Carlsbad	Post Adjudication
	Roswell	Consent Decree w/auto extension probation

Drug Court	Carlsbad – Every Thursday at 4:00 pm Roswell - Every Wednesday at 4:00 pm
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Treatment Providers	Carlsbad – Carlsbad Mental Health	Kathryn Lackner 575-885-4836
	Roswell - Counseling Associates, Inc.	Ann Anderson 575-623-1480

Program Components

Carlsbad

Drug Court Team comprised of DA, Children's Court Attorney, JPO, School, Therapist, Judge and Chief JPO, Therapy to include weekly Parent Group, Teen Group, Individual Therapy and Family Therapy, Random Drug Testing, Life Skills Classes, both individual and group, Education and Job Development, Physical Activity, Regular JPO check ins.

Roswell

Four phase program with individual and family counseling. Weekly psycho-educational groups utilizing the Hazelton Matrix Model and the SAMHSA Youth Treatments Series for teens and young adults which includes: random drug testing, weekend 12-step groups for adolescents, relapse prevention, community service, GED support through the PLATO System, vocational/educational support, individual and family case management services advocating for the clients and providing access to community services and resources. In order to move from phase to phase each client must state in writing why they should move up to the next phase. At Phase II, a therapist will create an individual program plan for each client. At the end of Phase III, the client will develop an educational and or career plan(s).

Problem-Solving Courts (cont.)

Juvenile Drug Court

Sixth Judicial District

Deming
496 West National
Las Vegas, NM 87701

Program Director	Rachel Pelz	575-543-1554 Email: demdrmm@nmcourts.gov
Type of Cases		Post Adjudication
		Probation Violation

Drug Court	Every other Thursday at 4:00 pm
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Treatment Providers	Ben Archer Health Center	575-544-4578
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Program Components

Individual, group and family therapy; Parent Group; GED assistance; required 12-Step meeting attendance; drug and alcohol testing; Community services; community augmented services for juveniles and family members; Juvenile Community Corrections Program provides additional services, i.e. transportation, life skill training, field trips.

Additional information

Alumni group, creative system for earning incentives and fast track.

Problem-Solving Courts (cont.)

Juvenile Drug Court

Eighth Judicial District

Taos
105 Albright St., Suite H
Taos, NM 87571

Raton
1413 South 2nd Street
Raton, NM 87740

Program Director - Carlsbad	Reynaldo Garcia	575-751-8622 Email: taodrag@nmcourts.gov
Type of Cases		Post Adjudication
		Probation/Parole Violation
		Pre-Adjudication early intervention program

Drug Court	Taos – Every Wednesday at 5:30 pm Raton – Every Tuesday at 3:30 pm
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Treatment Providers	Taos – Human Resource Development Associates Raton – Service Organization for Youth, Inc.	Walter Vigil, Executive Director 575-737-9042 Ferman Ulibarri, Executive Director 575-445-8568
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Program Components

Juvenile Drug Court is an intensive outpatient program consisting of four phases (a minimum of eight weeks per phases). The following components are provided by the program: Drug and Alcohol Education Peer Groups, Group Therapy sessions, Moral Recognition Therapy (MRT), Individual Counseling Sessions, Individual Family Sessions, Drug and Alcohol Educational Support for parents, Random Drug Testing; Acupuncture Sessions, Community Service, Weekly Surveillance home visits, and Pro-Social Events. Other requirements include Court appearance; weekly sessions of 12-Step Program, and mandatory attendance either on educational program or employment.

Additional information

Psychological and/or psychiatric evaluations may be recommended when identified as a need, AA/NA sponsor mandatory, before completion of the second phase. Incentives are usually awarded for additional accomplishments. Formal graduation ceremonies are held when participants successfully complete the program.

Problem-Solving Courts (cont.)

Juvenile Drug Court

Eleventh Judicial District

Farmington
851 Andrea Dr.
Farmington, NM 87401

Program Director	George Di Re	505-599-9112 x 131 Email: aztdghd@nmcourts.gov
Type of Cases		Post Adjudication

Drug Court	-Every Wednesday at 5:00 pm (assigned Judge) - Every Thursday at 5:00 pm (assigned Judge)
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<u>Treatment Providers</u>	In House Treatment Providers	505-599-9112
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Program Components

A four phase program that uses the Hazelden adolescent recovery plan and the Matrix treatment model. Program includes: Individual, Family and Group Counseling, Random Urinalysis and Alcohol Testing. Also use GPS monitoring and scam bracelets. After hours and Weekend Surveillance, Equine and Outpatient Counseling aftercare, a Summer Reading Program Community Service, Summer ROPES Course, Adventure Challenge, Mentoring Services, an intensive physical fitness program (Endurance), Anger Management and life skills builder. Youth In Progress Life Skills, pro-social activities and vocational preparation.

Additional information

The San Juan County Juvenile Drug Court Program has an exceptionally strong educational component. The Program borrows the requirements from the nationally recognized Grade Court Program to strengthen each participant's educational goals/standing. Upon successful completion of the educational component (Grade Court) the participant is eligible for a four-semester books and tuition scholarship to the San Juan College. In order to provide culturally sensitive support to its Native American participants, the Drug Court program enlists the services of a Traditional Practitioner for ceremonies as needed.

Problem-Solving Courts (cont.)

Juvenile Drug Court

Twelfth Judicial District

Alamogordo
1000 New York Ave, Rm 203
Alamogordo, NM 88310

Carrizozo
P.O. Box 725
Carrizozo, NM 88301

Program Director	Maureen Schmittle	575-437-3714 Email: aladmks@nmcourts.gov
Type of Cases		Post Adjudication

Drug Court	Alamogordo – Alternating Thursdays at 5:00 pm Carrizozo – Alternating Tuesdays at 4:30 pm
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Treatment Providers	Alamogordo	Celena Hoey, LPCC
	Carrizozo	Barbara Birdsong

Program Components

Groups based Moral Recognition Therapy (cognitive-behavioral), life skills and substance abuse. Also provide individual and family counseling, physical training, intensive monitoring, drug testing, and mentoring.

Additional information

The 12th Juvenile Drug Court is a highly structured, intense out-patient program and consists of two divisions. It is a four phase program followed by an aftercare element. Each progressive program phase requires the participant to demonstrate increasing levels of sobriety and personal responsibility. There is a strong family component evident throughout all phases of the program.

Problem-Solving Courts (cont.)

Juvenile Drug Court

Thirteenth Judicial District

Bernalillo

1500 Adalia Road, Bldg A

Bernalillo, NM 87004

Grants

P.O. Box 758

Grants, NM 87020

Los Lunas

1835 Highway 314 SW

Los Lunas, NM 87031

Program Director - Bernalillo	Joseph Rinaldi	505-867-9254 Email: berdjfr@nmcourts.gov
Program Director - Grants	Eva Hazlett-Sanchez	505-287-2104 x 3119 Email: graders@nmcourts.gov
Program Director – Los Lunas	Cynthia Ferrari	505-865-2438 Email: lludcff@nmcourts.gov
Type of Cases	Bernalillo	Post Adjudication Probation/Parole Violation
	Grants	Post Adjudication
	Los Lunas	Pre/Post Adjudication

Drug Court	Bernalillo – Every Wednesday at 4:00 pm Grants – Every Wednesday at 4:00 pm Los Lunas - Every Friday at 4:00 pm
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Treatment Providers	Bernalillo – Hogares, Inc. Grants -A New Awakening, Inc. Los Lunas – Forensic Behavioral Health Associates	Jennifer Patton 505-891-9797 505-235-0900
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Program Components

Bernalillo

Individual, group and family counseling, Girls Circle, Medicaid Enrollment Assistance, Moral Recognition Therapy (cognitive behavioral), community services, GED tutoring program, life skills training; random drug testing, curfew checks by surveillance officers, and electronic monitoring.

Grants

Individual therapy; Substance Abuse Relapse Prevention Group; Life Skills; Behavior Management Class; Parenting Classes; Parent Support Group; Educational Diagnostic Assessment/Power Path; Art Therapy; Substance Peer group; Case Management; Computer Skills Training; GED Training; Job Training and Placement; SIL (Independent Living Class); Art Classes; Animal Care Management Training; Life Skills; Medicaid enrollment assistance; Family Therapy; Anger Management; Community Service; Home Visits/Monitoring; Lab Testing and Random UA's; After Care Program; and NA/AA Sunday evenings.

Problem-Solving Courts (cont.)

Thirteenth Judicial District - Cont'd

Los Lunas

Individual therapy; MRT; Parent Support group; gender specific groups; Art Therapy; Substance Abuse Peer group; Recreational components; Case Management; Tutoring; GED training; Job training and placement; Equine Therapy; Art classes; Life Skills; Medicaid enrollment assistance; Wilderness Experience; Prison program; DEA Program; Family therapy; Anger management; community service and random UA's.

Additional information

Bernalillo

Ride along with the Rio Rancho Department of Public Safety (police); community participation with local businesses; experiential wilderness training.

Grants

Collaboration with and support from the following agencies and businesses: Grants Public Schools; NM State University – Grants Campus; Grants Police Dept.; Cibola County Sheriff's Dept.; NM State Police; Milan Municipal Police Dept.; Adult Parole and Probation Office; Child Protective Services; Midwest CAP Office; NM Department of Labor; Good Samaritan Nursing Home; Mother Whiteside Library; Cibola County Animal Shelter; Food Pantry; Roberta's Place; Grants Recreation Dept.; Cibola County DWI Program; and other businesses and individuals in the community who provide assistance to Cibola County Juvenile Drug Court.

Los Lunas

Valencia County Juvenile Drug Court is both effective and innovative in its program components. This drug court was a pioneer in multiple track programming. There are currently 3 tracks to serve the varying needs of participants. Education is an important component of the drug court program. To assist participants with their educational successes, the Valencia County Juvenile Drug Court has implemented in-house tutoring and GED classes. Vocational classes are held every summer during the school break.

6. Teen Courts

New Mexico Teen Court Association

200 West 1st Street Suite 524

Roswell, NM 88201

Phone: (505) 622-0811

Fax: (505)-622-2141

e-mail: teencrt@nm.net

<http://www.roswell-usa.com/teencourt/newhub.html>

Teen Court is an option for first offenders to be tried in a court room setting, by a jury of their peers (teens of approximately the same age). The peer jury does not decide innocence or guilt, it only decides sentences. The youth going before the teen jury must acknowledge that he or she has committed the offense(s) charged. If the youth accepts the teen jury and completes it successfully, then no further action will be taken.

How Does Teen Court Work?

Cases coming before Teen Court includes traffic violations, and misdemeanors, including but not limited to: First offender DWI (as referred from the District Attorney's Office and /or Children's Court), Minor in Possession of Alcohol, Shoplifting, Criminal Damage(vandalism) Disorderly Conduct, Assault, Battery, Public Affray (fighting). On court night, the youth, who must be under 18 (at the time of arrest) and have a parent or guardian present, is prosecuted; represented by a Teen Court Peer Attorney, is sworn to tell the truth and testifies from the witness box. After hearing the evidence presented by the prosecuting and defense attorneys, the jury decides what sentence the defendant must complete. This decision is based on a pre-existing charging grid that has been approved and reviewed by the Board of the Directors of Teen Court of Chaves County Inc., and the teen volunteers.

Teen Courts (cont.)

Listing of New Mexico Teen Courts

Bernalillo County

Bernalillo County Teen Court
3500 Comanche NE, Bldg E – Suite 4
Albuquerque, NM 87107
Phone: (505) 459-6822
Fax: (575) 622-2141

Cibola County

Cibola County Teen Court
551 Washington Ave.
Grants, NM 87020
Phone: (505) 287-3605, (505) 287-5644 x109
Fax: (505) 287-5650

Doña Ana County

Doña Ana County Teen Court
2251 Calle de Santiago
Mesilla, NM 88046
Phone: (575) 647-2154
Fax: (575) 647-2158

Grant County

Teen Court of Silver City
215 N. Bullard St.
Silver City, NM 88061
Phone: 575-388-4504
Direct Line: 575-956-1205
Fax: 575-388-0465

Luna County

321 W. Spruce
Deming, NM 88030
Phone: 575-544-7377
Cell: 575-640-7318
Fax: 575-546-7377

Otero County

Teen Court Coordinator
1013 New York Avenue
Alamogordo, NM 88310
Phone: 575-443-2943
Fax: 575-443-2941

Chaves County

Chaves County Teen Court
403 N. Richardson
Roswell, NM 88201
Phone: (575) 622-0811

Curry County

Curry County Teen Court
816 North Main
Clovis, NM 88101
Phone: (575) 763-7725
Fax: (575) 763-7267

Española County

Española Municipal Court
409 Paseo de Onate
Espanola, NM 87532
Fax: 505-747-6049

Los Alamos County

2500 Trinity Drive, Suite C
Los Alamos, NM 87544
Cell: 505-412-8938
Fax: 505-662-8365

McKinley County

Post Office Box 70
Gallup, New Mexico 87305
Phone: 505-863-1423 ext. 4202
Fax: 505-863-1425

Roosevelt County

520 W. 2nd Street
Portales, NM 88130
Phone: 575-359-1048 ext. 15
Fax: 575-226-1050

Teen Courts (cont.)

Sandoval County

3500 Comanche NE
Bldg E – Suite 4
Albuquerque, NM 87107
Phone: 505-459-6822
Cell: 505-228-8459

Santa Fe County

Teen Court of Santa Fe County
142 West Palace Avenue
Santa Fe, NM 87501
(505) 995-9555
Fax: (505) 988-8035

Socorro County

Socorro County DWI Annex Bldg
198 Neel Street
Socorro, NM 87801
Phone: 575-838-2208
Cell: 575-418-7211
Office cell: 575-518-8492

Torrance County

Post Office Box 2834
Moriarty, New Mexico 87035
Phone: 505-832-4424
Fax: 505-832-4905

Valencia County

444 Luna Ave
Los Lunas, New Mexico 87031
Phone: 505-866-3323
Cell: 505-306-3367
Fax: 505-866-2424

San Juan County

Halvorson House, Inc
Post Office Box 1709
Farmington, NM 87499
Phone: 505-326-2736
Fax: 505-325-2127

Sierra County

428 McAdoo
T or C, NM 87901
Phone: 575-894-7812 ext. 11
Cell: 575-642-4129
Fax: 575-849-3946

Taos County

105 Albright St., Suite O
Taos, NM 87571
Phone: 575-751-9073
Fax: 575-758-2454

Union County

Post Office Box 430
Clayton, New Mexico 88414
Phone: 575-207-7104
Fax: 575-374-3888

7. Juvenile Justice Continuum Coordinators and Programs

County	Coordinator	Address	Email	Phone	Programs
Bernalillo	Tom Swisstack	5100 2 nd St. NW Albuquerque, NM 87122	twisstack@bernco.gov	505-761-6600	-Reception Assessment Center (RAC) -Alternatives to Violence (Case Management)
Chaves	Charlotte Andrade	P.O. Box 1597 Roswell, NM 88202	ccgrants@co.chaves.nm.us	575-624-6559	-1 st offender program -Girls Circle -Restorative Justice -Wings for Life -Intensive Youth Advocacy
Curry	Sandy Chancey	P.O. Box 760 Clovis, NM 88201	schancey@clovis-scholls.net		-Juvenile Citation Program -Reception Assessment Center (RAC)
Doña Ana	Shirley Judson		sjudson@nmsu.edu	575-993-9397	-Citation Program -Reception Assessment Center -Choices/Gender Programming -DMC
Lea	Eva Sanchez	100 Main St, Ste 4 Lovington, NM 88260	sanchez@leacounty.net	575-396-8521	-Youth Reporting Center -"TARS" (substance abuse education)
Lincoln	Darrell Gasaway	1204 Mechem Dr. Ste 13 Ruidoso, NM 88345	darrell_gasaway@yahoo.com	575-336-2727	-Citation/Diversion Program, -Girls Circle -Intensive Community Monitoring -Restorative Justice
Los Alamos	Deborah Gill	P.O. Box 1416 Los Alamos, NM 87544	deb4llab@aol.com	505-412-9371	-Delinquency Diversion - Girls Circle -Restorative Justice
McKinley	Patricia Johnson	P.O. Box 70 Gallup, NM 87035	pjohnson@co.mckinley.nm.us	505-726-8249	-Day Reporting -Botvin Life Skills -DMC
Rio Arriba	Jack Ortega	424 Vera Dr. Santa Fe, NM 87501	jac_ortega@comcast.net	505-310-9741	-Alternatives to Detention -Girls Circle/Botvin -Alternatives to School Suspension -Intensive Community Monitoring

Juvenile Justice Continuum Coordinators and Programs (cont.)

County	Coordinator	Address	Email	Phone	Programs
Sandoval	Loretta Johnson	8321 Eagle Rock NE Albuquerque, NM 87122	Loretta.johnson1@comcast.net	505-350-2056	-Day Reporting -Boy Scout Diversion Project -Reception Assessment Center
Santa Fe	Rich DeMella	P.O. Box 909 Santa Fe, NM 87501	rmdemella@ci.santa-fe.nm.us	505-955-4049	-Intensive Community Monitoring -Girls/Botvin -Day Reporting -DMC
Taos	Karel Dunning-Mirabal	P.O. Box 913 Taos, NM 87571	karel@hrds.org	575-758-0670	-Intensive Community Monitoring, -Restorative Justice, -Learning Lab -DMC
Valencia	Eric Zamora	P.O. Box 119 Los Lunas, NM 87031	ezamora@co.valencia.nm.us	505-866-2003	-Reception Assessment Center

8. Juvenile Community Corrections Service Providers

Border Area Mental Health Services

PO Box 1349
315 S. Hudson, Suite 19
Silver City, NM 88061
Phone: (575) 388-4497
Contact: Christi Gigante
Counties Served: Luna and Hidalgo

Counseling Associates Inc.

PO Box 1978
110 East Mescalero Rd.
Roswell, NM 88202
Phone: (575) 623-1480
Contact: John Dunlap
Counties Served: Chavez

DWI Program

1122 Industrial Park Road
Española, NM 87532
Phone: (505) 747-1418
Contact: David F. Trujillo
Counties Served: Rio Arriba

Guidance Center of Lea County

920 W. Broadway
Hobbs, NM 88240
Phone: (575) 393-3168
Contact: Margie Mendiola
Counties Served: Lea

Kids In Need of Supportive Services

PO Box 673
1702 Durango Street
Silver City, NM 88062
Phone: (575) 956-7209
Contact: Susanne Kee
Counties Served: Grant

Carlsbad Mental Health Center

914 N. Canal
Carlsbad, NM 88220
Phone: (575) 885-4836
Contact: Kathryn Lackner
Counties Served: Eddy

Counseling Center

1900 E. 10th Ave.
Alamogordo, NM 88310
Phone: (575) 437-7404
Contact: Kim Richards
Counties Served: Lincoln and Otero

Families & Youth Inc.

PO Box 1868
1320 S. Solano
Las Cruces, NM 88004
Phone: (575) 522-4004
Contact: Brian Kavanaugh
Counties Served: Dona Ana and South Valley Extension

Human Resource Development Associates

PO Box 913
1335 Gusdorf Rd. Building E
Taos, NM 87571
Phone: (575) 758-0670
Contact: Rose Rael
Counties Served: Taos

Mental Health Resources

1100 W. 21st. Street
Clovis, NM 88101
Phone: (575) 769-2345
Contact: Kelly Hartz
Counties Served: Curry and Roosevelt

Juvenile Community Corrections Service Providers (cont.)

Peanut Butter & Jelly Family Services

1101 Lopez Rd. SW

Albuquerque, NM 87105

Phone: (505) 877-7060

Contact: Caprice Pino

Counties Served: Bernalillo and
Rio Arriba County

TeamBuilders Counseling Services Inc.

PO Box 204

214 E. Main Street

Tucumcari, NM 88401

Phone: (575) 742-2620

Contact: Tony Bustos

Counties Served: Harding, San Miguel
Guadalupe, Quay and DeBaca

Youth Development Inc.

6301 Central NW

Albuquerque, NM 87105

Phone: (505) 831-6038

Contact: Louis Pacias

Counties Served: Bernalillo, Sandoval
and Valencia

Service Organization for Youth Inc.

PO Box 1165

101 Letton Drive

Raton, NM 87740

Phone: (575) 445-8568

Contact: Ferman Ulibarri

Counties Served: Colfax

Youth Advocate Programs, Inc.

717 W. Apache

Farmington, NM 87401

Phone: (505) 820-3165

Contact: Patty Rosati

Counties Served: Santa Fe, McKinley,
San Juan, Socorro, Cibola, Torrance, Sierra
and Catron

9. Cultural Services for Indian Youth

Children, Youth and Families Department

Bernie Teba, Tribal Liaison

PERA Bldg. 1120 Paseo de Peralta, 5th Floor

P.O. Drawer 5160

Santa Fe, NM 87502

Tel: (505) 827-7612

Cell: (505) 412-0093

Fax: (505) 827-4474

E-mail: bernie.teba@state.nm.us

Corrections Department

Tex Joey, Native American Program Coordinator and Spiritual Advisor, Tribal Liaison

P. O. Drawer 250

Grants, NM 87020

Tel: (505) 876-8413

Cell: (505) 670-4538

E-mail: tex.joey@state.nm.us

Cultural Affairs Department

Samuel Cata, Deputy Director, Tribal Liaison

Historic Preservation Division

228 E. Palace Avenue, Room 320

Santa Fe, NM 87501

Tel: (505) 827-4210

E-mail: sam.cata@state.nm.us

New Mexico Cultural Affairs Department

Wendell Chino Building

1220 South Saint Francis Drive, 2nd Floor

Santa Fe, NM 87505

Tel: (505) 476-1600/1602-04

Fax: (505) 476-1601

Web: www.iad.state.nm.us/

Cultural Services for Indian Youth (cont.)



New Mexico Children, Youth and Families Department Cultural Services to Indian Youth

Indian youth at YDDC form a drum group and record a four track CD entitled, "War Wolves Future Chiefs."

The lack of access to culturally relevant and appropriate services is among the issues affecting American Indian youth in short or long-term confinement in New Mexico (NM) Children, Youth and Families Department (CYFD) controlled facilities. Incarcerated Indian youth often come from rural and distant Tribes or Pueblos in NM. For a variety of reasons, Indian youth have little contact with their families or tribal service providers while in CYFD custody. The lack of contact with family and/or tribal service providers affects the rehabilitation, treatment, and re-entry plans for incarcerated Indian youth.



Since 2006, the CYFD has provided funding to the American Indian Development Associates (AIDA) to provide cultural services to incarcerated Indian youth. The underlying purpose of the project is to provide culturally relevant technical assistance and training. The project also address CYFD's mandates under the NM Children's Code (§32A-1-4 NMSA et. seq.) that require provision of culturally appropriate treatment and rehabilitation services to confined Indian youth located at the John Paul Taylor Center in Las Cruces, NM and the Youth Diagnostic and Development Center in Albuquerque, NM.

Through the project AIDA provides a cultural-based curriculum in collaboration with the CYFD Tribal Liaisons, CYFD Program Managers, CYFD Juvenile Correction Officers and the AIDA Mentors and/or consultants. Through the program the team is able to do the following:

- Plan and implement mentor based activities,
- Plan and implement cultural activities,
- Plan special activities such as speaking engagements and presentations, and
- Plan and conduct training for CYFD facility staff and mentors.

With assistance from the cultural mentors to the project, youth at YDDC formed a drum group and recorded a four track CD entitled, "War Wolves-Future Chiefs." Each member of the group was provided a copy to take home when they leave the facility. The War Wolves have performed for the opening ceremonies for Native American Day at the NM State Legislature as well as the Miss Indian UNM Pageant.



Other mentoring activities include implementation of the [ALA N-O-T on Tobacco](#) cessation curriculum, traditional sweat lodges, spiritual counseling and mentoring, talking circles, storytelling, and arts and crafts. Special activities and presentations are conducted quarterly and include presentations on traditional subsistence, leadership and empowerment.

Cultural Services for Indian Youth (cont.)

As a result of this program, incarcerated Indian youth are able to use culture-based methods, approaches, values, and philosophies to address their behavior issues. It was reported that the youth who participated in the culturally appropriate services through this project were less likely to be a behavioral problem when they returned to the regular programming schedule at each facility. These youth who have very limited family contact due to the distance and lack of transportation for their Indian families are able to maintain their Indian identity and culture through the services provided by this program.

Rita Martinez, Program Coordinator
American Indian Development Associates
2401 12th St. N.W., Suite 212
Albuquerque, NM 87104
Telephone: (505) 842-1122
Fax: (505) 842-9652
E-mail: info@aidainc.net

10. Psychological Evaluators for Court Proceedings

Juvenile Forensic Evaluators

Optum Health

Dr. Keith Brown, Clinical Director

505-798-5617 or 206-423-0177

Email: keith.a.brown@optumhealth.com

Website: <https://www.optumhealthnewmexico.com/>

List of contractors provided as of July 1, 2010 for FY 11

Judicial District	Service Provided	Contractor
JD1: Santa Fe, Los Alamos, Rio Arriba	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Susan Cave
JD2: Bernalillo	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Clinton Rhyne Dr. Alexander Paret
JD3: Dona Ana	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. David Sachs Dr. Nick Barneccio
JD4: Mora, San Miguel, Guadalupe	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Susan Cave Dr. Clinton Rhyne
JD5: Chaves, Eddy, Lea	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Sylvia R. Nesbitt Dr. Will Parsons
JD6: Grant, Hidalgo, Luna	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. David Sachs Dr. Janette Castillo
JD7: Catron, Socorro, Sierra, Torrance	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Clinton Rhyne
JD8: Taos, Colfax, Union	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Susan Cave Dr. Christopher Alexander
JD9: Roosevelt, Curry	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Nick Barneccio
JD10: Harding, Quay, DeBaca	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Clinton Rhyne Dr. Janette Castillo
JD11: San Juan, McKinley	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Alexander Paret (CST only) Dr. Christopher Alexander
JD12: Lincoln, Otero	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Sylvia R. Nesbitt Dr. Janette Castillo
JD13: Cibola, Valencia, Sandoval	Competency to Stand Trial (CST) Treatment Amenability (TA)	Dr. Christopher Alexander Dr. David Heard

When there is more than one provider assigned to a Judicial District, the Court may select the provider.

Psychological Evaluators for Court Proceedings (cont.)

Contact Information for Juvenile Forensic Evaluators		
Contractor	Types of Forensic Evaluations	Judicial Districts/Counties
Christopher J. Alexander, Ph.D. 2320 Grande Blvd., SE, Suite C Rio Rancho, NM 87124 (505)898-1117 Voice (505)890-5414 Fax alexanderphd@msn.com	Competency To Stand Trial (CST) Treatment Amenability (TA)	JD 8: Taos, Colfax, Union JD 11: San Juan, McKinley JD 13: Cibola, Valencia, Sandoval
Nick Barnecko, Ph.D. 121 Wyatt Street #8 Las Cruces, NM 88001 (575)541-1110 Voice (575)541-1113 Fax nickbarnecko@yahoo.com	Competency To Stand Trial (CST) Treatment Amenability (TA)	JD 3: Dona Ana JD 9: Roosevelt, Curry
Janette Castillo, Ph.D. 121 Wyatt Street #8 Las Cruces, NM 88001 (575)541-1110 Voice (575)541-1113 Fax Janette_mialkowski@hotmail.com	Competency To Stand Trial (CST) Treatment Amenability (TA)	JD 6: Grant, Hidalgo, Luna JD 10: Harding, Quay, DeBaca JD 12: Lincoln, Otero
Susan Cave, Ph.D. 2213 Brothers Road, Suite300 Santa Fe, NM 87505 (505)988-7616 Voice (505)988-5592 Fax sbcave@cybermesa.com	Competency To Stand Trial (CST) Treatment Amenability (TA)	JD1: Santa Fe, Los Alamos, Rio Arriba JD4: Mora, San Miguel, Guadalupe JD8: Taos, Colfax, Union
David B. Heard, Ph.D. 11813 San Victorio NE Albuquerque, NM 87111 505.730.5001 Voice 505.892.8572 Fax dheard@rrps.net	Competency To Stand Trial (CST) Treatment Amenability (TA)	JD 13: Cibola, Valencia, Sandoval
Sylvia R. Nesbitt, Psy.D. 121 Wyatt Drive, Suite 5 Las Cruces, NM 88005 (575)525-8696 Voice (575)523-1152 Fax Snesbitt1753@aol.com	Competency To Stand Trial (CST) Treatment Amenability (TA)	JD 5: Chaves, Eddy, Lea JD 12: Lincoln, Otero
Alexander J. Paret, Ph.D 11504 Peneffeld Lane, NE Albuquerque, NM 87111 (505)340-6440 Voice (505) 312-8483 Fax sixfreud@aol.com	Competency To Stand Trial (CST) Treatment Amenability (TA)	JD 2: Bernalillo JD 11: San Juan, McKinley
Will D. Parsons, Ph.D. 304 Leas Avenue P.O. Box 2180 Roswell, NM 88202 (575)627-5855 Voice (575)627-5955 Fax parsonspychology@dfn.com	Competency To Stand Trial (CST) Treatment Amenability (TA)	JD 5: Chaves, Eddy, Lea
Clinton E. Rhyne, Ph.D. P.O. Box 584 Tijeras, NM 87059 (518)727-2663 Voice crhyne3@aol.com	Competency To Stand Trial (CST) Treatment Amenability (TA)	JD 2: Bernalillo JD 4: Mora, San Miguel, Guadalupe JD 10: Harding, Quay, DeBaca

Psychological Evaluators for Court Proceedings (cont.)

<p>Dr. David Sachs Mesilla Valley Mental Health Assoc. 3521-A Del Rey Blvd. Las Cruces, NM 88012 (575)382-1200 Voice (575)382-3521 Fax dasachs@msn.com</p>	<p>Competency To Stand Trial (CST) Treatment Amenability (TA)</p>	<p>JD3: Doña Ana JD6: Grant, Hidalgo, Luna</p>
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11. Behavioral Health Care Providers

OptumHealth New Mexico manages behavioral health services for New Mexico's Behavioral Health Collaborative and provides a directory to help direct both adult and child consumers to services for mental health and substance abuse. Providers are listed in:

- the Behavioral Health Provider Directory, and
- the Behavioral Health Provider Directory Supplement, found at:

<https://www.optumhealthnewmexico.com/consumer/en/findBehavioralHealthCareProviders.jsp>.

Contacting OptumHealth

Optum Health

Dr. Keith Brown, Clinical Director

505-798-5617 or 206-423-0177

Email: keith.a.brown@optumhealth.com

Website: <https://www.optumhealthnewmexico.com/>

Toll-free: 1-866-660-7185. OptumHealth can:

- Answer questions
- Help locate providers close to a particular location
- Help arrange transportation to office visits
- Provide a copy of this directory in another language beside English and Spanish, on audiotape and in large print.
- Provide an oral interpretation in other languages.

OptumHealth New Mexico Office Locations

Region 1

2800 Hutton Ave.

Farmington, NM 87402

Phone: 505-326-9390

Counties: San Juan, McKinley, Cibola, Valencia, and Sandoval

Region 2

2904 Rodeo Park East, Suite 300A

Santa Fe, NM 87505

Phone: 505-428-6594

Counties: Santa Fe, Los Alamos, Rio Arriba, Taos, Colfax, Union, Harding, Mora, San Miguel, and Guadalupe

Region 3

8801 Horizon Blvd., NE

Albuquerque, NM 87113

Phone: 505-798-5600

County: Bernalillo

Region 4

400 Pennsylvania Ave.

Roswell, NM 88201

Phone: 575-624-4450

Counties: Chaves, De Baca, Quay, Curry, Roosevelt, Lea, and Eddy

Region 5

840 N. Telshor

Las Cruces, NM 88011

Phone: 575-556-1760

Counties: Dona Ana, Luna, Hidalgo, Grant, Catron, Socorro, Torrance, Lincoln, Otero, and Sierra

Region 6

2904 Rodeo Park East, Suite 300A

Santa Fe, NM 87505

Phone: 505-428-6594

Counties: Native American Communities (including Pueblos, Navajo chapters, and Apache entities)

RECENT NEW MEXICO OPINIONS RELATED TO CHILDREN

The Supreme Court and the Court of Appeals have issued a number of published opinions relating specifically to children. Since July 2011, these have included the following;

Supreme Court

Diamond v. Diamond, 2012-NMSC-022. The Supreme Court interpreted the Emancipation of Minors Act to authorize partial emancipation.

Chatterjee v. King, 2012-NMSC-019. A same sex partner may have standing to pursue joint custody of a child. In this case, the facts pleaded by the petitioner were sufficient to confer standing on her as a natural mother under the Uniform Parentage Act.

Freedom C. v. Brian D., 2012-NMSC-017. The Supreme Court addressed certain issues under the Kinship Guardianship Act, in particular the extent to which both parents must meet the prerequisites of §40-10B-8(B) before guardianship can be granted, in this case to the grandparents. Also, the fact that one parent lives in the same house as the kinship guardian does not necessarily preclude application of the KGA.

Court of Appeals - Abuse and Neglect

State ex rel. CYFD v. Laura J., slip op. filed 9/26/12. While affirming termination of the Mother's parental rights under the Children's Code, the Court of Appeals held that the Child's cousin, who had intervened in the children's court, had standing to appeal. This cousin had sought to be considered for placement purposes. The appellate court held that CYFD did not make reasonable efforts to locate relatives for placement, as required by §32A-4-25.1(D), and remanded so that CYFD could consider whether the cousin could serve as an appropriate placement for the child.

State ex rel. CYFD v. Carl C., 2012-NMCA-065. The Court of Appeals held that evidence that either the mother *or* the father perpetrated the abuse was sufficient for a court to conclude that action or inaction of the child's parent, guardian or custodian caused the abuse, and it was not necessary to specifically find which parent caused the abuse.

State ex rel. CYFD v. Steve C., 2012-NMCA-045. The petition filed by CYFD under the Abuse and Neglect Act had alleged neglect. At the close of the adjudicatory hearing, CYFD asserted that there was sufficient evidence presented to support a finding of abuse. The court considered this to be a motion to conform to the evidence, granted the motion and, without further hearing, found that Father had neglected and abused the children. The Court of Appeals concluded that the court erred in not following §32A-1-18(A), which requires the court to hear the additional issues, and that it was a violation of due process for Father to be denied the opportunity to present a defense on the new charge.

Court of Appeals - Juvenile Justice

State v. Antonio T., slip op. filed 12/13/12. When a school vice principal interrogated a high school student suspected of being intoxicated, she conducted the interrogation in her office in the presence of a police officer. The Court of Appeals concluded that this was an investigatory detention but that §32A-2-14 did not apply because the vice principal was not acting to assist law

enforcement beyond her duties as a school administrator. Miranda warnings were not required even though the child's statements to the vice principal were used against him in the delinquency case.

State v. Nanco, 2012-NMCA-109, cert. granted 10/12/12. The Court of Appeals held that, under the Children's Code, a child who was found not guilty of being a serious youthful offender but was adjudicated as a delinquent offender was not entitled to presentence commitment credit against his commitment to CYFD.

State v. Carlos A., 2012-NMCA-069. Carlos' status as a minor did not render his consent to search the car he was driving involuntary. Carlos argued that juveniles are entitled to expanded rights under the Fourth Amendment and that the police officer requesting the search was required to inform him that he had the right to deny consent. The Court of Appeals disagreed, holding that minors have no greater rights than adults in the context of consent to search. Section 32A-2-14 only protects *statements* made during an investigatory detention (see *State v. Javier M.*, 2001-NMSC-030), and Carlos did not argue that his consent to search was a statement.

State v. Leticia T., 2012-NMCA-050, cert. granted 5/11/12. The Court of Appeals held that the warrantless search of the Child's trunk should have been suppressed for lack of exigent circumstances. The Court, however, agreed with the lower court on the denial of Child's motion to dismiss. Child argued for dismissal because the preliminary hearing was not timely held; the Court of Appeals agreed that the hearing was not timely but ruled that dismissal was not required under Rule 10-144. Child also moved to dismiss because her trial was not held within the time limits in Rule 10-243. Since she was tried as a youthful offender, the Court held that Rule 5-604, which no longer contains a specific time limit, applied instead. The Court encouraged the Rules Committee to revisit which rules should apply in youthful offender cases.

State v. Oscar Castro H., 2012-NMCA-047. When a delinquency petition is submitted to a grand jury on a notice of intent to seek adult sanctions, a "no-bill" requires that the charges be dismissed without prejudice.

State v. Candace C., 2012-NMCA-030. The Court of Appeals held that an officer may administer field sobriety tests if the officer has reasonable suspicion that a driver was driving impaired. Section 32A-2-14, which, under *State v. Javier M.*, 2001-NMSC-030, requires that a child subject to an investigatory detention be advised of his or her right to remain silent, does not require the officer to advise a minor of a right to withhold consent to FSTs. Similarly, in *State v. Randy J.*, 2011-NMCA-105, the appellate court held that Child's responses during the field sobriety tests, results of the blood tests and Child's implied consent to the blood test are not statements subject to suppression under §32A-2-14(D).

UPDATES TO THE 2014 NEW MEXICO CHILD WELFARE HANDBOOK <http://childlaw.unm.edu/resources>

This is the third semi-annual update to the 2014 New Mexico Child Welfare Handbook. The 2014 Handbook was published in July 2014, with later developments reported in the January 2015 and July 2015 updates. This January 2016 update covers the period July 1, 2015 to December 31, 2015. **It is important to check the updates when using the Handbook.**

The New Mexico Supreme Court has decided a delinquency case and a criminal child abuse case but no civil abuse or neglect cases. The Court of Appeals has issued opinions in a few civil abuse or neglect cases and a delinquency case.

There were few changes to the Children's Court rules, while the Children, Youth and Families Department (CYFD) amended or replaced a number of its regulations. The CYFD rules were changed in part to reflect the requirements of the federal Preventing Sex Trafficking and Strengthening Families Act, described in the January 2015 update.

The Every Student Succeeds Act, passed by Congress and signed into law in December 2015, contains a number of provisions specific to foster children. The Health and Human Services Department and the Department of Justice have issued guidance on compliance by child welfare agencies and courts with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

These and other developments are addressed in more detail below. Cites to affected sections of the Handbook appear in parentheses after the description of each development.

Changes to Supreme Court Rules

Children's Court Rules

Rule 10-162, the preemptory challenge rule, was amended to add a subsection on the misuse of **preemptory excusal** procedures. (Handbook Chapters 4, 5, 6, 6A)

Rule 10-316 was adopted to require that an **educational decision maker** be named in a court order at the custody hearing and reviewed at subsequent hearings in every case. (The Children's Court forms adopted in 2014 already provide for the naming of an educational decision maker in the custody order, as well as in subsequent orders. These forms were amended in 2015 to correct the name of the Family Educational Rights and Privacy Act.) (Handbook § 13.11, 16.12.6, 17.10, 19.12, 21.10)

A new **Rule 10-323** on the **conduct of hearings** in abuse and neglect cases was also adopted. The rule focuses on the persons who may or should be present at a hearing and identifies several categories of individuals who may have a "proper interest in the case" or a "proper interest in the work of the court." (Handbook § 13.4)

Rules of Criminal Procedure and UJIs

The Supreme Court adopted a new jury instruction, **UJI 14-6019A**, for use in **criminal sexual penetration (CSP) cases** in which the **victim's age** is not an essential element of the offense but an essential sentencing fact. Under § 30-9-11(E)(2)-(6), when a victim is age 13 – 18, CSP in the second degree triggers a statutory increase to a second degree felony and a mandatory minimum sentence. The Use Note to **UJI 14-954** was amended in part to explain that the victim's age in these cases is an essential sentencing fact that must be determined by the jury beyond a reasonable doubt. (Handbook § 34.5.1)

The Supreme Court also amended the **UJI Criminal General Use Note** to clarify that the court may alter an **elements instruction** when supported by binding precedent or unique circumstances, and when necessary to accurately convey the law to the jury. The Committee commentary explains that, even where a UJI exists, if it is inadequate to convey the legal questions of the case or has been rendered obsolete by a change in the law, modification may be necessary to avoid fundamental error. (Handbook Chapter 34)

Rules 5-501 and 5-502 requires the parties to a criminal case, when listing their witnesses, to identify any witnesses who will be providing expert testimony and the subject matter of their testimony. (Handbook § 34.6.6)

Changes to CYFD Rules

CYFD has amended or replaced a number of rules in the New Mexico Administrative Code (NMAC), some of which affect practice in abuse or neglect cases in Children's Court. Parts 8.10.2 (Intake), 8.10.9 (Youth Services), and 8.26.2 (Placement Services) were amended extensively, while 8.10.3 (Investigations) and 8.10.8 (Permanency Planning) were repealed and replaced. The changes were effective September 29, 2015.

The permanency planning rules, 8.10.8 NMAC, have been updated in part to reflect changes in state and federal law since 2005. For example, they devote more attention to relative notification and placement and to sibling continuity (8.10.8.10). New provisions on education, including educational continuity, IEPs, next step plans and educational decision makers, have also been added (8.10.8.10(F) and 8.10.8.18). (Handbook §§ 16.8, 16.12.6, 19.8.4)

A number of the changes to CYFD rules conform state practice to the Preventing Sex Trafficking and Strengthening Families Act passed by Congress in 2014. For example:

- The permanency planning and youth services rules require that PSD take certain steps in preventing, identifying, and reporting sex and human trafficking and in reporting runaways. PSD is to make reasonable efforts to locate children or youth missing from foster care, determine the factors that led to the child or youth being absent, and assess the child's or youth's experience, including whether the child or youth is a victim of sex or human trafficking (8.10.8.24 and 8.10.9.22).
- A permanency plan of planned permanent living arrangement (PPLA) may be used only for youth who are age 16 or older (8.10.9.7(L)). (Another rule, 8.10.8.12(E), states that

PPLA may only be used for youth over 16, which appears to mean 17 year olds, but the federal law allows PPLAs for children who have “attained 16 years of age.”).

- The case plan for a child age 14 or older must be developed in consultation with the child, who may choose two other members of the team as well (8.10.8.13D).
- Life skills plans, which are part of the case plan, must now be developed with and for children at age 14, not 16. PSD will develop a life skills plan with the youth regardless of the youth's permanency plan and will present the plan to the court prior to the first hearing after the youth's 14th birthday and every subsequent hearing (8.10.9.11).
- PSD must provide children age 14 or older with copies of certain documents about their rights and responsibilities and obtain a signed acknowledgment that the child has received and understands them (8.10.8.13E).
- The rules on placement now require that PSD make efforts to normalize the lives of children in PSD's custody and empower caregivers to approve a child's participation in activities based on the caregiver's own assessment using a reasonable and prudent parent standard, without prior approval of PSD. When a child age 14 or older disagrees with a decision made under this standard, the child may request a review of the decision in writing (8.26.2.13). (Handbook §§ 16.6, 17.9, 18.5.1, 19.8.1, 19.9, 38.4)

Case Law

Abuse and Neglect

State ex rel. CYFD v. Yodell B., in the Matter of Tyrell B., 2015-NMCA-____ (No. 33,990, Dec. 21, 2015). Holding that clear and convincing evidence is the proper standard of proof for proving active efforts under ICWA § 1912(d), the Court of Appeals concluded that the evidence was insufficient to show that CYFD made active efforts to prevent the breakup of the Indian family before terminating Father's parental rights. ¶¶ 16, 29. Concluding that the active efforts requirement is a “ ‘more involved and less passive standard’ ” than reasonable efforts, the court found that CYFD took only a passive role by making Father locate and obtain service providers on his own and making him ensure that service providers were communicating with CYFD about his progress. ¶¶ 20, 26. (Handbook §§ 1.3.4, 3.3.4, 15.5.6, 15.11.3, 22.4.5, 39.2.8, 39.2.9)

State ex rel. CYFD v. Alfonso M.E., in the Matter of Uriah F.-M., 2015-NMCA-____ (No. 33,896, Dec. 14, 2015). At the time Child was taken into custody, Father was incarcerated due to an arrest for DWI and subject to an immigration hold. ¶ 4. After Father was deported, the Mexican consulate arranged for a home study and a psychological evaluation and Father obtained employment and attended therapy sessions. A month after deportation, CYFD filed a motion to terminate parental rights. ¶ 34. The Court of Appeals reversed the district court's decision terminating parental rights and remanded the case back to the lower court. ¶ 64.

The appeals court held that abandonment under § 32A-4-28(B)(1) is inapplicable. Under *Grace H.*, § 32A-4-28(B)(1) applies only when the parent is absent prior to termination. Here, Father was present in the case and expressed a legitimate desire to take responsibility for Child. ¶ 23.

Regarding § 32A-4-28(B)(2), the Court emphasized that the Abuse and Neglect Act places the burden on CYFD, not the parent, to prove by clear and convincing evidence that the parent is unlikely to alleviate the cause and conditions of neglect in the foreseeable future and that the

agency made reasonable efforts to assist the parent in adjusting the conditions that rendered him unable to properly care for the child. The Court concluded that CYFD had not met its burden of proof and that the district court had essentially relied on the lack of evidence, rather than evidence, to terminate parental rights. For example, in finding that Father had not alleviated the causes and conditions of neglect, the district court noted that Father had an alcohol problem and that there was no evidence whether he was still drinking. The Court of Appeals held that this lack of evidence does not constitute clear and convincing evidence. ¶ 37. Similarly, the district court's findings pointed to the lack of certain information in the home study as a basis for termination; however, it was CYFD's statutory responsibility to present evidence that established that Father's home was unsafe or unstable, which CYFD failed to do. ¶¶ 49-50.

The Court of Appeals did not reach best interest, but commented on the district court's concern that Father did not speak English and Child at 18 months did not speak Spanish. The appeals court said that it was "unconvinced that, as a general rule, native language disparities between a natural parent and his or her infant child are insurmountable obstacles to reunification" and had serious reservations about the district court's reliance on this theory in light of the lack of evidence before the court. ¶¶ 61-62. (Handbook §§ 22.1.2, 22.4.2, 22.4.3, 22.5.10)

State ex rel. CYFD v. Scott C. in the Matter of Bryce H., 2015-NMCA-____ (No. 34,220, Sept. 3, 2015). The Court of Appeals held that the doctrine of claim preclusion did not bar CYFD from substantiating allegations of abuse or neglect in its own administrative proceedings when the court case had been dismissed with prejudice per agreement. "By expressly identifying different decision-makers, different purposes, and different standards of proof, the statutes and regulations appear to contemplate inclusion of substantiated reports in CYFD's child abuse database, even where abuse cannot be proven by clear and convincing evidence in children's court." ¶ 18. The Court also held that, once CYFD dismisses a case against a defendant by notice under Rule 10-145(A)(1)(a), the district court loses jurisdiction to reopen. ¶ 20. Scott C. filed a petition for certiorari, which was pending as of December 31, 2015. (Handbook Chapters 8, 12)

State ex rel. CYFD v. Christina L., 2015-NMCA-115 (No. 34,061, Aug. 20, 2015). The Court of Appeals reversed the district court's adjudication of neglect under § 32A-4-2(E)(4), finding that evidence of Mother's defiant attitude toward CYFD does not constitute a mental disorder or incapacity. ¶ 21. The court noted that § 32A-4-2(E)(4) requires CYFD to establish both the existence of a mental disorder or incapacity *and* that such condition makes the parent unable to perform his or her parental responsibilities. ¶ 17. Under (E)(4), CYFD does not have to prove culpable behavior on the parent's part but also cannot rely on evidence of the parent's intentional or negligent disregard of the child's need, as it can under § 32A-4-2(E)(2), which pertains to neglect as a result of "the faults or habits of the child's parent." *Id.*

The Court added that, to the extent the lower court relied on the expert witness's opinion that Mother functioned at a lower cognitive ability, which was based on the results of a non-diagnostic therapeutic tool used to assess Mother's developmental history, the opinion was not properly supported. In addition, expert testimony in the form of a diagnosis is likely required to show neglect due to mental disorder or incapacity. ¶¶ 4, 22. (Handbook § 15.5.3)

State ex rel. CYFD Concerning the Mercer-Smiths, 2015-NMCA-093 (Nos. 31,941 and 28,294, June 18, 2015), summarized in the July 2015 update. Cert. was granted on August 26, 2015. (Handbook § 28.5)

Delinquency

State v. DeAngelo M., 2015-NMSC-033 (No. S-1-SC-34995, Oct. 15, 2015). The Supreme Court held that, to overcome §32A-2-14(F)'s presumption that statements of a 13- or 14-year-old to a person in a position of authority are inadmissible, expert testimony is not required and the prosecution need not prove that the child had the maturity and intellectual capacity of an average 15-year-old. Rather, the recording of the child's custodial interrogation must clearly and convincingly show that "the child's answer to open-ended questions demonstrated that the ... child has the maturity to understand each of his or her constitutional and statutory rights and the force of will to insist on exercising those rights." ¶¶ 3, 17-19. In this case, the Court concluded that the State failed to meet the burden of proof needed to overcome the statutory presumption. The district court erred in denying the child's motion to suppress. ¶ 30. (Handbook § 33.5.4)

State v. Acosta, 2015-NMCA-____ (No. 33,573, Sept. 2, 2015). In a case addressing the adequacy of the state's notice of its intent to introduce prior bad acts evidence under Rule 11-404(B), the Court of Appeals held that the state's failure to specifically invoke the rule or identify the consequential fact to which the prior bad acts evidence might have been directed was prejudicial enough to justify the grant of a new trial. ¶¶ 19, 25. (Handbook § 34.6.8)

State v. Wyatt B., 2015-NMCA-110 (No. 33,297, Aug. 13, 2015), *cert. denied*, Oct. 13, 2015. Among other holdings, the Court of Appeals upheld the district court's denial of a 16-year-old's motion to suppress incriminating statements made to police officers while subject to an investigatory detention and DWI arrest. ¶ 3. Applying the totality of the circumstances analysis set forth in § 32A-2-14(E), the court found that such factors as the child's impaired physical and mental condition due to intoxication and the police officer's denial of child's request to have his parents present did not override other evidence showing a valid waiver of rights. ¶¶ 21-25. (Handbook § 33.5.4)

Criminal Child Abuse

State v. Nichols, 2015-NMSC-____ (No. S-1-SC-34549, Nov. 19, 2015). Rejecting the state's theory that defendant inflicted a fatal liver injury on his infant child, the jury convicted defendant of one count of child abuse resulting in death or great bodily harm based on the state's theory that defendant negligently permitted medical neglect. The Supreme Court held that the state failed to provide substantial evidence that the medical neglect caused the child's death or that the child's symptoms were so obvious that defendant was criminally reckless in not seeking immediate medical attention. ¶¶ 37, 44, 49. The Court also noted that "causing" and "permitting" child abuse lose their distinction when the charge is based on a theory of endangerment by medical neglect. The jury had found defendant *not guilty* of *causing* medical neglect but *guilty* of *permitting* medical neglect but the difference between the two is not clear and the verdicts made it impossible to determine what culpable act was the actual basis for the jury's conviction. ¶¶ 34-36. (Handbook § 34.3.3)

Cert has been granted in the following cases, which were summarized in past updates:

- *State v. Bailey*, 2015-NMCA-102 (No. 32,521, June 9, 2015), *cert. granted*, Sept. 25, 2015. (Handbook §§ 34.5.1, 34.6.8)
- *State v. Tufts*, 2015-NMCA-075 (No. 33,419, April 7, 2015), *cert. granted*, June 19, 2015. (Handbook § 34.5.6).

- *State v. Tapia*, 2015-NMCA-048 (No. 32,934, Feb. 17, 2015), *cert. granted*, May 11, 2015. (Handbook §§ 34.5.1, 34.5.2)

Federal Law

The **Every Student Succeeds Act**, P.L. 114-95, enacted on December 10, 2015, reauthorizes the Elementary and Secondary Education Act (ESEA) of 1965, the main Federal education law, largely replacing No Child Left Behind. The new law contains a number of provisions aimed at helping to improve educational outcomes for foster children. The new law, for example:

- amends 20 U.S.C. § 6311 of the ESEA to require that state educational plans set forth the steps the state educational agency will take to ensure collaboration with the state child welfare agency to ensure the educational stability of children in foster care, including assurances that:
 - foster children may remain in their school of origin unless a determination is made that this is not in their best interest, in which case they will be immediately enrolled in a new school, even without records, and the new school will immediately contact the last school attended to obtain relevant academic and other records; and
 - the state education agency will designate an employee to serve as a point of contact for the child welfare agency;
- amends 20 U.S.C. § 6311 of the ESEA to require that the annual state report card include disaggregated achievement information on foster children; and
- amends 20 U.S.C. § 6312 of the ESEA to require local education agencies (LEAs) to collaborate with child welfare agencies and develop a plan governing how transportation to maintain foster children in their original school will be provided and funded. (Handbook §§ 16.12.6, 16.6, 38.1, 38.3)

In August 2015, the HHS Administration on Children and Families, the HHS Office for Civil Rights, and the Department of Justice, issued joint guidance entitled “**Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.**” This document includes an overview of the law, answers to specific questions and examples for child welfare agencies and courts, and resources to consult for additional information. See <http://www.acf.hhs.gov/programs/cb/laws-policies/whats-new> or http://www.ada.gov/doj_hhs_ta/child_welfare_ta.html. (Handbook §§ 5.2.4, 6.4.2, 6A.5, and 8.2.4, and Chapter 38)

Other Resources

The ABA has published **Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders**. Information on ordering the book can be found at: <http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=224751148>. (Handbook Chapter 5)

UPDATES TO THE 2014 NEW MEXICO CHILD WELFARE HANDBOOK <http://childlaw.unm.edu/resources>

This is the second semi-annual report on updates to the 2014 New Mexico Child Welfare Handbook. The 2014 Handbook was published in July 2014 and updated in a five page document in January 2015. This July 2015 update covers the period January 1, 2015 to June 30, 2015. **It is important to check these updates when using the Handbook.**

Only a few abuse-related laws came out of the 2015 Legislative Session while the Supreme Court issued the *Strauch* opinion, which makes it clear that “every person” is a mandatory child abuse reporter. The Supreme Court also decided a number of criminal child abuse cases and approved a significant new set of jury instructions on intentional and reckless child abuse, while also issuing a new opinion on rehearing in *Antonio T.*, a delinquency case. The Court of Appeals issued a number of opinions relating to termination of parental rights, placement, and other issues arising from abuse and neglect cases in Children’s Court.

Congress passed the Justice for Victims of Trafficking Act, which amended the Child Abuse Prevention and Treatment Act, or CAPTA, while the federal Children’s Bureau issued a Program Instruction on state implementation of the Preventing Sex Trafficking and Strengthening Families Act. A major event was the Bureau of Indian Affairs’ publication of new guidelines for Indian Child Welfare Act cases; this marks the first time that the BIA Guidelines have been updated since they were first issued in 1979. The BIA has also issued proposed regulations to support ICWA implementation.

These developments are addressed in more detail below. References to affected sections of the Handbook appear in parentheses after the description of each development.

Changes to the Children’s Code and Other State Laws

2015 N.M. Laws, Ch. 51 (HB 53). **Section 32A-4-6 of the Abuse and Neglect Act** was amended to include a new subsection (B) providing that a child may not be taken into protective custody solely on the grounds that the child’s parent, guardian or custodian refuses to consent to the administration of a psychotropic medication to the child. House Bill 53 also added a new section to the Public School Code to prohibit schools from denying access to programs or services to children whose parents refuse to place the student on psychotropic meds. (Handbook §§ 12.5, 13.7.2)

2015 N.M. Laws, Ch. 28 (HB 277). The **Kinship Guardianship Act** was amended to delete the requirement that ICWA kinship guardianship cases be decided beyond a reasonable doubt, such that now the standard of proof is clear and convincing evidence for all cases. The law was also amended to clarify that the court must set a date for hearing that is between 30 and 90 days from the date of filing of the petition, and the petition no longer has to state the child’s marital status. (Handbook §§ 30A.2.1, 30A.2.2)

2015 N.M. Laws, Ch. 13 (HB 101). The **Sexual Exploitation of Children Act** was amended to make it a second degree felony to knowingly hire or offer to hire a child under 16 to engage in a prohibited sexual act (as defined in the law). (Handbook § 34.5.5)

Changes to Supreme Court Rules

Proposed Rules Pending in the Supreme Court

A proposed **Rule 10-316** would require that an **educational decision maker** be named in a court order at the custody hearing and reviewed at subsequent hearings in every case. (The Children's Court forms adopted in 2014 already provide for the naming of an educational decision maker in the custody order, as well as in subsequent orders.) (Handbook § 13.11, 16.12.6)

A new **Rule 10-323** on the **conduct of hearings** in abuse and neglect cases in Children's Court is being considered. The proposal focuses on the persons who may be present at a hearing and who should be excluded. (Handbook § 13.4)

Rules governing **court-connected mediation services** were proposed and offered for public comment in early 2015. These proposed rules, if adopted, would apply to court-connected mediation in abuse and neglect cases. (Handbook § 29.4)

Criminal Child Abuse UJIs

The Uniform Jury Instructions on criminal child abuse have been revised and reissued as UJI 14-611 – 14-625. The former instructions, UJI 14-602 – 14-610, have been repealed. The new instructions set forth the elements that the Supreme Court has been addressing in cases such as *Consaul* (see January 2015 update) and *Montoya* (below). Because of the confusion it causes, the word "negligence" has been replaced altogether with "recklessness" since "reckless disregard" is the minimum level of culpability required to sustain a conviction for child abuse. (Handbook §§ 34.3.1, 34.3.2)

Case Law

State v. Strauch, 2015-NMSC-009 (No. 34,435, March 9, 2015). The Supreme Court reversed the Court of Appeals, holding that both privately and publicly employed social workers are mandatory reporters under the child abuse reporting statute, §32A-4-3(A). As a result, statements made to a social worker by an alleged child abuser in private counseling sessions are not protected from disclosure in a court proceeding by the evidentiary privilege in Rule 11-504(D)(4). ¶ 2. In reaching the conclusion that the reporting statute must be read broadly, the Court reviewed at length the history of the mandatory reporting requirement. The Court pointed out, for example, that for many years the statute provided that "every person, including but not limited to" the people listed, must report child abuse. In 2003, the phrase "but not limited to" was taken out as a matter of routine clerical cleanup in accordance with the Legislative Drafting Manual, which instructed that the word "include" already implies an incomplete list. The Court wrote: "There is absolutely no indication in the legislative history that by complying with its own technical drafting manual, the Legislature intended to make an unannounced policy change from the universal reporting requirement that had existed for thirty years to a sharply limited

requirement.” ¶ 37. Attached to the Court’s opinion is an appendix compiling all of the statutory language on child abuse reporters since 1965. (Handbook §§ 27.4, 34.1, 34.3, 34.6.2)

Abuse and Neglect

State ex rel. CYFD v. Casey J., In the Matter of Tichelle J., 2015-NMCA-____ (No. 33, 409, June 22, 2015). Father challenged the termination of his parental rights (TPR), not to restore those rights but to mandate a relative placement for the children. Both parents and the children were members of the Navajo Nation and ICWA applied. Father contended that CYFD did not make active efforts to prevent the breakup of his family because Children were not placed with relatives and were not always placed together in one foster home. The Court of Appeals held that the focus of an active efforts challenge to TPR is on CYFD’s efforts to provide the parent with remedial services and rehabilitative programs, not on placement. ¶ 15. However the Court proceeded to address the placement issue and concluded that ICWA placement preferences had not been violated. In affirming the lower court’s decision, the Court reviewed the testimony and findings at the many hearings at which CYFD workers reported on efforts to comply and Navajo Nation workers serving as the qualified expert witness (QEW) testified to good cause for not following those preferences. ¶¶ 25-64. Note that Judge Wechsler concurred in the result but argued that, under ICWA, failure to comply with placement preferences is not a basis for invalidating a TPR. ¶ 82. (Handbook §§ 15.5.6, 15.11.3, 16.9, 22.4.5, 39.3, 39.5.2)

State ex rel. CYFD Concerning the Mercer-Smiths, 2015-NMCA-____ (Nos. 31,941 and 28,294, June 18, 2015). On the parents’ motion, the district court held CYFD in contempt for violating the court’s Placement Order and awarded compensatory damages to the parents for loss of enjoyment of life because the possibility of reconciliation with their children had been reduced by CYFD’s contumacious conduct. The Court of Appeals upheld the contempt order as well as the damages award. (Handbook § 28.5)

State ex rel. CYFD v. Melvin C., In the Matter of Daevon Dre C., 2015-NMCA-067 (No. 33,605, April 27, 2015). The Court of Appeals held that when a parent pleads no contest to abuse and neglect and the lower court proceeds with an adjudication on that basis, the court, if it terminates parental rights, must proceed under §32A-4-22(B)(2). The children’s court had allowed CYFD to pursue TPR based on abandonment despite its earlier finding of abuse or neglect and discussions at the adjudication about a treatment plan. The appellate court held that, once the court entered a finding of neglect, it was statutorily required to conduct a dispositional hearing and implement a treatment plan. The court distinguished *State ex rel. CYFD v. Christopher B.*, 2014-NMCA-016, because the allegations of abuse or neglect had been dismissed in that case and hence were a non-issue. ¶¶ 17-19. (Handbook §§ 22.4.2, 22.4.3, 22.4.4)

State ex rel. CYFD v. Jerry K., In the Matter of Claudia K., 2015-NMCA-047 (No. 33,341, Jan. 12, 2015), *cert. denied*, April 15, 2015. The Court of Appeals affirmed the district court’s order terminating Father’s parental rights. The children had been placed in the legal custody of the state for neglect. When Father was sentenced to 35 years in prison, CYFD moved for TPR because efforts to reunify would be futile owing to the length of Father’s incarceration. ¶¶ 13, 21. Father was willing to relinquish provided the children could be adopted by the Schultzes, a family he said were “fictive kin” and who would be willing to facilitate his maintaining a relationship with the children. (Father refused to relinquish to allow Children’s present foster

parents to adopt them.) ¶ 32. Father argued on appeal that the lower court erred in excluding evidence of his efforts to arrange for placement with the Schultzes. The Court of Appeals held that “while Father could and did express his preferences in regard to Children’s placement, once Children were [in the legal custody] of the Department, Father was not in a position to decide where or with whom Children would be placed.” ¶ 31. The Court also noted that Father failed to provide any authority for the proposition that he could lawfully relinquish on condition that the children be adopted by the Schultzes. ¶ 33. (Handbook §§ 22.3.3, 22.4.3)

Delinquency

State v. Antonio T., 2015-NMSC-019 (No. 33,997, June 22, 2015). On rehearing, the Supreme Court withdrew the opinion that was filed October 23, 2014 and summarized in the January 2015 update. In the opinion filed June 22, 2015, the Supreme Court held that statements elicited by a school official in the presence of a law enforcement officer may not be used against the child in a delinquency proceeding unless the child was advised of his or her statutory right to remain silent and made a knowing, intelligent, and voluntary waiver of that right. ¶¶ 22. The presence of the law enforcement officer turned the principal’s interrogation of the child into an investigatory detention and therefore triggered the protections provided by §32A-2-14(C). Because the State failed to prove waiver under § 32A-2-4(D), the statements were inadmissible. ¶ 26. (Handbook §33.5.4)

Criminal Child Abuse

Ohio v. Clark, 576 U.S. ____ (June 18, 2015). The U.S. Supreme Court decided that the introduction at trial of statements made by a three year old to his preschool teachers after they asked him about the injuries on his body were not testimonial and did not violate the Confrontation Clause. The Court held that the teachers elicited the statements for the primary purpose of protecting the child in the context of an on-going emergency involving suspected child abuse, circumstances similar to the 911 call in *Davis v. Washington*, 547 U.S. 812 (2006). The Court indicated that statements of the very young and statements made to teachers will not likely be testimonial. (Handbook §§ 27.4, 34.6.7)

State v. Cabezuela, 2015-NMSC-016 (No. 33,781, May 7, 2015) (*Cabezuela II*). On remand from the Supreme Court in *State v. Cabezuela*, 2011-NMSC-041 (*Cabezuela I*), Defendant was re-convicted of intentional child abuse resulting in the death of a child under 12. In *Cabezuela II*, the Court held that the fact that the pathologist, Dr. Aurelius, testified in part about work done by a pathology fellow working under her supervision did not violate the Confrontation Clause. She supervised and worked alongside the fellow and made independent personal observations and knowledge about the injuries. On the other hand, the admission of her statements about alleged bite marks did violate the Confrontation Clause because she had consulted a forensic odontologist and relied on his opinions in her testimony. Nevertheless, the Court concluded that the error had only a negligible impact on the verdict and was harmless error. ¶¶ 29-31. The Court also reviewed the jury instructions for the role of failure to act and clarified that, even if failure to act is not an element of intentional child abuse, it may be considered among the circumstances to prove intent. ¶¶ 40-41. (Note that the UJIs have since been revised.)

While the Court upheld the conviction, it remanded to the district court for resentencing. The Court held that a conviction for intentional child abuse resulting in the death of a child under 12, while carrying a life sentence, is not a capital offense requiring a minimum sentence of 30 years before parole. Defendant is entitled to present mitigation evidence and have the district court consider allowing parole eligibility after twenty years. ¶¶ 8-13 (Handbook §§ 34.3.1, 34.6.7)

State v. Montoya, 2015-NMSC-010 (No. 33, 967, March 12, 2015). The Supreme Court affirmed defendant's conviction for intentional child abuse resulting in the death of a child under 12, but remanded the case for re-sentencing because the district court failed to consider mitigating circumstances before imposing a life sentence. ¶ 68.

The Supreme Court held that the jury instructions were sufficient to properly instruct the jury in the case. The Court distinguished *Cabezuela I*, 2011-NMSC-041, in which the verdict form made it impossible to tell whether the jury convicted defendant of intentional or reckless child abuse. The verdict forms in *Montoya* were clear in asking the jury to specify whether it was finding intentional or reckless child abuse. ¶¶ 28-29. The Court also found that the Court of Appeals went too far in *State v. Davis*, 2009-NMCA-067, when concluding that negligent (now "reckless," see *State v. Consaul*, 2014-NMSC-030) child abuse is not a lesser included offense of intentional child abuse. ¶ 38. The Supreme Court held that reckless child abuse is a lesser included offense and put defendants on notice that they will have to defend against both intentional and reckless child abuse when the abuse results from the same conduct. ¶ 43.

Defendant argued on appeal that the testimony of the expert forensic pathologist lacked specificity and allowed the jury to speculate on the cause of death. The Court disagreed. The pathologist was clear in stating that multiple blunt force injuries together were the cause of death, and there was ample evidence outside her testimony to support a finding of guilt by the jury. The Court distinguished *Consaul*, wherein expert medical testimony provided the only evidence that a crime had been committed. ¶¶ 49, 55-56. (Handbook §§ 34.3.1, 34.3.2, 34.3.3, 34.6.6)

State v. Tufts, 2015-NMCA-___ (No. 33,419, April 7, 2015). The Court of Appeals reversed Defendant's conviction for sending forbidden obscene images to a child under 16 by means of an electronic communication device under § 30-37-3.3 because the statute was not intended to apply to images hand delivered to a child on an storage device (SD) or memory card. Hand delivery of an SD device is not "sending" the image. ¶¶ 4, 12. Rather, the conduct in question is covered by § 30-37-2(A), which prohibits delivering or providing sexually oriented material harmful to minors. ¶ 13. (Handbook § 34.5.6).

State v. Bailey, 2015-NMCA-___ (No. 32,521, June 9, 2015). The Court of Appeals upheld the lower court's admission of evidence of uncharged bad acts of Defendant under Rule 11-404(B) to prove intent in a criminal sexual penetration of a minor case (CSPM). Intent was an element of the crime charged and Defendant had claimed that his conduct was without sexual intent. ¶¶ 13, 22. (Handbook §§ 34.5.1, 34.6.8)

State v. Tapia, 2015-NMCA-048 (No. 32,934, Feb. 17, 2015), *cert. granted*, May 11, 2015. The Court of Appeals reversed Defendant's kidnapping conviction but upheld his convictions on several counts of criminal sexual contact of a minor and CSPM. The Court rejected Defendant's jury instruction and substantial evidence challenges, and found that "in light of the requirement

that penetration minimally occur to any extent” the evidence was sufficient for the jury to find that the penetration element of CSPM was met. ¶ 9. (Handbook §§ 34.5.1, 34.5.2)

Federal Law

The **Justice for Victims of Trafficking Act of 2015**, P.L. 114-22, enacted May 29, 2015, makes a number of changes to federal law to improve justice for victims of trafficking. These changes include amendments to the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. 5106a. These amendments require states, as a condition of receiving CAPTA funds, to provide assurances and include in their state CAPTA plan provisions and procedures for:

- Identifying and assessing all reports involving known or suspected child sex trafficking victims; and
- Training protective services workers about identifying, assessing and providing comprehensive services to children who are sex trafficking victims.

The state is also required to collect and report the number of children who are victims of sex trafficking, as part of the National Child Abuse and Neglect Data System. These changes to CAPTA take effect in two years. (Handbook §38.2)

Most of the requirements of the **Preventing Sex Trafficking and Strengthening Families Act**, P.L. 113-183, that apply to state protective services will take effect September 29, 2015. These requirements are conditions of receiving federal funds for foster care and are described briefly in the January 2015 Handbook Update. The state must, for example, provide for transition planning to begin at age 14 rather than 16 and, for children with a permanency plan of another planned permanent living arrangement, assure that at reviews and permanency hearings the court ascertains whether the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities. On June 26, the Children's Bureau issued Program Instruction 15-07 on state program compliance: <http://www.acf.hhs.gov/programs/cb/resource/pi1507>. (Handbook §§ 16.6, 17.9, 18.5, 19.9, 38.4)

New ICWA Guidelines were published on February 25, 2015. The updated Guidelines for State Courts and Agencies in Indian Child Custody Proceedings provide guidance to State courts and child welfare agencies implementing ICWA and supersede and replace the guidelines published in 1979. See <http://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf>. The BIA has also proposed a set of regulations to improve ICWA implementation; these regulations are intended to complement the updated Guidelines and address significant developments in jurisprudence since ICWA's inception. They were developed in part because of comments and recommendations suggesting that actual regulations were needed to fully implement ICWA. See <http://www.bia.gov/cs/groups/public/documents/text/idc1-029629.pdf>. (Handbook Ch. 39)

UPDATES TO THE 2014 NEW MEXICO CHILD WELFARE HANDBOOK <http://childlaw.unm.edu/resources>

Since the New Mexico Child Welfare Handbook was updated in June of 2014, the New Mexico Supreme Court has approved a number of changes to the Children's Court Rules and Forms and issued a few decisions affecting abuse and neglect, kinship guardianship, delinquency, and criminal child abuse. On September 29, 2014, the President signed into law the Preventing Sex Trafficking and Strengthening Families Act, which amends Titles IV-B and IV-E of the Social Security Act pertaining to foster care and adoption assistance.

These developments are addressed in more detail below. References to the relevant section(s) of the Handbook will appear in parentheses after the description of each change.

Changes to the Children's Court Rules and Forms

The Supreme Court has amended a number of rules and concluded a major effort to update the forms and develop new forms to reflect current law and procedure. The forms have also been reorganized for ease of use. Article 4 now contains the forms that apply to delinquency and youthful offender proceedings. A new Article 5 contains the abuse and neglect forms while a new Article 6 contains forms applicable to proceedings under the Children's Mental Health and Developmental Disabilities Act. (Handbook §§ 12.1, 12.5, 13.2, 22.5.3, 26.1, 32.10)

Though these rules are not addressed in the Handbook, **Rule 10-104** and related appellate **Rule 12-307** include new provisions worth noting. One permits service on an attorney to be made by leaving a copy of the document at a location designated by the court for that purpose and the other applies special rules to documents filed and served by an inmate confined to an institution.

Abuse and Neglect

Rule 10-102(B) was amended and **Form 10-501A** adopted to require that a party information sheet be filed with the petition in all abuse and neglect cases. The form of petition, formerly **Form 10-454**, was itself amended and recompiled as **Form 10-501**. (Handbook §§ 12.1, 12.3)

As noted in the committee commentary, new **Rule 10-317**, Notice of Change in Placement, is substantially modeled after § 32A-4-14. However, it also requires CYFD to notify the court of any change in the child's placement, including when the child's foster parents or substitute care provider requests the change. **Forms 10-565** (advance notice of change in placement) and **10-566** (emergency notice of change in placement) have also been adopted. (Handbook § 28.4)

New **Rule 10-323** and **Form 10-567** require that a completed party dismissal sheet—for administrative purposes only and not to be included in the record—accompany any order filed with the court that dismisses a respondent or child from a case for any reason and at any stage.

Rule 10-343 was amended to change the requirements for extensions of time for adjudicatory hearings. Amended **Rule 10-343** no longer provides for the Supreme Court to rule on extensions

of time and reinstates the pre-2009 requirement of mandatory dismissal with prejudice for failure to comply with the time limits for adjudications. The maximum period of time for all extensions is 60 days, except upon a showing of exceptional circumstances. (Handbook §§ 15.2.2, 15.2.3)

Forms 10-451 through **10-453**, pertaining to ex parte custody motions, affidavits, and orders, were withdrawn and new **Forms 10-503, 10-504, 10-505A, and 10-505B** adopted. (Handbook §§ 12.5, 12.6, 38.4)

Form 10-456A, affidavit of indigency, is now **Form 10-510**. (Handbook §§ 5.1, 13.5)

New **Forms 10-511** (motion to appoint counsel), **10-512** (order appointing counsel), and **10-550** (motion to withdraw as counsel) were adopted while a number of notice, motion, and order forms relating to the appearance or appointment of counsel were amended and recompiled. See **Forms 10-551 to 10-555**. (Handbook Chapters 4, 5 and 6; Handbook §§ 12.7 and 13.5)

Service by publication is addressed in **Forms 10-513** through **10-516**. (Handbook § 12.8)

New **Form 10-521** provides a form of notice for cases in which the Indian Child Welfare Act applies. (Handbook §§ 12.10, 13.2, 39.2.5)

New **Form 10-520** is a detailed custody order. (Handbook § 13.11) New **Forms 10-522A** through **10-522D** contain four new adjudicatory judgment and dispositional orders for contested and non-contested and ICWA and non-ICWA cases. (Handbook §§ 15.11-15.12, 16.12)

Forms 10-530, 10-531, 10-532, and 10-533 contain new forms applicable to judicial review, permanency, and permanency review hearings. (Handbook Chapters 17-21).

Form 10-470, related to termination of parental rights (TPR) motions, was amended and recompiled as **Form 10-540**. Among other things, **Form 10-540** enumerates the statutory grounds for TPR (§§ 32A-4-28(B)(1), (2), and/or (3)), and provides that more than one person may be named as father per § 32A-5-17(A)(4) and (5) and as mother per *Chatterjee*. (Handbook §§ 12.4, 22.4.2, 22.5.3, 25.1)

Form 10-471, report of mediation, was amended and recompiled as **Form 10-563**. (Handbook §§ 14.4, 29.4.3)

New **Form 10-564** was adopted and language included in **Forms 10-520** and **10-522** through **10-533** to provide for the appointment (or re-appointment) of an educational decision maker at each step in the abuse or neglect case. The purpose is to eliminate confusion about who may make decisions about a child's education, obtain and release a child's educational records, and consent to educational testing. (Handbook § 16.12.6)

Children's Mental Health

Forms 10-491, 10-493, and 10-494, related to the Children's Mental Health and Developmental Disabilities Act, were amended and recompiled as **Forms 10-601, 10-602, and 10-603**. **Forms 10-492 and 10-495** were withdrawn. (Handbook §§ 6.5.1, 6A.4.4, 32.10)

Delinquency

As directed by the Supreme Court in *State v. Jones*, 2010-NMSC-012, the Children's Court Rules Committee revisited the question of which rules best protect the rights of alleged youthful offenders. Under **Rule 10-101(A)** as amended, alleged youthful offenders are no longer subject to the Rules of Criminal Procedure and are now governed by the Children's Court Rules for the duration of the proceedings, except as otherwise provided in the Children's Court Rules. (Handbook §§ 33.5.1, 33.5.7) A number of changes have been made to the delinquency rules to implement this decision. (Note also: The citation to Rule 101(A)(1)(c) in Handbook § 22.5.7 should now be to Rule 101(A)(1)(d).)

Rule 10-227, applicable to admissions, no contest pleas, and consent decrees in delinquency proceedings, was withdrawn and has been replaced by amended **Rule 10-226**, which supplements and clarifies the procedures for plea negotiations and agreements in both delinquency and youthful offender proceedings. (Handbook §§ 33.5.6, 33.5.8)

Rule 10-243 was amended and **Rule 10-243.1**, applicable to youthful offender proceedings, was adopted. These rules provide for the Children's Court to decide all requests for extensions of time and reinstate the pre-2009 requirement of mandatory dismissal with prejudice for failure to comply with the time limits for adjudications. Under **Rule 10-243**, the maximum period of time for all extensions is 90 days, except upon a showing of exceptional circumstances. For youthful offender proceedings, **Rule 10-243.1** requires that the adjudicatory hearing be commenced within 6 months and allows the court to grant up to two 6-month extensions. The aggregate may not exceed one year except in exceptional circumstances. (Handbook §§ 33.5.4, 33.5.6)

Rule 10-245 was amended and new **Rule 10-245.1** was adopted. The rules set forth the procedural requirements for jury trials in delinquency and youthful offender proceedings. (Handbook § 33.5.4)

New **Rule 10-247** establishes procedures and other requirements for amenability hearings in youthful offender proceedings and makes it clear that the Rules of Evidence apply. New **UJI 14-9005** requires the jury to make special findings to assist the court when deciding amenability. (Handbook § 33.5.7)

The provisions on appeal, including the advisement of the right to an appeal, were moved out of **Rule 10-251** and into their own rule, new **Rule 10-253**. New **Rule 10-251.1** applies to youthful offender judgments. (Handbook § 33.5.9)

New **Forms 10-432** (waiver of arraignment in youthful offender proceedings) and **10-433** (waiver of preliminary examination and grand jury proceeding) were adopted.

Case Law

In the Matter of Mahdjid B. and Aliah B., State ex rel. CYFD v. Djamila B., 2014-NMSC-___ (No. 34,583, Dec. 15, 2014). Affirming the Court of Appeals' decision on different grounds, the Supreme Court held that kinship guardians have a statutory right to a revocation hearing in accordance with the revocation procedures of the Kinship Guardianship Act, including an

evidentiary hearing in compliance with the Rules of Evidence, before being dismissed from an abuse and neglect proceeding. *Djamila B.* ¶ 2. The Court found that the revocation could occur in the abuse and neglect case as the children’s court has jurisdiction over the kinship guardian and the ability to make decisions in the best interests of the children. *Id.* ¶¶ 2, 35. Clarifying the Court of Appeals’ holding, the Supreme Court pointed out that kinship guardians are not necessary and indispensable parties to abuse and neglect proceedings because the necessary and indispensable party concept is derived from the Rules of Civil Procedure, not the Children’s Court Rules. *Id.* ¶¶ 39-40. (Handbook §§ 22.5.2, 25.1, 30A.2.4)

In the Matter of Grace H., State ex rel. CYFD v. Maurice H., 2014-NMSC-034 (No. 34,126, Sept. 18, 2014). In the course of denying rehearing, the Supreme Court withdrew its opinion filed on June 12, 2014, and substituted a new one with a number of corrections that do not alter the holding. The new opinion alters the paragraph citations to *Grace H.* in the Handbook; for example, ¶ 44 of the original *Grace H.* opinion is now ¶ 43, and ¶ 43 is now ¶ 41. (Handbook § 22.4.2)

State v. Antonio T., 2014-NMSC-____ (No. 33,997, Oct. 23, 2014). The Supreme Court clarified the procedural protections that § 32A-2-14 provides to alleged delinquent children. The Court held that a fifteen year old’s statements, which were elicited by a school official, could not be used against the child in a delinquency proceeding because the state failed to show that the child knowingly, intelligently, and voluntarily waived his right to remain silent under § 32A-2-14(D). *Antonio T.* ¶¶ 21, 23. The Court was careful to note that its holding only applies to delinquency proceedings and in no way affects school disciplinary proceedings. *Id.* ¶ 24. (Handbook § 33.5.4)

State v. Consaul, 2014-NMSC-030 (No. 33,483, Aug. 21, 2014). Overturning Defendant’s conviction for child abuse resulting in great bodily harm based on a theory of suffocation, the Supreme Court examined the reliability of expert medical opinion in criminal child abuse cases, particularly those in which medical opinion testimony often serves as the foundation of the prosecution’s theory, such as shaken baby syndrome. *Consaul* ¶ 73, n.4. The Court held that the expert medical testimony alone, which at best demonstrated that the infant in *Consaul* was “likely suffocated” with no additional non-opinion evidence in support, was insufficient to support a criminal verdict beyond a reasonable doubt. *Id.* ¶¶ 2, 57, 70-72. The Court specified that, if the prosecution is to rely only on medical opinion, it must go beyond the mere probable causation required for evidentiary admissibility and “establish ... why the expert opinions are sufficient in themselves to establish guilt beyond a reasonable doubt.” *Id.* ¶ 73. (Handbook §§ 34.3.3, 34.6.6)

In addition to that and other holdings, the Court clarified that recklessness is required for the crime of negligent child abuse. *Consaul* ¶¶ 37-38. It expressed concern that its prior cases and jury instructions have confused criminal and civil negligence. To avoid confusion, the Court believed that what has long been called “criminally negligent child abuse” should be called “reckless child abuse” in the jury instructions, without any reference to negligence. *Id.* ¶ 37. The Court was also doubtful that the phrase “knew or should have known” should be used, a subject the Court said it will address in the near future. *Id.* ¶ 40. (Handbook § 34.3.2) Revisions to the criminal child abuse jury instructions are pending. (Handbook §§ 34.3.1 through 34.3.3)

Federal Law

The Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, has as much to do with improving outcomes for children and youth in foster care as it does with preventing sex trafficking. It requires that states receiving federal foster care dollars ensure by the end of September 2015 that their state plan:

- Includes policies and procedures for determining appropriate services for children under state responsibility whom the state believes are victims or at risk of becoming sex trafficking victims. The law also requires the state to develop protocols for locating a child who is missing from foster care, determining why the child ran away or otherwise went missing, responding to those factors in placements, and screening to determine if the child is a possible sex trafficking victim. (Handbook § 38.3)
- In the interest of supporting normalcy for children in foster care, provides training to foster parents on a “reasonable and prudent parent standard” for the participation of the child in age or developmentally-appropriate activities. (Handbook §§ 11.3, 38.3)
- Limits another planned permanent living arrangement (APPLA) as a permanency goal for children under the age of 16 and includes certain case plan and case review requirements for all foster children with a permanency plan of APPLA. These include a number of requirements for permanency hearings: documenting intensive, ongoing, unsuccessful efforts for family placement, re-determining the appropriateness of the child’s placement (including ensuring that the court asks the child about the desired permanency outcome for the child and makes a judicial determination that APPLA is the best permanency plan for the child), and documenting the steps the state has taken to ensure that the child has regular, ongoing opportunities to engage in age or developmentally-appropriate activities. (Handbook §§ 18.5.1, 19.2, 19.8.2, 38.4)
- For foster youth age 14 or older, requires the case plan to be developed in consultation with the child and up to two members of the case planning team who are chosen by the child, and that it include a list-of-rights document. The age for transition planning is lowered from 16 to 14. (Handbook §§ 6A.5, 16.6, 17.9, 19.9, 38.9).
- Ensures that foster children aging out of the system have a birth certificate, social security card, health insurance information and medical records, and a driver’s license or equivalent ID. (Handbook §§ 38.3, 38.7, 38.8)
- Adds as an objective of the Chafee Foster Care Independence Program that children who are likely to remain in foster care until age 18 have regular, ongoing opportunities to engage in age or developmentally-appropriate activities. (Handbook § 38.5)
- Ensures that all parents of a child’s siblings who have legal custody of the siblings be identified and notified within 30 days after removal of a child from home. The term “siblings” includes individuals who would have been considered siblings if not for termination of parental rights or death of a parent. (Handbook §§ 12.9, 13.10, 38.9)