

# **Tribal Legal Code Resource: Juvenile Justice**

*Guide for Drafting or Revising  
Tribal Juvenile Delinquency and  
Status Offense Laws*

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Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the [U.S. Department of Justice](#).

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# Preface

The purpose of the Tribal Legal Code Resource: Juvenile Justice - Guide for Drafting or Revising Tribal Juvenile Delinquency and Status Offense Laws is to assist tribal nations in drafting and/or revising their juvenile statutes (a.k.a. “ordinances,” “codes,” or “code provisions”) as part of the development and/or reform of their juvenile justice systems. Such system and law design should reflect the vision and values of the tribal community to be served. This resource is intended to be used as a part of policy and planning discussions and includes sample statutory language with critical commentary. This resource is also intended to assist with the blending of the vision and values of the Native community and to reinforce the tribal community’s commitment to, and protection of, their youth.

In revising or developing a juvenile code or system, the grown-ups must acknowledge that they have not given their children a world consistent with Native traditional values. Much has gone into that “failure,” but in our Native hearts we know it is our failure and not theirs. The effort made in working on the juvenile code and system must be dedicated to righting that failure; to restoring to Native children the benefit of dedicated adults in our nations, who take responsibility for the world they have entered and lead.

The children of our Tribal Nations must be given the opportunity to assume their rightful places. We will not shield them from responsibility or from the consequences of their actions, nor will we excuse bad behavior, theirs or ours. This code, this juvenile system, should help us, adults and children, to remember our respective places in the world, and remind us that we have a personal responsibility to ourselves, our families, our clans, our communities, and our world and all that share that world.

We are Native people with shared beliefs and responsibilities; they are not now nor were they ever optional.

—Chief Judge Abby Abinanti (*Yurok*)

The Tribal Law and Policy Institute would like to thank the Traditional Village of Togiak for allowing us to pilot test this resource with their community. Their feedback and suggestions have assisted us in refining this resource.



# Tribal Legal Code/Policy Development Series

The [Tribal Law and Policy Institute](#) (TLPI) has developed many resources to assist tribal governments in creating a comprehensive, community-based, victim-centered response to crime. This series is developed with a philosophy that tribal laws and policy should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how federal and state laws apply. Each resource is designed to help tribal governments customize laws and policies that fit community values, principles, and capacities. These resources are all freely available for downloading on the [Tribal Court Clearinghouse](#).

## **Tribal Legal Code Resources**

[Tribal Legal Code Resource: Tribal Laws Implementing TLOA and VAWA 2013](#) is designed to be a resource for tribes interested in implementing the Tribal Law and Order Act sentencing enhancement provisions or VAWA 2013's Special Criminal Domestic Violence Jurisdiction. The resource focuses on the tribal code and rule changes that may be needed should a tribe elect to implement the increased tribal authority in either or both statutes. It discusses the concerns and issues that need resolution in implementation and provides examples from tribal codes and tribal court rules. (February 2105)

[Tribal Legal Code Resource: Juvenile Justice -Guide for Drafting or Revising Tribal Juvenile Delinquency and Status Offense Laws](#) provides guidance for tribes interested in drafting and/or revising their juvenile laws. It includes both juvenile delinquency laws and status offense laws (that is, laws – such as truancy or runaway - which only apply to juveniles due to their status as juveniles). This resource is designed to assist tribes in ensuring that their juvenile justice system reflects the vision and values of the tribal community to be served. Part I provides guidance concerning how to address juvenile code development, preliminary considerations, and assessing resources. Part II provides extensive examples, critical commentary, discussion questions, and exercises designed to help tribes customize their laws to meet the needs of the individual community This resource covers the full range of juvenile delinquency laws and status offense laws and processes. It also provides guidance for tribes interested in developing specialized court dockets such as juvenile wellness courts, peacemaking courts, and teen courts. (March 2015)

[Tribal Legal Code Resource: Domestic Violence Laws](#) was developed by TLPI in cooperation with OVW and BJA. This victim-entered approach to domestic violence against Native women resource guide includes exercises, examples, and discussion questions to help tribes customize their laws to meet the needs of their community. This resource was revised and updated in 2012 and in 2015, to include the Tribal Law and Order Act (TLOA) (2010) and the Violence Against Women Act Reauthorization of 2013 (VAWA 2013). (Revised February 2105)

[Sexual Violence and Stalking Laws: Guide for Drafting or Revising Victim-Centered Tribal Laws Against Sexual Assault and Stalking](#) was developed by the TLPI in conjunction with the Southwest Center for Law and Policy and is intended to be a guide for drafting or revising victim-centered tribal criminal laws on sexual assault and stalking. This resource guide includes sample language and discussion questions which are designed to help tribal community members decide on the best laws for their community. This resource was revised and updated July 2012, including changes addressing the 2010 enactment of the Tribal Law and Order Act.

[Tribal Legal Code Resource: Crimes Against Children](#) has been developed by the TLPI under a Children's Justice Act Partnerships for Indian Communities training and technical assistance grant. Specifically, it has been developed to provide assistance to tribes and tribal organizations that have received Children's Justice Act Partnerships for Indian Communities grants. Tribes frequently request assistance in developing and/or updating their laws to address victimization of tribal children. TLPI developed this resource guide and workbook to meet the identified need. This project was conceived in 2001 under the guidance of an advisory committee of experts in the tribal justice field, those working with Native child abuse and child victimization issues, and those working with tribal child and family services providers. The resource provides illustrative examples, narrative, and discussion questions. The discussion questions direct users through a tailoring process that will assure that the resulting draft statutory provisions reflect the needs and values of the tribal community that the targeted law serves. (August 2008).



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# Part I: Overview

## Chapter 1: How to Start a Juvenile Code Development Project

### [1.1] Introduction

Tribal nations are increasingly reassuming responsibility for their children after an era in which their nations' powers and resources were limited for a variety of reasons, many of which were not within their control. Never have Tribal Nations denied their responsibility to their children, but now they are determined to assume and/or take back control of guiding them into adulthood. It is also increasingly evident that Native youth benefit from responsible Native adult guidance, as opposed to the guidance of those who are not familiar with the strengths of Native people or with a Native vision for the future of Tribal Nations.

Tribal Nations are sovereign governments. Many tribes have asserted exclusive or concurrent criminal jurisdiction and/or civil jurisdiction over “crimes” committed by Native youth enrolled in a tribe, or living on or near tribal lands. Tribal leaders and parents are painfully aware that Native youth have embraced or have been caught up in negative activities and behaviors—many that would not have occurred in a prior era. Today, responding appropriately to the unacceptable behavior of Native youth requires that Tribal Nations accept responsibility by drafting or revising juvenile justice codes.

This resource was developed to provide a starting point for drafting or revising tribal juvenile justice laws and to acquaint the drafters with the basic elements of many juvenile justice systems. The drafters may want to form a code revision working group to draft or revise their code. In the course of drafting such a code the drafters will need to make decisions about the values that will guide their work with their youth.

This resource highlights federal and state law considerations and includes sample provisions from model tribal and state juvenile codes<sup>1</sup> and existing tribal juvenile codes<sup>2</sup>. Critical commentary on sample statutory provisions and exercises are provided to assist drafters in refining their thinking as they design the juvenile justice system best suited to their individual communities.

## [1.2] What This Resource Guide Can Do

This resource is designed to assist tribal communities in drafting laws to address youth misconduct and to assist youths and their families.

This resource is also designed to encourage the participation and commitment of the immediate family, extended family, and entities within the wider tribal community with an interest in the welfare of youth. Juvenile justice system and law reform may be accomplished with or without attorney input. Attorneys often have, unless they are well grounded in the values of the drafting community, a built-in bias for the justice system that they have studied and worked in. In many instances, this bias has been debilitating to drafters who seek a model that is not a mirror of the state or federal system. The best results come from a full community discussion of competing values, so that approaches or options are designed to meet as many needs as possible consistent with community values. Attorneys may be of assistance in the final drafting of the law, after important decisions are made by the community.

This resource is designed to guide tribal communities through the discussions necessary to create a juvenile justice code for their communities.

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<sup>1</sup> This includes relevant excerpts from the Tribal Juvenile Justice Code (1989), [http://www.tribal-institute.org/lists/juvenile\\_guide.htm](http://www.tribal-institute.org/lists/juvenile_guide.htm), which was developed by the National Indian Justice Center (NIJC) for the Bureau of Indian Affairs (BIA) in order to comply with a requirement in the 1986 Omnibus Drug and Alcohol Act (25 U.S.C. 2454) to develop a “Model Indian Juvenile Code” consistent with the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5601 et. seq.). The 1989 BIA Tribal Juvenile Justice Code influenced the drafting of many tribal juvenile statutes. Relevant excerpts are also included from the Model Tribal Juvenile Code, [http://www.cirj.org/docs/CIRJ\\_Model\\_Tribal\\_Juvenile\\_Justice\\_Code.pdf](http://www.cirj.org/docs/CIRJ_Model_Tribal_Juvenile_Justice_Code.pdf), developed by the University of Washington’s Native American Law Center as part of the John D. and Catherine T. MacArthur Foundation’s Models for Change initiative. Efforts are currently underway by the BIA in collaboration with other federal agencies to develop a revised “Model Indian Juvenile Code” based largely upon the University of Washington Native American Law Center’s Model Tribal Juvenile Code.

<sup>2</sup> This includes relevant excerpts from the juvenile codes of the Absentee-Shawnee Tribe of Oklahoma, Eastern Band of Cherokee, Confederated Salish and Kootenai Tribes, Hopi Tribe, Kalispel Tribe of Indians, Klamath Tribes, Leech Lake Band of Ojibwe, Little River Band of Ottawa Indians, Mississippi Band of Choctaw Indians, Muscogee (Creek) Nation, Native Village of Barrow, Navajo Nation, Northern Arapaho Tribe, Oglala Lakota Nation, Organized Village of Kake, Pascua Yaqui Tribe, Rosebud Sioux Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Stockbridge-Munsee Community, Confederated Tribes of Warm Springs, White Mountain Apache Tribe, and Pueblo of Zuni. It also includes relevant excerpts from Cass County/Leech Lake Band of Ojibwe Wellness Court Memorandum of Understanding, Clayton County Juvenile Justice Collaborative Cooperative Agreement, Colorado Statutes, Connecticut Statutes, Florida Statutes, Kansas Statutes, Texas Senate Bill, Wyoming Statutes, and Vermont Rule of Family Practice.

If you are a member of a tribal council, or if you are a tribal community member who has started thinking about creating or revising a juvenile justice code, then you are ready to begin. The first decision is “Shall we do this? Shall we create a code or revise our existing code?” If the answer is yes, then using this resource as a road map for discussions will get you where you want to go.

## [1.3] What This Resource Guide Cannot Do

This resource cannot make anyone into an expert in juvenile justice, nor does it focus in depth on the substantive issues, for example, what causes delinquent conduct. It cannot “fix” your children, your families, or your community. Many questions and concerns in these areas will not be addressed in this resource.

This resource is NOT intended to be used as a template or a model code, but rather to be used as a guide by tribal communities to create a unique code tailored to each individual tribal community.

The more your tribe, its members, and the communities of interest involve themselves in these discussions, the greater the chances of having this code become a springboard to wider solutions. The work of establishing a code is limited in scope, but essential to the creation of a responsive juvenile justice system.

## [1.4] A Note on Terminology

Tribal governments use a variety of terms to describe their laws, including *statutes*, *ordinances*, and *codes*. Generally, the term *code* refers to an organized listing of all laws for a given subject matter, while a specific subsection may be entitled a *statute* or *ordinance*. In this resource guide, the terms will be used interchangeably in order to be relevant to a wide variety of audiences.

When using this guide, and throughout the drafting process, it is a good idea to keep at least one dictionary by your side. We recommend using one or more of the following:

- A general dictionary, such as [Merriam-Webster’s Collegiate Dictionary](#),
- A law dictionary, such as [Black’s Law Dictionary](#),
- A law dictionary for nonlawyers, such as [Law Dictionary for Non-Lawyers](#) by Daniel Oran.

A [Glossary](#) is provided in the appendix of this document to define legal terms, as those terms are used in this resource.

## [1.5] How to Use this Resource Guide

There are two principle parts in this guide:

- Part I: Overview
- Part II: Workbook

The overview portion of the resource guide provides a wealth of information on tribal juvenile justice systems, trends, and cultural awareness. It is recommended that all members of the code revision working group read the overview section or participate in a presentation that includes the information contained in the overview, so that the working group can start with some common understandings.

The workbook portion of the resource guide is designed to be used as a tool for a facilitator of the code revision working group. Each of the workbook sections is divided into five main parts:

1. Overview
2. Model Code Examples
3. Tribal Code Examples
4. Tribal Code Commentary
5. Exercises

Each section of the workbook relates to key sections of a juvenile code. The Overview briefly discusses the code sections, often referring back to a section in the Overview for additional information. The Model Code and Tribal Code Examples sections provide a review of how the model codes and other tribes have dealt with the topic in their provisions. The code examples are followed by a section called Tribal Code Commentary that discusses the Tribal Code Examples and explains key provisions or differences between examples given.

The fifth section, Exercises, is designed to help your community find the provisions that meet your needs. It will:

- Guide your look at the current code, justice systems, and situations that relate to the particular code section covered in the chapter.
- Provide questions and sometimes additional material for consideration and discussion by your working group.

The workbook section is meant to ensure that your tribe will have a juvenile code that truly fits the needs, resources, and values of your unique community.

## [1.6] Team Selection and Guidelines

Much thought should go into selecting your code drafting team, for they will be the first line of drafters and must be willing to commit the time and energy needed for this very demanding project. The following is a list of people/agencies that may be useful in drafting this code.

- Survivors of the juvenile system, including family members
- Tribal prosecutor or one who serves in the role of juvenile prosecutor
- Tribal law enforcement
- Tribal juvenile probation officer
- Social Services, including Child Protection or Indian Child Welfare workers
- Substance abuse treatment provider
- Mental health treatment provider
- Medical care personnel
- Domestic violence advocates and batterer treatment provider
- School personnel
- Tribal education department
- Corrections personnel
- Youth council representative
- Defense advocates or attorneys
- Elders
- Cultural mentor/leader
- Tribal court judges including personnel in alternative judicial systems
- Any services used for transition, job training, etc.
- Tribal council members
- Any state or federal agency interacting with Native youth relative to offenses

Indian country has been besieged with the need for code development and/or revisions in recent years. Historically, as tribal nations developed codes and courts to dispense justice, a very common practice was to simply adopt state code and change the name to a tribal name, often times not even making the name switches throughout the document. As time has gone by many of those “change the name codes” have proven to be inadequate to address the needs of tribal people and current code drafters are increasingly seeking to draft documents that reflect their tribal needs and values.

This history has created a knowledge base that allows us, the drafters of this resource, to make some suggestions for you to consider as you begin the process. The tips set out in the following text come from the successful efforts of other tribal nations.

**1. The primary work should be done by individuals known throughout the community as “problem solvers.”**

This work will not successfully reach the goal of producing a juvenile justice code if it becomes a process of finger pointing and blaming others for weakness in the current law or approach. The best laws are developed one step at a time by a group that is committed to brainstorming and reviewing possible solutions, both long term and short term, to problems.

**2. There should be equal representation from various tribal agencies and advocacy programs.**

Equal representation is important. The code development process should not be the “property” of any one agency or group.

**3. The work should be completed in a setting of mutual respect.**

The setting should be a safe environment in which the group can share, learn, and explore. It is okay to acknowledge differences of opinion, but not in a stereotypical or judgmental manner.

**4. The agenda should be focused upon areas of mutual concern or shared interest.**

Try to focus on areas of common interest instead of differences. A shared vision such as meaningful consequences designed to address the needs of the offender, the victim, and the community to ensure a healthy community can create confidence and trust.

**5. The participants should be willing to examine not just the way things are, but also be willing to explore ways of improving the law.**

All participants must be willing to talk about and explore new ways to address the needs of youth in their community. This is a process where different people will have differing views and it is a time when it is possible to listen and learn from each other.

**6. The participants should be willing to be creative and persistent.**

To be successful, each person involved must be willing to be creative and persistent. The process will undoubtedly have frustrations and difficult times. Think outside the box.

**7. The participants must be willing to share the burden.**

This means sharing resources, training, technical assistance, and limited available funding. Alternate the locations of meetings so that the burden of hosting and/or travel does not fall on the same people.

**8. All agencies should be allowed input into drafting prior to finalization of the draft.**

All tribal agencies involved should have a chance to review the draft code before it is considered completed. Allowing for this input will help to ensure each agency remains committed to the process and eventual implementation.

**9. Consider traditional/cultural strategies and the adaption of those values to modern issues and practices.**

We are all aware that times have changed. That does not necessarily mean that values have or should change. What it does mean is that we need to do the work of updating the application of those values to today's problems.

**10. Expect to spend a great deal of time together.**

Try to be aware of applicable cultural practices, including making sure that meals are provided for lengthy meetings. Make sure that everyone is as comfortable as possible. Note that there are now substantial restrictions on the use of federal funds for food. The safest practice is to use nongrant funds for food. If you are considering using federal grant funds, be sure to check with your grant manager.

## [1.7] How to Organize to Create a Juvenile Code

There are several approaches to organize to start work on a juvenile code. The key is to pick one that your initial team or council thinks will be successful. Some groups have decided to do the drafting in a "retreat" format, where the "team" spends several days in a row working through the process to create a working draft. Others have established representative working groups focusing on different areas with a timeline and regular meetings scheduled to develop a draft. Another approach is to have a core group create a draft for wider circulation to representative groups and individuals, including a process for community input. Any of these approaches can use a facilitator and all should include a recorder to keep track of the work.

There is no right way or better way. The best way is the one that reflects the preference of your community. Remember, this is a very difficult and important process and taking the time to do the job right is essential. Do not rush the process. Do not cut short the input process. The code should be a document that reflects the needs and vision of the community it serves. It is not a standalone product and should not be developed as such.

It is important to ascertain if there are any funds available to assist in the development of the code. In-kind contributions can be important and significant: for instance, a meeting place; supply support (copying, mailing, paper, pens); any part-time staff assignment for research, note keeping, and creating drafts; covering mileage costs or providing transportation; and/or providing a meal.

It is important that all members of the team or working group be provided with a binder of existing documents that they agree to review and study before beginning their work together, including but not necessarily limited to:

- Tribal constitution and/or bylaws.
- Any existing controlling or impacting tribal/federal/state juvenile justice codes.
- All related tribal codes (family/dependency/placement/probate).
- Lay-friendly summary of Western scientific research on the human brain and adolescent development.
- Any written stories from the community concerning corrective actions involving youth in a cultural context.
- Any oral stories concerning traditional corrective actions involving youth.
- Any anthropological documentation or historical records, regarding rearing/disciplining youth, about your tribe or other tribes with whom you share cultural or linguistic ties.
- Copies of any tribal court opinions related or relevant to youths in the community.
- Any existing tribal juvenile code.

It is also important that all members of the team or working group be exposed to the latest information on adolescent brain development and its implications for juvenile justice system reform. See, for example:

- [The Teen Brain: It's Just Not Grown Up Yet](#), National Public Radio.
- [The Teen Brain](#), Harvard Magazine.
- [Teenage Brains](#), National Geographic.

Currently, even state juvenile justice systems are being reformed to take into account new scientific research with respect to the development of the human brain. The human brain is now understood to have different capacities and abilities depending upon whether it belongs to a child, an adolescent, or a young adult. Juvenile justice system reformers recommend an approximation with age as follows: that a “child” includes individuals up to age ten; that an “adolescent” includes individuals from ten to seventeen; and that a “young adult” includes individuals from eighteen to twenty-five. This brain development research has implications for tribal statutory drafting where the implication is that children ten and younger should be presumed to fall within the tribe’s dependency law (e.g., with respect to child maltreatment); adolescents should be presumed to fall within the tribe’s juvenile law (e.g., with respect to status offenses, delinquent acts, and related families-in-need-of-services [FINS] matters); and tribes should consider extending the tribal court’s juvenile jurisdiction, to be exercised at the discretion of the judge, up to age twenty-five.

Here are a few “Dos” and “Don’ts” to consider as you plan this process for developing a juvenile justice code.



## When developing your code development team, DO . . .

- Select code development team members with various viewpoints who have demonstrated interest, expertise, or experience with the juvenile justice system or issues related to youth.
- Select, if possible, members of all the disciplines who are involved in the juvenile justice system.
- Select team members who are “survivors” of the current juvenile justice system, including their family members.
- Make sure the selection process includes elders and cultural leaders.
- Select, if possible, a team member(s) who is currently in the juvenile justice system, including family members.
- Design a process that invites broad-based participation in identifying issues and making recommendations. If possible, the process should be one of consensus, as that is more likely to ensure widespread acceptance and is more in keeping with many traditional resolution practices.
- Proceed in phases with set time frames/meeting times, including a study phase in which juvenile code issues that are important to the community are identified before drafting provisions.
- Assign manageable tasks to team members or subcommittees, to be accomplished within clear time frames.
- Emphasize person-to-person communication. Develop a communication plan that ensures everyone in the work group is kept informed of the process and project status.
- If experiencing an impasse or disagreement in the work group, consider having an expert<sup>3</sup> address the issues, presenting a pro and con discussion for consideration.

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<sup>3</sup> Local experts might include, e.g., school officials who could discuss their disciplinary policies, juvenile intake/probation officers who could describe the existing juvenile intake and monitoring process, presenting officers or prosecutors who could describe what types of cases they tend to prosecute, judges who could talk about existing juvenile court processes and the realities of available dispositions, and school, law enforcement, and justice system personnel from other jurisdictions implementing model processes (loop them in by phone), e.g., precourt diversions from school or law enforcement to teen court, family conferencing at juvenile court intake, diversions to therapeutic dockets like wellness court, circle sentencing, family mediation, and peacemaking.

## When developing your code development team, DON'T . . .

- Select code development members based *only* on their positions within the tribal judicial system.
- Overlook the current science on adolescent brain development.
- Disregard the importance of traditional beliefs, values, approaches, and/or customary law.
- Devote resources to drafting before consensus is reached concerning priority issues and recommendations.
- Be discouraged by lack of participation or lack of progress.
- Delay too long before dividing the work of the team into tasks that can be accomplished within the time frames established.
- Get bogged down in what you cannot accomplish, or resources you do not currently have but need or want.
- Let difficult or divisive issues be resolved by forcing a change in the law or maneuvering to avoid public meeting and discussion that would provide a wider range of opinions.

## [1.8] Problem Evaluation/Needs Assessment

Fact gathering is necessary before starting the actual work of drafting a new code. The need for legal, historical, cultural, and scientific research is described in the previous section. However, it is also necessary to do some basic fact gathering. The following information will be helpful:

- How many children up to age ten are enrolled members, or may be eligible for enrollment (some tribes have set ages for becoming enrolled)?
- How many adolescents ages ten to seventeen are enrolled members or may be eligible for enrollment?
- How many young adults ages eighteen to twenty-five are enrolled members or may be eligible for enrollment?
- How many of the children, adolescents, and young adults in the preceding age ranges are members of other tribes residing on reservation?
- How many of the children, adolescents, and young adults in the preceding age ranges, are children of members, but not eligible for membership?
- How many enrolled children, adolescents, and young adults (of any Indian nation) living in your Nation are currently involved with the delinquency system either on or off the reservation? Keep separate statistics for your nation and other tribal nations and on- and off-reservation actions.

- Provide an estimate of the number of all children, adolescents, and young adults who are enrolled (age break down) and who are involved in the dependency system (include adolescent and young adult parents).
- List the location and type of every placement option used for tribal and/or Indian children, adolescents, and young adults including nontribal reservation residents.
- Identify schools on reservation or off reservation used for children, adolescents, and young adults. (If possible school-based services should be identified for each school.)
- Identify all mental health assessment options (consider those that focus on trauma symptoms, dual diagnosis, and ongoing treatment options).
- Identify all health facilities that can do assessments regarding sexual abuse and can assess whether the individual is of danger to his- or herself and/or others. (A full assessment would include a suicide assessment and immediate acting out potential.)
- Identify any and all hotlines that are applicable or could be applicable.
- Identify all inpatient/outpatient options (on and off reservation) for treatment of substance abuse for children, adolescents, and young adults.
- Make note of distance to all inpatient/outpatient options off reservation.
- Identify any case managers in any system currently with tribal children, adolescents, and/or young adults in their caseload: domestic violence, substance abuse, and social services, including those with transitional caseloads.
- The team should visit the nearest commonly accessed juvenile and dependency courts to view hearings, that include, where relevant, tribal, state and federal courts. The team when observing should pay particular attention to what “parts” are necessary and what parts could change, for example, must a judge sit on a bench with a robe or can she sit at a table.
- The team should tour commonly used treatment and detention facilities and group homes. The team needs to decide whether these facilities and approaches are the ones it is comfortable with for tribal children, adolescents, young adults, and their families.
- Probation officers and police officers, who are assigned to these individuals, should be contacted to determine what resources they can bring to the table.
- All available programming for children, adolescents, and young adults should be listed, either tribal or community based.

As a starting point, it is important to know what options are available. At this juncture you may need to remind the team not to get bogged down in feeling bad about any perceived lack of resources. Every community has to start somewhere. Part of the process of developing a juvenile code will be to raise community awareness of the issues affecting tribal youth. The team can continue to work on other system improvements after developing the code.

It will become clear early on that the issues of juvenile justice are impacted not just by the law, but also by systems, including the tribal and local community system available to guide children to adulthood. Tribal people once had intact systems and community supports for successfully raising and mentoring youth, and we can again if we have the will, or develop the will, to recreate these systems and supports.

# Chapter 2: Preliminary Choices to Guide Code Development

## [2.1] Introduction

It is important, once your team is selected and a development process adopted, that several questions be discussed thoroughly. Resolution of these questions will shape the development of the code provisions. Your team must feel comfortable with the foundation of the code before drafting the laws that will focus the tribe's response to problems and concerns with their youth, families, and community.

The team may choose to hold community meetings to determine philosophical approaches if they are not clear as to community preferences or if they believe that the community has not fully considered the various options. For example, what should be the guiding philosophy and values of your juvenile justice system? Is the primary goal to help youth grow and heal (a.k.a. habilitation and rehabilitation)? Is the primary goal to require youth to repair harm done to others (a.k.a. restorative justice)? Should you also hold youth accountable (a.k.a. accountability)? Is it important to punish youth (a.k.a. punishment and retribution)? When should promoting public safety be a higher priority? Will the new law be informed by the science on adolescent brain development? What cultural principles and values are to be promoted? See [Chapter 30: Integrating Culture, Customs, Traditions, and Generally Accepted Practices](#).

The team may also choose to hold community meetings to educate the community and to get feedback on some critical organizational issues. For example, do we wish to reform our laws for children and adolescents/young adults (including child maltreatment, status offenses, truancy, and delinquent acts)? Do we want to focus primarily on status offenders or youth who commit what would be crimes if they were adults? Do we want to use a status offense model or a Family in Need of Services (FINS) model? Which population is best served with the out-of-court resources available?

Other issues that need to be resolved include issues that impact all community members, such as:

- Should these courtroom actions be open or closed to the public?
- Should certain youth, by virtue of age or the act, be deemed not suited for the juvenile process?
- At what age, if any, should violent offending youth be transferred to adult criminal court (or should such provisions be removed from existing law)?
- What precourt or diversion programs or activities exist for youth?

- What mechanisms are available to presenting officers and prosecutors to reach agreements with youth and their families to obtain remedial/rehabilitative services and/or to participate in precourt or diversion programs or activities?
- Should some youth be emancipated before the age of majority (identify the age of majority)?
- Should the juvenile court retain jurisdiction over some young adults until age twenty-five?
- When should notice of court proceedings and mandates to participate be required for family, extended family, and/or ceremonial relatives?
- When should traditional authorities be recognized to weigh in on or decide matters?
- When should traditional healers or ceremonies be used?
- Should identified traditional dispositions be mandated in the law or left up to the judge to be decided case by case?
- Should identified traditional or more Western reparations be mandated in the law or left up to the judge to be decided case by case?
- What process has been established to authorize and assist a judge in learning about the applicable custom or tradition where he or she does not know it?
- Should there be a youth’s bill of rights?
- Should there be a bill of duties and obligations<sup>4</sup> owed to youth by the tribe and the family/extended family?
- Should all juvenile records be destroyed at a certain point or just certain juvenile records?

## [2.2] Philosophical Choices

### **A. Habilitation and Rehabilitation—Identifying and Meeting the Needs of Today’s Native Youth and Their Families**

A philosophical choice is defined as a reasoned or sensible choice. Many tribes today are seeking to promote the welfare of their youth by committing to a “habilitative”<sup>5</sup> and “rehabilitative” juvenile justice system—where the goal is to help youth become capable and/or to bring youth back to a

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<sup>4</sup> A number of more traditional tribes are exploring the responsibilities and rights of extended family members and what rights, privileges, and duties they might have with respect to youth. Some of these rights, privileges, and/or duties have been put into tribal statutes. See Chapter 30, “Integrating Culture, Customs, Traditions, and Generally Accepted Practices.”

<sup>5</sup> The medical definition of “habilitation” is “assisting . . . a child with achieving developmental skills when impairments have caused delaying or blocking of initial acquisition of the skills. Habilitation can include cognitive, social, fine motor, gross motor, or other skills that contribute to mobility, communication, and performance of activities of daily living and enhance quality of life.” This is as opposed to the medical definition of “rehabilitation” as “. . . a treatment or treatments designed to facilitate the process of recovery from injury, illness, or disease to as normal a condition as possible.” Available at <http://medical-dictionary.thefreedictionary.com>, visited 16 January 2015.

healthy condition. In designing juvenile justice laws, it is critical to learn about what is happening to youth, particularly within the given tribal community. This includes learning about current crises; listening to youth and their families; learning about existing youth services, programs, and activities; recognizing deficits; and seeking to reform relevant portions of the justice, case management, treatment, and educational systems. This process should include an exploration of various therapeutic justice models that are often incorporated in precourt, postcourt, or court diversion processes. We know that nationally, Native youth are experiencing high rates of substance use/abuse, mental health problems, and suicide. By prioritizing an effort to study the local welfare and justice statistics of our youth, and by committing to design, fund, and implement habilitation and rehabilitation services, programs, and activities for tribal youth and their families, tribes seek to meet cultural and traditional duties and obligations to youth.

## **B. Tribal Cultural Values**

Many people—tribal and nontribal—discuss the desire to have a culturally responsive juvenile system. Several factors have to be considered. First, people are often referring to values that shaped practices in the past. It is important to note that there is a significant difference between practices (a.k.a. “traditions”) and values (a.k.a. “legal norms”). While older practices may not be workable or relevant in today’s world, the values may be very relevant. For instance, a tribe may have as a value a certain behavior standard; for instance, a value of not stealing/borrowing another’s horse. That value would require the redressing practice of including extended family involvement in discipline for a boy who stole/borrowed a horse without permission. The remedy could require that the boy and his family (uncles) care for the horses of the wronged party for a period of time and/or that the boy and his family replace the horse of the other family, if the horse died as a result of the boy’s misbehavior.

The value placed on the support and involvement of the boy’s family, could be incorporated into the tribal juvenile system so that the boy learns that his behavior reflects not just on him but also on his family. A tribe could determine that the family unit is responsible for redressing a wrong committed by a youth. If they did, that particular code would set out the redressing practice of dispositional conditions that required involvement of a defined family, including extended family. In a situation in which the youth’s extended family is not willing or unable to participate, and in which the behavior is not with a horse but, for example, a car, then the issue becomes how can or should that value be adapted when he does not have extended family participation and/or how can it be adapted when the theft involved or the wrong behavior involved is not as parallel. (Parallel meaning: where everyone in the last century was sure to have both extended family and a horse, the same cannot be said today for extended families or cars.)

If there is a desire to have a culturally relevant code, then the working group must determine:

- What the values (legal norms) of the community were at a time that the group wishes to model (no stealing);
- Whether there was family involvement in redress;
- What corrective practice(s) (traditions) existed; and
- How can those values (legal norms) be adapted to the circumstances of today?

It is important to realize that certain behaviors did not historically exist in tribal communities, for example, methamphetamine abuse. With new behaviors and problems, the culture must adapt. For instance, all horse-involved tribes at one point were prehorse; they adapted once the horse was incorporated into their daily life. The adaptation is possible if the discussion focuses on the value (and sometimes the practice is also relevant).

Some tribes have found it useful to hold community meetings and/or to establish a culture-bearer/elders committee to work simultaneously with their law drafting committee. This group or committee could be tasked with “finding” and discussing the nuances of the cultural values relevant to current problems, for example, methamphetamine abuse.

This discussion could focus on the following initial questions that would be relevant to the rehabilitation and accountability of substance users:

- What are the values with respect to youth (how do we value them)?
- What are the values with respect to physical and spiritual renewal leading to healing and recovery?
- What duties and obligations are owed to youth and by whom?
- What values should be taught to youth regarding self-respect, honoring self, positive beliefs, etc.?
- What are the values regarding how youth should manage their thoughts, emotions, and physical reactions?
- Who are the traditional healers and mentors?
- What are the traditional healing practices, activities, and ceremonies regarding healthy relationships, parenting, rites of passage for youth, etc.?
- What are the traditions and values surrounding restitution to and reconciliation with persons harmed by the youth’s conduct?

The law drafting committee would then identify the relevant value and the framework they believe best represents the cultural foundation they wish to adapt to the present circumstances. Once the



value and cultural foundation are identified, the “modernization” work can be done. Be aware that adaptation may be needed, for instance, if the traditional institution is weakened or nonexistent (e.g., a functional extended family does not exist). A model could be created that reflects the institution—mentors, counselors, probation officers, caseworkers, or other volunteers or personnel might be given roles similar to those of extended family members (e.g., mentors, sponsors, cultural educators, and/or to work with professionals to culturally modify evidence-based treatment methods, particularly in the areas of substance abuse and trauma counseling). Additionally, or alternatively, better efforts to identify and involve actual extended family members could be required under the tribal code.

## **C. Restorative Justice**

Practices and programs from peacemaking courts to family conferencing have been called restorative justice. Strictly speaking, these programs are encompassed in restorative justice, though they do not represent the whole restorative justice approach. Restorative justice involves certain principles and practices as set forth in the following text. Not all alternatives to “standard” practices are necessarily restorative, and it is essential that practitioners not contribute to the confusion in this area. It is also important to understand that certain practices and programs can embrace principles of restorative justice without adopting the entire approach.

Please see [Chapter 32: Peacemaking Court](#) for further information.

Restorative justice very specifically requires that the harms and needs of the victim be addressed, and that the offender is held accountable for their act and for righting the harms. The victims, offenders, and community must be involved in this process.

The process recognizes that some offenses are simply not repairable, in that there is no way of repairing the harm or of going back. In those cases, the healing is the effort to put right acts, as in aiding the victim’s journey toward their life after the event. The offenders must realize and acknowledge the effect of their actions on others, and they must take responsibility for those actions. Likewise, the community must address any contributions to harms that are attributable, even in part, to the community as a whole; for example, failure to intervene when children are raised in homes by parents or parental figures that are rendered harmful by virtue of untreated substance abuse. Traumatized children will often emerge as victimizers, not realizing the link between harmed and becoming the harmer.

Restorative justice, unlike nonrestorative justice systems, often includes a direct meeting between the victim and the offender, when they negotiate with each other on how to make things right. However, the inability to have a direct meeting does NOT invalidate the ability to adhere to restorative justice principles. Encounters, direct or indirect, may not be possible, or in certain circumstances may not be appropriate or desired. For example, cases in which the perpetrator has a high potential for violence against others (including the intake officer, mediator, or peacemaker, etc.), cases in which there is a likelihood of traumatizing, victimizing, or retraumatizing/victimizing

the victim (in child abuse or domestic violence situations), and/or cases in which the victim does not consent (however the choice should always remain with the victim as to whether to participate in restorative justice process). There are degrees of encounter, for example, a letter, a video, a video exchange, or a person may stand in for the victim at the victim's request. Restorative justice is not necessarily an alternative to prison; rather it may be used in conjunction with incarceration to more fully address the issues of the community and the victim.

Another significant difference between restorative and a retributive system is the use of fines. The state or tribe is often seen as the victim and a fine imposed for a violation in a punitive system of the law. Restorative justice first seeks restitution to the victim, not imposition of fines. In some cases, the restitution may be to the tribe but only where the tribe is the "victim" and the money then goes to redress the wrong done.

A final word on restorative justice: it is not an all or nothing choice. Each tribe can decide how and if these principles should apply to their community. They may also try out approaches to determine if they wish to choose an alternative to the now accepted concept that crime is a violation of the law and the tribe. One such alternative is that crime is a violation of people and relationships. If the second approach is chosen, then the redress must heal the harm done to the community as a whole. Those different approaches will guide the development of the law. For further information on restorative justice, please see [Restorative Justice Online](#), [Edutopia](#), and [Fact Sheet on Evidence Based Prevention and Intervention Programs](#).

## **D. Federal/State Approach**

Most tribes are acutely aware of the retributive (sanctioning/punishing) quality of federal and state systems. Actually, most tribes have modeled their criminal justice systems, including juvenile justice systems after federal and state systems. Now that tribes have the ability to more directly control their justice systems, tribal people are examining the effectiveness and desirability of the retributive approach. These discussions are often contextualized by tribes seeking to examine historical values and practices that were previously effective in moderating unacceptable behaviors. In part because of Natives' disproportionate representation in federal and state facilities, the tribes have vast experiential knowledge in the workings of a retributive system. Fifty percent of the youth incarcerated in the federal juvenile system are tribal.<sup>6</sup>

There are significant overlaps between the approaches (restorative and retributive), particularly in the definition of "wrongs." The systems agree that community precepts must be maintained. It is in the responses that they differ. In one system violations create guilt and punishment; in the

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<sup>6</sup> William Adams, Julie Samuels, Janeen Buck Willison, Hannah Dodd, Meredith Dank, Barbara Parthasarathy, Kamala Mallik-Kane, Jessica Kelly, Sybil Mendonca, & KiDeuk Kim, *Tribal Youth in the Federal Justice System*, ix (2011) available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/234549.pdf>, visited 16 January, 2015.

traditional tribal system or restorative system, violations create obligations and require an effort to put things as right as possible.

## **E. Combinations**

Many tribes have operational juvenile justice systems. Some may be seeking to create a juvenile justice system. In either instance, it is possible for a tribe to design a system that takes the strengths of each philosophy and creates a new system. Strengths in this instance are defined as practices a tribal community agrees are capable of creating the outcomes envisioned. In the first analysis, the tribe in all likelihood is not happy with its current approach or they would not be considering this resource.

Many tribes are not happy with current outcomes, including continued law breaking, alienation of young tribal members, and the warehousing of young tribal adults. The tribes fear the loss of a generation(s) to the various justice/corrective systems, which are infrequently returning Native youth as productive tribal citizens. It is the tribal communities who are invested in these youths, and it is these communities that must develop particular and unique tribal strategies.

The tribes have the advantage of a “manageable” system, one that by size can be responsive to the unique needs of each community. Imposed systems, particularly ones with bad performance records for all youth and specifically for tribal youth, should not be continued. However, it is equally important to note the strengths of each and every alternative before a community chooses a juvenile system for its youth. Knowing that outcome is the most important factor (outcome for the victim, the community, and the youth), each community must be flexible in approach and implementation.

## **[2.3] Separate or Combined Codes**

Reference to “juveniles” is found in several areas of the law. The initial question for each tribe is whether they want to combine all references to youth in one code with various chapters (areas of concern) or separate the areas into separate codes. Remember that the new science of brain development argues for a distinction between a child (0–10 years), an adolescent (11–17 years), and a young adult (18–25 years). The primary areas are discussed in the following text.

### **A. Dependency Codes**

Dependency codes are also referred to as child welfare codes and address the issues of parental/guardian/caretaker abuse and/or neglect. Although they are seen as children’s codes, they most often address the deficiencies of adults in caring and providing for children. Keep in mind, however, that these codes also apply to youth who are parents. Offenders either admit to allegations or the court determines that a child in their care has been mistreated. The mistreatment is abuse that the parent or caretaker should have and/or could have avoided if they had been parenting “properly.” In recent years there has been increasing emphasis on the needs of children who are “placed” in a system because of the “fault” of others, but then are seriously impacted and in fact

abused and/or neglected by the system designed to protect them from parental/caretaker abuse. Graduates of the various dependency systems have been found to have tremendous hurdles to surmount if they are to catch up with their nondependent peers.

Native children are overrepresented in state dependency systems. That overrepresentation was instrumental in the passage of the 1978 [Indian Child Welfare Act](#) (ICWA), which created federal standards for the states that seek to make Native children dependents. Many tribes include a chapter or section in their tribal codes addressing how the tribe will interact with the state court system using ICWA on behalf of their tribal members who find themselves involved in state court proceedings. ICWA creates party status for tribes in state court actions regarding Native children, and creates unique rights for tribes and tribal citizens. ICWA also creates a status termed *Indian custodianship*, which has all the attributes of a voluntary guardianship, featuring a simplified creation and dissolution process.

## About the Indian Child Welfare Act

The [Indian Child Welfare Act](#) (ICWA) was passed by Congress to address the problem of Native children being removed from Native homes (off and on reservations). Often states did not adequately involve tribes in cases regarding Native children. Tribes were concerned about the high number of Native children being raised outside of their tribal communities by non-Natives. Not only were these children away from their family, but they often lost their tribal culture. In response to these problems, ICWA sought (1) to affirm existing tribal authority to handle child protection cases (including child abuse, child neglect, and adoption) involving Indian children and to establish a preference for exclusive tribal jurisdiction over these cases; and (2) to regulate and set minimum standards for the handling of those cases remaining in state court and in state child social service agencies.<sup>7</sup>

For further information on ICWA, please see:

- Tribal Law & Policy Institute, [Indian Child Welfare Act](#)
- Native American Rights Fund, Online edition of “[A Practical Guide to the Indian Child Welfare Act](#)”
- National Indian Child Welfare Association, [Indian Child Welfare Act of 1978](#)

The dependency system, whether tribal or nontribal, at its very best offers help and support to struggling families. Tribal communities have, along with Congress and several state courts, seen the system at its worst when dealing with Native families. That, unfortunately, does not mean the system isn't needed; rather, it places a very high burden on states and tribes to craft approaches and ensure

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<sup>7</sup> Tribal Law & Policy Institute, Indian Child Welfare Act available at <http://www.tribal-institute.org/lists/icwa.htm>, visited 29 December, 2014.

resources that, at the very least do no further harm, and hopefully do not punish struggling parents/caretakers and innocent children.

Tribal dependency codes establish a community minimum standard of care for tribal children. They need to be closely evaluated in terms of community values and resources. Particular attention needs to be paid to why decisions are made, who is offering what type of help, and how help is given and offered. Tribes need to be aware of the impact of decisions and the pros and cons of approaches.

## **B. Delinquency Codes**

This resource specifically addresses the “delinquency” code. However, the term *delinquency* is often a misnomer, in that tribes tend to lump a number of distinctive types of statutes together and call them a “delinquency code.” These include provisions governing “status offenses” (e.g., behavior that is prohibited only by virtue of the age of the person alleged to be a wrongdoer, including but not limited to underage driving of vehicles, purchasing and/or consuming alcohol, purchasing and/or smoking cigarettes/cigars, incorrigibility, curfew violations, running away, and truancy); “delinquent acts” (conduct that would be a crime if committed by an adult); “crimes” (treating the youth as an adult and effectively putting him or her in the adult criminal process); and FINS (identifying youth misconduct and assessing family needs and ordering remedial services) or some variant. All of these types of statutes address the behavior of youth; some also address the behavior and needs of parents.

Most states and some tribes incorporate adult criminal codes by reference into their delinquency codes. They cite the adult criminal code violations and note that if a minor commits the offense, it is a youth crime.

The major differences between the adult criminal and juvenile codes are the penalty sections. Youth are subject to “dispositional alternatives” as opposed to a criminal “sentence,” although both youth and adults may be subject to probation where a violation could result in detention (youth in a secure juvenile detention facility and adults in jail or prison).

Note also, that there is a big difference in punishment between tribal and federal jurisdiction over felony behavior. A federal conviction adds years to the terms of incarceration versus a tribal conviction for the “same” offense. If juvenile felony behavior is involved, the “offender” is charged in federal court and incarcerated in the federal system, where currently more than half of the incarcerated youth offenders come from Indian country.

## About Federal Incarceration of “Indian Country” Youth

According to the Urban Institute’s [Final Report on Tribal Youth in the Federal Justice System](#), Indian country juveniles made up 53 percent of the juveniles committed to the U.S. Bureau of Prisons between 1999 and 2008. Indian country juveniles committed during this period tended to be male American Indians convicted of a violent offense (assault, sexual abuse, and murder/manslaughter being the top three) and sentenced in one of the same five judicial districts (Arizona, Montana, North Dakota, South Dakota, and New Mexico). The Indian country juveniles were on average fifteen years old when the offense was committed and served on average sixteen months before serving approximately 81 percent of their sentence. The average time served doubled from twelve months in 1999 to twenty-five months by 2008.

Most were committed to the custody of the Federal Bureau of Prisons by probation confinement conditions. The majority of juveniles with adult status were committed for the first time either by a U.S. District Court (48 percent) or were supervision violators (31 percent).

According to the [Federal Bureau of Prisons Federal Juvenile Population](#) web page, the federal juvenile population has consisted predominately of Native American males with an extensive history of drug and/or alcohol use/abuse, and violent behavior. These juveniles tend to be older in age, generally between 17 to 20 years of age, and are typically sentenced for sex-related offenses.”

## About Public Law 280 States

In a [Public Law 280](#) state, a youth may be processed by either the state or tribal justice systems, but often by the state system where the tribe does not choose to exercise its concurrent jurisdiction, often due to a deficit of resources.

Public Law 83-280 (commonly referred to as Public Law 280 or PL 280) was a transfer of legal authority (jurisdiction) from the federal government to state governments that significantly changed the division of legal authority among tribal, federal, and state governments. Congress gave six states (five states initially—California, Minnesota, Nebraska, Oregon, and Wisconsin; and then Alaska upon statehood) extensive criminal and civil jurisdiction over tribal lands within the affected states (the so-called mandatory states). PL 280 also permitted the other states to acquire jurisdiction at their option.

PL 280 has generally brought about:

1. An increased role for state criminal justice systems in “Indian country” (a term that is specifically defined in federal statutes);
2. A virtual elimination of the special federal criminal justice role (and a consequent diminishment of the special relationship between Indian Nations and the federal government);

3. Numerous obstacles to individual Nations in their development of tribal criminal justice systems; and
4. An increased and confusing state role in civil related matters (including tribal juvenile justice).

Juvenile prosecution is generally limited by the Indian Civil Rights Act (ICRA), and includes offenses that are misdemeanors or felonies charged as a misdemeanor, which limits the penalty possibility to misdemeanor recourses. ICRA limits punishment possibilities so that any actual prosecution is deemed a misdemeanor by virtue of the limited potential for fine/incarceration.

## About the Indian Civil Rights Act

The [Indian Civil Rights Act](#) (ICRA) was enacted by Congress in 1968, and then amended in 1986, 1991, 2010, and 2013. Tribal inherent sovereignty predates the United States and the U.S. Constitution. Tribes did not participate in the Constitutional Convention and did not ratify the U.S. Constitution. As a result, the Bill of Rights and other individual liberty protections found in the Constitution do not apply to tribal governments. After years of Senate testimony regarding abuse of Native individuals by state and federal officials, as well as tribal governments, Congress passed ICRA. This extended certain constitutional provisions to tribal governments. The 1986 amendment increased tribal sentence limitations, for a single offense, from six months imprisonment and/or \$500 fine to one year imprisonment and/or \$5,000 fine. The 1991 amendment reaffirmed tribal court criminal jurisdiction over all Indians (tribal members and nonmembers). In 2010 the [Tribal Law and Order Act](#) (TLOA) amended ICRA to increase tribal sentence limitations to a maximum of three years imprisonment and/or \$15,000 fine. However, to exercise these enhanced sentences tribes must provide certain additional civil protections, including the provision of effective defense counsel and a licensed and law-trained judge, make the tribal laws publicly available, and maintain a record of the criminal proceeding.

The 2013 amendment recognized tribes' inherent authority to exercise "special domestic violence criminal jurisdiction" over non-Indian offenders who commit domestic violence, dating violence, or violate a protection order. However, in order to exercise this special domestic violence criminal jurisdiction, tribal courts will have to provide certain enumerated due process protections. These include all of the TLOA due process protections (even if tribes do not impose the enhanced sentencing options), as well as several additional due process protections including the right to an impartial jury.

For further information on ICRA, please see [Tribal Law and Policy Institute, Indian Civil Rights Act](#).

Some tribal juvenile codes make an effort to segregate status offenses and delinquent acts (acts that would be crimes if the offender were an adult). The rationale for this is that status offenders (e.g., truants) should not be housed or treated with youth who may be exhibiting more serious antisocial behavior. There is a growing body of literature that points out that incarceration of status and low-

level offenders often creates an enhanced offender who has been exposed not to socially accepted youth practices but to the opposite. All humans, youth in particular, mirror the behavior of the dominant group, and in an incarceration model it is important not to further reinforce the negative behavior model.

The Family In Need Of Services (FINS) model is designed to assist first-time, status, and low-level offenders and their families by assessing their needs and referring or ordering them to remedial or rehabilitative services, programs, and activities.

For more information on the FINS model, please see Chapter 21: Nondelinquency Proceedings: Status Offenses/Family in Need of Services; Chapter 22: Nondelinquency Proceedings—Family in Need of Services (FINS) Interim Care; Chapter 24: Nondelinquency Proceedings—Family in Need of Services (FINS) Referral to Juvenile Counselor; Chapter 25: Nondelinquency Proceedings—Family in Need of Services (FINS) Breakdown in Parent-Child Relationship; Chapter 26: Nondelinquency Proceedings—Family in Need of Services (FINS) Consent Decrees; and Chapter 27: Nondelinquency Proceedings—Family in Need of Services (FINS) Dispositions.

## **C. Probate Codes**

Generally speaking, probate codes offer guidance in the creation of nondependency guardianships. Guardianships are created for a variety of reasons, including parental unfitness; unavailability (including parents absent due to temporary or permanent medical problems, death, military service commitments, jail, or school); and family preferences and/or convenience. The guardianships may be over the person and/or the property of a minor. Who qualifies as a “minor” is defined in the code, typically anyone under the age of eighteen years of age.

The probate code may cover the issue of inheritance with or without a will. Family members are defined, including the concept of termination of parental rights and adoption. (This would only apply in the event of death without a specific will designation.) If a child inherits property/money, the responsibility of managing the child’s property is set out in the probate code.

The probate code may also cover the concerns of a youth who is incompetent. Incompetency can arise from the mere fact of being a youth, or from some actual inability to care appropriately for himself or herself, requiring a commitment to a facility for care.



## **D. Family Law Codes**

A family law code is the other possible intersection of children with the law. This law applies to the children that come before the court because their parents or guardians either have not established parental rights or the grown-ups wish to change their relationship to each other, which necessarily alters their relationship to their children. These rights are played out in custody disputes that include issues of child support and may also touch on the child's contact with parents and extended family.

Married or unmarried parents have similar rights, and these rights must be addressed if the parties cannot agree, and the code must have overall guiding principles; for example, parents should have equal custodial rights; parents must be able to provide age-appropriate supervision, care, and guidance; and parents must be afforded contact regardless of the ability of parent to provide ongoing care. There are questions about what principles should guide the decisions in family court (e.g., what to do when a parent is incarcerated), what co-parenting skills/emphasis are essential, etc. Family codes set forth the philosophy of parenting, and that parenting philosophy should be consistent with the philosophy outlined in the juvenile justice laws. Protecting the parenting of children and securing family relationships is essential to the youth's success. The codes that address children, adolescents, young adults, and their families, need to philosophically interface with and support each other.

Tribes are beginning to establish tribal child support divisions that are increasingly developing realistic child support guidelines, including in-kind contributions. The overall goal is for child support to emphasize co-parent involvement.

## **E. Conclusions**

It is readily apparent that any particular family could find itself simultaneously embroiled in more than one of the areas set out in the preceding text. They could be in four different courts, with four sets of requirements, with four different judges and court dates. Additionally, a family could find itself with a similar result from differing courts, for example, guardianship of a child could be determined in each of the courts, as each code could have a procedure for the establishment of a guardianship.

Each tribe must seek clarity of issues and approaches. One approach is to combine all possible statutes affecting juveniles into one all-encompassing code. Another approach, one increasingly favored, is that one judge be responsible for all of the possible matters involving families and children. These families would have their matters consolidated, so that the court system is working to support an overall approach, not frustrating families as they try to meet the goals of different professionals. This approach requires the court to be internally organized so that such case management is possible. It requires that treatment services, social services, probation, and the family law system have the ability to interact and collaborate.

## [2.4] Collaborative Justice Courts in the Juvenile Court Systems

The kind of approach previously outlined has also been termed collaborative courts (sometimes called problem-solving courts, and in the juvenile system sometimes referred to as diversionary courts). They are part of a larger movement to make courts more responsive to the needs of users. This has evolved partially as a convenience to the courts and more particularly to supportive services that seek to consolidate their appearances to conserve resources. Additionally, users of the services have found that exposure to a similar community can offer further support to their individual efforts. This section describes a number of different types of collaborative courts emerging in the juvenile court system.

The calendaring (scheduling) of matters in clusters has also been a trend in recent years. Cluster calendaring is also used in dependency courts; however, consistent with the focus of this commentary, the following discussion is limited to delinquency.

### A. Wellness Courts

Wellness courts represent a movement in nontribal circles generally called drug courts. Most tribes prefer the designation *wellness* as opposed to *drug*, wishing to place an emphasis on the positive approach they are seeking to institute. They feature a team approach with the team being headed by the judicial officer, and the treatment team consisting of counselors, therapists, case managers, and others who are working with the individual to establish a treatment plan for substance abuse, including after care. A critical component of this approach is regular and formal contact with the court. The objective is to encourage the offenders to form a personal relationship with the team, and especially with the judicial officer.

The court encourages the personal progress of each participant. Consequences for missing court are part of the contact, but the consequences (at least initially) are increased involvement in wellness activities, not penalization. This is a court and/or calendar that benefits from having the involved individuals support each other as peers, as well as from noncourt-based activities for individual, family, and community support.

Please see [Chapter 31: Tribal Healing to Wellness Court](#).

## **B. Mental Health Courts**

Mental health courts have been tried on a limited basis and require a sophisticated support team. The basic structure of the court, requiring frequent contact and team meetings, mirrors the collaborative court approach of wellness courts. The requirements as to medication and treatment goals are often structured to aid the participant to avoid further nonproductive contact with the justice system.

Referrals to this court usually evolve from criminal contact by the “defendant,” and this court can operate as a diversion court. The object is to assist the defendant to moderate and regulate their mental health needs with the goal of avoiding criminal contact. The individual’s contact with the criminal justice system is often seen as resulting from untreated mental health concerns.

## **C. Truancy Courts**

Truancy courts are often combined with delinquency and/or dependency courts depending on the age of the truant. Truancy among young children is most often seen as the responsibility of parents and guardians. Among adolescents, truancy may or may not be the responsibility of the parent or guardian. Additionally, the courts may respond to truancy citations (violations that charge the parent or guardian and/or youth as the offender) to parent/guardians and/or the youth.

The main goal of these courts is to reduce truancy, improve the school performance of the youth, and support their continued education. The court can and will explore the issues of the youth, attempting to identify the reasons the youth is habitually truant and possible remedies. It may also look at the school’s support system and determine where there may be deficits. Both the school and the youth are required to participate in truancy court and remediation plans may involve the youth, family, and the school support team.

Please see [Chapter 28: Nondelinquency Proceedings—Truancy Provisions](#).

## **D. Peer or Teen Courts**

Peer and/or teen courts are generally considered diversion courts, also called collaborative courts. They feature frequent contact with the court, a treatment team approach, and, upon successful completion, a dropping of all offenses so no juvenile offense record is created. Peer courts most often hear either low-level misdemeanor community offenses or school behavior referrals. Generally, because the process involves a minor, the youth’s parent or guardian must agree to the referral to peer courts. Confidentiality is required. Adults supervise the courts but all of the roles of the court are performed by teens. The youth are trained (coached) in their roles, by those adults who assist the functioning of the teen court and by their peers. The peer courts offer an opportunity to divert the offender from the juvenile system, as well as a learning experience for the teens filling the necessary roles. Successful completion of the process, including sentencing requirements, most often results in a dismissal of the complaint or dismissal prior to the filing of the complaint.

A common feature of this particular court is that the successful defendant is then required to participate in future court proceedings as a juror or in another court role.

Please see [Chapter 33: Teen Court](#).

## **E. Youth Domestic Violence Courts**

Youth domestic violence courts operate like adult domestic violence courts, with the use of restraining orders and a heavy concentration on intervention and treatment with the batterers. This is seen as an early intervention approach that attempts to interrupt the development of a lifetime of battering by the youth.

Cultural responses are often incorporated into this approach to educate the youth on proper roles and responsibilities. Behavior alteration is seen as a primary focus. This kind of court may involve a family approach if the court sees the violence is a carryover from the family of origin.

## **F. Gang Courts or Gun Courts**

Gang courts or gun courts are diversion courts, but are often more punitive than is the norm for collaborative courts, with the diversion aspect coming only after an admission of guilt and responsibility but prior to sentencing. Sentencing is diverted so long as the youth is in compliance with program requirements.

This kind of court normally requires a very structured plan, including stay-away orders from individuals and activities, curfews, school, job, treatment (groups), and mentoring. Heavy supervision by a case manager and/or probation officer is generally a significant component of this court. Entry into the program may also involve a commitment to tattoo removal for specific gang tattoos. Significant failure to follow the plan can result in very onerous consequences for the offender, often including incarceration for corrective purposes or longer-term incarceration viewed as punitive consequences.

These courts are often the courts of last chance before significant incarceration. They require heavy monitoring by the judicial officer and by the “treatment team.”

## **G. Girls' Courts**

The number of girls being arrested has continued to increase in the last decade. Courts and probation officers have noted that girls’ problems and responses and their overall ability to engage in traditional probation services are markedly different than those of boys. Increasingly, probation departments are moving toward developing separate girls’ services. Even for shared problems, for example, substance abuse, girls require a different approach than boys.

The focus here should be on the number of girls involved in juvenile justice systems, the problems presented, and the potential referrals. If a specific tribe notes a significant influx of girls into the delinquency system, it is essential that the justice system planners consider this to be a specific and

separate problem area to be addressed by a specific approach and treatment team that is familiar or willing to become familiar with “girls’ issues.”

## [2.5] Special Issues

Additional issues do not necessarily fit neatly into any category but need to be considered in the creation or revision of a systems model. They are considerations that will impact not only the systems, but also the children and families that are required to appear in these systems.

### **A. Enrollment**

It is the responsibility of every branch of the court to ensure that all youth who appear before the court are enrolled if they are eligible for enrollment. It is a basic citizenship right and the responsibility for youth enrollment must be placed upon adults. If enrollment has not been accomplished it should be required. Much of the future reciprocal responsibilities of the youth and the tribal community flow from this status, and as such it is a primary requirement. As long as enrollment does not flow automatically as a birthright but requires affirmative action, that action is the responsibility of the responsible adults in a youth’s life.

See [Chapter 6: Subject Matter Jurisdiction](#).

### **B. Minority Status and Emancipation**

Each tribe must decide at what age their members will become adults, no longer subject to the special protection of the law afforded by their minority status (meaning under age). The accepted standard for the population of this country currently is eighteen. Note: the state and federal systems that interact with the tribes have selected eighteen, but some systems are recognizing that young adults are not able to function without continuing support during the transition period to young adulthood. This realization may eventually influence a change in recognition of the child/adult line. This is particularly true of children with little family support; for example, foster care graduates. Tribes have historically deemed children of age at different demarcations, some of them being functional (when a child might be ready to participate in ceremonies or to engage in subsistence activities) and some being status (the mere fact of reaching a certain age). The need to interact with state and federal systems requirements may compromise a tribe’s ability to make an independent call as to all status issues.

This type of decision and the rationale for the decision must come from the history and norms of the tribe, the community’s sense of responsibility, and the ability of their youth. Tribes should also review and consider current research on the brain and adolescent development, which recognizes that the brain is not fully developed in many young adults until they are close to twenty-five years of age.

Emancipation is an issue that often enters into this discussion. Emancipation in this context means to release a child from parental care and responsibility. Many codes list criteria for such a release, for

example, a certain age (if the youth is not yet at the age of adulthood); demonstrated ability to financially care for themselves; a residence; graduation from high school; and the desire to enlist in the armed services and/or participate in marriage.

See [Chapter 6: Subject Matter Jurisdiction](#).

### **C. Should Court Rooms be Open or Closed?**

For any or all of the courts noted previously, there is a question of whether they should be closed to the public and confidential, with only needed staff and participants allowed in court? This is a public policy consideration. Non-Indian courts have long struggled and continue to struggle with the issues of closed versus open courtrooms. In brief the arguments are as follows. The proponents of open courtrooms claim that the public has a right to know and a right to oversee the workings of justice. Those opposed to open courtrooms claim that family business is family business and privacy protects a youth from public scrutiny. Closed courts allow the family to have the time and space to work on their issues in private. Additionally, research on adolescent brain development would argue in favor of a closed court policy to protect against stigmatizing youth (and thus further harming them) who are simultaneously working through difficult circumstances and development stages.

There is also a possibility of partially open courtrooms. This involves setting up protocols for both matters that are open and matters that are closed to public viewing. The issue of open court rooms for certain offenses are community issues and need to be resolved with community input.

Please see [Chapter 11: Rights in Juvenile Proceedings](#).

### **D. Expungement and Destruction of Juvenile Records**

Expungement and destruction of juvenile records helps to shield the youth, whether before or after reaching majority age, from the long-term impact of a criminal record. A criminal record often becomes an issue when a youth enlists in the armed services, seeks a professional license, seeks employment, or applies to school and is required to disclose any past criminal record.

There are rules (federal/state) providing a procedure for expungement of a juvenile record. In drafting a juvenile code attention should be paid to these issues, and the options should be discussed and resolved according to community standards, keeping in mind how long-term impacts may or may not serve the community as a whole. The inability of a youth to transcend early mistakes may seriously impact their lives. It is essential to determine whether the long-term impact of juvenile court records is in the interest of the individuals (offender/victims), families, and communities being served by the juvenile justice system.

Please see [Chapter 10: Juvenile Court Records](#).

## E. Transfer to Adult Court

Transferring delinquency cases to adult court is an increasingly common approach in state systems. During the 1980s and 1990s violent youth crime rates rose and the media often depicted teenagers as members of violent street gangs or as “super predators.” The public, when polled, thought the juvenile court’s lenient treatment of young offenders contributed to the problem. In response, state lawmakers changed the laws to subject youth who commit serious crimes to adult criminal court jurisdiction. The goals of this policy were to protect the public and to punish the offenders. More recent studies by scholars researching state juvenile justice system policies and laws, have argued that many states passed increasingly punitive laws in response to “moral panics”—where the public, the media, and politicians reinforced each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat posed by a particular group of individuals, here predatory youth, who threatened the moral order.<sup>8</sup>

Alarming, this state approach is being adopted by some tribes even in the face of empirical evidence indicating that it does not help the offending youth or serve the protection needs of the community. It is a reactive response to youth violence concerns, as it is increasingly the younger violent offenders who are normally subject to such an approach. Punitive responses, while seemingly comforting to the public in the short run, need to be rationally examined for effectiveness. If they are found to be effective, then there is some basis for discussion, otherwise this approach is misguided.

We note that the University of Washington’s Center of Indigenous Research and Justice in its recently completed [Model Tribal Juvenile Code](#), drafted as part of the John D. and Catherine T. MacArthur Foundation’s Models for Change initiative, completely omits provisions transferring juvenile cases to adult criminal court, even for serious offenses. The purpose and policy section at 1.01.110 (d) reads:

This article shall be construed and interpreted to fulfill the following purposes: to remove from children committing delinquent acts the legal consequences of criminal behavior, and to substitute therefore programs of supervision, treatment, and rehabilitation which: (1) hold them accountable for their actions; (2) provide for the safety and protection of the community; and (3) promote the development of competencies which will enable them to become responsible and productive members of the community.

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<sup>8</sup> See for, e.g., Chapter 4, “Why Crime Is Different,” in Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, Cambridge, Massachusetts: Harvard University Press, (2008).





# Chapter 3: What Is Needed— Assessing Resources

## [3.1] Age/Offense Appropriate

The issues presented to a tribe when considering whether to create a juvenile justice code require a multipart analysis. Initially the team must consider the magnitude and dimensions of the juvenile justice problem in the community. Then the team must consider whether the community has the ability and willingness to work with youth who find themselves in trouble, as well as working with the families of those troubled youth.

The team must also decide at what age certain defined behavior(s) become potentially “criminal,” as opposed to a problem requiring parental and/or family intervention. A growing area of concern is determining when a behavior problem requires school intervention as opposed to law enforcement attention. Criminalization of school behavior at all ages has upset many parents, but that must be balanced with the concerns of school teachers and administrators who fear that out-of-control students are interrupting education and posing a threat to others in the school environment.

It is possible for a team to progress into a full juvenile justice system in a piecemeal manner. For instance, a community after reviewing key issues may decide to start only with status offenses as outlined in the previous chapter, or may seek to work only with those offenses that would be considered misdemeanors if committed by adults. Assuming responsibility for felony offenders, even considering the restrictions of ICRA, requires development of a complex system, including treatment and detention that is often very costly. Many tribes have opted to limit their response to juvenile felony violators to reentry programs (Reentry is not addressed in this iteration of the Juvenile Code Resource. This topic could be covered in a section of a juvenile code; it could also be the subject of a separate tribal reentry statute.) that help the youth transition from felony treatment or incarceration back into the community.

Decisions around the scope of a juvenile justice system should be driven by perceived problems and potential resources. Juvenile justice systems have a tremendous need for resources; they are not and cannot be expected to become self-sufficient overnight. The hope is that by judicious use of specialized resources addressing the problems of tribal youth at an early stage, the negative influences on and in the community can be eliminated and these youths can be transformed into community resources.

## [3.2] System Support/Collaboration

The juvenile justice system is made up of various entities with multiple needs (e.g., the courts, attorneys and lay advocates, law enforcement, probation, case workers, social and behavioral services, residential and detention facilities). It is essential that each part of the system is created with the understanding that it is related to, but not controlling of, all other segments of the system. The most effective systems are those where there is understanding and collaboration. All parts of the system must be, in general, committed to the same goals if the system is to be effective. All players must buy in to the philosophical underpinnings of the system or the system will work against itself, thereby decreasing effectiveness, and in general frustrating workers and users of the system.

### **A. Law Enforcement**

A respected police department with officers who perceive themselves as community protectors is essential. They are the face of justice for much of the community. To be effective in their role as law enforcement officers the officers must be seen as protectors. They must be integral members of the community. They must be persons who have personal reputations for fairness and who support the needs of community youth, elders, and families. The more grounded they are in the tribal culture and the community, the more effectively they will carry out their obligations.

Professionally, it is essential that tribal law enforcement officers are equally competent to state and local police officials, and are also perceived to be so by the community. Their ongoing competency is critical, and it is recommended that they avail themselves to federal officer and other training opportunities, as possible. Continued training should be mandatory. Part of their job responsibilities should include being a member of the communities they serve. Some jurisdictions use officers as prosecutors or presenters in juvenile court. Though this seems a quick fix to filling the role of prosecutor, it is not ideal, because the role of prosecutor is time consuming and pulls the officer out of the field, leaving the community without the active presence of officers on patrol.

Additionally, law enforcement must have modern equipment. It is unacceptable to have a force that does not have the ability to protect themselves and their community. The law enforcement department can be expensive, but it is a critical branch of tribal government.

### **B. Prosecutor (a.k.a. Presenting Officer)**

The juvenile justice system must have a person designated to review the reports that are forwarded to the system for possible dependency, delinquency, and/or criminal filing, which may include diversionary filings. The minimum requirements for this position include advocate-level abilities, for example, advanced competency in reading and writing, coupled with the ability to communicate verbally at an advanced level and a good working knowledge of the community and the culture of the community.

The prosecutor must see their role as integral to the system and be willing to participate as a community member. The most effective prosecutors are those who are not just seen as aligned with law enforcement but also seen as aligned with justice and fairness (including therapeutic goals). They need to be able to represent the interests of law enforcement, victims, and the community, while not losing sight of the very real fact that the “wrongdoer” is also a member of the community and many are also “victims” in their own right.

See [Chapter 17: Presenting Officer/Prosecutor and Consent Decrees](#).

## **C. Attorneys/Lay Advocates**

Consistent with the federal ICRA, the tribal juvenile justice system must allow youth in the juvenile or dependency court to have legal counsel (an attorney or a lay advocate at their own expense). The minimum requirements for this position vary under tribal law given the tribe’s choice of sentencing power. However, juvenile matters are unlikely to result in the secure detention of a juvenile for a duration of longer than one year. Secure detention for longer than one year would trigger federal law requirements that a tribe pay for a licensed attorney for a youth involved in juvenile court. However, many tribes are opting to pay for licensed attorneys for youth, in any case, to protect the rights and interests of youth in the tribal juvenile justice system. Nevertheless, many tribes continued to allow lay advocates to practice in their justice systems. The requirements for such practice varies under tribal law and can range from the mere payment of a fee with approval to practice by the Chief Judge to passage of a tribal or state bar exam.

Lawyers and lay advocates will need to educate themselves about the purposes and role of defense counsel in therapeutic court dockets such as wellness [drug] court for the purpose of successfully habilitating or rehabilitating their clients. Many other types of diversion and community-based programs will have similar requirements. Lawyers and advocates will also need to familiarize themselves with existing programs and should be encouraged to participate in the development of new programs.

## **D. Juvenile Judge**

The juvenile court judge is required to further the tribe’s juvenile justice policy and the purposes of the juvenile code. In more modern codes these tasks are about supervising and coordinating treatment and other services and monitoring and responding to youth and family compliance and/or noncompliance. Only in extreme cases will the judge adjudicate (hold a trial for) a youth to be a delinquent (to find him or her guilty of committing a juvenile offense)—and to sentence that youth to secure detention.

The tribe’s juvenile code purposes may include some or all of the following: (1) securing the care, protection, and mental and physical welfare of youth; (2) preserving and retaining the unity of the family; (3) removing from children committing delinquent acts the legal consequences of criminal behavior, and substituting programs of supervision, treatment, and rehabilitation; (4) ensuring that

the rights of the parties are recognized and protected; and (5) coordinating services for youth and their families with an emphasis on prevention, early intervention, diversion, and community-based alternatives.<sup>9</sup>

Judges who have not previously worked in juvenile court will need to educate themselves with respect to the rehabilitative focus (as opposed to the criminal court’s primarily fact-finding and punitive focus) of the juvenile justice system, the preferred use of diversion programs, and particularly therapeutic diversion programs (e.g., wellness [drug] court). Juvenile judges are essential leaders in the co-development and operations of therapeutic dockets and community-based programs (including tribal-school efforts to respond to truancy). They will need to understand their new and unusual role as reform team leader, collaborating team leader in justice system operations, parental figure, mentor, sponsor, and supporter of the success of tribal youth.

## **E. Probation Department**

Probation officers are generally required to “enforce” terms that the court imposes on youth. Behavior requirements often arise when an adolescent or young adult is released pending adjudication or postdispositional requirements imposed on the youth (the youth must complete requirements as part of their obligation to the court for admissions, findings, or convictions). Occasionally these requirements may be imposed as diversion requirements, meaning that if the youth and his or her family comply with certain requests the matter will not be officially filed or brought to court. Diversionary supervision is usually less intensive, and may be referred to case managers (described in the following text).

Probation officers should complete course work in their area of concern at the junior or other college. If there is not an available candidate with the academic credits/training then it is essential that the probation officer have competency at the advocate level (advanced competency in reading and writing, coupled with the ability to communicate verbally at an advanced level and a good working knowledge of the community and culture of the community).

The probation officer must assist the youth and their family in determining what services would benefit the youth and family to address the problems noted; assisting in the assessment of services; providing ongoing monitoring and encouragement for the youth; and providing a progress report on the youth for the court.

Probation officers often interact with the youth when he or she is referred or first brought in (sometimes detained or arrested and sometimes taken into protective custody). If detained or arrested, they initially determine if the youth is releasable, and under what conditions. They also

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<sup>9</sup> Taken and summarized from Model Tribal Juvenile Code (2015) (*Developed by the University of Washington’s Native American Law Center drafted as part of the John D. and Catherine T. MacArthur Foundation’s Models for Change initiative and for the Bureau of Indian Affairs*) Section 1.01.110 (d) Purpose and Policy.

interview the youth, family, and community (victim) at an appropriate presentencing point. The interview summary report will become part of the probation officer's report to the court.

Perhaps the most important facet of probation officers' responsibilities is their partnership with the youth and his or her family. They must align with the youth while meeting their quasi-law enforcement responsibilities. They monitor compliance and ensure that compliance is progressing. Under many juvenile justice processes, probation officers oversee youth and family compliance with pretrial, diversion, and posttrial programs and services. Good probation officers are akin culturally to clan and/or aunt and uncle relatives. They are a loving, nonjudgmental presence that can help determine community standards and assist a wrongdoer to right his or her wrongs.

## **About Family Group Decision Making\***

Consider Having Your Juvenile Intake or Probation Officers Use a “Family Group Decision Making Process.”

Family Group Decision Making (“FGDM”) recognizes the importance of involving family groups in decision making about children who need protection or care, and it can be initiated by service providers and/or community organizations whenever a critical decision about a child or youth is required. In FGDM processes, a trained coordinator who is independent of the case brings together the family group and the service providers to create and carry out a plan to safeguard children and other family members. FGDM processes position the family group to lead decision making, and the statutory authorities agree to support family group plans that adequately address agency concerns. The statutory authorities also organize service providers from governmental and nongovernmental agencies to access resources for implementing the plans. FGDM processes are not conflict-resolution approaches, therapeutic interventions, or forums for ratifying professionally crafted decisions. Rather, FGDM processes actively seek the collaboration and leadership of family groups in crafting and implementing plans that meet the child's or youth's needs.

\* Taken from University of Colorado, Kempe Center, [National Center of Family Group Decision Making](#). For more information on the purposes, values, and processes of Family Group Decision Making Process, go to the Kempe Centers, [Family Group Decision Making in Child Welfare - Purpose, Values and Processes](#).

## **F. Case Managers/Community Workers**

Generally, in the juvenile justice system case managers are used for certain “dockets” or “calendars” (court actions are grouped by type, e.g., children's court [dependency], juvenile court [status, delinquency, and FINS], family court [paternity, divorce, and probate], criminal court, and wellness court [drug court]). Case managers develop an expertise in the services needed for their area of specialty. For instance, a wellness court worker would have access to and be acquainted with substance abuse and mental health treatment and treatment-associated resources.

Case managers, in addition to their specialty knowledge, need the advocate skills outlined. This knowledge is combined with their community and cultural awareness and their ability to align with

the youth and their families. The partnership responsibilities outlined in the probation officers section are equally applicable to case managers.

## **G. Facilities—Treatment and Electronic Detention**

There is a significant lack of juvenile facilities in Indian country for youth. All but a few tribes are too small in population to support a full range of facilities required to address the divergent needs of a stressed youth population. Additionally, serious offenders are either housed in state or federal facilities because of the jurisdictional composite imposed on reservations.

Tribal juvenile systems need to designate a liaison officer to work with youth that are housed in off-reservation facilities, whether they are treatment or locked facilities. The liaison officer may be a case manager, but his or her responsibility would include maintaining contact with the youth and his or her family during the period of treatment or incarceration. The liaison officer should develop a transition plan for the return of the minor to the community. It is possible for tribal systems to partner with other systems off reservation when the primary purpose of out-of-home placement is for treatment. Partnering can involve locating culturally appropriate treatment and ensuring that monitoring and support is there for the youth. It is important that any period of separation from the community and family does not end up feeling to the youth like they have been thrown away.

Additionally, tribal/state/federal agreements can be put in place to exercise concurrent jurisdiction, under which the tribe constructs agreements supporting dispositional alternatives that feature wraparound services. An example of concurrent jurisdiction would be allowing a youth to opt for treatment in a tribal or Native facility. A treatment failure would result in a period of time at a locked nontribal facility.

Another alternative is to impose electronic monitoring. This requires a careful assessment, and should not be widely used as the success of the monitoring requires a level of commitment that youth without substantial family support may not have. The monitoring program can be a global positioning system (GPS) and/or a drug or alcohol monitoring system. This approach has been very effective with youth who have support and who have the external/internal resources to help them comply. Many jurisdictions have statutes that allow for such monitoring by classifying the monitoring as “detention.”

See [Chapter 9: Relations with Other Agencies and Courts](#).

## H. Housing Needs

Many youth find themselves in an impossible situation with parents who are unable to parent on a full-time basis due to parental incapacity. When this occurs, if a youth has a caring adult parental alternative, who provides housing and supports the youth's need for care, the tribe needs to be able to carefully evaluate that alternative and support where reasonable. Although group homes and residential schools may be less than desirable, adolescents and young adults may prefer those alternatives. It is preferable that these placements be achieved without designating youth as dependents or delinquents. It is important to realize that alternatives do not have to be limited to those developed in the dominant society. Even considering giving adolescents the right to partial emancipation or any other designation that supports their semi independence may be a good option at times.

Labeling does not further these solutions. Parents and youth will often turn away from alternatives not wishing to be stigmatized by terms such as *delinquency* or *dependency*. Any structured supportive alternative may be preferable to youth who are essentially homeless.

## I. Mental Health Assessment and Treatment

There is a tremendous need to have competent mental health services available for tribal youth and their families. Trauma, both historical and individual, is in recent years being understood as a cause of negative behavior in tribal youth.

Juvenile justice systems need to assess the nature and degree of trauma in tribal youth, families, and communities, particularly as Native communities have been ground zero to much trauma. Traumatic events may include the following:

1. Abuse or assault: physical, emotional, sexual
2. Exposure to family violence/intimate partner violence
3. Accidents that cause injury and/or death to family and/or close friends
4. Deliberate harm by others; torture; abuse; abuse of power
5. Harm by others in the line of duty
6. Negative consequences of economic policies, poverty
7. Homelessness, being a refugee
8. Human caused and natural disasters
9. Living under occupation or in conditions of servitude or slavery
10. Mass violence: assaults, massacres, genocide, wars

11. Neglect by others of those cannot care for themselves
12. Serious illness
13. Structural violence (social structures and institutions that deprive people of their rights and ability to meet basic needs)
14. Sudden loss of loved ones, status, identity, possessions, home, territory
15. Sudden changing of the rules, expectations or norms
16. Surgical, dental, and medical procedures, including difficult births
17. Witnessing death or injury

Of particular importance in Indian country is historical trauma, which is the “cumulative emotional and psychological wounding over the lifespan and across generations emanating from massive group trauma.”<sup>10</sup> This trauma is pervasive throughout Indian country. Mental health providers have researched historical interactions that have negatively impacted tribal communities to understand the root causes of current behaviors.

Understanding the impact of trauma in Indian country is essential. Untreated trauma results in reenactment behaviors, those that turn unhealed trauma energy against the self or others. Upon analysis, untreated trauma can be identified as the basis for much “deviant behavior.” It is important to identify the source of such behavior if treatment or resolution of the behavior is one of the objectives of bringing youth into the juvenile justice system.

To recap, careful assessment of potential trauma must be part of any examination of a youth’s presenting behavior. If trauma is found, then the treatment plan must incorporate trauma-based responses.

Please see [Chapter 29: Trauma-Sensitive Statutory Provisions](#) and [Chapter 24: Nondelinquency Proceedings—Family in Need of Services \(FINS\) Referral to Juvenile Counselor](#).

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<sup>10</sup> Maria Yellow Horse Braveheart, *The Historical Trauma Response among Natives and Its Relationship with Substance Abuse: A Lakota Illustration*, 35 *Journal of Psychoactive Drugs* 1 (p. 8) (2003).



## **J. Schools**

Youth committing delinquent acts in a community often have academic histories that are riddled with problematic behavior, including truancy, social problems (acting out), and significant issues with academic performance. Tribal youth must be educated to be good tribal citizens and competent parents, and to be able to participate successfully in the workforce. Failure in school often foreshadows a lack of success as young adults and is a common factor among the prison population.

It is essential that any juvenile justice system place a heavy emphasis on the academic performance of potential and actual offenders. This may include academic testing and remediation. Between 69 and 85 percent of the prison population shows a failure to graduate high school. (These figures are not Native specific.) Most professionals working with youth predict that a lower prison population could be supported by a higher high school graduation rate. If tribes wish to do better than our state neighbors they must not ignore the implication of the relationship between high school success and criminal involvement. School issues must be given primary attention to avoid the long-term impact of educational shortcomings.

Another issue that communities should resolve is the presence of law enforcement at school sites and the use of law enforcement for disciplinary intervention with troubled and problematic students. The recent specter of elementary children being hauled off in handcuffs for admittedly bad behavior or tantrums has caused many parents and educators to call for a review of the trend to arrest children exhibiting problem behaviors. Frustrated school administrators fearing damage to facilities and injury to staff and other students are increasingly calling on law enforcement, when parents do not respond to less drastic requests. However, the consequences of criminalizing children must be seriously considered. Other options must be fully explored as the long-term impact on the individual child and the attendant “cost” to the community is potentially very high.

## **K. Cultural Resources**

The juvenile court should strongly consider establishing a cultural division inside the court. This entity or position would be responsible for establishing individualized cultural reengagement or engagement plans for youth. The court should have the ability to provide mentors for youth, with activities that are supportive of the participant developing values consistent with those of the tribal community. These activities should be individualized and feature both group and one-on-one services. Language class involvement has proven successful in increasing youth self-esteem in many communities.

It is not enough to talk about making culturally relevant systems. Such a system requires a commitment and a visible presence. It is very important, particularly for a juvenile justice system that official promises and talk match up with the reality presented to youth and their families. Our youth are the future and they have seen state and federal officials talk about how important youth are while NOT allocating resources to youth needs. Tribes have talked about the importance of culture, the

importance of those values being the guiding principles for our youth; and it is incumbent on tribes to dedicate whatever resources are necessary to demonstrate their commitment to Native culture.

See [Chapter 30: Integrating Culture, Customs, Traditions, and Generally Accepted Practices](#).

## **L. Transitional Supports, Including Housing**

Life skills are essential for tribal youth. Parents and parental figures need to model life skills and/or ensure that they are taught to youth. It is important that youth involved in the juvenile justice system acquire such life skills, without them they cannot be successful. If youth cannot support themselves, as in providing for their own food and shelter, getting and holding a job, and engaging in future planning, then they should not be allowed to age out of the juvenile system. It is not about an age requirement, it is really about youth being able to meet the requirements of caring for themselves.

It is possible to assist students, in college or completing certificate programs, with housing while they are completing their education. However, vacations, breaks, and graduations must be considered. Supervised youth hostel facilities or living stipends to assist in transitions are a possible solution. Transitional supportive housing for young adults is a problem that needs to be addressed along with all the other housing concerns of reservations. Housing for this age group should be supportive and have on-site services that will assist youth in their primary concerns of job search, budgeting, planning, etc.

## **M. Support for Parents**

Parents may need assistance ranging from visitation support (if the child or adolescent is housed away from the community), directed parenting assistance (e.g., how to parent an adolescent, a special needs adolescent, or an adolescent parent), and respite care. Some parents need assistance in applying for programs for their children (scholarship, financial aid applications, public aid programs, program admissions forms, etc.). It is essentially impossible for youth to succeed without adult assistance, and the adult assistance needed increasingly requires substantial knowledge.

A frequent concern is that a youth may be manifesting a family problem and the “real” issues are in the family, or lodged in family-based dysfunctional behaviors. If the youth’s behavior is a symptom of the family’s issues, then the issues can become quite complicated. Many juvenile systems allow for cross-referrals, and it may be appropriate to institute dependency proceedings. On occasion it is appropriate to combine the two matters and treat the family issues with the delinquency behavior.

There is also the issue of parents who may lack physical and/or mental capacity without assistance to parent their children. These parents may be able to parent, or partially parent with supportive services, and very careful plans have to be made to provide such ongoing support.

Please see [Chapter 25: Nondelinquency Proceedings—Family in Need of Services \(FINS\) Breakdown in Parent-Child Relationship](#).

## **N. Victim Services**

Although most if not all tribes have adopted the approach of the dominant society that crimes are against the tribe as in “People vs. Defendant” or “Tribe vs. Defendant,” it has historically been the position of most tribal cultures that the person wronged is not the tribe, rather it is the person(s) harmed by the action or inaction. In recent decades the state and federal governments have looked to the concept of adding the victim to the equation of justice, not just as a witness, but rather as a party who may participate in the court process, and have their concerns redressed directly.

Victims are being allowed to directly address the court(s) in terms of sentencing; address the perpetrators in terms of harm caused, etc.; and seek restitution for property destruction, physical harms, or the costs associated with those harms.

In addition, restorative justice and/or programs incorporating the concepts of restorative justice have increasingly come into favor, allowing victims’ concerns to be addressed directly by the wrongdoer. This may or may not include direct interaction of the parties, and the negotiation of a plan to make the matter right between or among them.

## **O. Restorative Efforts—Activities**

The previous chapter discussed in summary fashion the approaches of restorative justice. These concepts are culturally familiar and comfortable to most tribes and should be considered as available to youth and their families. Restorative justice practices are designed to restore harmony to the community; repair, as much as is possible, the relationships of the parties; and allow the return of the youth to good standing in the community.

Restorative justice is ideally suited for communities that historically and currently are somewhat insular or isolated. The system creators or those tasked with improving the juvenile justice system should review these concepts and consider whether and how to incorporate them into their tribe’s system.

## **About Family Group Conferencing\***

A Family Group Conference (“FGC”) is a facilitated group dialogue and decision-making process in which a young person who has done harm is encouraged and supported to be directly accountable to the person who was harmed. The focus is on doing right, not on punishment. Typically, participants in a FGC include a young person accused of a crime, his/her family, the persons who were harmed and their supporters, and a trained facilitator. Depending on the severity of the crime, a member of law enforcement might also be present. Ideally, an FGC results in a consensus-based plan for repairing the harm to the extent possible. When the young person completes the plan, filed charges are dropped. The participants also try to understand why the offending happened and tailor the plan to help prevent future wrongdoing.

FGC can also be used in lieu of traditional school discipline processes that would otherwise result in suspensions or expulsions for more serious negative behavior on school campuses. Ideally, a single restorative system of youth accountability that addresses both school needs and juvenile charges would result when youth commit crimes on school campuses.

## **History of Family Group Conferencing**

Family Group Conferencing is the national model for addressing youthful wrongdoing in New Zealand. The Maori—New Zealand’s indigenous people—spoke out against the disproportionate incarceration of their youth and advocated for FGC as a more effective model for dealing with youth crime. In 1989, the New Zealand government passed the Children, Young Persons, and Their Families Act which adopted a national model for using FGC in all youth crimes other than murder and manslaughter. Since 1989, youth incarceration has been rendered virtually obsolete, juvenile detention facilities have been closed, recidivism rates have plummeted, and victim satisfaction rates are high.

\* [Family Group Conferencing](#), taken from [Community Works](#).

## **[3.3] Dispositional Alternatives**

The system must have at its disposal the ability to impose consequences that are appropriate for the youth offender, the family, the victim(s), and the community. The consequences must fit the gravity of the offense and the real needs of the youth to learn and incorporate behavior changes. The alternatives must be tailored to the offense and the offender. A certain amount of attention should be given to graduating those consequences to allow the offender to modify or correct his or her behavior with limited consequences. Increasing the consequences is usually associated with increased restriction of freedom of movement, but should also be associated with increased services as in treatment service requirements.

What follows is a listing of possible alternative services for the youth. These services may be tribally established, be contracted for, or be provided by neighboring local, state, or federal governments or nonprofits. If the consequences are imposed from outside the tribe, it is important to remember that continued connection of the youth with their tribe and their family is extremely important to their eventual ability to absorb the “lesson.” In all likelihood, and assuming eventual release, the youth will return to the tribe. He or she may have continuing problems if the underlying issues are unaddressed. The youth may then reintroduce his or her problems to the community.

## **A. Placement Options—Out of Home Detention, Treatment, and Foster Care**

After youth have been subject to punitive measures, they are returned to their home, maintained in their home, or face an out-of-home placement. Less serious offenders may have the opportunity to address mental health concerns and/or substance use/abuse issues during inpatient care. Indian Health Services and specific tribal agencies may offer access to some facilities. It is important that each tribal juvenile justice system's personnel become familiar with the available tribal and neighboring local, state, or federal options. In situations in which there is concurrent jurisdiction and/or intergovernmental agreements, additional placements may be available to youth and some of these facilities may be open to providing culturally relevant supportive services. In all cases there is also a need for after-care services. Planning for those services is essential and should begin before a youth is released from a facility.

If the youth needs an increased level of supervision or would benefit from services and opportunities available from an out-of-home placement, but does not require out of family placement, then foster care/a guardianship/an Indian custodianship is a possible placement option. This could include extended family placements and/or placement with an unrelated adult who is known to the youth and/or the family and who is able to offer a suitable home. A case manager or probation officer will need to supervise and monitor such placements, depending on the offense and the level of supervision needed.

Serious offenders will be housed in locked or semilocked facilities. Those offenders also require ongoing supportive contact and transitional services.

## **B. Home Detention**

Home detention is basically house arrest with limited access to supervised activities, including school and school-related activities. It may include an ankle monitor with GPS and/or substance-use monitoring. It may also include access to counseling (individual or specialized, e.g., domestic violence, antitheft, driving skills), outpatient treatment programs (featuring frequent and random drug/alcohol testing), and employment.

Home detention is often seen as an opportunity for youth to demonstrate their willingness to work with service providers and to show they can discipline themselves with support to avoid bad behavior. This requires parents or adult figures who will support the needs and demands of the supervision and who will place the agreement to report noncompliance at the top of their parenting list.

## **C. School Placements**

This kind of placement can be as simple as requiring a student to reengage in school through the continuation of school or a GED program. It may require a boarding school or other specialized academic program, depending on the needs of the youth in question.

Sometimes youth can find it very beneficial to have a “change of scenery” with a chance to start over where their past does not have to be confronted on a regular basis. The essential importance of this requirement to continue education is that youth **MUST** achieve, as much as possible, education competency and success to avoid further and continued involvement with the criminal system.

## **D. Specialized Programs, Classes, and Mentors**

Specialized programs and classes can be developed on reservation or found in the surrounding communities. They may address certain behaviors, giving the youth tools and information designed to assist them to avoid pitfalls or to acquire needed skills for success.

These classes include but are not necessarily limited to the following:

1. Antitheft
2. Graffiti abatement
3. Alcohol and substance abuse education
4. Driving classes
5. Cultural how-to classes—including producing items and/or attending community events
6. Cultural classes on historical and traditional knowledge
7. Domestic violence classes
8. Life skills classes
9. Peer counseling
10. Youth fellowship classes, so that youth are exposed to positive activities

An important part of these programs may be the partnership with teams of youth to accomplish projects. These can overlap into the provision of services to the community. Additionally, mentors in the model of teaming an adult with a youth are very successful. Mentors should be viewed as fulfilling the role of an adult advisor much as an aunt or uncle and can supplement ongoing support.

## **E. Protective Orders**

Protective orders are designed to keep youth away from person(s), places, and activities. They require that the youth refrain from any contact in a very particular manner. They may allow for some contact under a supervised situation, for example, therapeutic contact with a parent. Protective orders may also be used to keep others from contacting the youth, if the youth is being harassed or otherwise disturbed in an unlawful manner.

These orders are generally for a limited duration and are very specific, often stating the required distance between the youth and persons or places. They are sought for the purpose of protection of the youth or protection from the youth, and can be reviewed by the court for changed circumstances. Violations of these orders are often considered separate criminal offenses. Protective orders should be used wisely and uniformly adhered to so that further criminal involvement is avoided.

## **F. Conclusion**

The “parts” described are required to operate an effective and responsive juvenile justice system. The tribal court must share the responsibility to oversee the development of the system and to ensure that its staff’s vision, mission, and competency meet the demands of this youth-focused and necessarily collaborative and integrated system.





# Chapter 4: Criminal Offenses

## [4.1] Introduction

Earlier chapters have reviewed the preliminary considerations a team needs to work through before adopting a juvenile code or undertaking revisions/updates for a code. Once the decision has been made to move forward with the project, the actual drafting can occur. The code must consider designating some or all of the following categories of youth behavior as prohibited behavior:

1. Criminal behavior—society (tribal and nontribal) basically agrees on the definition of many crimes and has deemed certain actions to be criminal in nature, for example, assault, battery, robbery, burglary, hunting, and fishing.

Please see [Chapter 8: Transfer to Tribal Criminal Court or Other Jurisdiction](#).

2. Status offenses—those offenses that, if committed by an adult, would not be a crime, for example, driving under age, possession of firearms, and truancy.

Please see [Chapter 23: Nondelinquency Proceedings—Stand-alone Status Offenses](#).

3. Any behavior or offenses particular to a given community that could involve regalia or cultural offenses.

A fourth category of behavior may be considered to be a red flag warranting some juvenile justice system involvement, as opposed to prohibited behavior. This category would include behavior indicating that a youth and his family are in need of services (a.k.a. FINS). That particular behavior does not rise to the level of criminal behavior, including but not limited to the commission of defined status offenses.

Please see Chapter 7: Juvenile Offenses; [Chapter 21: Nondelinquency Proceedings: Status Offenses/Family in Need of Services \(FINS\)](#).

Additionally, another class of offenses must be considered or acknowledged by the juvenile code. Those include the management of sex offenders in Indian country. Youth and adult offenders, as well as youth and adults with histories of victimizing children and adolescents, must be accounted for in any scheme of laws seeking to protect the community. Protected areas or zones are increasingly being considered as a management tool for law enforcement. Management and treatment of sex offenders (either youth or adult) are very complex topics. These topics cannot be fully addressed here, but they are of extreme importance. Further, any offense that can result in a designation of “sex offender” for a youth, requiring sex offender registration, must be carefully administered. Definition of these offenses is a serious issue, especially for the purposes of work with juveniles. Any youth conduct that would be deemed a sex offense requiring registration must be

seriously studied. This is an area of evolving knowledge. Criminal, mental health, and treatment experts must be consulted when a tribe is considering criminalizing juvenile sexual behavior.

## [4.2] Incorporation of Criminal Code(s)

Drafters may look to neighboring tribal, state, and federal juvenile laws. It will be important to keep in mind the previous discussions regarding tribal, federal, and state jurisdiction; characterizations of misdemeanors versus felonies; the actual consequence possibilities under the federal law through ICRA and [Oliphant](#) with current TLOA amendments and recent [Violence Against Women Act \(VAWA\) 2013](#) amendments; and existing treatment or other facility limitations. Foreign codes will offer definitions of offenses (the necessary elements that make up each crime); outline proof required; often identify graduated offenses (e.g., theft from petty to grand as determined by amount of loss); and have an established statutory scheme that has the advantage of prolonged, and thus tested, usage.

Please see [Chapter 9: Relations with Other Agencies and Courts](#).

### **About the Tribal Law & Order Act and the Violence Against Women Act 2013**

Drafters may look to neighboring tribal, state, and federal juvenile laws. It will be important to keep in mind the previous discussions regarding tribal, federal, and state jurisdiction; characterizations of misdemeanors versus felonies; the actual consequence possibilities under the federal law through ICRA and *Oliphant* with current TLOA amendments and recent [Violence Against Women Act \(VAWA\) 2013](#) amendments; and existing treatment or other facility limitations. Foreign codes will offer definitions of offenses (the necessary elements that make up each crime); outline proof required; often identify graduated offenses (e.g., theft from petty to grand as determined by amount of loss); and have an established statutory scheme that has the advantage of prolonged, and thus tested, usage.

Please see [Chapter 9: Relations with Other Agencies and Courts](#).

### **About the Tribal Law & Order Act and the Violence Against Women Act 2013**

The U.S. Supreme Court in [Oliphant v. Suquamish Indian Tribe](#), 15 U.S. 191, 208 held that tribal sovereignty does not extend to the exercise of criminal jurisdiction over a non-Indian for crimes committed in Indian country.

However, on July 29, 2010, Congress passed the [Tribal Law & Order Act](#) (“TLOA”) that enhanced the tribes’ authority to prosecute and punish criminals. However, tribes are required to provide certain due process requirements. For further information, please see:

- United States Department of Justice, [Tribal Law and Order Act](#).

- National Congress of American Indians, [Tribal Law & Order Resource Center](#).

Further, the VAWA 2013 reauthorization recognized tribes' inherent authority to criminally prosecute non-Indians for the crimes of domestic violence, dating violence, and the violation of protection orders. However, in order for tribes to utilize this criminal jurisdiction, tribes must provide certain enumerated due process protections, including most of the protections required in TLOA. For further information, please see:

- Tribal Law and Policy Institute, [Violence Against Women Act – Title IX: Safety for Indian Women](#).
- United States Department of Justice, [Violence Against Women Act \(VAWA\) Reauthorization 2013](#).
- United States Department of Justice, [VAWA 2013 Pilot Project](#).
- [National Indigenous Women's Resource Center](#).

Most state juvenile laws also have a full listing and definitions of status offenses. The important concept to remember is that as aggravating as the conduct underlying these offenses may be, this conduct is not generally criminal in nature, but is more reflective of immaturity and lack of supervision, and/or representative of underlying treatable concerns.

Given current research and findings regarding the human brain, we now know that much of this conduct is characteristic of a normal phase in adolescent brain development. Punishments and consequences that do not consider why youth are engaging in negative conduct are not likely to further therapeutic outcomes that change the behavior. If the negative behavior continues it can be a precursor to more serious negative or criminal behavior. Parental involvement or parental figure involvement, if available, is often able with support to address negative behaviors. It is important that the “system” have an understanding of the developmental phases of children, adolescents, and young adults. Blaming as opposed to problem solving is generally counterproductive for this group of youth “offenders.”

Please see [Chapter 7: Juvenile Offenses](#).

Drafters also need to look to other identified local concerns. These concerns might include issues like elder or vulnerable (developmentally or otherwise vulnerable) youth/adult abuse, issues related to the need for restraining orders in dating relationships, or youth who are parents. Decisions will need to be made as to which court/docket/calendar should handle various types of needs or misconduct. For instance, are youth/underage parents more properly heard in juvenile court? Or should all juvenile matters be determined by family court? Certain or repeated violations of restraining orders can be determined to be criminal in nature.

Charging decisions can become very significant, that is why in earlier chapters the issue of determining a consistent philosophy and a team approach is recommended. How an incident is petitioned or charged will determine the approach taken by the system, the consequences or alternatives available, and the support accessible to the youth and/or their family. Additionally, drafters need to be aware of “stealth” consequences, for example, eviction if a youth is found to be in public housing with illegal drugs. This consequence is serious for not just the youth but also the entire family, and it might be more appropriate and/or helpful to find another approach to resolution of a perceived problem of a family’s youthful members.

The penalty portion of the juvenile code must reflect value decisions about what target populations should be subject to such penalties in terms of age, gender, conduct, youth needs, and available resources, the jurisdictional limitations and/or availability of negotiated agreements with neighboring local, state, and federal governments, and the actual availability of tribal community resources. Depending on the overriding philosophy of the code it is important to build into the consequences not just “punishment” but also redemption possibilities, so that youth can be restored not just to their family but to their community. This includes an understanding of the citizenship requirements of their Indian nation. An aspect of punishment/consequences not generally available to non-Indian communities (other than proscribed stay-away orders) is the possibility of banishment for tribal member youth or expulsion for nontribal youth who commit certain offenses or become a danger to the community. Either of these can be for specific periods of time. Banishment should be considered **ONLY** as a consequence of last resort as it is for all intents and purposes the most severe sanction available to tribal nations.

## **[4.3] Offenses Particular to a Certain Tribal Community**

These offenses can include certain archaeological site disturbances, including cemetery disturbances, which may or may not be defined as criminal behavior in nontribal settings. Even if they are defined in the nontribal setting, it is important to put a distinctive tribal perspective to any such crime. That could be in the enhancing of a crime; for instance, stealing from a dance camp would have an additional penalty not just related to the amount of loss, requiring a culturally appropriate settlement. There should be certain offenses that require a distinctive resolution that are not just general criminal redress. Each community needs to determine those offenses. Nonmembers should not define them.

The same can be true of the destruction of community resources (this can include natural resources and such things as school sites that benefit tribal children) including cultural resources. In all likelihood they have a certain monetary value but the shared value of community resource also needs to be addressed. For instance, vandalizing a cultural site, including a currently used site should be considered a “criminal” offense and a cultural offense. The code would ideally list the consequences in a dual fashion so that the offender would be required to address both aspects of the offense. This

is a method of bringing a philosophy into the tribal criminal court in an attempt to develop a real understanding that community must be addressed. This is victim representation not just at the individual level but also at the community level. It is meant to specifically foster responsible tribal citizenship.

It is important to hold on to the concept that if tribal communities want different results than those achieved by nontribal communities they must conduct their business in a different and tribally unique fashion. They should not mirror the system about which they have serious ongoing concerns. This is a critical component that, if addressed, could bring a tribe's juvenile justice system into alignment with their tribal values.

## [4.4] Sex Offender Registration and Notification Act in Indian Country

The [Sex Offender Registration and Notification Act](#)<sup>11</sup> (SORNA) also applies to tribal juvenile justice systems. The tribe needs to have a comprehensive approach that is a tribally “global/all encompassing” approach to youth sex offenders. How and where the provisions of this act are referenced or addressed in tribal law is a local issue, but any juvenile code should recognize the outstanding issues as related to youth. SORNA provides a comprehensive set of minimum standards for sex offender registration and notification in the United States. SORNA aims to close potential gaps and loopholes that existed under prior law and to generally strengthen the nationwide network of sex offender registration and notification programs.

SORNA also recognizes tribal court convictions. [Section 127 of SORNA](#) attempts to track the existing jurisdictional framework on Indian lands, but does so in a way that grossly oversimplifies the complex distribution of authorities. SORNA recognizes two classes of tribes: (1) those subject to PL 280 jurisdiction in the six mandatory PL 280 states (Minnesota, Wisconsin, California, Nebraska, Oregon, and Alaska) and (2) all other tribes. For tribes in the first category, authority and responsibility to implement SORNA on Indian lands was automatically delegated to the state in which the tribal lands are located. Tribes in the second category include those tribes subject to PL 280 jurisdiction but that are located within the voluntary PL 280 states, and where they were given one year to pass a resolution “elect[ing] to carry out [SORNA] as a jurisdiction subject to its provisions.”<sup>12</sup> Those tribes that failed to enact a resolution before the deadline joined the mandatory PL 280 tribes in the first category, and all responsibility to implement the SORNA requirements on tribal lands was delegated to the state.

Of the 562 federally recognized Indian tribes in the United States in 2006, 211 were eligible to make an election under Section 127 of SORNA. The Department of Justice reported that, as of 2006 198

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<sup>11</sup> PL 248-109.

<sup>12</sup> Id.

of the eligible tribes passed a resolution expressing their intention to comply with the SORNA mandates. An additional five tribes passed resolutions delegating their responsibilities under the act to the states in which the tribes' lands are located. A number of Indian tribes in mandatory PL 280 jurisdictions, while expressly excluded from making an election under Section 127, passed resolutions stating their intention to comply with the law and expressing their opposition to the delegation of their authority to the state. Although Section 127 included a stringent deadline for tribes to elect to comply with the SORNA mandates, the law also acknowledged that any tribe that has made a [Section 127](#) election may change its mind at any time and the responsibility for implementing SORNA on tribal lands will immediately fall to the state.

This is a developing area of law in Indian country. Unfortunately, Indian country has been the repeated hunting grounds for perpetrators with histories of victimizing, both in modern times and in prior eras. It is important that Indian communities implement policies that address these issues. It is of equal importance that in so doing particular attention be paid to the need to label individuals as sex offenders only when justified by their actions and the communities' right to protection.

## [4.5] Conclusion

The offenses/consequences established by a team will create the environment in which their community addresses youth who are not being successfully managed by themselves or their families. It is important that this management happen in a fashion that is value consistent with the community and that the practices of this system truly represent the values of each community. Similarly, it is important to keep in mind youth brain development and how it factors into offense definitions and appropriate consequences. The long-term impact of failing to intervene or intervening inappropriately is harm to our youth, their individual success, and the future welfare of the tribe and tribal community.

# Part II: Workbook

The workbook portion of this resource is designed to be used by a group of people including tribal and justice system leaders and personnel, representatives from service agencies, community members, and representatives of youth and their families who are interested in developing or revising a tribal juvenile code. Please refer to Part I of this resource to identify key community members that might be included in this group (Chapter 1, section 1.7, “How to Organize to Create a Juvenile Code”). Part II, the workbook, is designed to be used by both individuals and groups as a starting point for value and policy discussions, system planning and design, and the drafting of specific provisions on identified subtopics.

Code development is often considered a boring, dry matter, but selecting the key provisions that appear in most juvenile codes and looking at options will stimulate discussion on the provisions your community really needs and wants and the provisions that support your cultural beliefs about youth and family. A tribal juvenile code should reinforce community values and set out the structure and process for your juvenile justice system. Further, developing or revising a juvenile code will force a hard look at your existing juvenile justice system, including educational, therapeutic, and cultural services, programs, and activities, whether they are located in or near the community, or are a part of the existing tribal court and/or its affiliates.

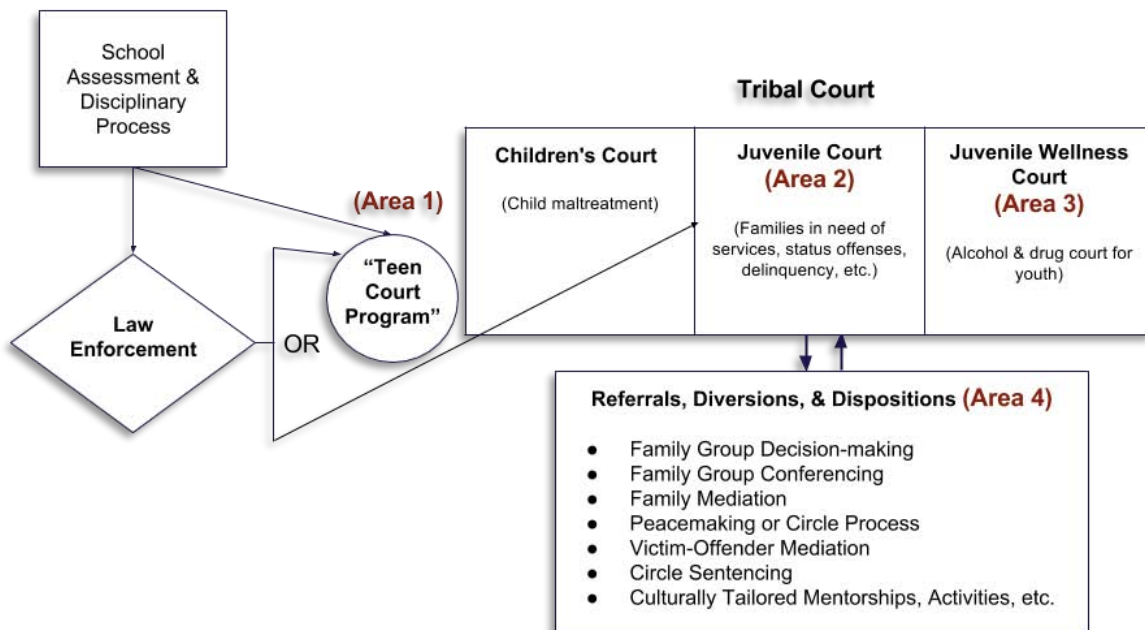
Each chapter in Part II leads the group to make decisions that will affect the final structure and provisions of the tribal juvenile code. While this resource is not designed to serve as a template for the drafting of a juvenile code word for word, it should be used to help your group identify your community’s priority needs, values, and policy preferences relative to the selected provisions of a juvenile code. Once these decisions are made, they may be communicated to an attorney or someone with legal training to help in drafting the final code. The group should always review the attorney’s draft to ensure that it follows the groups’ wishes.

Each chapter of the workbook takes a key section of the juvenile code and provides:

- **Overview:** An overview of the code section.
- **Model and Tribal Code Examples:** Examples of juvenile code sections from other tribes or in some cases model codes.
- **Tribal Code Commentary:** A brief explanation of the code examples.
- **Exercises:** A series of questions that ask your group to evaluate your current situation, discuss key provisions, and record your decisions.

To assist your group in identifying which “key sections” to focus on, we provide a bird’s eye view of the possible, known juvenile justice system components in the following text, with a corresponding table of relevant provisions to work on. We provide this aid with the caveat that each tribal community will innovate as they see fit. You will find a diagram mapping a hypothetical tribal juvenile justice system below. The diagram includes the resources to develop all possible areas, from the school assessment and disciplinary process to a teen court, to the juvenile court and/or juvenile wellness court, and including referrals, diversions, and dispositions. The Teen Court Program is designated as Area 1. The Juvenile Court is designated as Area 2. The Juvenile Wellness Court is designated as Area 3. Finally, the popular (in tribal circles) Referrals, Diversions, and Dispositions are designated as Area 4. Each area corresponds to the required statutory provisions in the tables following the diagram, and to the chapters in the workbook. Review the diagram, determine where your group wishes to focus its juvenile law development or reform efforts, identify which area or areas you wish to develop or reform, and review the corresponding chapters in the workbook. For best results, work with your group to complete and document your answers and decisions with respect to the exercises at the end of each chapter.

### Possibilities for Tribal Juvenile Justice Systems





Please note that most tribes will need to develop or reform the foundation of their juvenile justices' system—their Juvenile Court in Area 2, before going on to add the desired special dockets (e.g., Wellness Court in Area 3, or desired referrals, diversions, and dispositions in Area 4. A Teen Court in Area 1 and Peacemaking and Circle Process in Area 4 may take the form of either a special docket or a diversion program, depending upon how it is set up.

In our review of the approximately thirty publicly available tribal juvenile codes, we have identified numerous important deficits with respect to the Juvenile Court in Area 2 (and that may impact the other areas), including codes that:

- Lump child maltreatment and juvenile delinquency laws together;
- Lump both juvenile “crimes” and status offenses together;
- Are heavy on punishment of juvenile and status offenders;
- Are light on protecting and fostering youth, including treatment, habilitation, and rehabilitation;
- Allow for transfer to adult criminal court;
- Apply the juvenile delinquency court process, including the use of probation and “sentencing” to secure detention, to status offenders;
- Lack multiple referral and/or diversion provisions (e.g., informal resolution, consent decree, and court ordered diversion);
- Lack comprehensive case management, treatment planning, and implementation that involve the family as part of the juvenile court process;
- Lack diversion dockets (e.g., wellness court) and/or programs (e.g., mediation, peacemaking, and circle process);
- Fast track youth to secure juvenile detention facilities through
- Use of inadmissible confessions (out-of-court statements),
- Use of involuntary or unintelligent admissions in court (“guilty pleas”), and/or
- Use of criminal contempt of court for probation violations (can turn a status offense into a crime);
- Apply lower, civil, standards of proof of an offense, as opposed to proof beyond a reasonable doubt;
- Fail to provide youth with basic “Juvenile 8” civil rights (most of ICRA does not apply to juveniles, except for due process and equal protection);
- Fail to provide youth with paid for legal counsel;
- Lack provisions for appropriately identifying and considering trauma in the juvenile court process; Lack provisions protecting against (re)traumatization in the juvenile justice process; and

- Lack provisions for identifying and integrating local tribal culture, custom, traditions, and/or generally accepted practices.

It is important to recognize that the Juvenile Court in Area 2 provides the foundation for all other innovative dockets, referrals, diversions, and dispositions, for those tribes that choose to retain their coercive sovereign powers over juvenile matters as a last resort, and instead of transferring tribal youth to the federal and state systems. A tribe that chooses to exercise the full range of its sovereign powers will need to commit to reforming Area 2 to ensure therapeutic and fair justice for tribal youth and their families.

### Checklist for Developing or Reforming a Juvenile Court (Area 2)

Provision(s)	Comments	Add or Change this?
Subject Matter Jurisdiction	Which youths should be in court? For what types of misconduct?	Yes <input type="checkbox"/> No <input type="checkbox"/>
Transfer	To adult criminal tribal court? To federal or state juvenile court?	Yes <input type="checkbox"/> No <input type="checkbox"/>
Agreements	With agencies and other governments	Yes <input type="checkbox"/> No <input type="checkbox"/>
Juvenile Records	Confidential proceedings, records vs public records, & expungement/destruction	Yes <input type="checkbox"/> No <input type="checkbox"/>
Rights of Youth	From questioning, to custody & interrogation, to court	Yes <input type="checkbox"/> No <input type="checkbox"/>
Rules of Evidence	Special rules for juveniles	Yes <input type="checkbox"/> No <input type="checkbox"/>
Custody & Detention	Special rules for juveniles	Yes <input type="checkbox"/> No <input type="checkbox"/>
Detention Hearings	When you may or should place youth in secure juvenile detention facilities or not	Yes <input type="checkbox"/> No <input type="checkbox"/>
Intake, Referral, Diversion	Informal adjustment, consent decrees, and/or court ordered diversion	Yes <input type="checkbox"/> No <input type="checkbox"/>
Juvenile Offender Process	Trials for Juvenile Crimes	Yes <input type="checkbox"/> No <input type="checkbox"/>
FINS/Status Offender Process	Hearings for Family in Need of Services/Status Offenses	Yes <input type="checkbox"/> No <input type="checkbox"/>
Disposition Hearings	Placements, supervision, services, probation, restitution, diversions, detention	Yes <input type="checkbox"/> No <input type="checkbox"/>
Truancy – a special status offense	Unexcused absences from school as symptom of need for services	Yes <input type="checkbox"/> No <input type="checkbox"/>
Trauma Sensitive Provisions	Indian youth tend to be vulnerable and traumatized requiring special processes & services which they are not getting	Yes <input type="checkbox"/> No <input type="checkbox"/>
Integrating Culture, Customs, Traditions	Juvenile Court laws & processes	Yes <input type="checkbox"/> No <input type="checkbox"/>

**Checklist for Developing or Reforming the Process for Referrals,  
Diversions, and Dispositions (Area 4)**

Desired Services or Program	Comments	Add or Change this?
Treatment Planning & Management? (youth & family)*	As part of Juvenile Court intake, referral, &/or diversion	Yes <input type="checkbox"/> No <input type="checkbox"/>
Case Planning & Management? (youth & family)*	As part of Juvenile Court intake, referral, &/or diversion	Yes <input type="checkbox"/> No <input type="checkbox"/>
Family Group Decision-making***	Family involvement in treatment & case planning	Yes <input type="checkbox"/> No <input type="checkbox"/>
Family Group Conferencing***	Family involvement in reparations to those harmed, healing, & reintegration	Yes <input type="checkbox"/> No <input type="checkbox"/>
Family Meditation**	Family meditation of any issues the family identifies	Yes <input type="checkbox"/> No <input type="checkbox"/>
Peacemaking or Circle Process**	Often community involvement in reparations to those harmed, healing, and reintegration of perpetrator into community	Yes <input type="checkbox"/> No <input type="checkbox"/>
Victim-Offender Mediation**	Reparations & healing between perpetrator & those harmed	Yes <input type="checkbox"/> No <input type="checkbox"/>
Circle Sentencing **	Reparations & healing between perpetrator & those harmed	Yes <input type="checkbox"/> No <input type="checkbox"/>
Culturally tailored mentorships, activities, etc.**	Cultural values, education, mentorships, rites of passage, cleansing & healing ceremonies, etc.	Yes <input type="checkbox"/> No <input type="checkbox"/>
<p>* may be written into juvenile statute (code)  ** usually had its own informal or formal rules governing process</p>		

### Checklist for Developing or Reforming Area 3

Key Components	Policy, procedure, law, or rule, &/or agreements	Work on this aspect?
Uses a team approach: <ul style="list-style-type: none"> <li>▪ Tribal Juvenile and/or Family Court</li> <li>▪ Alcohol &amp; drug treatment</li> <li>▪ Mental health treatment</li> <li>▪ Community healing resources</li> </ul>	<ul style="list-style-type: none"> <li>▪ Wellness Court establishment statute</li> <li>▪ Inter-agency agreements</li> <li>▪ Inter-governmental agreements</li> </ul>	Yes <input type="checkbox"/> No <input type="checkbox"/>
Youth are referred to, or are court order by Tribal Juvenile/Family Court, to Wellness Court, using a fair process	Juvenile Court statute <ul style="list-style-type: none"> <li>▪ Informal Adjustment</li> <li>▪ Consent Decree</li> <li>▪ Court Order</li> </ul>	Yes <input type="checkbox"/> No <input type="checkbox"/>
Youth have to be eligible: <ul style="list-style-type: none"> <li>▪ Substance using or abusing</li> <li>▪ Alleged to have committed an eligible offense</li> </ul>	Wellness Court establishment Statute <ul style="list-style-type: none"> <li>▪ Jurisdiction/Eligibility</li> </ul>	Yes <input type="checkbox"/> No <input type="checkbox"/>
Treatment is different: <ul style="list-style-type: none"> <li>▪ Frequent court supervision (e.g., bi-monthly)</li> <li>▪ Happens in phases over time (e.g., 1 yr plus)</li> <li>▪ Alcohol &amp;/or drug treatment</li> <li>▪ Mental health treatment</li> <li>▪ Culture incorporated</li> </ul>	<ul style="list-style-type: none"> <li>▪ Inter-agency agreements</li> <li>▪ Third-party contracts</li> <li>▪ Wellness Court Policies &amp; Procedures                             <ul style="list-style-type: none"> <li>▪ Phased Treatment Plan</li> </ul> </li> </ul>	Yes <input type="checkbox"/> No <input type="checkbox"/>
Intensive case management & alcohol/drug testing	Wellness Court Policies & Procedures	Yes <input type="checkbox"/> No <input type="checkbox"/>
Judge & team use frequent rewards & sanctions to get Youth to comply with their conduct & treatment plans	Wellness Court Policies & Procedure	Yes <input type="checkbox"/> No <input type="checkbox"/>
Judge leads the team & interacts with Youth as judge & mentor in and out of Wellness Court hearings	N/A but could be in Wellness Court Policies & Procedures	Yes <input type="checkbox"/> No <input type="checkbox"/>
Wellness Court has a monitoring and evaluation plan & data collection to make sure what they are doing this working	N/A	Yes <input type="checkbox"/> No <input type="checkbox"/>
Have a interdisciplinary & community education plan & operations	<ul style="list-style-type: none"> <li>▪ Inter-agency agreements</li> <li>▪ Inter-governmental agreements</li> </ul>	Yes <input type="checkbox"/> No <input type="checkbox"/>
Have Wellness Court policies, procedures, & agreements	<ul style="list-style-type: none"> <li>▪ Wellness Court Policies &amp; Procedures</li> <li>▪ Inter-agency &amp; Inter-governmental Agreements</li> </ul>	Yes <input type="checkbox"/> No <input type="checkbox"/>



# Chapter 5: General Provisions of the Juvenile Justice Code

## [5.1] Overview

One early decision that you will have to make is how to combine your draft laws by topic. Many contemporary tribal codes conflate the tribe’s dependency process (addressing child maltreatment) with its delinquency process (addressing juvenile and status offenses). We recommend that tribes design separate processes and draft independent statutes (codes) for the following reasons:

- The purposes of the two laws are different (child protection versus rehabilitating adolescents and holding them accountable).
- Juvenile delinquency adjudications (trials) require more stringent requirements (with statutory reinforcement of the “Juvenile 8” Rights—see [Chapter 11: Rights in Juvenile Proceedings](#)).
- The required standard of proof for juvenile delinquency adjudications is higher (beyond a reasonable doubt—see [Chapter 11: Rights in Juvenile Proceedings](#) and [Chapter 12: Evidentiary Rules in Juvenile Proceedings](#)).
- More and specific, tailored, statutory “doors” (using “informal adjustment, consent decrees, and various court orders”) are desirable for adolescents and young adults to participate in services, programs, and activities, whether for therapeutic and/or cultural purposes—see [Chapter 15: Informal Adjustment in Juvenile Proceedings](#), [Chapter 17: Presenting Officer/Prosecutor and Consent Decrees](#), and [Chapter 19: Predisposition Studies in Juvenile Proceedings](#).
- The juvenile delinquency dispositions are different and may be more severe thus requiring special protections for youth (restitution, etc. and placement in a secure juvenile detention facility, in addition to placement in the home with protective supervision, kin and foster care placements, and guardianships—see [Chapter 20: Disposition in Juvenile Proceedings](#) and [Chapter 21: Nondelinquency Proceedings—Status Offenses/Family in Need of Services \(FINS\)](#)).

A second and related decision in designing and drafting your juvenile law is whether to include two separate processes, one for juvenile offenders and one for status offenders (note that family-in-need-of-services [FINS] process is a type of “status offender” process and may be preferred as it prioritizes precourt services to youth and their families). We recommend that tribes design and include both processes in their juvenile law.

While the purposes, rights, and doors to services, programs, and activities may be the same, status offenders are treated differently in the following ways for the following reasons (see [Chapter 21: Nondelinquency Proceedings—Status Offenses/Family in Need of Services \(FINS\)](#)):

- The disposition options for status offenders are much more limited (legal custody may only be transferred temporarily, e.g., for thirty days).
- Placement outside of home, kin or other responsible adult placements, or foster care is limited to “juvenile shelter facilities” (such as shelters, halfway houses, and group homes—placement in secure juvenile detention facilities and adult penal facilities is prohibited, even with sight and sound separation).
- The disposition orders automatically terminate after a short period of time, for example, thirty days with one possible extension of ninety days.

The thinking behind treating status offenders differently than juvenile offenders is that, given what we now know about adolescent brain development, “status offending” is likely a normal part of growing up, necessitating guidance and assistance, but it does not rise to the level of actionable misconduct in the juvenile justice system, much less the criminal justice system. The statutory limits on applicable dispositions and placements protect status offenders from future juvenile justice or criminal justice system involvement. The harms of such involvement include being labeled as delinquent or a criminal (which negatively affects the youth’s self-concept going forward, e.g., thinking “I am bad” or “I am a criminal”); having a permanent, negative record; and potentially regularizing the youth’s involvement in the juvenile and criminal justice system in the future.

Your juvenile code should contain general provisions that describe the problem to be addressed by the code. If you have researched the problem of juvenile misconduct in your community, you may have specific data or conclusions about the problem. This type of information should appear in a *Findings* section of a code.

A *Purposes* section of a code explains why your community is adopting this code. It explains what you want to accomplish by adopting the code. You may have several goals or purposes in passing this law.

While there is no requirement that your code include both a Findings and a Purposes section, the inclusion of both of these sections can be very helpful in explaining your philosophy toward youth justice and the intent of the law. These sections are also helpful to tribal judges in interpreting the code on a daily basis. If a case is appealed, these sections will likely also be used by the appellate judges in interpreting the code.



## [5.2] Model Code Examples

### (1989) BIA Tribal Juvenile Justice Code

#### 1-1 SHORT TITLE, PURPOSE AND DEFINITIONS

##### **1-1 A. Short Title**

Title 1 (Chapters 1-1 through 1-21) shall be entitled “The Juvenile Justice Code” (code).

##### **1-1 B. Purpose**

The Juvenile Justice Code shall be liberally interpreted and construed to fulfill the following expressed purposes:

1. To preserve and retain the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this code;
2. To recognize that alcohol and substance abuse is a disease which is both preventable and treatable;
3. To remove from children committing juvenile offenses, the legal consequences of criminal behavior and to substitute therefore a program of supervision, care, and rehabilitation consistent with the protection of the \_\_\_\_\_ Community;
4. To achieve the purposes of this code in a family environment whenever possible, separating the child from the child’s parents only when necessary for the child’s welfare or in the interests of public safety;
5. To separate clearly in the judicial and other processes affecting children under this code the “juvenile offender” and the “family in need of services,” and to provide appropriate and distinct dispositional options for treatment and rehabilitation of these children and families;
6. To provide judicial and other procedures through which the provisions of this code are executed and enforced and in which the parties are assured a fair hearing and their civil and other legal rights recognized and enforced;
7. To provide a continuum of services for children and their families from prevention to residential treatment, with emphasis whenever possible on prevention, early intervention and community-based alternatives; and;
8. To provide a forum where an Indian child charged to be “delinquent” or a “status offender” in other jurisdictions may be referred for adjudication and/or disposition.

University of Washington  
Center of Indigenous Research and Justice  
[Model Tribal Juvenile Code](#)  
CHAPTER 1 GENERAL PROVISIONS

**1.01.110 Purpose**

This article shall be construed and interpreted to fulfill the following purposes:

- (a) to secure the care, protection, and mental and physical welfare of children coming within the jurisdiction of the [Tribe] Juvenile Court;
- (b) to preserve and retain the unity of the family and to carry out the other purposes of this article in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or the safety and protection of the community;
- (c) to distinguish, in judicial and other processes affecting children coming within the provisions of this article, between the child who has committed a delinquent act and the child in need of services, and to provide appropriate and distinct dispositional options for these children and their families;
- (d) to remove from children committing delinquent acts the legal consequences of criminal behavior, and to substitute therefore programs of supervision, treatment, and rehabilitation which:
  - (1) hold them accountable for their actions;
  - (2) provide for the safety and protection of the community; and
  - (3) promote the development of competencies which will enable them to become responsible and productive members of the community;
- (e) to set forth procedures through which the provisions of this article are to be executed and enforced, while ensuring the rights of the parties are recognized and protected; and
- (f) to coordinate services for children and their families, with an emphasis on prevention, early intervention, diversion and community-based alternatives.

## [5.3] Tribal Code Examples

### Zuni Tribal Code

#### Title IX. Zuni Children's Code

#### CHAPTER 1. GENERAL PROVISIONS

#### Section 9-1-2 Purpose, Construction and Severability

A. It is the purpose of this Children's Code to:

1. Recognize that the young people are the Zuni Pueblo's most important resource and that their welfare is paramount;
2. Secure for each child before the Court the care and guidance that is in the best interest of the child and consistent with the customs, cultural values, and laws of the Pueblo of Zuni;
3. Whenever possible preserve and strengthen family ties and a child's cultural and spiritual identity to help the child become a productive and well-adjusted member of the community;
4. Protect the peace, safety, and security of the Pueblo of Zuni and its community members;
5. Foster cooperative intergovernmental relations between the Pueblo of Zuni and the state of New Mexico and other states and tribes, with regard to the welfare of children and families; and
6. Protect the rights of Zuni parents and the sovereign and traditional right of the Zuni Pueblo to determine the best interest of children and families.

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### The Laws of the Confederated Salish and Kootenai Tribes, Codified

#### Title III, Chapter 3 YOUTH

#### Part 1 - General Provisions and Definitions

#### Section 3-2-101. Policy

The Confederated Salish and Kootenai Tribes (Tribes) recognize Indian children as the Tribes' most important resource, and declare it to be the policy of the Tribes to treat Indian children in accordance with their paramount importance. Indian children shall be entitled to a permanent, physical and emotional environment necessary to promote their successful development into productive, responsible adults. It is the policy of the Tribes to prevent the unwarranted break-up of Indian families by adopting procedures that recognize family member rights while utilizing the best interests of the child standard. Finally, it is the policy of

the Tribes, when permanent out-of-home placements are necessary, that those placements be accomplished through guardianship and adoption in the child's extended family; legal adoption outside the Tribes shall be the least preferred alternative.

Sault Ste. Marie Tribal Code

CHAPTER 36: JUVENILE CODE

**SUBCHAPTER I: PREAMBLE**

**36.102 Purpose.**

The Juvenile Code shall be liberally interpreted and construed to fulfill the following expressed purposes:

- (1) To preserve and retain the unity of the family whenever possible and to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of this Chapter.
- (2) To recognize that alcohol and substance abuse is a disease, which is both preventable and treatable.
- (3) To remove from children committing juvenile offenses, the legal consequences of criminal behavior and to substitute therefore a program of supervision, care, and rehabilitation consistent with the protection of the Sault Ste. Marie Tribal Community.
- (4) To achieve the purposes of this Chapter in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety.
- (5) To separate clearly in the judicial and other processes affecting children under this Chapter the juvenile offenses and the juvenile status offenses, and to provide appropriate and distinct dispositional options for treatment and rehabilitation of these children and families.
- (6) To provide judicial and other procedures through which the provisions of this Chapter are executed and enforced and in which the parties are assured a fair hearing and their civil and other legal rights recognized and enforced.
- (7) To provide a continuum of services for children and their families from prevention to residential treatment, with emphasis whenever possible on prevention, early intervention, and community-based alternatives.

- (8) To provide a forum where an Indian child charged to be delinquent or a status offender in other jurisdictions may be referred for adjudication and/or disposition.

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## **The Cherokee Code of the Eastern Band of the Cherokee Nation**

### **Chapter 7A - JUVENILE CODE**

#### **ARTICLE I. - IN GENERAL**

##### **Sec. 7A-1.—Purpose**

This chapter shall be interpreted and construed so as to implement the following purposes and policies:

- a. To divert juvenile offenders from the juvenile system through the intake services authorized herein so that juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety;
- b. To provide procedures for the hearing of juvenile cases that ensure fairness and equity and that protect the constitutional rights of the juveniles and parents; and
- c. To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety.

## **[5.4] Tribal Code Commentary**

A good number of tribes have used the 1989 BIA Tribal Juvenile Justice Code as a foundation for the drafting of their juvenile codes. The alternative, the University of Washington's Center of Indigenous Research and Justice Model Tribal Juvenile Code was completed and made public in the fall of 2014. At the time of first publication of this resource, tribes had not yet had an opportunity to review and incorporate its provisions. Both of the model codes provide good language and may be relied upon as a template that should then be modified to include tribe-specific findings, purposes, and policies.

The Zuni code recognizes that children are the pueblo's most important resource. It emphasizes the importance of the cultural and spiritual identity of a child. The stated purpose is to provide guidance to youth consistent with cultural values. It also recognizes the importance of providing community safety and security and keeping a family together. Another goal of the code is to promote intergovernmental cooperation, while recognizing the sovereignty of the Zuni's to determine what is in the best of interest of Zuni children and families.

The Confederated Salish and Kootenai tribes recognize that the welfare of children is paramount and that each child before their court should receive the care and guidance needed to become responsible adult members of their community. They also recognize the importance of maintaining family ties and strengthening the child's individual, cultural, and tribal identity. The Policy Section of their code highlights the importance of customs and traditions and states that they will be incorporated into the code to the greatest extent possible.

The Sault Ste. Marie Tribal Code requires the court provide services to care for the mental and physical needs of children before the juvenile court. The code specifically mentions alcohol abuse as a preventable and treatable disease, a common problem in delinquency cases. The code intends to remove the consequences of criminal behavior from a juvenile, and instead provide supervision, care, and rehabilitation consistent with the safety concerns of the community. The juvenile court is also a forum for tribal children adjudicated delinquent in other jurisdictions and referred to the Sault Ste. Marie Nation for adjudication and disposition.

The Eastern Band of Cherokee has set up a juvenile system designed to divert children from the court system. During intake the children are diverted to appropriate services. Keeping children in their homes and receiving help through community-based services is their goal. Juveniles' and their parents' constitutional rights are protected in their juvenile system. The juvenile system focuses on the strength and weaknesses of the child and family with a view toward protecting the public.

Note that most contemporary tribal juvenile codes do not, but should distinguish between children (ages 0–10), adolescents (ages 11–17), and young adults (ages 18–25). These distinctions are desirable given current research on the development of the human brain and adolescents. For purposes of tribal juvenile code development, the research findings implicate the jurisdiction of the juvenile court (as opposed to the dependency or criminal court—children should be handled by the dependency court, and even young adults, on a case-by-case basis, should be handled by the juvenile court); the definition of status offenses versus juvenile offenses; when, if ever, an adolescent should be transferred to adult criminal court; when, if ever, a young adult should be subject to the mitigated punishment and dispositional jurisdiction of the juvenile, as opposed to the criminal court, and the types of educational, therapeutic, and cultural services, programs, and activities that are best suited to each age group.

## [5.5] Exercises

The following exercises are meant to guide you in writing the findings and purposes section of the tribal juvenile code.

- Make a list of the challenges that youth face in your community. Describe the current tribal, state, and/or federal system(s) for dealing with youth misconduct in your community (if you can, flow chart what happens)
  - How is truancy handled?
  - How is alcohol or drug use handled?
  - How is physical assault handled?
- Discuss the guiding philosophy/values that you want for your juvenile justice system and code
  - Habilitation and rehabilitation (helping youth grow and heal)?
  - Restorative justice (requiring youth to repair harm done)?
  - Punishment/retribution (punishing youth)?
  - Accountability (holding youth accountable for their conduct)?
  - Public safety (protecting the public from youth misconduct/harms)?

### Points for discussion \*

**Are any of these national findings, related to Native juvenile delinquency, true in your community? Are there other findings in your community?**

National findings:

- Most delinquent acts by Native youth are low-level offenses, many involving alcohol.
- Native youth receive disproportionately severe sanctions for delinquent acts, such as confinement or transfer to adult justice systems.
- There are inadequate law enforcement resources in Indian country.
- State and federal systems lack cultural competence and fail to attend to Native youths' needs.
- There is an overreliance on incarceration of Native youth.
- There is a lack of support and resources for tribal justice systems.
- Forty-four percent of the Native population is under twenty-five.
- Native youth are twice as likely as white youth and three times as likely as minority youth to commit suicide.

- Gangs are becoming common in Indian country.
- Native youth suffer disproportionately from risk factors leading to delinquency: poor health, poverty, low education attainment, violence, depression, and substance abuse.
- Native youth are overrepresented in the federal and state juvenile justice systems.

Taken from Neelum Arya and Addie Rolnick, “A Tangled Web of Justice, American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems,” Policy Brief, Race and Ethnicity Series, Volume 1. Go to [http://www.campaignforyouthjustice.org/documents/CFYJPB\\_TangledJustice.pdf](http://www.campaignforyouthjustice.org/documents/CFYJPB_TangledJustice.pdf).



# Chapter 6: Subject Matter Jurisdiction

## [6.1] Overview

The tribe shares jurisdiction (concurrent jurisdiction) in many juvenile cases with the federal and/or state government. All tribal codes have a general provision on jurisdiction describing the tribe's general jurisdictional powers. Additionally, tribal juvenile codes have their own section on jurisdiction. This section sets out the extent of the juvenile court's jurisdiction, describing when it has the power to act, the power over what persons, and what it has the power to do. This is known as juvenile court "subject matter jurisdiction."

In your juvenile code the jurisdiction section should refer to definitions in your juvenile code's definition section. In most tribal juvenile codes, the definition section fleshes out the juvenile court's subject matter jurisdiction—its "power over what types of persons." Sample sections are included in this resource.

Many contemporary tribal juvenile courts and their laws will reference and apply offenses defined in the tribe's criminal code to youth. These may include additional status offenses. Status offenses are acts that are illegal because of the age of the youth. Common status offenses include truancy or running away. Status offenses cannot be adequately or fairly dealt with by looking at the youth in isolation, but rather the court may need to deal with the family. Some codes thus term status offenses as "family in need of services" or "family in conflict" and give the juvenile court jurisdiction over the parents or guardians of the youth, as well as the youth. Juvenile courts in general in recent years have narrowed the number of status offenses they handle and some have even eliminated them. See [Chapter 7: Juvenile Offenses](#), [Chapter 21: Nondelinquency Proceedings—Status Offenses/Family in Need of Services \(FINS\)](#), and [Chapter 23: Nondelinquency Proceedings—Stand-Alone Status Offenses](#) for the definitions of juvenile offenses, FINS, and status offenses.

## [6.2] Model Code Examples

### (1989) BIA Tribal Juvenile Justice Code

#### 1-2 JURISDICTION OF THE JUVENILE COURT

There is hereby established for the \_\_\_\_\_ Tribe of the \_\_\_\_\_ Reservation a court to be known as the \_\_\_\_\_ Juvenile Court. The juvenile court has exclusive original jurisdiction over all proceedings established in this code in which an Indian child residing in or domiciled on the reservation is:

##### **1-2 A. Juvenile Offender**

Alleged to be a “juvenile offender” as defined in section 1-1C of this code, unless the juvenile court transfers jurisdiction to the tribal court according to chapter 1-3 of this code; or

##### **1-2 B. Family In Need of Services**

Alleged to be a child whose family is “in need of services” as defined in section 1-1C of this code.

##### **1-2 C. Definitions**

(Note: Certain definitions were omitted)

As used in this code:

4. “Child”: An individual who is less than eighteen (18) years old (see the definition of “transfer to tribal court”).
14. “Family in Need of Services”: Means:
  - (a) a family whose child, while subject to compulsory school attendance, is habitually and without justification absent from school; or
  - (b) a family wherein there is allegedly a breakdown in the parent-child relationship based on the refusal of the parents, guardian, or custodian to permit a child to live with them or based on the child’s refusal to live with his parents, guardian or custodian; and
  - (c) in either of the foregoing situations:
    - (1) the conduct complained of presents a clear and substantial danger to the child’s life or health and the intervention of the juvenile court is essential to provide the treatment, rehabilitation or services needed by the child or his family; or

- (2) the child or his family are in need of treatment, rehabilitation or services not presently being received and the intervention of the juvenile court is essential to provide this treatment, rehabilitation or services. (See chapters 1-16 through 1-19 of this code for specific “family in need of services” procedures).
22. “Juvenile Offender”: A child who commits a “juvenile offense” prior to the child’s eighteenth (18th) birthday.
23. “Juvenile Offense”: A criminal violation of the Law and Order Code of the \_\_\_\_\_ Tribe which is committed by a person who is under the age of eighteen (18) at the time the offense was committed.

**University of Washington**  
**Center of Indigenous Research and Justice**  
[Model Tribal Juvenile Code](#)  
**CHAPTER 1 GENERAL PROVISIONS**  
**1.07 JUVENILE COURT**

**1.07.110 Juvenile Court - Name**

There is hereby established the [Tribe] Juvenile Court, hereinafter referred to as the Juvenile Court.

**1.07.130 Juvenile Court - Jurisdiction**

The Juvenile Court shall have personal, subject matter and territorial jurisdiction to the extent permitted under the Constitution and Laws of the [Tribe] and in which an Indian residing in or domiciled on the [Reservation] is:

- (a) alleged to have committed a delinquent act as defined [herein].
- (b) alleged to be a truant as defined [herein]; or
- (c) alleged to be a child in need of services as defined [herein].

**1.02 DEFINITIONS**

**1.02.110 Definitions**

(Note: Certain definitions were omitted)

- (b) **Child:** A person who:
  - (1) is under eighteen (18) years of age;

(2) is eighteen (18) years of age or older and:

- (A) is alleged, or found by the Juvenile Court, to have committed a delinquent act; and
- (B) therefore comes or remains within the jurisdiction of the Juvenile Court under the provisions of this title.

(c) **Child in Need of Services:** A child who is found by the Juvenile Court:

- (1) to habitually engage in conduct that:
  - (A) is disobedient of the reasonable and lawful commands of the child's parent, guardian, or custodian; and
  - (B) poses an imminent threat to the physical safety of the child or others.
- (2) to be a runaway as defined [herein];
- (3) to have engaged in conduct prohibited by a provision of the tribal code that applies only to children; or
- (4) following the filing of a delinquency petition in accordance with [the provisions of this title]:
  - (A) to be unrestorably incompetent to be adjudicated; and
  - (B) in proceedings conducted in accordance with the provisions of [this chapter]:
    - (i) to have engaged in conduct that would otherwise warrant a finding of delinquency under [the delinquency provisions of this title]; and
    - (ii) to be in need of supervision, treatment or rehabilitation.

(e) **Delinquent Act:** An act, committed by a child, that would be a criminal violation of [the tribal code] if committed by an adult.

(k) **Runaway:** The term "runaway" as used in this title means:

- (1) A child who, without good cause and without the consent of his or her parent, guardian or custodian, is intentionally absent from the child's home or legal residence:
  - (1) with the intent to abandon the child's home or legal residence;
  - (2) for a period of more than 12 hours;
  - (3) between the hours of 8:00 pm and 5:00 am; or

- (4) in circumstances presenting an imminent threat to the child's physical safety.
- (2) A child who has intentionally abandoned a placement ordered by the Juvenile Court or another court having jurisdiction over the child.

## [6.3] Tribal Code Examples

### Sault St. Marie Tribal Code

#### **Chapter 36: Juvenile Code**

#### **SUBCHAPTER II: JURISDICTION OF THE JUVENILE DIVISION**

##### **36.201 Jurisdiction.**

- (1) There is hereby established for the Sault Ste. Marie Chippewa Indians Tribal Court a division to be known as the Juvenile Division. The Juvenile Division has exclusive original jurisdiction over all proceedings established in this Chapter in which an Indian child is:
  - a) alleged to be a juvenile offender as defined in '36.324 of this Chapter, unless the Juvenile Division transfers jurisdiction to the Tribal Court according to '36.202 of this Chapter; or (Section on transfer to adult court)
  - b) alleged to be a child who violates the provisions of subchapter V, VI, VII, or VIII of this Chapter. (Sec. V, Status Offenses; Sec. VI, Compulsory School Offenses; Sec. VII, Curfew; Sec. VIII, Provision Related to Alcohol and Drugs)
- (2) The Juvenile Division shall have exclusive original jurisdiction over all proceedings under this Chapter in which a child is alleged to be a juvenile offender as defined in '36.324 of this Chapter.

#### **SUBCHAPTER III: DEFINITIONS**

(Note: Certain definitions were omitted)

##### **36.303 Adult.**

“Adult” means an individual who is seventeen (17) years of age or older (see the definition of transfer to Tribal Court).

##### **36.306 Child.**

“Child” means an individual who is less than seventeen (17) years old (see the definition of transfer to Tribal Court).

**36.324 Juvenile Offender.**

“Juvenile offender” means a child who commits a juvenile offense or juvenile status offense prior to the child’s seventeenth (17th) birthday.

**36.325 Juvenile Offense.**

“Juvenile offense” means a criminal violation of Chapter 71 of the Tribal Code, which is committed by a person who is under the age of seventeen (17) at the time the offense was committed.

**36.327 Juvenile Status Offense.**

“Juvenile status offense” means a violation of the provisions of subchapters V, VI, VII, and VIII committed by a person who is under the age of seventeen (17) at the time the offense was committed.

**36.340 Transfer to Tribal Court.**

“Transfer to Tribal Court” means transferring a child from the jurisdiction of the Juvenile Division to the jurisdiction of the Tribal Court according to '36.203 of this Chapter, which results in the termination of the Juvenile Division’s jurisdiction over that offense.

**36.341 Tribal Lands.**

“Tribal lands” shall mean:

- (1) all land within the limits of the Tribe’s reservation, including trust land, fee patented land, and rights of way running through the reservation, and
- (2) all land outside the boundaries of the Tribe’s reservation held in trust by the United States for individual members of the Tribe or for the Tribe, and
- (3) all other land considered “Indian Country” as defined by 18 U.S.C. '1151 that is associated with the Tribe.

**36.344 Tribal Child.**

“Tribal child” means a child who is either:

- 1) a member; or
- 2) the biological child of a member; or
- 3) lives on the tribal lands.

[The Laws of the Confederated Salish and Kootenai Tribes, Codified](#)

**TITLE III, CHAPTER 3 YOUTH**

**Part 1 - Purpose, Definitions, and Jurisdiction**

(3-3-101. and 3-3-102. Omitted)

**3-3-103. Jurisdiction of the Youth Court.**

The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation have established a court known as the Confederated Salish and Kootenai Tribal Youth Court. The court has exclusive original jurisdiction over all proceedings established in this code in which an Indian youth is residing in or domiciled on the reservation, alleged to be a “Youth Offender” or “Youth in Need of Supervision,” as defined in Section 3-3-102 of this Chapter, unless the Youth Court transfers jurisdiction to the Tribal Adult Court or a State District Youth Court according to this code. Youth Court does not have jurisdiction over traffic or fish and game offenders, these matters are referred to the appropriate Tribal Court division.

(3-2-104. Omitted)

**3-2-105. Definitions.**

(Note: Certain definitions were omitted)

- (2) “Child” means any person less than eighteen (18) years of age.
- (7) “Delinquent Child” means a child who has committed a delinquent act according to the provisions of the Codes of the Confederated Salish and Kootenai Tribes.
- (8) “Domicile” means the place considered to be the child’s home, according to the traditions and customs of the child’s Tribe, or the place where the child is living and is expected to continue living for an indefinite period of time.
- (15) “Indian Youth or Indian Child” means a child of Indian descent who is either enrolled or enrollable in an Indian tribe, band, community, or who is a biological descendant of an enrolled member and has significant contacts or identification with an Indian community.
- (25) “Youth” means any person less than eighteen (18) years of age.
- (34) “Youth Court” means the Court established by the Confederated Salish and Kootenai Tribes, to hear all proceedings in which a youth is alleged to be a delinquent youth, a youth in need of supervision, or a youth in need of care and includes the Youth Court, the judge, and juvenile probation officers.

- (37) “Youth in Need of Supervision” means a youth who commits an offense prohibited by law which if committed by an adult, would not constitute a criminal offense, including but not limited to a youth who:
- a) Violates any Tribal, Montana municipal, State, or federal law regarding use of alcoholic beverages or tobacco by minors, except that traditional cultural use of tobacco shall not be a youth offense;
  - b) Habitually disobeys the reasonable and lawful demands of his parents, or guardian or is ungovernable and beyond their control;
  - c) Being subject to compulsory school attendance, is habitually truant from school; or
  - d) Has committed any of the acts of a delinquent youth but whom the Youth Court in its discretion chooses to regard as a youth in need of supervision;
  - e) Runaway; or
  - f) Curfew.
- (38) “Youth Offender”: A youth who commits a “Youth Offense” or a “Status Offense” prior to the youth’s eighteenth (18th) birthday.
- (39) “Youth Offense”: A violation of the law and order code of the Confederated Salish and Kootenai Tribes, or equivalent city, state, or federal law, which is committed within the exterior boundaries of the Flathead Indian Reservation by a person who is under the age of eighteen (18) at the time the offense was committed.

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## **Zuni Tribal Code**

### **Title IX. Zuni Children's Code**

#### **CHAPTER 3. CHILDREN’S COURT**

##### **Section 9-3-1. Children’s Court Establishment and Jurisdiction**

- A. **Original Jurisdiction.** There is hereby established the Zuni Tribe’s Children’s Court. Except as may otherwise be provided in this code, the Children’s Court has original jurisdiction over all proceedings brought under the Zuni Children’s Code, and any other proceeding for the commitment of the minor, or the appointment of a guardian or custodian or similar arrangements for care, custody, protection, or best interests of the minor, whether or not arising from a proceeding under this Code.



- B. **Concurrent Jurisdiction.** The Children’s Court shall have concurrent jurisdiction over any minor who within another jurisdiction, commits an act deemed illegal by the criminal laws of that jurisdiction provided that the minor is a resident of the Zuni reservation or under the jurisdiction of the court.
- C. **Composition.** The court shall include the Healing to Wellness Court and other forums for alternative dispute resolution and mediation under the supervision and authority of the court.

**Section 9-1-3. Definitions:**

(Note: Certain definitions were omitted)

- 7. **Child.** A person under 18 years of age.
- 13. **Delinquent Act.** An act, which if committed by an adult, would be designated as a crime under the Zuni Criminal Code or the laws of the state of New Mexico. The term “delinquent act” should also include the possession or consumption of alcohol by a minor.
- 20. **Indian.** A person who is a member or eligible to be a member of a federal recognized tribe, band, community, or Native Alaska village, group, or regional corporation as defined in 43 U.S.C. §1601, et seq.
- 21. **Juvenile Offender.** A person who commits a delinquent act prior to his eighteenth birthday, and includes a person who remains subject to the jurisdiction of the Court because of an act committed prior to his eighteenth birthday.
- 24. **Minor in Need of Care.** A minor who is:
  - A. Neglected by a parent, guardian, custodian, other adult, or other care provider;
  - B. Abused by a parent, guardian, custodian, other adult, or other care provider; or
  - C. A status offender.

**The Cherokee Code of the Eastern Band of the Cherokee Nation**

**Chapter 7A - JUVENILE CODE**

**ARTICLE I. - IN GENERAL**

(7A-1. and 7A-2. Omitted)

**Sec. 7A-3.—Jurisdiction.**

The Cherokee Court has exclusive, original jurisdiction over any case involving an Indian juvenile who, regardless of whether he or she is domiciled within the territory of the Eastern Band of Cherokee Indians, is alleged to have committed a delinquent, undisciplined or unlawful act within the territory of the Tribe. In addition, the Cherokee Court has jurisdiction over the parent, guardian, or custodian of a juvenile who is under the jurisdiction of the court pursuant to this section if the parent, guardian, or custodian has been served with a summons pursuant to section 7A-18. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs. For juveniles alleged to have committed a delinquent, undisciplined or unlawful act within the territory of the Tribe, the minimum age is six years of age. The court also has exclusive original jurisdiction of the following proceedings:

- (1) Proceedings to determine jurisdiction;
- (2) Proceedings to determine whether the juvenile is within the jurisdiction of the court;
- (3) Proceedings to determine whether the facts alleged constitute a delinquent or undisciplined offense;
- (4) Proceedings to determine whether the facts are sufficiently serious to warrant court action;
- (5) Proceedings to obtain assistance from community resources when court action is not necessary;
- (6) Proceedings to determine whether a juvenile who is on conditional release and under after-care supervision of the court counselor has violated the terms of his conditional release;
- (7) Hearing procedures;
- (8) Proceedings for expunction of records of juveniles adjudicated delinquent or undisciplined.

**Sec. 7A-4.—Retention of jurisdiction.**

When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or, until the delinquent juvenile reaches his 16th birthday

and until the undisciplined juvenile reaches his 18th birthday, except as provided otherwise in this section. The court has continuing jurisdiction over a delinquent juvenile who is in custody and over proceedings to determine whether a delinquent juvenile is on probation or who is under the post-release supervision of the court has violated the terms of the delinquent juvenile's probation or the delinquent juvenile's post-release supervision. In addition, the court retains jurisdiction over the parent, guardian, or custodian of a juvenile who is under the jurisdiction of the court pursuant to this section if the parent, guardian, or custodian has been served with a summons pursuant to section 7A-18.

## [6.4] Tribal Code Commentary

A good number of tribes have used the 1989 [BIA Tribal Juvenile Justice Code](#) as a starting point for their juvenile code structure and jurisdiction provisions. The alternative, the University of Washington's Center of Indigenous Research and Justice [Model Tribal Juvenile Code](#) was completed and released in the fall of 2014. At the time of the first publication of this resource, no tribes had yet reviewed the University of Washington model code. Both model codes provide comprehensive and useful templates for tribal juvenile codes.

The Sault Ste. Marie Tribe calls their juvenile court a juvenile division. The division has exclusive and original jurisdiction over an Indian child alleged to be a juvenile offender (unless the division transfers the child to adult court) and over a juvenile alleged to have committed a status offense, alcohol drug offense, curfew, or compulsory school offense. Exclusive and original jurisdiction means the division would be the first and only division of the tribal court to handle the juvenile cases.

Sault Ste. Marie defines a *child* as person under the age of seventeen. It refers to an "Indian child" in the jurisdiction section, but does not define *Indian child* in the code. It does define *tribal child* as one who is a member or is a child of a member, or a child living on tribal land. The term *tribal child* is used throughout the code.

The section then defines *tribal land*. The tribal code gives jurisdiction over an alleged child offender even if the child is not a tribal member, but lives on tribal land. Juvenile offender and status offender are also both necessary definitions to understand the extent of the juvenile division's jurisdiction.

The tribes of the Flathead Indian Reservation call their juvenile court the Confederated Salish and Kootenai Tribal Youth Court. The court has original and exclusive jurisdiction over an Indian youth alleged to be a "youth offender" or "youth in need of supervision."

An *Indian youth* is defined as a child less than eighteen years of age who is a child of Indian descent, either enrolled, eligible for enrollment, or a descendant of an enrolled member and has significant contacts with the community and identification with an Indian community.

A *youth offender* is defined in the code's definitions section as one who commits either a youth offense or a status offense. A "youth in need of supervision" is one that commits a status offense, such as one who violates curfew, consumes alcohol or drugs, fails to comply with parental rules, or is a runaway. The court may transfer jurisdiction over the youth to the adult tribal court under certain circumstances. The section also notes that it does not have jurisdiction over traffic or game violations.

The Zuni Tribe's Children's Court has jurisdiction over minors, defined as children less than eighteen years of age, actions brought under the Children's Code for an alleged delinquent act or child in need of care proceeding. An act committed by a child, which if committed by an adult would be designated as a crime under the Zuni Criminal Code or the laws of the state of New Mexico, is a "delinquent act." The term *delinquent act* includes the possession or consumption of alcohol by a minor. Status offenses are not considered delinquent acts, but rather justify a proceeding for "a minor in need of care."

The Zuni tribal court has concurrent jurisdiction over a minor who commits a delinquent act in a state jurisdiction, but is a resident. Zuni has a Healing to Wellness Court and other alternate dispute-resolution options that fall under the juvenile court jurisdiction.

The Eastern Band of Cherokee makes it clear that it not only has jurisdiction over the proceedings and the minor, but also the parents or guardians of the minor. Because most rehabilitative proceedings require the cooperation of the parents, this provides additional power to enforce a juvenile court order. The Eastern Band of Cherokee has also placed a minimum age requirement of six years of age. A delinquent child at sixteen years of age will no longer be appearing in juvenile court for acts after the age of sixteen, although subject to the court until eighteen if involved with the juvenile court before sixteen years of age.

Note again that most contemporary tribal juvenile codes do not, but should, distinguish between children (ages 0–10), adolescents (ages 11–17), and young adults (ages 18–25) to conform with the current research and findings on the development of the human brain. These findings implicate the jurisdiction of the juvenile court. Children should be handled by the dependency court, adolescents should be handled by the juvenile court, and even young adults, on a case-by-case basis, should be handled by the juvenile court. These findings also implicate a reconsideration of what should be considered a juvenile offense versus what should be considered a status offense or misconduct warranting intervention by the juvenile justice system through its FINS process.

## [6.5] Exercises

The following exercises are meant to guide you in developing a jurisdiction section for your juvenile code that meets the needs and concerns of youth in your community.

- Find and examine your tribe’s general jurisdiction code provision (it may be located in your constitution and/or your judicial or court establishment code)—who comes within the tribe’s jurisdiction?
- Find and examine your tribal court’s subject matter jurisdiction code provision for the juvenile court (in your juvenile code)—are there age requirements?
- What types of conduct or circumstances bring youth within the jurisdiction of your juvenile court?
- Make a list of who you want your tribal juvenile court to have jurisdiction over.
  - Members
  - Resident nonmember Natives/Indians
  - Resident non-Natives/Indians
  - What ages?
    - 0–10 “child”
    - 11–17 “adolescent”
    - 18–25 “young adult”
    - Gender

### Points for discussion \*

Do adolescents have the psychological capabilities necessary to function as competent defendants in court?

Should juveniles accused of juvenile or criminal offenses be held to the same standards of blameworthiness as adults and punished in the same way as adult criminals who have committed similar crimes?

How does exposing juveniles to especially punitive sanctions affect their behavior, development, and mental health?

- During the past two decades, policies and practices concerning the treatment of juvenile offenders in the United States became increasingly punitive, as evidenced by the increase in the number of juveniles tried as adults and the expanded use of harsh sanctions within both the juvenile and criminal justice systems.

- This was a break from the traditional model of juvenile justice, which emphasized rehabilitation rather than punishment as its core purpose that had prevailed for most of the twentieth century.
- Policy makers, practitioners, and mental health professionals need to be familiar with the developmental changes that occur during childhood and adolescence in the capabilities and characteristics that are relevant to their competence to stand trial, their criminal culpability, and their likely response to treatment.
- Brain maturation continues well into adulthood [~25 years of age]—compared to adults, adolescents are more susceptible to peer influence, less oriented to the future, more sensitive to short-term rewards, and more impulsive.
- The research on adolescent brain, cognitive, and psychosocial development supports the view that adolescents are fundamentally different from adults in ways that warrant their different treatment in the justice system.
- An analysis of factors that mitigate criminal responsibility under the law indicates that adolescents are inherently less culpable than are adults and should therefore be punished less severely.
- In addition, studies of competence to stand trial indicate that those who are under 16 are more likely to be incompetent than are adults, raising questions about the appropriateness of trying younger adolescents in criminal court.
- Studies of the impact of punitive sanctions on adolescent development and behavior, including prosecuting and sanctioning adolescents as adults, indicate that they do not deter adolescents from breaking the law and may in fact increase recidivism. In contrast, family-based interventions have been shown to be both effective and cost effective.

\*Taken from Laurence Steinberg, “Adolescent Development and Juvenile Justice,” *Annu. Rev. Clin. Psychol.* 5 (2009): 47–73.

# Chapter 7: Juvenile Offenses

## [7.1] Overview

Tribal juvenile codes have their own section on “subject matter jurisdiction.” This section acts in a dual capacity, often in conjunction with a definitions section to describe what constitutes a “delinquent act,” “juvenile offense,” or a “juvenile crime.” These categories are to be distinguished from “status offenses” or the conduct giving rise to a Family In Need of Services (FINS). Juvenile offenders are subject to a secure detention sanction whereas status offenders or FINS clients are not. Aside from delimiting tribal power and tribal court adjudicatory jurisdiction, these definitions describe the conduct that will bring a youth and his or her family within both the rehabilitative and punitive power of the tribal government.

As such, these definitions should be reflective of actual typical youth misconduct in the region but also known risky behaviors requiring timely intervention given existing resources. Keep in mind that it is now well documented that many states experienced unfounded “moral panics” that fueled punitive statutory reforms in the 1990s and 2000s where youth were viewed as super predators who should be handled by the adult criminal systems. This was bad policy based on misperceptions and unsubstantiated reports of youth crime. In defining your tribe’s “juvenile offenses” use reliable data on the needs of youth in four areas: family problems, mental health, problems with substance use, and youth misconduct. Be sure to include your local treatment providers and youth service providers in the discussion as they will know the circumstances and needs of the youth population. Their perspectives will be invaluable in defining what conduct should trigger tribal government intervention and rehabilitation for youth and their families.

The following facts about adolescents’ development should influence establishment of a juvenile court system focused on habilitation and rehabilitation as opposed to sanction:

1. Teenagers are less competent decision makers than adults. Although capacities for reason and understanding (cognitive abilities) approach adult levels by about age sixteen, evidence suggests they may be less capable than are adults of using these capacities in making real-world choices.
2. Emotional and psychosocial development lags behind cognitive. Adolescents are considerably more susceptible to peer influence than are adults, more likely to focus on immediate rather than long-term consequences, and are more impulsive and subject to mood fluctuations.
3. They are more likely to take risks and probably less skilled in balancing risks and rewards.

4. Personal identity is fluid and unformed in adolescence. This is a period when individuals separate from their parent, experiment (often in risky endeavors), and struggle to figure out who they are<sup>13</sup>.

It may be helpful to review [Section 2.2: Philosophical Choices](#).

## [7.2] Model Code Examples

### [\(1989\) BIA Tribal Juvenile Justice Code](#)

#### [1-1 SHORT TITLE, PURPOSE AND DEFINITIONS](#)

##### 1-1 C. Definitions

As used in this code:

(1. through 22. Omitted)

23. “Juvenile Offense”: A criminal violation of the Law and Order Code of the \_\_\_\_\_ Tribe which is committed by a person who is under the age of eighteen (18) at the time the offense was committed.

### University of Washington

#### Center of Indigenous Research and Justice

#### [Model Tribal Juvenile Code](#)

#### CHAPTER 1 GENERAL PROVISIONS

##### 1.05.110 Definitions

(a. through d. Omitted)

(e) **Delinquent Act:** An act, committed by a child, that would be a criminal violation of [the tribal code] if committed by an adult.

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<sup>13</sup> Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, Cambridge, Massachusetts: Harvard University Press (2008) 151.



## [7.3] Tribal Code Examples

### **The Cherokee Code of the Eastern Band of the Cherokee Nation**

#### **Chapter 7A - JUVENILE CODE**

#### **ARTICLE I. IN GENERAL**

##### **Sec. 7A-2. Definitions.**

Unless the context clearly requires otherwise, the following words have the listed meanings:

(Certain Definitions Omitted)

- (f) Delinquent juvenile shall mean any juvenile who is less than 16 years of age who has committed a criminal offense under tribal or federal laws, including violation of the motor vehicle laws.
  
- (m) Juvenile shall mean any person who is less than 18 years of age and is not married, emancipated, or a member of the armed services of the United States. A juvenile who is married, emancipated, or a member of the armed forces shall be prosecuted as an adult for the commission of a criminal offense. Wherever the term “juvenile” is used with reference to rights and privileges, that term encompasses the attorney for the juvenile as well.

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### **The Klamath Criminal Code**

#### **Title 2 Chapter 19**

#### **JUVENILE OFFENSES**

##### **19.313 Juvenile in Possession of Alcohol or Tobacco.**

It is a crime for a juvenile to buy, attempt to buy, or misrepresent his or her age in attempting to buy alcoholic liquor or tobacco products. It is also a crime for a juvenile to transport, possess, or consume alcoholic liquor or tobacco products. A juvenile who possesses or consumes tobacco product for ceremonial uses under the supervision of a responsible adult is not guilty of an offense under this provision.

##### **19.314 Firearms.**

It is a crime for a juvenile to discharge a firearm on the Reservation unless the juvenile discharges the firearm under the supervision of a parent, guardian, or other responsible adult acting with the permission of the juvenile’s parent or guardian. However, if the juvenile is

twelve (12) years of age or older and has completed a hunter's safety course accredited by the Tribes or the State of Oregon, the juvenile is not guilty of an offense under this provision.

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## **Native Village of Barrow Tribe Juvenile Delinquency Prevention and Rehabilitation Code** \*

### **1-1 SHORT TITLE, PURPOSE, AND DEFINITIONS**

#### **1-1 C. Definitions**

(Note: Certain definitions were omitted)

As used in this Code, except where the context clearly suggests otherwise:

4. **Amusement Device:** Any machine or device designed to be operated or used for playing a game upon the insertion of a coin, trade check or slug, and which is played or operated essentially for amusement and entertainment, but does not mean or include any machine or device used exclusively for the vending of merchandise.
5. **Child or Juvenile:** Any person under the age of eighteen (18) years old who is a member or eligible for membership in the Native Village of Barrow Tribe or other person under the age of eighteen (18) years old where consent is obtained.
7. **Controlled Substance:** Any substances listed in 9.20.040 of the Barrow Municipal Code or AS 11.71.140 through AS 11.71.190 or any amendments thereto, including imitation controlled substances as defined by AS 11.73.099(3).
11. **Delinquent Act:** Any one of the acts set out in Chapter 1-2 of this Code committed by a child, the commission of which would bring that child within the jurisdiction of the juvenile court.
12. **Delinquent Child:** A child who commits a delinquent act prior to the child's eighteenth (18) birthday.
15. **Drug Paraphernalia:** All items, equipment devices, products and materials which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, as further defined in 9.20.040 of the City of Barrow Municipal Code, as that Code may from time to time be amended.

20. **Inhalant:** Any product, legal or illegal, that can be inhaled in order to obtain a high, including but not limited to glue, rubber cement, paint thinner, spray paint, and markers.

## 1-2 DELINQUENT ACTS

The acts set out in this section, when committed by a child, shall be deemed to be delinquent acts that would bring the child within the jurisdiction of the juvenile court pursuant to this Code. The juvenile court may order secure detention, among other rehabilitative remedies, for a child who has been adjudged to have committed any of the acts set out in Sections 1-2A, 1-2B, 1-2C, and 1-2D.

### 1-2 A. Acts Harming People or Animals

1. **Reckless Endangerment:** Recklessly engaging in conduct that creates a substantial risk of serious physical injury to another person.
2. **Throwing or Shooting at People or Animals:** Throwing or shooting any stone, shot or other object into or across any street or alley, or in any place where it is likely to hit another person or an animal wrongfully, or throwing or shooting any stone, shot or other object at any person, vehicle, or animal, except in case where such is justifiably in defense of oneself, of another person or of property.
3. **Cruelty to Animals:** Knowingly inflicting severe physical pain, prolonged suffering or death on an animal.
4. **Possession or Use of Weapons:** Knowingly possessing or using a weapon, other than an ordinary pocket knife, except that it shall not be considered a delinquent act for a child to possess a weapon and to use such weapon for hunting purposes with the consent of his or her parents.

### 1-2 B. Acts against Public Order

1. **Disorderly Conduct:** Engaging in fighting, public indecency, or other acts that in some manner disturb the public or are hazardous to the public.
2. **Dangerous or Reckless Driving:** Operating any land or water vehicle in a dangerous or reckless manner, with excessive speed that is a threat to the safety of the community, or while under the influence of alcohol or drugs.
3. **Excessive Noise:** Creating unreasonable noise which disturbs the peace and privacy of another person in their residence. As used in this section, noise is unreasonable if, considering the nature and purpose of the juvenile's conduct and the circumstances known to the juvenile, including the nature of the location and the time of day or night, the

conduct involves a gross deviation from the standard of conduct that a reasonable person would follow in the same situation. “Noise” does not include speech that is constitutionally protected.

4. **Gambling:** Engaging in any monetary gambling, wagering, or betting activity.

### 1-2 C. Acts against Property

1. **Fire Starting:** Intentionally starting a fire or causing an explosion which recklessly places another person or any property in danger. For purposes of this section, “another person” includes but is not limited to fire and police service personnel or other public employees who respond to emergencies, regardless of rank, functions, or duties being performed.
2. **Vandalism:** Willfully cutting, removing, defacing, or in any manner injuring any building, fence or enclosure, street, bridge, or other property without the express permission of the owner of the property at issue.
3. **Tampering with Vehicles:** Starting or otherwise meddling with, entering, occupying, loitering in, taking, or driving away any automobile or other vehicle belonging to another, without the consent of the owner or person in charge thereof.
4. **Throwing or Shooting at Property:** Throwing or shooting any stone, shot, or other object into or across any street or alley, or in any place where such action is likely to injure property, or throwing or shooting any stone, shot, or other object at any vehicle, structure, electric light, or other property of another (whether public or private), except in cases where such action is justifiably in defense of oneself, of another person, or of property and discharging any slingshot, firearm, pellet gun, or BB gun within one hundred yards of any residential structure, any business, any area used for storage of equipment or vehicles, or any tribal playground, softball field or cemetery, except in cases where such action is done justifiably in defense of oneself, of another person, or of property.
5. **Trespass:** Willfully or in any manner trespassing or intruding upon property not one’s own against the will of the owner, occupant, or agent thereof.
6. **Theft:** Taking the property of another person without that person’s consent, with the intent to steal or deprive the rightful owner of possession.
7. **Depositing Sharp Objects:** Throwing or depositing in any street or other public place any broken glass, bottles, crockery, nails, or other substance whatsoever whereby the feet or body of any person or property may be injured.
8. **Release of Dogs:** Willfully or intentionally releasing the confined dog of another person.

## 1-2 D. Alcohol and Controlled Substances

1. **Possession, Consumption or Being under the Influence of Controlled Substances:** Knowingly consuming, possessing or being under the influence of a controlled substance. Provided, however, that it is not a delinquent act for a juvenile to possess or consume a controlled substance for bona fide religious purposes based on tenets or teachings of a church or religious body, in a quantity limited to the amount necessary for religious purposes, and dispensed by a person recognized by the church or religious body. Provided further that a juvenile does not commit a delinquent act by consuming, possessing, being under the influence of a controlled substance which has been lawfully prescribed for him by a medical doctor. To qualify for this exception, the substance must be in the physical possession of the juvenile for whom it was prescribed or his parent or guardian.
2. **Possession of Alcohol with Intent to Sell:** Possessing an alcoholic beverage with the intent to sell it.
3. **Possession or Use of Inhalants:** Intentionally inhaling or being under the influence of the gas or vapors of any nonprescribed inhalant with the purpose of reaching a high.
4. **Carrying or Transportation of Controlled Substances:** Carrying, transporting, or aiding in the transportation of any controlled substance or any drug paraphernalia. Provided, however, that a juvenile does not commit a delinquent act by carrying or transporting a substance which has been lawfully prescribed for him by a medical doctor. To qualify for this exception, the substance must be in the physical possession of the juvenile for whom it was prescribed or his parent or guardian.
5. **Manufacture, Sale, or Distribution of Controlled Substances:** Participating or aiding in the manufacture, sale, or distribution of controlled substances.
6. **Possession of Drug Paraphernalia:** Knowingly possessing any drug paraphernalia.

\* Not available online, as of April 2015.

## [7.4] Tribal Code Commentary

While a good number of tribes have used the 1989 BIA Tribal Juvenile Justice Code as a starting point for their juvenile code structure and jurisdiction provisions, others alter the definition of “juvenile offender” to either include status offenses or to delineate specific juvenile offenses and/or status offenses. The alternative, University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code was completed and released in the fall of 2014. At the time of the first publication of this resource, no tribes had yet reviewed the University of Washington model code. Both model codes provide comprehensive and useful provisions for tribal juvenile codes.

The tribal statutes highlighted offer three different approaches in defining juvenile offenses. The first is to define juvenile offenses by reference to an existing criminal statute or statutes. For example, the Eastern Band of Cherokee provisions define a “delinquent juvenile” as a person who is less than sixteen years of age who has committed a criminal offense under tribal or federal laws, including violations of motor vehicle laws. The second approach is to adopt a tribal criminal code but to carve out a set of juvenile offenses separate from the adult crimes. See, for example, the Klamath Criminal Code, which has a separate section entitled “Juvenile Offenses” where it defines two crimes—“Juvenile in Possession of Alcohol or Tobacco” and “Firearms.”

A third approach is to set out a list of juvenile offenses in the tribal juvenile court law. See the Native Village of Barrow’s Code, which divides twenty-two delinquent acts into four categories and defines them—acts harming people or animals, acts against public order, acts against property, and acts dealing with alcohol and controlled substances. Whichever approach is used, it is important to craft specific provisions targeted at youth behavior and to understand the purpose for crafting the provision. Is this intended to be a juvenile offense as opposed to a status offense where youth will be subject to secure detention and potential court supervision until they turn eighteen? Does the defined behavior capture risk factors identifying youth who need certain available therapeutic interventions? Do we prefer to establish a juvenile court system that handles only status offenders or that will use only a Family In Need of Services (FINS) process (where there will be no secure detention, there will be limited durations for tribal court supervision, and there will be a heavy focus on family habilitation/ rehabilitation)?

## [7.5] Exercises

The following exercises are meant to guide you in developing a juvenile offense section for your juvenile code that meets the needs and concerns of youth in your community.

- Find and examine your juvenile code’s section defining “delinquent act,” “juvenile offense,” or “juvenile crime”—what misconduct is targeted?
- Does your juvenile code include “status offenses” (conduct or misconduct that is not criminal and that may only be committed by a minor, e.g., truancy, curfew violations, running away, and possession and use of tobacco/inhalants)?
- Find and examine your juvenile code’s “disposition” section—does your juvenile code treat juvenile offenders and status offenders the same?

Make a list of the juvenile offenses you wish to target.

## Read and Discuss\*

### What are the common youth “crimes”?

#### Top 25 Crimes, Offenses and Violations Referred to Youth Justice Diversion Programs

1. **Theft/Larceny**—Typical Cases: Shoplifting, Stealing a Bicycle, Stealing from Backpacks and Lockers
2. **Vandalism**—Typical Cases: Tagging and Graffiti, Drawing on Public Restroom Walls, Keying a Car and Cutting Auto Tires
3. **Alcohol Offenses**—Typical Cases: Underage Purchase or Possession, Underage Consumption of Alcohol, Providing Alcohol to Underage Persons, Possessing an Open Container in Public/Car
4. **Disorderly Conduct**—Typical Cases: Fighting in a Public Place, Cursing at a Teacher, Flashing, Mooning and Indecent Exposure
5. **Simple Assault or Battery**—Typical Cases: Bullying When It Amounts to Assault, Child/Parent Physical Disagreements, Shoving or Pushing a Person
6. **Possession of Marijuana**—Typical Cases: Possessing Small Amounts of Marijuana, Smoking Marijuana in a Public Place
7. **Tobacco Offenses**—Typical Cases: Illegally Purchasing Tobacco, Chewing or Smoking Tobacco at School, Providing or Enabling Youth to Use Tobacco
8. **Curfew Violations**—Typical Cases: Sneaking Out of Home after Curfew, Walking Home after Curfew, Violating a Park Curfew
9. **School Disciplinary Offense**—Typical Cases: Disrupting Class, Food Fights and Cheating, Violating the Dress Code
10. **Traffic Violations**—Typical Cases: Speeding or Failing to Yield, Not Wearing a Seat Belt, Riding in the Back of a Pickup Truck
11. **Truancy**—Typical Cases: Cutting Class, Having Excessive Tardies, Violating Court Order to Attend School
12. **Criminal Trespass**—Typical Cases: Entering a Vacant Building, Entering Land or a Dwelling without Permission, Returning to a Store after Being Banned
13. **Mischief/Criminal Nuisance**—Typical Cases: Damaging a Mailbox, Egging or Toilet-papering a House, Picking Flowers in a Restricted or Private Area

14. **Possession of Drug Paraphernalia**—Typical Cases: Having a Pipe in Pocket with Resin, Using Drug Paraphernalia to Use a Controlled Substance, Possessing Drug Paraphernalia to Grow Marijuana
15. **Harassment**—Typical Cases: Bullying, Making Telephone Calls without Good Reason, Insulting or Taunting Another Person to Provoke a Disorderly Response
16. **Fraud**—Typical Cases: Writing Bad Checks, Impersonating Another Person, Committing Fraud Via E-Mail
17. **Burglary**—Typical Cases: Enter Friends or Relatives Homes to Steal Something, Entering a School Building to Steal Something, Entering a Home/School and Causing Damage
18. **False Reporting**—Typical Cases: Pulling a Fire Alarm, Calling in False 911 Calls, Calling in a Bomb Threat
19. **Loitering**—Typical Cases: Hanging Out in a Group in Front of a Building, Smoking in Groups on the Street Corner, Being in a Park or Store after Closing
20. **Possession of Stolen Property**—Typical Cases: Having a Bicycle You Know Is Stolen, Receiving Stolen Goods from a Friend, Being in the Company of Someone Who Is Stealing
21. **Possession of a Weapon**—Typical Cases: Unlawfully Possessing Pepper Spray, Possessing a BB or Pellet Gun While Underage, Carrying Weapons Like Metal Knuckles or Nunchucks
22. **Reckless Endangerment**—Typical Cases: Throwing Snowballs at Cars, Hanging on to a Moving Car, Speeding Out of a Parking Lot
23. **Resisting an Officer without Violence**—Typical Cases: Lying to a Police Officer, Including One's Age, Running Away from Law Enforcement, Refusing to Move When Ordered by an Officer
24. **Runaways**—Typical Cases: Running Away from a Noncustodial Parents House, Going to Another City/State When Forbidden by a Parent, Staying at a Friend or Families House without Parent Permission
25. **Unauthorized Use of a Motor Vehicle**—Typical Cases: Driving without a License, Unlawfully Using All-Terrain Vehicles (ATVs), Taking Parents or Friends Car without Permission

\* Taken from Global Youth Justice. Go to [http://www.globalyouthjustice.org/TOP\\_25\\_CRIMES.html](http://www.globalyouthjustice.org/TOP_25_CRIMES.html).



# Chapter 8: Transfer to Tribal Criminal Court [Or Other Jurisdictions]

## [8.1] Overview

Under some limited circumstance your tribe may feel that certain cases involving youth should be handled by the tribal criminal court, where the youth is treated as an adult. Common candidates for transfer include older adolescents who have not been responsive to past juvenile court supervision and who commit serious crimes. A tribe may want to balance the concerns for public safety with the recognition of immaturity of adolescents as a mitigating factor in the crime. Generally, a youth transferred and convicted in a criminal court will have a criminal record and may be subject to longer sentences and incarceration in a prison.

At times the federal government or state government may seek to prosecute a youth as an adult in federal or state court. The sentences in tribal juvenile court may not be longer than in tribal criminal court, but sentences in federal or state court can be significantly longer. Often tribal juvenile courts consider whether the juvenile court has the resources to rehabilitate the youth. Once the youth is transferred to tribal criminal court, the tribal juvenile court will no longer have jurisdiction over that case.

Judicial waiver, statutory exclusion, and direct file are three mechanisms used to transfer juvenile offenders to adult criminal court. Generally, juvenile court has original jurisdiction and reviews a particular case to determine whether certain factors established by the code or by precedent have been met and whether the crime and the characteristics of the youth justify adult treatment. If it finds sufficient cause, it will waive juvenile court jurisdiction.

However, some state and tribal laws permit a prosecutor to directly file a case in adult criminal court and then the judge in that court determines at a hearing if the case is an appropriate case for the criminal court. There are also some statutes that legislatively mandate a transfer to adult criminal court for certain crimes. States have increasingly allowed transfer of juveniles to adult criminal courts at lower ages and for more offenses, but tribes should examine their values, customs, and concerns to make these important decisions. Some states have passed “once waived, always waived” statutes, which require that once juvenile court jurisdiction has been waived, it is waived in the future for other offenses committed by the juvenile. This is not recommended, but merely acknowledged.

Some tribes do not have sufficient resources to work with youth offenders with serious problems and may consider transferring a juvenile case to state or federal juvenile jurisdiction if the state/federal system has more resources. The next section describes transfers to state or federal juvenile courts to allow for expanded resources and cooperation with federal or state programs through memorandums of understanding (MOU).

It may be helpful to review [Chapter 4: Criminal Offenses](#).

## [8.2] Model Code Examples

### [\(1989\) BIA Tribal Juvenile Justice Code](#)

#### [1-3 TRANSFER TO TRIBAL COURT](#)

##### **1-3 A. Transfer Petition**

An officer of the court may file a petition requesting the juvenile court to transfer the child to the jurisdiction of the adult tribal court if the child is sixteen (16) years of age or older and is alleged to have committed an act which would have been considered a serious crime if committed by an adult.

##### **1-3 B. Transfer Hearing**

The juvenile court shall conduct a hearing to determine whether jurisdiction of the child should be transferred to tribal court. The transfer hearing shall be held within ten (10) days of receipt of the petition by the court. Written notice of the time, place and purpose of the hearing is to be given to the child and the child's parent, guardian, or custodian at least three (3) days before the hearing. At the commencement of the hearing, the court shall notify the child and the child's parent, guardian or custodian of their rights under chapter 1-7 of this code.

##### **1-3 C. Deciding Factors in Transfer Hearing**

The following factors shall be considered when determining whether to transfer jurisdiction of the child to tribal court:

1. the nature and seriousness of the offense with which the child is charged;
2. the nature and condition of the child, as evidenced by his age, mental and physical condition; and
3. the past record of offenses.

##### **1-3 D. Standard of Proof in Transfer Hearing**

The juvenile court may transfer jurisdiction of the child to tribal court only if the court finds clear and convincing evidence that both of the following circumstances exist:

1. there are no reasonable prospects for rehabilitating the child through resources available to the juvenile court; and
2. the offense(s) allegedly committed by the child evidence a pattern of conduct which constitutes a substantial danger to the public.

### **1-3 E. Pre-Hearing Report in Transfer Proceedings**

At least three (3) days prior to the transfer hearing, the petitioner shall prepare a pre-hearing report for the juvenile court and make copies of that report available to the child and the child's advocate, parent, guardian or custodian. The pre-hearing report shall address the issues described in sections 1-3C and 1-3D above.

### **1-3 F. Written Transfer Order**

A child may be transferred to tribal court only if the juvenile court issues a written order after the conclusion of the transfer hearing which contains specific findings and reasons for the transfer in accordance with sections 1-3C and 1-3D above. This written order terminates the jurisdiction of the juvenile court over the child with respect to the juvenile offense(s) alleged in the petition. No child shall be prosecuted in the tribal court for a criminal offense unless the case has been transferred to tribal court as provided in this chapter.

## **[8.3] Tribal Code Examples**

### [Sault Ste. Marie Tribal Code](#)

#### **Chapter 36 Juvenile Code**

#### **SUBCHAPTER II: JURISDICTION OF THE JUVENILE DIVISION**

(36.201 Omitted)

#### **36.202 Transfer Petition.**

The prosecutor may file a petition requesting the Juvenile Division to transfer the child to the jurisdiction of the adult Tribal Court if the tribal child is fifteen (15) years of age or older and is alleged to have committed an act which would have been considered a serious crime if committed by an adult.

#### **36.203 Transfer Hearing.**

The Juvenile Division shall conduct a hearing to determine whether jurisdiction of the child should be transferred to Tribal Court. The transfer hearing shall be held within ten (10) days

of receipt of the petition by the Court. Written notice of the time, place, and purpose of the hearing is given to the child and the child's parent, guardian, or custodian at least three (3) days before the hearing. At the commencement of the hearing, the Court shall notify the child and the child's parent, guardian, or custodian of their rights under '36.402 of this Chapter.

#### **36.204 Deciding Factors in Transfer Hearing.**

The following factors shall be considered when determining whether to transfer jurisdiction of the child to Tribal Court:

- 1) The nature and seriousness of the offense with which the child is charged.
- 2) The nature and condition of the child, as evidenced by his age, mental and physical condition.
- 3) The past record of offenses.

#### **36.205 Standard of Proof in Transfer Hearing.**

The Juvenile Division may transfer jurisdiction of the child to Tribal Court only if the Court finds clear and convincing evidence that both of the following circumstances exist:

- 1) There are no reasonable prospects for rehabilitating the child through resources available to the Juvenile Division.
- 2) The offense(s) allegedly committed by the child evidence a pattern of conduct which constitutes a substantial danger to the public.

#### **36.206 Prehearing Report in Transfer Proceedings.**

At least three (3) days prior to the transfer hearing, the petitioner shall prepare a prehearing report for the Juvenile Division and make copies of that report available to the child and the child's advocate, parent, guardian, or custodian. The prehearing report shall address the issues described in '36.204 and '36.205 above.

#### **36.207 Written Transfer Order.**

A child may be transferred to Tribal Court only if the Juvenile Division issues a written order after the conclusion of the transfer hearing which contains specific findings and reasons for the transfer in accordance with '36.204 and '36.205 above. This written order terminates the jurisdiction of the Juvenile Division over the child with respect to the juvenile offense(s)

alleged in the petition. No child shall be prosecuted in the Tribal Court for a criminal offense unless the case has been transferred to Tribal Court as provided in this Chapter.

### **36.208 Noncriminal Proceedings.**

No adjudication upon the status of any child in the jurisdiction of the Juvenile Division shall be deemed criminal or be deemed a conviction of a crime unless the Juvenile Division transfers jurisdiction to the Tribal Court according to '36.207 of this Chapter.

### **36.209 Rules of Procedure.**

The procedures in the Juvenile Division shall be governed by the rules of procedure for the Tribal Court which are not in conflict with this Chapter.

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## **Laws of the Confederated Salish and Kootenai Tribes, Codified**

### **Title III, Chapter 3 YOUTH**

#### **Part 2: Transfer to Adult Tribal Court or State District Youth Court**

#### **3-3-201. Transfer of Jurisdiction to Adult Tribal Court.**

The Youth presenter shall have discretionary authority to file the cause in Adult Tribal Court, based on input provided by the Juvenile Probation Office and consistent with the factors set forth in subsection 2 below.

- 1) A juvenile offender may be transferred to Adult Tribal Court only if:
  - a) the offender is sixteen (16) years of age or older,
  - b) is alleged to have committed a serious crime, and
  - c) is an enrolled member of the CS&KT or other federally recognized tribe.
- 2) The Youth presenter shall consider the following factors to determine transfer.
  - a) the nature and seriousness of the alleged offense,
  - b) the youth's nature and condition as evidenced by his/her age, mental and/or physical condition,
  - c) the youth's past record of offenses, and
  - d) the youth's contact with the Tribe.

- 3) **Transfer report.** The juvenile officer shall prepare a transfer report for the Youth Court Presenter to consider that addresses the issues described in subsections 1 and 2 above. This report shall be attached to the motion of transfer.

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## Warm Springs Tribal Code

### Chapter 360 Juveniles

#### I. GENERAL

##### **360.130 Remand to Tribal Court.**

1. Upon motion a juvenile may be remanded to the Tribal Court for disposition as an adult if, following a hearing, the Juvenile Court determines by a preponderance of the evidence that:
  - a. The juvenile at the time of remand is sixteen (16) years of age or older; and
  - b. The juvenile committed or is alleged to have committed an act which would constitute a criminal violation if committed by an adult; and
  - c. The juvenile is not amenable to rehabilitation in facilities or programs available through the Juvenile Court; and
  - d. Retaining jurisdiction will not serve the best interests of the juvenile.
2. The following factors shall be considered by the Juvenile Court when determining whether to remand a juvenile to Tribal Court under this section:
  - a. The juvenile at the time of remand is sixteen (16) years of age or older; and
  - b. The juvenile committed or is alleged to have committed an act which would constitute a criminal violation if committed by an adult; and
  - c. The juvenile is not amenable to rehabilitation in facilities or programs available through the Juvenile Court; and
  - d. Retaining jurisdiction will not serve the best interests of the juvenile;
  - e. The nature and seriousness of the offense with which the juvenile is charged;
  - f. The nature and condition of the juvenile, as evidenced by his age, mental and physical condition; and
  - g. The past record of offenses and Juvenile Court efforts at rehabilitation.

**Zuni Tribal Code**

**Title IX. Zuni Children's Code**

**CHAPTER 3. CHILDREN'S COURT**

**Section 9-3-4. Transfer to Tribal Court of Alleged Juvenile Offender**

- A. **Petition**—The prosecutor may file a petition requesting the court to transfer an alleged juvenile offender to the jurisdiction of the Tribal Court if the minor is at least 16 years of age, and is alleged to have committed an act, which if committed by an adult, would be a Class A offense under the Criminal Code or a felony under the laws of another jurisdiction.
- B. **Hearing**—The Court shall conduct a hearing within 10 days of filing to determine whether the matter should be transferred.
- C. **Report**—The Juvenile Probation Officer shall prepare and present a written report to the court at least three days before the transfer hearing containing information on the alleged offense; and the minor's condition as evidenced by his age, mental and physical condition; past record of offenses; and rehabilitation efforts. Within the same time limit, the prosecutor and other parties may also file written recommendations.
- D. **Deciding Factors**—The following factors shall be considered by the Court in determining whether to transfer jurisdiction:
  - 1. The nature and seriousness of the offense as set forth in the petition;
  - 2. The minor's emotional maturity, mental condition as indicated in the reports provided to the Court; and
  - 3. The past record of offenses and rehabilitation efforts.
- E. **Standard of Proof and Findings**—The Court may transfer the matter to the Tribal Court, if it finds by a preponderance of the evidence no reasonable prospect for rehabilitating the minor through resources available to the Court, and either of the following exists:
  - 1. The past offenses committed by the minor indicate a pattern of conduct constituting a substantial danger to the public; or
  - 2. The offense with which the minor is charged indicates conduct that constitutes substantial danger to the public.
- F. The Court's order is a final order for purposes of appeal.

G. The Children’s Court Judge may not preside over a case that has been transferred to the Tribal Court.

## [8.4] Tribal Code Commentary

We note that a good number of tribes have used the 1989 [BIA Tribal Juvenile Justice Code](#) transfer provisions as a starting point. The 1989 BIA Tribal Juvenile Justice Code transfer language includes clear standards and fair process for tribal judges to use in determining whether or not to transfer a case out of the tribal juvenile court and into a tribal adult criminal court (or, potentially with modifications, to a state or federal court). However, there is growing concern among juvenile justice advocates and legal scholars nationally that such transfer provisions are unwarranted by the data on youth offending, harmful to youth, and expensive for juvenile justice systems. Consequently, the drafters of the recently completed University of Washington’s Center of Indigenous Research and Justice [Model Tribal Juvenile Code](#) omitted completely the statutory provisions authorizing transfers from tribal juvenile court to adult criminal courts. However, because each tribe operates in its own unique context given its needs, resources, and priorities, we have provided the comparative statutory provisions and analysis here.

The Sault Ste. Marie Tribal Code requires that a transfer petition be filed in the juvenile division by the prosecutor and that a hearing be held within ten days of receipt of the petition. Notice to the child and the child’s parent/guardian is required at least three days before the hearing. This is an example of the judicial waiver method of transfer. The only difference between Sault Ste. Marie and the 1989 BIA Tribal Juvenile Justice Code on this point is that the 1989 BIA Tribal Juvenile Justice Code allows any officer of the court to file a petition for transfer.

The factors considered at the transfer hearing are the nature and seriousness of the offense and the child’s condition and past record. A child must be at least fifteen years of age to be transferred under Sault Ste. Marie’s statute, while the 1989 BIA Tribal Juvenile Justice Code has a minimum age of sixteen. The juvenile court may transfer to adult court only if the court finds clear and convincing evidence that there are no reasonable prospects for rehabilitating the child through resources available to the juvenile court and the offense evidenced a pattern of conduct that constitutes a substantial danger to the public. Transfer to an adult court occurs by written order of the juvenile division with the findings and the reasons for transfer. The jurisdiction of the juvenile division is terminated upon transfer. This statute (following the 1989 BIA Tribal Juvenile Justice Code) attempts to keep the child in juvenile court unless the juvenile court simply cannot rehabilitate the child and the child is dangerous. However, many tribal courts have a minimum age requirement of sixteen.

The confederated Salish and Kootenai Nation gives the Youth Presenter (similar to a prosecutor) the discretionary authority to file a case in (adult) tribal court, based on input from the probation office. This is an example of the direct file method of transfer. The juvenile officer is required to prepare a written report for the Youth Presenter to consider. The factors the Youth Presenter is



required to consider include that the youth must be sixteen years old or older; he or she must have committed a serious crime; and he or she must be a member of a federally recognized tribe. The code defines a “serious crime” as a felony that seriously damages persons or property or involves dangerous drugs. The youth presenter is required to consider the nature and seriousness of the offense; the child’s nature and condition based on age, mental health, and physical condition; and past offenses and contacts with the tribe. The youth has a right to a hearing and a right to understand the consequences of a transfer to tribal criminal court.

The Warm Springs Code requires a motion in juvenile court. The child must be at least sixteen years old, the offense must be a criminal violation, and the child must *not* be amenable to rehabilitation in facilities or programs available through the juvenile court. The court needs to find that retention of jurisdiction by the juvenile court would not be in the best interest of the juvenile. Warm Springs looks at the nature and seriousness of the offense, but does not require a serious crime; it merely needs to be an adult crime, and not a status offense. The court also looks at the nature and condition of the youth, and the past record and efforts at rehabilitation in making its determination. Because it also must look at the best interests of the youth, there must be some balancing against the negative impact of a criminal conviction for the youth and the inability of the juvenile system to provide rehabilitation programs or facilities for the youth.

In the Zuni Juvenile Court, a petition is filed by the prosecutor and a hearing held within ten days. The youth must be at least sixteen years of age and the crime that the youth is alleged to have committed must be a Class A offense or a felony in another jurisdiction. A report is prepared by the juvenile probation officer, which includes information relative to the condition of the youth, the past record, and past rehabilitation efforts. A finding is required on a preponderance of evidence that there is no reasonable prospect for rehabilitation of the youth with the juvenile courts resources and there either exist a pattern of past conduct that constitutes a substantial danger to the public or the offense alleged constitutes a danger to the public. A preponderance of evidence is a low threshold, requiring only a demonstration that it is more likely than not.

Juvenile justice system reformers, in other contexts, argue that status offenders should not be treated as juvenile offenders merely to access services. A similar argument may be made with respect to Native youth who have their cases moved into the state or federal system where the juvenile dispositions and placements are more severe (e.g., placement in a secure detention facility) and/or where the potential to be transferred to adult criminal court are substantially greater.

## [8.5] Exercises

The following exercises are meant to guide you in developing the transfer to adult criminal court sections of the tribal juvenile code.

- Find and examine your juvenile code to see if it has provisions for the transfer of youth to adult criminal court—what are the criteria for transfer?
- Make a list of reasons for transferring youth (or letting the following assume jurisdiction) to each of the following:
  - Tribal adult criminal court,
  - State juvenile court,
  - Federal court, and
  - Other tribal courts.
- Make a list of reasons to prohibit transfer to any of the above (or for assuming your juvenile court's jurisdiction to handle the case).

### Read and Discuss\*

**Does your tribe have concurrent jurisdiction with the federal government?**

**How does this impact decisions to exercise your tribe's juvenile court jurisdiction?**

In order to better understand the processing of tribal youth cases and the factors involved in cases handled at the federal level, a study team interviewed more than thirty federal and tribal officials familiar with these issues, conducted site visits, and reviewed relevant documents. Key factors and issues identified included the following:

- **Many different tribal, federal, state, and local law enforcement agencies may be involved in investigating Indian Country cases.** The two federal agencies most often involved in investigations in Indian Country are the Department of Justice's Federal Bureau of Investigation and the Department of the Interior's Bureau of Indian Affairs. Tribes also may operate law enforcement agencies with their own criminal investigators. Tribal police are typically the first to respond to an incident and will contact federal law enforcement if the case seems serious enough to constitute a federal crime.
- **Cases that may warrant federal prosecution are referred to the appropriate U.S. Attorney's Office, which then elects to accept or decline the case based on several factors.** If the federal government decides to proceed with a prosecution, it may prosecute the defendant as a juvenile delinquent or seek to transfer the juvenile to adult status. The decision to prosecute a juvenile case at the federal level is based on a number of considerations. These include the seriousness of the crime, the youth's age and criminal

history, strength of the evidence, and the tribe's capacity to prosecute and appropriately sentence the offender. While the final decision to prosecute a case federally rests with the U.S. Attorney, tribal preference is also often taken into account. In general, tribal youth cases processed in the federal system tend to be egregious crimes committed by older offenders (those close to the age of majority) with more extensive criminal histories. Importantly, this reflects the types of cases referred to and accepted by federal prosecutors, rather than the underlying pattern of offending by tribal youth. Less serious offenses tend to be handled at the tribal level. Similarly, a number of factors influence whether a juvenile is processed as a juvenile delinquent or transferred to adult status. Federal law specifies the factors that must be considered in determining whether to transfer a case, including the type of offense and the offender's age, criminal history, and maturity. Relevant factors differ by type of transfer, although cases meeting certain criteria must be transferred. District practice also influences whether a juvenile is transferred to adult status; the prevalence of transfer varies across districts, occurring more frequently in some districts than in others.

- **Tribal youth cases may be prosecuted in both tribal and federal court.** The tribal case may be initiated first and dropped once the federal case begins, or both jurisdictions can pursue the cases to completion.
- **Federal cases against tribal youth face many processing challenges.** These challenges, some of which apply to Indian Country cases generally, include the physical and cultural distances between many reservations and federal actors, as well as the lack of federal detention facilities for juveniles.
- **The federal justice system is not designed for juveniles, yet it may sometimes be the best option available.** A consistent theme that emerged throughout the interviews was that, in both the federal and tribal systems, there is a lack of facilities, programs, and services to address the needs of tribal youth. Facilities for housing juveniles sentenced to detention in the federal system are limited and are often located far from the juvenile's home and family. Community-based treatment programs available to these youth are also very limited and are rarely located on or near a juvenile's reservation. Furthermore, these programs may not take into account the beliefs and traditions of the youth's culture. Although many of the officials (both tribal and federal) we interviewed indicated that the federal justice system is not designed for juveniles, they explained that it is sometimes the best option available. Despite its limitations, the federal system can sometimes access or fund services for juveniles that are unavailable to tribal communities. The federal system is also better able to address serious offenders due to its ability to sentence defendants for longer periods of time, given that the sentencing options available to tribal courts are limited by both federal law and, frequently, a lack of tribal detention facilities. Thus the decision of whether to proceed against a juvenile in the federal or tribal system is often based in part upon the nature and resources of the particular tribal system concerned. The availability of local (tribal) resources and the ability of

the federal system to access a wide range of treatment, services, programming, and detention settings were consistently cited by federal and tribal stakeholders as important considerations regarding whether and how to adjudicate an American Indian youth at the federal level.

\* Taken from William Adams and Julie Samuels, "Tribal Youth in the Federal System," Final Report (Revised), Urban Policy Institute, May 2011. Go to <http://www.urban.org/publications/412369.html>.

## **Read and Discuss\***

### **Should we be transferring youth to the adult criminal system?**

Elizabeth Scott and Laurence Steinberg in the book *Rethinking Juvenile Justice* believe that a model juvenile justice system should take these three key lessons based on scientific literature on adolescence.

1. Adolescents' choices to get involved in criminal activity are shaped by developmental forces that contribute to immature judgment, and thus are less culpable than are those of adults.
2. Because of these developmental influences, normal adolescents, particularly those growing up in high-crime neighborhoods, may get involved in criminal activity, but most are likely to mature out of these inclinations.
3. Because social context plays a key role in the accomplishment of essential developmental tasks during adolescence, the correctional settings and interventions that constitute society's response to juvenile crime will likely affect when delinquent youths make a successful transition to adulthood.

\* Taken from Elizabeth Scott and Laurence Steinberg, *Rethinking Juvenile Justice*, Cambridge, Massachusetts: Harvard University Press (2008).

# Chapter 9: Relations with Other Agencies and Courts

## [9.1] Overview

The tribe's ability to incarcerate a youth is limited by the Indian Civil Rights Act (ICRA) to one year, although a tribal nation may expand that jurisdiction to three years under the Tribal Law and Order Act (TLOA) of 2010 for certain crimes provided the tribe guarantees certain rights to defendants. There are situations when the federal government may take jurisdiction over some Native youth in Indian country and other situations in which the tribe encourages the federal government to take jurisdiction over certain youth due to their criminal history and seriousness of the crime. A tribe may feel incarceration for a longer period than the one year is necessary to protect the public or to rehabilitate the youth. The federal government may have resources for rehabilitation that are not available to the tribe. The federal government also has the ability to consider whether the youth will be tried in the juvenile system or the adult system based on the crime and background of the juvenile.

In Indian country in [Public Law 280](#) states or similarly legislated states, the state and tribe may have concurrent jurisdiction over juvenile matters in many situations. Even in Indian nations where the federal government is engaged in concurrent jurisdictions, states are involved in off-reservation delinquent activity. The state would also have the ability to incarcerate for more than one year and in some limited cases this may be a suitable and just option. The state would also have the ability to hold a juvenile accountable in an adult court, provided the situation meets the criteria of the state.

The state juvenile or the federal system may have more resources than the tribe and the youth's needs may be better addressed in the state or federal system. In such a situation the tribe may be encouraging the state or federal government to take action.

There are other situations in which the state, federal system, and tribe may need to work together for the benefit of the child and community. A youth may be involved in an offense outside of Indian country, and the state may believe that the tribe has the most suitable resources to rehabilitate the youth. A tribe may be involved with a youth in the tribal juvenile system, but seek nontribal services.

Coordination and cooperation between all jurisdictions that could address juvenile matters related to members or tribal residents of your jurisdiction ensures that the youth of your community receive the best services available. Statutes providing the authorization to enter into MOUs with other jurisdiction and with nontribal programs will help in providing comprehensive services to the juvenile and the community.

Cooperating with other entities may open up possibilities for grant funds for programs that can benefit tribal youth. Authorization is needed for a juvenile court to enter into a grant with another entity.

Additionally, social services may be involved in many of the juvenile court delinquency or status offenses. Ensuring that the power is given to the juvenile court to access and order action from social service agencies is vital. Depending upon the situation that might be tribal, state, or federal social service agencies.

Treatment or incarceration may also require the juvenile court to enter into agreements with programs that provide services to youth. Ensuring that the juvenile court has the ability to negotiate these agreements is important to their effective operation.

It may be helpful to review [Chapter 4: Criminal Offenses](#).

## [9.2] Model Code Examples

### [\(1989\) BIA Tribal Juvenile Justice Code](#)

#### [1-5 RELATIONS WITH OTHER AGENCIES](#)

##### **1-5 A. Cooperation and Grants**

The juvenile court is authorized to cooperate fully with any federal, state, tribal, public, or private agency in order to participate in any diversion, rehabilitation, or training program(s) and to receive grants-in-aid to carry out the purposes of this code. This authority is subject to the approval of the tribal council if it involves an expenditure of tribal funds.

##### **1-5 B. Social Services**

The juvenile court shall utilize such social services as may be furnished by any tribal, federal, or state agency provided that it is economically administered without unnecessary duplication and expense;

##### **1-5 C. Contracts**

The juvenile court may negotiate contracts with tribal, federal, or state agencies and/or departments on behalf of the tribal council for the care and placement of children whose status is adjudicated by the juvenile court subject to the approval of the tribal council before the expenditure of tribal funds;

##### **1-5 D. Transfers from Other Courts**

The juvenile court may accept or decline transfers from other states or tribal courts involving alleged delinquent children or alleged status offenders for the purposes of adjudication and/or disposition.

## [9.3] Tribal Code Examples

### Sault Ste. Marie Tribal Code

#### [Chapter 36: Juvenile Code](#)

#### **SUBCHAPTER II: JURISDICTION OF THE JUVENILE DIVISION**

##### **36.210 Transfers from Other Courts.**

The Juvenile Division may accept or decline transfers from other states or tribal courts involving alleged delinquent children or alleged status offenders for the purposes of adjudication and/or disposition. Proceedings transferred pursuant to the provisions of any state or federal law shall be deemed to have been commenced within the jurisdiction of the Juvenile Division. Proceedings transferred to the Juvenile Division shall be identical with proceedings originally filed in the Juvenile Division.

#### **SUBCHAPTER X: ADDITIONAL MATTERS**

(36.1001 through 36.1004 Omitted)

##### **36.1005 Cooperation and Grants.**

The Juvenile Division is authorized to cooperate fully with any federal, state, tribal, public, or private agency in order to participate in any diversion, rehabilitation, or training program(s) and to receive grant-in-aid to carry out the purposes of this Chapter. This authority is subject to the approval of the Sault Ste. Marie Tribal Board of Directors if it involves an expenditure of tribal funds.

##### **36.1006 Social Services.**

The Juvenile Division shall utilize such social services as may be furnished by any tribal, federal, or state agency provided that it is economically administered without unnecessary duplication and expense.

##### **36.1007 Contracts.**

The Juvenile Division may negotiate contracts with tribal, federal, or state agencies and/or departments on behalf of the Tribal Board of Directors for the care and placement of children whose status is adjudicated by the Juvenile Division subject to the approval of the Tribal Council before the expenditure of tribal funds.

Laws of the Confederated Salish and Kootenai Tribes, Codified

**TITLE III, Chapter 3 YOUTH**

**Part 2: Transfer to Adult Tribal Court or State District Youth Court**

(3-3-201. Omitted)

**3-3-202. Transfer of Jurisdiction to State District Youth Court.**

The Youth presenter shall have discretionary authority to transfer a juvenile offender to State Youth District Court based on input provided by the Juvenile Probation Office and consistent with the factors set forth in subsection 2 below.

- 1) A juvenile offender may be transferred to State Youth District Court only if:
  - a) the offender is alleged to have committed a serious crime: and/or
  - b) transfer will access services or funding for the youth not available through the Tribe.
- 2) The Youth presenter shall consider the following factors to determine transfer:
  - a) the nature and seriousness of the alleged offense,
  - b) the youth's nature and condition as evidenced by his/her age, mental and/or physical condition,
  - c) the youth's past record of offenses,
  - d) availability of funding for treatment, and
  - e) services that are available through state youth district court that are not available through Tribal Youth Court.
- 3) **Transfer report.** The juvenile officer shall prepare a transfer report for the Youth Court Presenter to consider that addresses the issues described in subsections 1 and 2 above. This report shall be attached to the motion of transfer.



## [9.4] Tribal Code Commentary

The 1989 BIA Tribal Juvenile Justice Code authorizes the juvenile court to cooperate with any federal, state, tribal, public, or private agency to participate in any diversion, rehabilitation, or training program to carry out the purposes of the code. The court may also enter into grants to aide in carrying out this purpose. Only expenditures of funds must be approved by the tribal council. It also is authorized to utilize social service agencies (federal, tribal, or state) and negotiate contracts with agencies on behalf of the tribal council for care and placement of children subject to approval by the tribal council. It may also accept or decline transfers from other states or tribal courts involving cases of alleged delinquent children.

The Sault Ste. Marie Tribal Code also permits acceptance or declination of transfers from other courts and the court is to treat transfers like action commenced in their juvenile court. The remaining sections of their code are similar to the 1989 BIA Tribal Juvenile Justice Code.

The section from the Confederated Salish and Kootenai Nation specifically addresses transfer from their juvenile court to the state court, which is similar to the criteria for transfer to an adult court. However, it specifically focuses on treatment or rehabilitative services available through the state that are not available through the tribe system. The code requires a transfer report specifically addressing each of the criteria required for transfer.

## [9.5] Exercises

The following exercises are meant to guide you in developing the relationships with other agencies/governments sections of the tribal juvenile code.

- Find and examine your tribe's code provisions governing cooperation with other agencies and/or governments—with whom may your juvenile court enter into agreements and for what?
- Find and examine any MOUs or Memorandums of Agreement (MOAs) relevant to your juvenile court—who does it bind and to do what?
- Make a list of agencies and/or governments that you would like to negotiate with for the provision of services—what services?

## Read and Discuss\*

Should we enter into agreements with the state to provide services that we do not have like mental health screening, assessment, and treatment?

### **Idaho Memorandum of Agreement to Support the Tribal Community Incentive Program, the Tribal Re-entry Program, and/or the Tribal Mental Health Program**

WHEREAS,

- the Idaho Juvenile Justice Commission has identified parenting and families, community resources, and reintegration as priority needs in the 3-Year Plan for 2012–2014
- the Idaho Juvenile Justice Commission is the State Advisory Board for the Juvenile Accountability Incentive Block Grant
- the Tribal Community Incentive Program (CIP) is designed to fill gaps in local services or resources to serve juvenile offenders who are at a high risk of commitment to the Department locally where families can participate more fully in their treatment and increase the likelihood of their success
- the Tribal Re-Entry Program (REP) is designed to provide resources to fill gaps in local services to serve juvenile offenders returning to the community from state commitment to increase the likelihood of successful reintegration
- the Idaho Department of Juvenile Corrections is the state agency designated to administer funds for tribal mental health services (MHP) for juvenile offenders
- juvenile offenders, whether remaining in, or returning to their community require individualized services based on reliable instruments in accordance with their unique needs and potential
- the successful reintegration of juvenile offenders leaving Department custody and the effective treatment of juvenile offenders in the local community benefits juveniles, families, the State of Idaho, the tribal, and its communities
- the Department and the Tribe understand the importance of connecting with existing community or county councils whose function is to staff cases for services
- statistical data gathered from county systems statewide recognizes approximately sixty-eight percent of juveniles in detention have diagnosed mental health needs
- the success of these programs is dependent on the continued cooperation and partnerships between the State, the Tribe and the Tribe's Juvenile Probation Department

NOW, THEREFORE, the Department and the Tribe each agree as to the following:

In order to receive CIP, REP, or MHP funds, The TRIBE shall:

- Convene screening teams for CIP and MHP applications
- Convene a pre-commitment team to determine a juvenile offender's eligibility for CIP
- Approve and authorize the Case Plan
- Initiate applications for services and provide supervision for participating juveniles
- Provide monitoring of any terms or conditions of treatment established by the screening team
- Use the following screening tools to identify specific needs and challenges of the juvenile offender
- Submit reports
- Review invoices from providers and certify that services were rendered as approved and payment is authorized
- Request reimbursement from the Department within forty-five (45) days of service
- Adhere to all applicable laws, rules, and guidelines, including procurement laws

The DEPARTMENT shall:

- Reimburse the Tribe or Provider for allowable and approved treatment costs identified by a screening team for juveniles remaining in their community until funds have been exhausted, funding is otherwise discontinued, or either party terminates the Agreement by giving the other party thirty (30) days written notice
- Reimburse the Tribe or Provider for allowable and approved treatment costs deemed important by a community treatment team for juveniles leaving state custody until funds have been exhausted, funding is otherwise discontinued, or either party terminates the Agreement by giving the other party thirty (30) days written notice
- Reimburse the Tribe or Provider for allowable and approved treatment costs identified by a screening team for mental health services for juvenile offenders until funds have been exhausted, funding is otherwise discontinued, or either party terminates the Agreement by giving the other party thirty (30) days written notice
- Complete a YLS/CMI while the juvenile is in state custody.

The DEPARTMENT and the TRIBE, in order to support these programs to keep juveniles in their community, or successfully reintegrate juvenile offenders in state custody back into their homes, communities and families, also agree as follows:

- The Department and Tribe Juvenile Probation Officers will participate in routine staffings for each participating juvenile, prior to his or her release from Department custody, to jointly support REP.
- The parties to this Agreement understand that the success of these programs is dependent on the collaboration of all, and commit to a partnership toward that goal.
- The parties to this Agreement will work with existing services or councils, where appropriate, to develop the system of care for the juvenile and their family. This may include, but is not limited to, identifying new formal and informal resources for the system of care, ensuring families have a voice through family involvement in screening teams, linking to more neighborhood-based delivery systems, increasing research-based programs, and developing training across different agencies and services in the system of care.

\*Taken from Memorandum of Agreement to Support the Tribal Community Incentive Program, the Tribal Re-entry Program, and/or the Tribal Mental Health Program. Go to <http://www.idjc.idaho.gov/wp-content/uploads/2014/01/Memorandum-of-Agreement-Tribal1.pdf>

# Chapter 10: Juvenile Court Records

## [10.1] Overview

If a community sees youthful indiscretions as normal adolescent behavior and the juvenile court system as one of the community's methods of teaching, rehabilitating, and developing the youth of the community to be the leaders of tomorrow, then it is extremely important to review the impact a juvenile record has on the young people of the community, when they become adults. Will the record need to be reported on college applications, job applications, and rental applications, and be considered for enhanced sentencing when the child is an adult? How will that impact young Native adults?

Many states have moved from completely confidential records with automatic sealing and/or destruction of records upon completion of any probation once the child reaches adulthood to public records and sealing or expungement of some or all records, only on motion of the individual with proof of no criminal activity and completion of any juvenile court sentence, probation, or restitution. Some states will consider a juvenile's offenses under "three strikes laws," those laws that mandate harsher sentences on repeat offenders.

When considering juvenile records, one must consider both the records kept by the court and the records kept by law enforcement. A tribal nation should review its own customs and norms to determine who within the tribe and family of the juvenile should be involved in a juvenile case and have access to records.

It may be helpful to review [Section 2.5 Special Issues: D. Expungement and Destruction of Juvenile Records](#).

[

## 10.2] Model Code Examples

### (1989) BIA Tribal Juvenile Justice Code

#### 1-20 JUVENILE RECORDS

##### **1-20 A. Juvenile Court Records**

A record of all hearings under this code shall be made and preserved. All juvenile court records shall be confidential and shall not be open to inspection to any but the following:

1. the child;
2. the child's parent, guardian or custodian;
3. the child's counsel;
4. the juvenile court personnel directly involved in the handling of the case; or
5. any other person by order of the court, having a legitimate interest in the particular case or the work of the court.

##### **1-20 B. Law Enforcement Records**

Law enforcement records and files concerning a child shall be kept separate from the records and files of adults. All law enforcement records shall be confidential and shall not be open to inspection to any but the following:

1. the child;
2. the child's parent, guardian or custodian;
3. the child's counsel;
4. law enforcement personnel directly involved in the handling of the case;
5. the juvenile court personnel directly involved in the handling of the case; or
6. any other person by order of the court, having a legitimate interest in the particular case or the work of the court.

##### **1-20 C. Destruction of Records**

When a child who has been the subject of any juvenile court proceeding reaches his or her eighteenth (18th) birthday, or the disposition order is terminated if the disposition order extends beyond his or her eighteenth (18th) birthday, the court shall order the clerk of the

court to destroy both the law enforcement records and the juvenile court records. The clerk of the court shall respond to all records inquiries as if no records had ever existed.

**University of Washington**  
**Center of Indigenous Research and Justice**  
[Model Tribal Juvenile Code](#)

**CHAPTER 1 GENERAL PROVISIONS**

**1.10 RIGHTS OF PARTIES**

**1.10.120 Confidentiality**

- (a) All Juvenile Court hearings and informal conferences held pursuant to this article shall be closed to the public
- (b) Only the Juvenile Court judges, juvenile case coordinators, juvenile presenting officers, counsel, law enforcement officers, witnesses, the parties, service providers and such family and friends of the child to whose presence the parties have no reasonable objection, may be present.
- (c) All records concerning a child are open to inspection only by his or her parent, custodian or guardian, their counsel or other legal representative, or other parties to related proceedings before the court.
- (d) With the consent of the court, records may be inspected by the child.
- (e) The name, picture, place of residence, or any other identifying information concerning any child, parent, custodian or guardian, or person appearing as a witness in any proceeding held pursuant to this article, shall not be published in any newspaper, newsletter, electronic publication, internet site, nor be given for any other publicity.
- (f) Unless otherwise provided in this article, and except as is necessary to conduct an investigation or properly adjudicate the matter, no person shall disclose any identifying information concerning a matter conducted pursuant to this title. The Juvenile Court judge shall so warn those in attendance at each proceeding held pursuant to this title.
- (g) Any person who violates any provision of this section may be subject to a civil contempt order by the Juvenile Court.

**1.05 RULES OF PROCEDURE**

**1.13.230 Use of Disposition and Evidence in Other Proceedings**

The disposition of a child and evidence adduced in a hearing in the Juvenile Court may not be used against such child in any proceeding in any court other than for a proceeding for delinquency or a child in need of services, whether before or after reaching majority, except;

- (a) in the establishment of conditions of bail, plea negotiations, and sentencing in felony offenses; and
- (b) in such excepted cases, such records of dispositions and evidence shall be available to prosecutors, judges and the accused and may be used in the same manner as adult records.

## [10.3] Tribal Code Examples

### Sault Ste. Marie Tribal Code

#### CHAPTER 36: JUVENILE CODE

#### SUBCHAPTER X: ADDITIONAL MATTERS

##### **36.1001 Juvenile Division Records.**

A record of all hearings under this Chapter shall be made and preserved. All Juvenile Division records shall be confidential and shall not be open to inspection to any but the following:

- (1) The child.
- (2) The child's parent, guardian, or custodian.
- (3) The child's counsel.
- (4) The Juvenile Division personnel directly involved in the handling of the case.
- (5) Any other person by order of the Court, having a legitimate interest in the particular case or the work of the Court.
- (6) The prosecutor.

##### **36.1002 Law Enforcement Records.**

Law enforcement records and files concerning a child shall be kept separate from the records and files of adults. All law enforcement records shall be confidential and shall not be open to inspection to any but the following:

- (1) The child.
- (2) The child's parent, guardian or custodian.
- (3) The child's counsel.
- (4) Law enforcement personnel directly involved in the handling of the case.



- (5) The Juvenile Division personnel directly involved in the handling of the case.
- (6) Any other person by order of the Court, having a legitimate interest in the particular case or the work of the Court.
- (7) The prosecutor.

### **36.1003 Destruction of Records.**

When a child who has been the subject of any Juvenile Division proceeding reaches his eighteenth (18th) birthday, the Court shall order the clerk of the Court to destroy both the law enforcement records and the Juvenile Division records. The clerk of the Court shall respond to all record inquiries as if no records had ever existed.

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## **The Cherokee Code of the Eastern Band of the Cherokee Nation**

### **Chapter 7A - JUVENILE CODE**

#### **ARTICLE I. - IN GENERAL**

##### **Sec. 7A-61.—Confidentiality of records.**

- (a) The Clerk of Court shall maintain a complete record of all juvenile cases filed in his office to be known as the juvenile record, which shall be withheld from public inspection and may be examined only by order of the Judge, except that the juvenile, his parent, guardian, custodian or other authorized representative of the juvenile shall have a right to examine the juvenile's record. The record shall include the summons, petition, custody order, court order, written motions, the electronic or mechanical recordings of the hearing, and other papers filed in the proceeding. The recording of the hearing shall be reduced to a written transcript only when notice of appeal has been timely given. After the time for appeal has expired with no appeal having been filed, the recording of the hearing may be erased or destroyed upon the written order of the Judge.
- (b) The court counselor shall maintain a record of the cases of juveniles under supervision by court counselors which shall include family background informational reports of social, medical, psychiatric, or psychological information concerning a juvenile; interviews with his family; or other information which the Judge finds should be protected from public inspection in the best interest of the juvenile.
- (c) The records maintained pursuant to subsection (b) may be examined only by order of the Judge except that the juvenile shall have the right to examine them.
- (d) Law enforcement records and files concerning a juvenile shall be kept separate from the records and files of adults except in proceedings when jurisdiction of a juvenile is transferred to Tribal court. Law enforcement records and files concerning juveniles shall

be open only to the inspection of the prosecutor, court counselors, the juvenile, his parent, guardian, or custodian.

- (e) All records and files maintained by the Division of Youth Services shall be withheld from public inspection and shall be open only to the inspection of the juvenile, professionals in that agency who are directly involved in the juvenile's case, and court counselors. The Judge authorizing commitment of a juvenile shall have the right to inspect and order the release of records maintained by the Division of Youth Services on that juvenile.
- (f) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parents.
- (g) Nothing in the section shall preclude the necessary sharing of information among authorized agencies.

**Sec. 7A-62.—Expunction of records of juveniles adjudicated delinquent and undisciplined.**

- (a) Any person who has attained the age of 18 years may file a petition in the court where he was adjudicated undisciplined for expunction of all records of that adjudication.
- (b) Any person who has attained the age of 18 years may file a petition in the court where he was adjudicated delinquent for expunction of all records. Such petition shall be filed no sooner than two years after termination of the court's jurisdiction over the petitioner. The petition may be granted in the court's discretion provided the person has not subsequently been adjudicated delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation under the laws of the Tribe or any state.
- (c) The petition shall contain, but not be limited to, the following:
  - (1) An affidavit by the petitioner that he has been of good behavior since the adjudication, that he has not subsequently been adjudicated delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation under the laws of the Tribe or any state.
  - (2) Verified affidavits of two persons, who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.
  - (3) A statement that the petition is a motion in the cause in the case wherein the petitioner was adjudicated delinquent or undisciplined. The petition shall be

served upon the prosecutor. The prosecutor shall have ten days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing on the petition.

- (d) If the Judge, after hearing, finds that the petitioner satisfies the conditions set out in subsections (a) and (b), he shall order and direct the Clerk of Court and all law enforcement agencies to expunge their records of the adjudication including all references to arrests, complaints, referrals, petitions, and orders.
- (e) The Clerk of the Court shall forward a certified copy of the order to the Chief of Police or other law enforcement agency.
- (f) Records of a juvenile adjudicated delinquent or undisciplined being maintained by a court counselor/intake counselor shall be retained or disposed of by the court.
- (g) Records of juveniles adjudicated delinquent or undisciplined being maintained by personnel at a residential facility operated by the Division of Youth Services shall be retained or disposed of as provided by this section.

**Sec. 7A-63.—Effect of expunction.**

- (a) Whenever a juvenile's record is expunged, with respect to the matter in which the record was expunged, the juvenile who is the subject of the record and his parent may inform any person or organization including employers, banks, credit companies, insurance companies, and schools that he was not arrested, he did not appear before the court and he was not adjudicated delinquent or undisciplined.
- (b) Notwithstanding subsection (a), in any criminal or delinquency case if the juvenile is the defendant and chooses to testify or if he is not the defendant but is called as a witness, the juvenile may be ordered to testify with respect to the fact that he was adjudicated delinquent.

**Sec. 7A-64.—Notice of expunction.**

Upon expunction of a juvenile's record the Clerk of the Court shall send a written notice to the juvenile at his last known address informing him that the record has been expunged and with respect to the matter involved, the juvenile may inform any person that he has no record. The notice shall inform the juvenile further that if the matter involved is a delinquency record, the juvenile may inform any person that he was not arrested or adjudicated delinquent except that upon testifying in a criminal or delinquency proceeding, he may be required by a Judge to disclose that he was adjudicated delinquent.

**WHITE MOUNTAIN APACHE JUVENILE CODE**  
**CHAPTER SEVEN DISPOSITION**

(Section 7. 1 through 7.12 Omitted)

**SECTION 7.13 RECORDS; PUBLICATION PROHIBITED**

- A. The records of proceedings of the Juvenile Court shall be kept in a docket separate from other proceedings, and shall not be opened for inspection or copied by anyone other than the parties to the proceedings, the representatives of the court, and youth counselors having an interest therein, except upon order of the court.
- B. No part of the record shall be published by a newspaper or other agency disseminating news or information nor shall a newspaper or agency publish the name of a child charged in the Juvenile Court with being delinquent, in need of supervision or neglected.

**SECTION 7.14 DESTRUCTION OF RECORDS**

When a person who has been before the Juvenile Court in a delinquency or in need of supervision proceeding attains the age of eighteen, the court shall order the clerk to destroy all records of such proceedings involving such person.

## **[10.4] Tribal Code Commentary**

The Sault Ste. Marie Code keeps juvenile records confidential, accessible only by the prosecutor, juvenile, the child’s parent/guardian, the child’s counsel, and those law enforcement and “juvenile court personnel actively involved in the case.” Both law enforcement and juvenile court records are automatically destroyed at the child’s eighteenth birthday or at the termination of the juvenile disposition order. Any inquiry into a child’s records should be responded to as if no records exist. Obviously the Sault Ste. Marie Nation believes that the retention of records may lead to job discrimination, denial of educational opportunities, and even denial of military service. They allow a juvenile to start fresh when they reach eighteen with no criminal record.

The Eastern Band of Cherokee also keeps juvenile records confidential, only allowing the juvenile, parents, guardians or custodians, and personnel involved in the case to have access to records. However, they do not automatically destroy records when the juvenile reaches the age of eighteen. The Eastern Band of Cherokee require a juvenile to file a petition requesting expunction of the juvenile record. A juvenile who has been adjudged undisciplined may file the petition upon reaching the age of eighteen. The juvenile adjudged delinquent may file a petition for expunction only after waiting two years after the juvenile court had jurisdiction over the juvenile. In either case the juvenile must file an affidavit stating that he has had no further juvenile or criminal convictions, along with affidavits substantiating good character and reputation of the petitioner by two persons unrelated to the petitioner. The petition is served on the prosecutor, who has ten days to voice any objections to expunction of the records. The judge orders expungement of the records (law enforcement and

court) if the offender has not been adjudicated delinquent or convicted of a criminal act in the state or tribe. When the records are expunged, the offender can legally report that he was not arrested or adjudicated delinquent or undisciplined.

The White Mountain Apache Code also ensures confidentiality except for those involved in the proceeding. It instructs the clerk of court to destroy all records of juvenile proceedings when a juvenile reaches the age of eighteen.

## [10.5] Exercises

The following exercises are meant to guide you in developing the handling of records section of the tribal juvenile code.

- Find and examine your juvenile code provisions governing the confidentiality and destruction of juvenile and law enforcement records—what are the requirements?
- Make a list of negative consequences for youth given existing law.
- What law changes, if any, would you propose to protect youth?

### Read and Discuss\*

**Should tribal juvenile court proceedings and/or records be opened up to a certain extent (e.g., to law enforcement officials, service providers, and/or victims of crime) or to the public?**

The National Association of Counsel for Children’s Board of Directors considered the following pros and cons of confidentiality in juvenile delinquency cases . . .

#### Pro-Confidentiality of Proceedings/Records

- Opening would impede rehabilitation of juveniles by foreclosing future education/work options
- Opening would deter juveniles from admitting delinquency (a key to the treatment process)
- Opening would cause public stigmatization of the child and family
- Insensitivity in the media about publishing the names of children and families
- Renown in the community (from publicizing the name) could actually reward a child

#### Pro-Opening of Proceedings/Records

- Need to punish children, including shame of public knowledge of delinquency
- Need to protect community, allowing them to know who the “dangerous juveniles” are

- Need to ensure that courts and law enforcement officials are basing decisions on complete information
- Lack of system accountability due to confidentiality, allowing system problems to go unaddressed
- Lack of community standards as to what is enough delinquency to warrant incarceration
- Public right of access to government functions, and lack of confidence in “secret” system

#### The NACC Position

- Neither absolute confidentiality nor total opening of juvenile court records and proceedings would be appropriate
- The presumption of confidentiality should remain
- Exception that judges should be allowed, on a case-by-case basis to open up proceedings and records to members of the media, researchers, and others with a bona fide interest in reporting on the juvenile court system and related systems to the public
  - After finding there would be no harm to the child
  - After an opportunity to be heard by the child’s counsel
- Conditioned on keeping the identity of reporters of neglect/abuse, and names/identifying and contact information of children and families not be made public
- Conditioned on judge being allowed to exclude media and observers from child victim/witness testimony and the choice to close all or part of the proceeding
- Identifying records of adjudication of juvenile delinquency should be made available to juvenile and criminal courts and law enforcement officials to ensure appropriate decision making

\*Taken from the Policy Statement on the Confidentiality of Juvenile Court Proceedings and Records, National Association of Counsel for Children, April 25, 1998. Go to [http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/policy/policy\\_statement\\_-\\_confident.pdf](http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/policy/policy_statement_-_confident.pdf)

#### **What about expanding victim participation in the juvenile justice system?**

Recent state enactments indicate that expanding victim participation in the juvenile justice system is an important policy issue

- Opening the courtroom to victims during juvenile hearings

- Informing victims of adjudicatory proceedings
- Requiring the judge to consider the interests of the victim when deciding to close juvenile proceedings
- Allowing the victims to be present and heard at predisposition or disposition proceedings

**What about facilitating agency collaboration and information sharing among agencies that serve children?**

Recent state action has recognized that many agencies that serve children may be better equipped to do so if provided with comprehensive access to a youth's records

- Recent policy initiatives expand access to juvenile records to youth corrections personnel, to courts, and to other agencies, and to school officials
- Some states, in response to a growing number of crimes committed by repeat youth offenders have created a collaborative, systemic approach to information sharing, e.g. the Serious Habitual Offender Comprehensive Action Program (SHOCAP)
  - Facilitates agency collaboration and information sharing to provide sanctions, treatment, and/or interventions

\*Taken from "Juvenile Justice Reform Initiatives in the States (1994–1996)." Go to [http://www.ojjdp.gov/pubs/reform/ch2\\_i.html](http://www.ojjdp.gov/pubs/reform/ch2_i.html)





# Chapter 11: Rights in Juvenile Proceedings

## [11.1] Overview

The early developers of juvenile justice systems in the United States (prior to 1967) intended legal interventions to be civil as opposed to criminal in nature.<sup>14</sup> The idea was to have informal proceedings, without legal procedures and evidentiary standards, which would allow the judge to get a “total picture” of the juvenile and to deal with the problems of the juvenile with prevention, treatment, and rehabilitation. The downside of this informality, as was demonstrated over and over again in the state court systems, was the absence of established guilt: an adjudication of delinquency was based upon the attitude of the child, the types of peers with whom he or she associated, or his or her family’s situation.

Fair hearings and high standards of proof of delinquency in juvenile proceedings have been generally required in state law since 1967 when the U.S. Supreme Court decided *In re Gault*.<sup>15</sup> In *Gault*, the U.S. Supreme Court held that due process is required in juvenile court *adjudicatory proceedings*. *Gault* requires recognition and enforcement of constitutional rights, the application of certain rules of evidence, and the establishment, beyond a reasonable doubt, that allegations are supported by the admissible evidence. In the state systems, post-*Gault*, informality is still often permitted in the prehearing stages and generally accepted in the postadjudicatory hearings on disposition.

Tribal laws governing juvenile proceedings may appear to have criminal law characteristics. However, a good number of tribal laws governing juvenile proceedings appear to be civil in nature and may have a provision explicitly stating that they are civil proceedings. If a tribal court’s juvenile proceedings are civil in nature, this may be due to early state law influences with respect to informality and the desired purpose of rehabilitation. It is also likely due to the fact that federal limitations on the criminal jurisdiction of tribes make a civil jurisdiction scheme preferable to ensure that the tribal court fully exercises its powers and services in the interest of all juveniles and their family members within the jurisdiction of the tribe.

Even where a tribe’s juvenile code is civil in nature, it is still necessary to include provisions to protect the rights of juveniles, at a minimum, that comply with ICRA’s requirements for fair (due) process, and preferably, that comply with the “Juvenile 8” rights as directed by U.S. Supreme Court

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<sup>14</sup> Characterizations of state juvenile justice system process are taken from Steven M. Cox et al., *Juvenile Justice: A Guide to Theory, Policy and Practice*, Thousand Oaks, California: Sage Publications (2011).

<sup>15</sup> *In Re Gault*, 387 U.S. 1 (1967).

case law and federal statutes, and as generally applied across the state systems (see discussion below).<sup>16</sup> When a youth is found to be “delinquent,” it is like being found guilty of a crime, particularly where a juvenile may be subject to secure detention as a disposition whether it is treatment-based or not. While tribes are not bound to follow the U.S. Supreme Court case law on fair juvenile process in their lawmaking, a compelling argument can be made that they should do so to protect both the rights and welfare of tribal youth and their families.

## **Where do the “Juvenile 8” rights come from?**

The Juvenile 8 rights come from a combination of U.S. Supreme Court precedents (cases) and federal laws (statutes) protecting the rights of juveniles in the federal and state court systems and stem from U.S. Constitutional provisions.<sup>17</sup> While tribes may not be bound by federal or state law to set out and enforce these rights in tribal statutes, a compelling argument can be made that doing so effects the “due process” provision of the Indian Civil Rights Act for juveniles in tribal juvenile court. Tribes adopting provisions in their statutes consistent with the Juvenile 8 will ensure fair process for youth in their tribal juvenile justice systems.

The Juvenile 8 include the juvenile’s:

1. Right to counsel (In Re Gault, 387 U.S. 1 (1967));
2. Right to be notified of the charges (In Re Gault, 387 U.S. 1 (1967));
3. Right to have a speedy trial (Juvenile Delinquency Act, 18 U.S.C. § 5036; Interstate Agreement on Detainers, 18 U.S.C. Appendix 2, §2 Articles III-VI (time limits for persons incarcerated in other jurisdictions; & see also *Barker v. Wingo*, 407 U.S. 514 (1972));
4. Right to confront witnesses against the juvenile and subpoena and call witnesses on his or her behalf (In Re Gault, 387 U.S. 1 (1967));
5. Right to a fair trial (In Re Gault, 387 U.S. 1 (1967));
6. Right to not be a witness against oneself or otherwise incriminate self (In Re Gault, 387 U.S. 1 (1967));
7. Right that the juvenile’s case will not be transferred into the adult criminal court without due process (*Kent v. United States*, 383 U.S. 541 (1966); and

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<sup>16</sup> 25 U.S.C. § 1301 et seq.

<sup>17</sup> Tribal laws frequently incorporate the provisions of ICRA or in the alternative, incorporate provisions, often modified, directly from the U.S. Constitution, or even a state constitution.

8. Right not to be found to be a juvenile delinquent absent proof “beyond a reasonable doubt” (In Re Winship, 397 U.S. 358 (1970)).

There is no right to a jury trial in juvenile proceedings ([McKeiver v. Pennsylvania](#), 403 U.S. 528 (1971)), and in many jurisdictions, juvenile proceedings are closed to the public to protect the welfare of the juvenile.

Some of the rights of youth in tribal process are implicated throughout all stages of that process, from initial interactions with the police through court hearings and “sentencing.” Specified juvenile rights are particularly important when and if the youth is taken into custody and/or questioned (the concern here is what happens in interrogations); during a transfer hearing in tribal juvenile court (the concern being that a hearing with legal standards is undertaken before subjecting youth to adult criminal court process); and during a preliminary hearing and/or an adjudication (trial) in tribal juvenile court (the concern being that the juvenile court not merely accept unknowing admissions and/or false confessions and dispose of a trial before “sentencing” the youth). The table that follows reviews the comparative legal process requirements, standards, and evidentiary rules applied variously by ICRA, the 1989 BIA Tribal Juvenile Justice Code, and the University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code, followed by a description of the varying provisions.

**Comparison of the statutory provisions of the Indian Civil Rights Act, the 1989 BIA Tribal Juvenile Justice Code, and the University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code.**

Rights/privileges at various stages in juvenile process.	Indian Civil Rights Act (ICRA)	1989 BIA Tribal Juvenile Justice Model Code	Center of Indigenous Research and Justice Model Tribal Juvenile Code
Custody (Interrogation)	<ul style="list-style-type: none"> <li>▪ No juvenile specific rights</li> <li>▪ No juvenile right against being compelled to be a witness against one’s self – applies to criminal cases only</li> <li>▪ Right to due process</li> </ul>	<ul style="list-style-type: none"> <li>▪ Privilege against self-incrimination</li> <li>▪ No questioning in custody except ...               <ul style="list-style-type: none"> <li>○ To identify</li> <li>○ Determine Parent, Guardian, or Custodian</li> <li>○ Medical assessment</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Right to Legal Counsel</li> <li>▪ Right to remain silent</li> <li>▪ Privilege against self-incrimination</li> <li>▪ Right to have Parent, Guardian, or Custodian</li> <li>▪ Statements made as result of interrogation inadmissible unless...               <ul style="list-style-type: none"> <li>○ Advised and waived</li> <li>○ Made after consulting with and in presence of legal counsel</li> <li>○ Recording made</li> <li>○ No threats.</li> </ul> </li> </ul>

Potential Transfer to Adult Criminal Court (Factors)	<ul style="list-style-type: none"> <li>▪ No juvenile specific rights</li> <li>▪ No juvenile right against being compelled to be a witness against one's self – applies to criminal cases only</li> <li>▪ Right to due process</li> </ul>	<ul style="list-style-type: none"> <li>▪ Court must find by clear and convincing evidence that ... <ul style="list-style-type: none"> <li>○ No reasonable prospects for rehabilitating</li> <li>○ Offenses evidence a pattern of conduct that constitutes a substantial danger public</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ No transfers to adult criminal court authorized by statute</li> </ul>	▪
Preliminary Hearing &/or Adjudication (Trial) (Admissions)	<ul style="list-style-type: none"> <li>▪ No juvenile specific rights</li> <li>▪ No juvenile right against being compelled to be a witness against one's self –applies to criminal cases only</li> <li>▪ Right to due process</li> </ul>	<ul style="list-style-type: none"> <li>▪ Court may accept an admission (like a guilty plea) if ... <ul style="list-style-type: none"> <li>○ Understands rights &amp; consequences</li> <li>○ Voluntary</li> <li>○ Intelligently</li> <li>○ Knowingly admits</li> <li>○ No facts = defense</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Right to Counsel</li> <li>▪ Right to due process including: <ul style="list-style-type: none"> <li>○ Notice</li> <li>○ Opportunity to be heard</li> <li>○ Discovery</li> <li>○ Testify</li> <li>○ Subpoena witnesses</li> <li>○ Introduce evidence</li> <li>○ Cross-examine witnesses</li> <li>○ Findings based solely upon evidence</li> </ul> </li> </ul>	▪
Adjudication (Trial)& Evidence (Out of Court Admission or Confession)	<ul style="list-style-type: none"> <li>▪ No juvenile specific rights</li> <li>▪ No juvenile right against being compelled to be a witness against one's self – applies to criminal cases only</li> <li>▪ Right to due process</li> </ul>	<ul style="list-style-type: none"> <li>▪ Valid out-of-court admission or confession insufficient w/out corroborating evidence</li> <li>▪ Statements made in custody to JC not used</li> </ul>	All of above for preliminary hearings. Plus same as 1989 BIA Tribal Juvenile Justice Code to left.	

The table compares the statutory provisions of ICRA, the [1989 BIA Tribal Juvenile Justice Code](#), and the University of Washington's Center of Indigenous Research and Justice [Model Tribal Juvenile Code](#). Relevant excerpts of the model codes are set out in the following text. We have compared and contrasted provisions as they apply to four critical stages of a tribal juvenile justice process and in answer to the question—why might so many tribal juvenile cases be transferred out, or if they remain in tribal juvenile court, why might they proceed to disposition (“sentencing”) without undergoing adjudication (“trial”)? The answer, we suspect, would be that tribal youth either admit to committing an offense early on or that they “plead guilty” during preliminary hearings. If this is the case, then it will be important to include tribal statutory protections against false and

coerced confessions, unknowing admissions, and use of what would be inadmissible evidence in juvenile proceedings in jurisdictions following U.S. Supreme Court precedent on fair process in juvenile proceedings. The four critical areas of tribal process include: (1) questioning, custody, and interrogation; (2) transfer hearings to adult criminal court (or to federal or state court); (3) preliminary hearings and/or adjudications in tribal juvenile court; and (4) in tribal juvenile adjudications specifically, the applicable rules of evidence.

**The Indian Civil Rights Act**—ICRA sets out only two rights applicable to tribal juvenile court process: due process and equal protection. None of ICRA’s criminal provisions apply to juveniles. The act requires that tribes treat everyone fairly and equally. Some may argue that the ICRA due process provision alone should be sufficient to ensure that all of the “Juvenile 8” rights are legally recognized and enforced. The difficulty is that this hasn’t been the experience in the state juvenile systems, where decades of abuses have resulted in a series of U.S. Supreme Court cases delineating specific rights and process to be applied in state and federal juvenile cases. In the tribal context, many tribal courts operate with lay judges and advocates who may not be familiar with the U.S. Supreme Court’s juvenile case law, or for that matter, with comparative tribal and state juvenile court process. It will be important to discuss hardwiring in specific juvenile statutory rights protections into the tribal laws applicable to tribal youth. This will ensure that tribal juvenile judges, court personnel, and advocates recognize, apply, and enforce them.

**(1989) BIA Tribal Juvenile Justice Code**—The BIA Tribal Juvenile Justice Code includes a number of specific juvenile statutory protections applicable to:

- **Questioning/Custody/Interrogation**—The BIA Tribal Juvenile Justice Code recognizes a youth’s right not to be compelled to answer questions that might incriminate him or her in tribal juvenile proceedings (the “privilege against self-incrimination,” a.k.a. “Fifth Amendment right” under the U.S. Constitution). It also prohibits questioning of youth who are taken into custody except to identify him or her, to determine who his or her parent(s), guardian, or custodian is, or for purposes of medical assessment.
- **Transfer Hearings**—The BIA Tribal Juvenile Justice Code requires that a tribal juvenile court find by “clear and convincing evidence” that there are no reasonable prospects for rehabilitating a youth and that the alleged offenses demonstrate that the youth has a pattern of conduct that poses a substantial danger to the public, before it can transfer him or her to an adult criminal court to be processed.
- **Preliminary Hearings/Adjudications (Re: Admissions)**—BIA Tribal Juvenile Justice Code requires that, before accepting a youth’s “guilty plea,” the tribal juvenile court judge questions the youth about whether he or she understands his or her rights and the consequences of admitting to having committed the alleged offense, whether he or she voluntarily, intelligently, and knowingly admits to all the facts necessary to prove the alleged

offense, and where the judge has determined that the youth has not, in his or her statements, set forth facts that, if true, would be a defense to the alleged offense.

- **Adjudications (Re: Rules of Evidence)**—BIA Tribal Juvenile Justice Code also makes a youth’s out-of-court admission, for example to a police officer, inadmissible in a trial (adjudication) unless other evidence is offered; in addition, that would point to the youth’s having committed the alleged offense. Also, any statements made by the youth to the juvenile counselor are inadmissible later at trial. Finally, any out-of-court statements or illegally seized or obtained evidence, that would be inadmissible in an adult criminal trial, are likewise inadmissible.

**Model Tribal Juvenile Code of the University of Washington’s Center of Indigenous Research and Justice**—The University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code includes a number of specific juvenile statutory protections applicable to:

- **Questioning/Custody/Interrogation**—The University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code provides a specific list of rights and a requirement to advise the youth of these rights for youth during custody and interrogation, including the right to legal counsel, the right to remain silent, the privilege against self-incrimination, and the right to have a parent, guardian, or custodian present. Further, the code makes any of the youth’s custodial statements inadmissible unless the youth was advised of his or her rights and waived them, made the statement(s) after consulting with and in the presence of legal counsel, a recording was made of the statement(s), and the youth was not threatened in making the statement(s).
- **Transfer Hearings**—The University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code does not recommend or authorize transfers from tribal juvenile court to adult tribal criminal court.
- **Preliminary Hearings/Adjudications (Re: Admissions)**—The University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code sets out a comprehensive list of due process rights for youth in all proceedings under the code, and after adjudication (or in contempt proceedings). Such rights include the youth’s parent’s, guardian, or custodian, including rights to notice of all proceedings, the opportunity to be heard before an unbiased fact-finder, the right to do discovery, the right to testify, the right to subpoena witnesses, the right to introduce evidence on one’s own behalf, the right to cross-examine witnesses, and the right to have court findings be based solely upon the evidence properly admitted in hearings before the juvenile court. In delinquency proceedings, the youth has a right to counsel at all stages of the juvenile proceedings. His or her parent(s), guardian, or custodian has a right to counsel at the youth’s disposition proceedings and in any contempt proceedings. The code modifies the right to counsel in

“child-in-need-of-services” proceedings (or proceedings involving status offenses or truancy) to include the youth’s right to be represented at any services planning conference and at all stages of any subsequent proceedings, and at all stages where a child-in-need-of-services petition has been filed. The model code also sets out comprehensive rights for youth including the privilege against self-incrimination; the right not to be fingerprinted, photographed, or to have any tissue samples taken absent a court order; the right not to be detained in a secure detention facility (except in compliance with the delinquency provisions) or in a jail, adult lock up or other detention facility; and special confidentiality provisions with respect to hearings and informal conferences (e.g., closed to the public), inspection of records, identifying information, and disclosures.

- **Adjudications (Re: Rules of Evidence)**—The University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code includes comprehensive rules of evidence specific to tribal juvenile delinquency proceedings, including (1) rules of admissibility modeled on the 1989 Tribal Juvenile Justice Code mentioned previously; (2) that oral, written, or other statements made as a result of an interrogation are inadmissible unless the youth was advised of his or her rights and waived them, made the statement(s) after consulting with and in the presence of legal counsel, a recording was made of the statement(s), and the youth was not threatened in making the statement(s); and (3) before permitting a youth’s statement to be introduced as evidence against the youth, the court must find that the statement was voluntarily and knowingly made, taking into account a list of factors (e.g., age, maturity, education, intelligence, mental development, physical and mental condition, consultation with parents/counsel, length of time interrogated, environment of interrogation, number of officers present, use of deception, use of isolation, food or sleep deprivation, or other coercive measures).

## [11.2] Model Code Examples

### [\(1989\) BIA Tribal Juvenile Justice Code](#) [1-3 TRANSFER TO TRIBAL COURT](#)

#### **1-3 A. Transfer Petition**

An officer of the court may file a petition requesting the juvenile court to transfer the child to the jurisdiction of the adult tribal court if the child is sixteen (16) years of age or older and is alleged to have committed an act which would have been considered a serious crime if committed by an adult.

#### **1-3 B. Transfer Hearing**

The juvenile court shall conduct a hearing to determine whether jurisdiction of the child should be transferred to tribal court. The transfer hearing shall be held within ten (10) days of

receipt of the petition by the court. Written notice of the time, place and purpose of the hearing is to be given to the child and the child's parent, guardian, or custodian at least three (3) days before the hearing. At the commencement of the hearing, the court shall notify the child and the child's parent, guardian or custodian of their rights under chapter 1-7 of this code.

### **1-3 C. Deciding Factors in Transfer Hearing**

The following factors shall be considered when determining whether to transfer jurisdiction of the child to tribal court:

1. the nature and seriousness of the offense with which the child is charged;
2. the nature and condition of the child, as evidenced by his age, mental and physical condition; and
3. the past record of offenses.

### **1-3 D. Standard of Proof in Transfer Hearing**

The juvenile court may transfer jurisdiction of the child to tribal court only if the court finds clear and convincing evidence that both of the following circumstances exist:

1. there are no reasonable prospects for rehabilitating the child through resources available to the juvenile court; and
2. the offense(s) allegedly committed by the child evidence a pattern of conduct with constitutes a substantial danger to the public.

## **1-7 Rights of Parties in Juvenile Proceedings.**

### **1-7 A. Privilege against Self-Incrimination.**

A child alleged to be a "juvenile offender" or a child whose family is "in need of services" shall from the time of being taken into custody be accorded and advised of the privilege against self-incrimination and from the time the child is taken into custody shall not be questioned except to determine identity, to determine the name(s) of the child's parent or legal custodian, or to conduct medical assessment or treatment for alcohol or substance abuse under section 1-13C of this code when the child's health and well-being are in serious jeopardy.

(1-7 B. Omitted)

### **1-7 C. Fingerprinting and Photographs.**



A child in custody shall not be fingerprinted nor photographed for criminal identification purposes except by order of the juvenile court. If an order of the juvenile court is given, the fingerprints or photographs shall be used only as specified by the court.

#### **1-7 D. Right to Retain Counsel.**

In “juvenile offender” and “family in need of supervision” cases, the child and his parent, guardian, or custodian shall be advised by the court and/or its representative that the child may be represented by counsel at all stages of the proceedings. If counsel is not retained for the child, or if it does not appear that counsel will be retained, the court in its discretion may appoint counsel for the child.

#### **1-7 E. Explanation of Rights.**

At his first appearance before the juvenile court, and at each subsequent appearance before the court, the child alleged to be a “juvenile offender” or a child whose family is “in need of services” and the child’s parent, guardian, or custodian shall be informed by the court of the following:

1. the allegations against him;
2. the right to an advocate or attorney at his own expense;
3. the right to testify or remain silent and that any statement made by him may be used against him;
4. the right to cross-examine witnesses;
5. the right to subpoena witnesses on his own behalf and to introduce evidence on his own behalf; and
6. the possible consequences if the allegations in the petition are found to be true.

#### **1-8 JUVENILE OFFENDER--TAKEN INTO CUSTODY**

(1-8 A. Omitted)

#### **1-8 B. Provision of Rights [when a Juvenile Offender is taken into custody]**

At the time the child is taken into custody as an alleged “juvenile offender,” the arresting officer shall give the following warning:

1. the child has a right to remain silent;
2. anything the child says can be used against the child in court;

3. the child has a right to the presence of his parent, guardian, or custodian and/or retained counsel during questioning, and;
4. the child has a right to an advocate or attorney at his own expense.

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**University of Washington**  
**Center of Indigenous Research and Justice**  
[Model Tribal Juvenile Code](#)  
**CHAPTER 1 GENERAL PROVISIONS**

**1.10 RIGHTS OF PARTIES**

**1.10.010 Due Process Rights**

In all proceedings conducted under [the provisions of this title], the parties shall have the right to due process, including:

- (a) the right to adequate notice of all proceedings, and the opportunity to be heard before an unbiased finder of fact;
- (b) the right to discovery [as provided for herein];
- (c) the right to testify, the right to subpoena witnesses, and the right to introduce evidence on the party's own behalf;
- (d) the right to cross-examine witnesses, except in such cases as this [title] expressly permits the use of hearsay testimony; and
- (e) the right to findings which are based solely upon evidence properly admitted in hearings before the Juvenile Court.

**1.10.030 Right to Counsel**

- (a) Neither a child nor the child's parent, guardian or custodian may waive the child's right to be represented by counsel.
- (b) Where counsel has not already been appointed or retained to represent the child, the Juvenile Court shall appoint the juvenile advocate, or other qualified and competent counsel, to represent the child at the child's first appearance before the Juvenile Court.

- (c) Prior to the child's first appearance before the Juvenile Court, the juvenile advocate shall be authorized to represent the child, without formal appointment by the Juvenile Court, in any proceedings conducted under the provisions of this title.
- (d) Upon presentation by counsel for the child of an order of appointment or a court order specifically allowing such access, any tribal agency, department, authority, institution, school, or health care provider shall permit counsel for the child to inspect and copy, without the consent of the child or the child's parent, guardian, or legal custodian, any records relating to the child involved in the case.

#### **1.10.050 Privilege Against Self-Incrimination**

Every child coming within the jurisdiction of the Juvenile Court shall be accorded and advised of the privilege against self-incrimination, and the child's exercise of the privilege shall not be used against the child in any proceedings conducted pursuant to [the provisions of this title].

#### **1.10.070 Fingerprinting and Photographs**

- (a) A child shall not be fingerprinted, photographed or have any tissue sample taken except by written order of the Juvenile Court.
- (b) Fingerprints, photographs or tissue samples from a child taken pursuant to a written order of the Juvenile Court shall be used only as specified in the written order.
- (c) This provision, however, shall not disallow photographs taken or fingerprints collected during an investigation.

#### **1.10.090 Secure Detention**

In no case shall a child be detained:

- (a) in a secure juvenile detention facility, except in accordance with [the relevant provisions of the delinquency code, where the child is alleged or found to have committed a delinquent act]; or
- (b) in a jail, adult lock-up or other adult detention facility.

#### **1.10.120 Confidentiality**

- (a) All Juvenile Court hearings and informal conferences held pursuant to this article shall be closed to the public.

- (b) Only the Juvenile Court judges, juvenile case coordinators, juvenile presenting officers, counsel, law enforcement officers, witnesses, the parties, service providers and such family and friends of the child to whose presence the parties have no reasonable objection, may be present.
- (c) All records concerning a child are open to inspection only by his or her parent, custodian or guardian, their counsel or other legal representative, or other parties to related proceedings before the court.
- (d) With the consent of the court, records may be inspected by the child.
- (e) The name, picture, place of residence, or any other identifying information concerning any child, parent, custodian or guardian, or person appearing as a witness in any proceeding held pursuant to this article, shall not be published in any newspaper, newsletter, electronic publication, internet site, nor be given for any other publicity.
- (f) Unless otherwise provided in this article, and except as is necessary to conduct an investigation or properly adjudicate the matter, no person shall disclose any identifying information concerning a matter conducted pursuant to this title. The Juvenile Court judge shall so warn those in attendance at each proceeding held pursuant to this title.
- (g) Any person who violates any provision of this section maybe subject to a civil contempt order by the Juvenile Court.

## **CHAPTER 2 DELINQUENCY**

### **2.02 RIGHTS OF PARTIES**

#### **2.02.110 Parties in Delinquency Proceedings**

The parties to all proceedings conducted pursuant to the provisions of this chapter shall be:

- (a) the child;
- (b) the Tribe; and
- (c) following adjudication, the child's parent, guardian or custodian.

#### **2.02.130 Right to Counsel**

- (a) The child shall be represented by counsel at all stages of any proceedings conducted pursuant to the provisions of this chapter.

- (b) The child's parent, guardian or custodian shall have the right to be represented by counsel at disposition, and in any proceedings for contempt brought against the child's parent, guardian or custodian pursuant to the provisions of this chapter.

#### **2.02.150 Hearings - Advisement of Rights**

At the commencement of all hearings conducted pursuant to the provisions of this chapter, the Juvenile Court shall advise the child, in language the child will easily understand:

- (a) of the nature and purpose of the proceedings;
- (b) of the right to counsel;
- (c) of the right to remain silent, and that any statement made by the child may be considered by the Juvenile Court as evidence that the child committed a delinquent act;
- (d) of the right to appeal any final order of the Juvenile Court.

### **2.04 INTERROGATION**

#### **2.04.110 Interrogation and Custodial Interrogation - Definitions**

For the purposes of this chapter:

- (a) an interrogation occurs whenever a law enforcement officer or other official asks a child a question, or subjects a child to any words or actions, that the law enforcement officer or other official knows or should know is reasonably likely to elicit an incriminating response; and
- (b) a custodial interrogation is any interrogation during which a reasonable person of the child's age and in the child's position would consider himself or herself to be unable to terminate the encounter.

#### **2.04.130 Advisement of Rights**

- (a) Prior to interrogating a child, the law enforcement officer or other official shall advise the child, in language the child will easily understand:
  - (1) that the child has the right to remain silent, and anything the child says may be used against the child in court;
  - (2) that the child has the right to have his or her parent, guardian or custodian present during any questioning;

- (3) that the child has the right:
  - (A) to be represented by counsel;
  - (B) to consult with counsel prior to any questioning; and
  - (C) to have counsel present during any questioning.
- (b) Prior to initiating or resuming the interrogation of any child, the law enforcement officer or other official shall again advise the child as required by subsection (a):
  - (1) if there has been any lapse in time since the prior advisement, including but not limited to circumstances in which the interrogation is resumed or reinitiated after ceasing or being interrupted for any reason; or
  - (2) if the law enforcement officer or other official is not the person who most recently advised the child as required by subsection (a), and:
    - (A) the law enforcement officer or other official was not present during the prior advisement; or
    - (B) the child was unaware that the law enforcement officer or other official was present during the prior advisement.

#### **2.04.150 Inadmissible Statements and Derivative Evidence**

- (a) An oral, written, or other statement of a child made as a result of any interrogation shall be inadmissible as evidence against the child in any delinquency or criminal proceedings, unless:
  - (1) the child was advised in accordance with §2.04.130; and
  - (2) the child clearly and affirmatively waived his or her rights before being questioned.
- (b) An oral, written, or other statement of a child made as a result of a custodial interrogation shall be inadmissible as evidence against the child in any delinquency or criminal proceedings, unless:
  - (1) the statement is made after consultation with and in the presence of counsel;
  - (2) an electronic recording is made of the custodial interrogation; and
  - (3) the recording is accurate and not intentionally altered.

- (c) An oral, written, or other statement of a child made as a result of any interrogation prior to or during which the child was subjected to threats or physical punishment shall be inadmissible as evidence against the child in any delinquency or criminal proceedings.
- (d) If the Juvenile Court finds that a statement is inadmissible under this section, then any statements or other evidence derived from the inadmissible statement, including subsequent statements made by the child, shall be likewise inadmissible as evidence against the child in any delinquency or criminal proceedings.

## **CHAPTER 3 CHILD IN NEED OF SERVICES.**

### **3.02 RIGHTS OF PARTIES**

#### **3.02.110 Right to Counsel**

- (a) The child shall be represented by counsel:
  - (1) at any services planning conference conducted pursuant to the provisions of §§ 3.07.1 10, et seq., and at all stages of any subsequent proceedings conducted pursuant to the provisions of this chapter; and
  - (2) at all stages of any proceedings conducted pursuant to the filing of a child in need of services petition in accordance with § 3.08.130.
- (b) The child's parent, guardian or custodian shall have the right to be represented by counsel [at disposition, and] in any proceedings for contempt brought against the child's parent, guardian or custodian pursuant to the provisions of this chapter.

## **[11.3] Tribal Code Examples**

### **Sault Ste. Marie Tribal Code**

#### **[Chapter 36: Juvenile Code](#)**

### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

#### **36.402 Rights of Parties in Juvenile Proceedings.**

- (1) A child alleged to be a juvenile offender shall from the time of being taken into custody be accorded and advised of the privilege against self-incrimination and should not be questioned without the presence or permission of the parent, guardian, or custodian except to determine identity, to determine the name(s) of the child's parents or legal custodian, or to conduct medical assessment or treatment for alcohol or substance abuse when the child's health and well-being are in serious jeopardy.

- (2) Omitted
- (3) In juvenile offender cases, the child and his parent, guardian, or custodian shall be advised by the Court and/or its representative that the child may be represented by counsel at all stages of the proceedings. If counsel is not retained for the child, or if it does not appear that counsel will be retained, the Court in its discretion may appoint counsel for the child.
- (4) At his first appearance before the Juvenile Division, the child alleged to be a juvenile offender and the child's parent, guardian or custodian shall be informed by the Court of the following:
  - (a) The allegations against him.
  - (b) The right to an advocate or attorney at his own expense.
  - (c) The right to testify or remain silent and that any statement made by him may be used against him.
  - (d) The right to cross-examine witness.
  - (e) The right to subpoena witnesses on his own behalf and to introduce evidence on his own behalf.
  - (f) The possible consequences if the allegations in the petition are found to be true.

**36.403 Taking a Child into Custody.**

- (1) Omitted
- (2) At the time the child is taken into custody as an alleged juvenile offender, the arresting officer shall give the following warning:
  - (a) The child has the right to remain silent.
  - (b) Anything the child says can be used against the child in court.
  - (c) The child has a right to the presence of his parent, guardian, or custodian and/or counsel during questioning.
  - (d) The child has a right to an advocate or attorney at his own expense.



## **CHAPTER 7 - KALISPEL YOUTH CODE**

### **PART 1 GENERAL PROVISIONS**

#### **Section 7-16 Rights of Parties**

##### **Section 7-16.01 Rights**

All parties are entitled to the following rights in all proceedings under this Code:

1. A statement by the Court to the youth and his or her parent(s), guardian, or custodian that the youth has the right to have a legal representative's advice and representation, at his or her expense. A party may request a continuance of a proceeding in order to seek legal representation;
2. The opportunity to subpoena witnesses;
3. The opportunity to introduce, examine, and cross-examine witnesses;
4. The opportunity to discover, offer, and inspect evidence; and
5. The opportunity to present arguments and statements.

##### **Section 7-16.02 Jury Trial**

There is no right to a jury trial for any proceeding under this Code.

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## **OGLALA SIOUX TRIBE LAW AND ORDER CODE**

### **Chapter 5: Juvenile Code**

#### **SUBCHAPTER II RIGHTS AND OBLIGATIONS**

##### **Section 2.01 Rights in Juvenile Offender Proceedings.**

At every stage of a juvenile offender proceeding under Chapter 5 of the Juvenile Code, the minor involved and his parents, guardian, or custodian shall be afforded the following rights, in addition to any others which may be available or provided by any other provisions of the Oglala Sioux Tribal Code:

- a) The right to have retained counsel at all hearings;
- b) The right to be present when any and all Tribal witnesses testify;
- c) The right to introduce evidence for and on their own behalf and to have witnesses subpoenaed to be present to testify for and on their behalf;
- d) The right not to be a witness against or otherwise incriminate themselves;

- e) The right to question or otherwise examine any witnesses who testify for and on behalf of the Tribe;
- f) The right to request a new hearing within ten (10) days after the adjudicatory hearing and the dispositional decision, on the grounds that new evidence has been discovered, which was not available at the original adjudicatory hearing;
- g) The right to appeal to the Oglala Sioux Tribal Court of Appeals, provided appellate procedure under the Tribal Code is followed accordingly.

## [11.4] Tribal Code Commentary

The 1989 BIA Tribal Juvenile Justice Code has served as a “model code” for many tribes to date. Section 1-7 “Rights of the Parties in Juvenile Proceedings” effectively provides for notification of five of the seven rights critical to juvenile proceedings (right to counsel, notice of charges, right to a fair hearing, right to confront and cross-examine witnesses, and protection against self-incrimination). The remaining two (no transfer to adult court absent a hearing and specified reasons and the requirement of proof beyond reasonable doubt) are set out in later sections of the code. It is noteworthy that Section 1-7A “Privilege against Self-Incrimination” provides significant protection for youth where it requires notification of the privilege from the time a child is taken into custody and prohibits the questioning of a child beyond identification and/or treatment or emergency purposes.

A good number of tribes have followed the 1989 BIA Tribal Juvenile Justice Code provisions with modifications. A good example of this is the juvenile code of the Sault Ste. Marie Tribe. The Sault Ste. Marie rights provisions are identical to the model with the omission of the right not to be fingerprinted or photographed for criminal identification purposes. This may be due to the fact that many tribes lack the resources to do so for even their adult criminal defendants.

The Kalispel Youth Code, Section 7-16.02 “Jury Trial” provides an example of a tribe that explicitly denies the right to a jury trial in juvenile proceedings. This is consistent with most state juvenile proceedings. It is also consistent with the research on adolescents that argues against the use of public proceedings due to potential harms to youth and stigmatization of youth. In many tribal communities the use of a jury in a kin-based society, would, in effect, publicize the proceeding.

The Oglala Sioux Tribe, in its Section 2.01(f) guarantees a right to request a new hearing where new evidence has been discovered after an adjudicatory hearing or dispositional decision. This right appears unique across the tribal juvenile statutes reviewed.

## [11.5] Exercises

The following exercises are meant to guide you in writing the “rights” section of the tribal juvenile code.

- Find and examine your juvenile code provisions setting out juvenile rights—does your list contain the “Juvenile 8”?
  - right to counsel (lay advocate or lawyer at own expense)
  - right to be notified of the charges
  - right to have a speedy trial
  - right to confront/cross-examine witnesses against the youth and to subpoena and call witnesses on his or her behalf
  - right to a fair trial (right to due process)
  - right to not be a witness against oneself or otherwise incriminate oneself
  - right not to have a case transferred into adult criminal court without a hearing and clear and convincing evidence that . . .
    - No reasonable prospects for rehabilitating through resources available; and
    - Offense(s) allegedly committed evidences a pattern of conduct that constitutes a substantial danger to the public
  - right not to be found to be a juvenile delinquent absent proof “beyond a reasonable doubt”
- If not, find and examine your constitution and/or judicial or court establishment code—do you have a general list that applies to everyone (adults and youth)? Is it based on the ICRA list (it usually begins, “No Indian tribe in exercising powers of self-government shall”)? Or is it based on the federal or a state constitution list?
- Discuss whether you want your youth to have the specially tailored “Juvenile 8” rights in juvenile court.
- Discuss whether you want your youth to have tribally paid for legal counsel in juvenile court (an attorney or lay advocate).

## Read and Discuss\*

### Should a tribe pay for and provide attorneys or lay advocates for youth involved in tribal juvenile court?

The question of whether the tribe should provide an attorney or other well-trained lay advocate for juvenile offenders is an important decision and could have a dramatic impact on the fairness of your juvenile process. Read the following excerpt from testimony by Nadia Seeratan, Senior Staff Attorney and Policy Advocate, National Juvenile Defender Center at the Hearing on Native Children Exposed to Violence, February 11, 2014 in Scottsdale, AZ, and discuss.

The juvenile defender is a unique role in that they are the only person in the justice system whose role it is to express the expressed interest of the child. By representing the expressed interest of a child, the defense attorney becomes the child's voice in a proceeding that is overwhelmingly confusing and frightening for young people. Although decisions of the United States Supreme Court—afford a constitutional right to counsel for youth are not binding on tribal nations—JDC believes these decisions, which recognize developmental science and brain science research, brings important information to bear and should provide persuasive and compelling arguments for the need for legal representation for all juveniles including American Indian and Alaska Native youth in tribal courts. So I'll start with Gault, the United States Supreme Court Case 47 years ago that provided juveniles with the right to counsel. In Gault, the court found that the child requires the guiding hand of counsel at every step in the proceedings, because the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into facts and to insist upon the regularity of proceedings. The court recognized the unique and critical role of the defender, stating the probation officer cannot act as counsel for the child, his role is an arresting officer and witnessing as the child, nor can the judge represent the child.

# Chapter 12: Evidentiary Rules in Juvenile Proceedings

## [12.1] Overview

In the state juvenile court systems, questions about the admissibility of evidence arise primarily regarding two stages in the process: (1) the police investigatory process; and (2) the court's adjudicatory process.<sup>18</sup>

**Police Investigatory Process**—Both the *Gault* and *Kent*<sup>19</sup> decisions have been interpreted to require the application of the U.S. Constitution's Fourth Amendment<sup>20</sup> and the exclusionary rule to the juvenile justice process. The exclusionary rule is the rule that evidence obtained in violation of an accused person's constitutional rights cannot be admitted into evidence (cannot be used to prove guilt in court).

In juvenile cases, the most difficult issue has revolved around the juvenile's competency to waive his or her Miranda rights, and then to make a statement or confession that may be used as evidence of his or her guilt in court. In general, state courts have relied on a "totality of circumstances" approach in determining the validity of the waiver. This standard is used to determine whether a juvenile's statement or confession may be used as evidence in court and includes a weighing by the judge of factors at the time of his or her questioning including his or her age, competency, and educational level; his or her ability to understand the nature of the charges; and the methods used in, and the length of, interrogation.

Many state juvenile acts are based upon the [Uniform Juvenile Court Act of 1968](#).<sup>21</sup> The Uniform Juvenile Court Act states that evidence seized illegally will not be admitted over objection.<sup>22</sup> Also, a valid confession made by a juvenile out of court is "insufficient to support an adjudication of delinquency unless it is corroborated in whole or in part by other evidence."<sup>23</sup>

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<sup>18</sup> Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

<sup>19</sup> *Kent v. United States*, 383 U.S. 541 (1966).

<sup>20</sup> Fourth Amendment of the U.S. Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

<sup>21</sup> National Conference of Commissioners on Uniform State Laws, 1968.

<sup>22</sup> *Id.* at sec. 27(b).

<sup>23</sup> *Id.*

**Adjudicatory Process**—Two of the post-*Gault* rights implicate evidentiary rules in juvenile adjudicatory proceedings: (1) the right to confront and cross-examine witnesses and (2) the right to remain silent. Under the Uniform Juvenile Court Act, the juvenile is entitled to introduce evidence and otherwise be heard in his or her own behalf and to cross-examine witnesses.<sup>24</sup> Also under the Uniform Act, a juvenile accused of a delinquent act need not be a witness against or otherwise incriminate himself or herself.<sup>25</sup> While a majority of state juvenile court acts do not set out a detailed set of rules of evidence, most do specify that only competent, material, and relevant evidence is admissible to prove guilt.

About “out-of-court statements” and the general prohibition against “hearsay”—“Hearsay” is defined as testimony that is given by a witness who relates not what he or she knows personally, but what others have said and that is therefore dependent on the credibility of someone other than the witness. This type of testimony is generally inadmissible under rules of evidence. The “hearsay rule” is the rule that no statement made by a witness on the stand can be received as testimony, unless it is or has been open to test by cross-examination or an opportunity for cross-examination, except as allowed by the rules of evidence. The gist of the rule is that the testimony of the person on the stand who is retelling a story told to them (as opposed to the testimony of the person who actually experienced the event) will not be admitted as reliable evidence.

**About Standards of Proof**—Finally, although many state and tribal juvenile proceedings are classified as “civil” in nature, the U.S. Supreme Court, post-*Gault*, has required that the highest standard of proof be applied in state juvenile proceedings—proof beyond a reasonable doubt. As discussed in earlier chapters, this higher standard is preferable in tribal juvenile proceedings as well, to ensure fair process and to protect the rights of the juvenile and his or her family by reliably establishing guilt. However, there may be some confusion where the practice in Indian country has been to combine juvenile offender proceedings and child maltreatment (abuse and neglect) proceedings within one tribal statute (ordinance or code). In many cases a lower civil standard of proof is applied as well to the juvenile proceedings. The preferred practice is to apply the standard of “beyond a reasonable doubt” to juvenile offender proceedings and the lower civil standards to child maltreatment proceedings.

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<sup>24</sup> Id. at sec. 27(a).

<sup>25</sup> Id.

## [12.2] Model Code Examples

### (1989) BIA Tribal Juvenile Justice Code

#### 1-7 RIGHTS OF PARTIES IN JUVENILE PROCEEDINGS

##### **1-7 B. Admissibility of Evidence.**

In a proceeding on a petition alleging that a child is a “juvenile offender” or a child whose family is “in need of services”:

1. an out-of-court statement that would be inadmissible in a criminal matter in tribal court shall not be received in evidence;
2. evidence illegally seized or obtained shall not be received in evidence to establish the allegations of a petition;
3. unless advised by counsel, the statements of a child made while in custody to a juvenile counselor, including statements made during a preliminary inquiry, informal adjustment or predispositional study, shall not be used against a child in determining the truth of allegations of the petition;
4. a valid out-of-court admission or confession by the child is insufficient to support a finding that the child committed the acts alleged in the petition unless it is corroborated by other evidence;
5. neither the fact that the child has at any time been a party to a “family in need of services” proceeding nor any information obtained during the pendency of such proceedings shall be received into evidence.

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### **University of Washington Center of Indigenous Research and Justice**

#### Model Tribal Juvenile Code

#### **CHAPTER 2 DELINQUENCY**

##### **2.01. RULES IN DELINQUENCY PROCEEDINGS**

###### **2.01.110 Rules - Generally**

Delinquency proceedings before the Juvenile Court shall be governed by the rules of evidence and procedure governing criminal proceedings before the Tribal Court, to the extent that such rules are not in conflict with the provisions of this title.

(2.01.130 Omitted)

### **2.01.150 Admissibility of Evidence**

In any proceedings on a delinquency petition brought under the provisions of this chapter:

- (a) no out-of-court statement which would be inadmissible in criminal proceedings before the Tribal Court shall be admissible to establish the allegations of the delinquency petition;
- (b) no evidence which would be inadmissible in criminal proceedings before the Tribal Court because such evidence was illegally seized or obtained shall be admissible to establish the allegations of the delinquency petition;
- (c) no statement of the child made to the juvenile case coordinator, nor any evidence derived from such a statement, shall be admissible to establish the allegations of the delinquency petition, unless the statement is made after consultation with and in the presence of counsel;
- (d) an out-of-court statement by the child shall be insufficient to support a finding that the child committed the acts alleged in the delinquency petition, unless the statement is corroborated by other evidence; and
- (e) the fact that a child has at any time been a party to child-in-need-of-services proceedings shall be inadmissible to establish the allegations of the delinquency petition, and any statement made by the child during the pendency of such proceedings shall be treated as a statement made in response to custodial interrogation, and subject to the provisions of § 2.04.150.

## **2.04 INTERROGATION**

(2.04.110 and 2.04.120 Omitted)

### **2.04.150 Inadmissible Statements and Derivative Evidence**

- (a) An oral, written, or other statement of a child made as a result of any interrogation shall be inadmissible as evidence against the child in any delinquency or criminal proceedings, unless:
  - (1) the child was advised in accordance with § 2.04.130; and
  - (2) the child clearly and affirmatively waived his or her rights before being questioned.



- (b) An oral, written, or other statement of a child made as a result of a custodial interrogation shall be inadmissible as evidence against the child in any delinquency or criminal proceedings, unless:
  - (1) the statement is made after consultation with and in the presence of counsel;
  - (2) an electronic recording is made of the custodial interrogation; and
  - (3) the recording is accurate and not intentionally altered.
- (c) An oral, written, or other statement of a child made as a result of any interrogation prior to or during which the child was subjected to threats or physical punishment shall be inadmissible as evidence against the child in any delinquency or criminal proceedings.
- (d) If the Juvenile Court finds that a statement is inadmissible under this section, then any statements or other evidence derived from the inadmissible statement, including subsequent statements made by the child, shall be likewise inadmissible as evidence against the child in any delinquency or criminal proceedings.

#### **2.04.170 Other Statements**

- (a) The provisions of § 2.04.150 shall not preclude the admission of:
  - (1) a statement made by the child in open court in any Juvenile Court or Tribal Court proceeding in which the child was represented by counsel;
  - (2) a spontaneous statement not made in response to interrogation; or
  - (3) a statement made in response to a question that is:
    - (A) routinely asked during the processing of a child being taken into custody; and
    - (B) not a question that the law enforcement officer knows or should know is reasonably likely to elicit an incriminating response.
- (b) The Tribe shall bear the burden of proving by a preponderance of the evidence that a statement falls within one of the exceptions identified in subsection (a).

#### **2.04.190 Factors Relating to Admissibility**

Before permitting any child's statement to be introduced as evidence against the child, the Juvenile Court must find that the statement was voluntarily and knowingly made, taking into account these and any other relevant factors:

- (a) whether the child had the opportunity to consult with his or her parent, guardian or custodian, or counsel before making the statement;
- (b) the child's age, maturity, and level of education;
- (c) the child's level of intelligence and mental development; as well as the presence of any cognitive or mental disability or impairment;
- (d) the child's physical and mental condition at the time the statement was made;
- (e) the length of time the child was detained prior to interrogation, and the length of time the child was interrogated before making the statement;
- (f) the environment in which the interrogation took place;
- (g) the number of law enforcement officers who conducted or were present during the interrogation, as well as their physical characteristics and demeanor;
- (h) any use of deception by the law enforcement officer(s) conducting the interrogation;
- (i) whether, either prior to or during the interrogation, the child was held in isolation, deprived of food or sleep, or subjected to other potentially coercive measures.

#### **1.04 RIGHTS OF PARTIES**

##### **1.04.170 Privilege Against Self-Incrimination**

- (a) Every child coming within the jurisdiction of the Juvenile Court shall be accorded and advised of the privilege against self-incrimination, and the child's exercise of the privilege shall not be used against the child in any proceedings conducted pursuant to the provisions of this title.
- (b) No statement, admission or confession made by, nor incriminating information obtained from a child in the course of any screening, assessment, evaluation, or treatment undertaken in conjunction with proceedings under this title, including but not limited to that which is court-ordered, shall be admitted into evidence in any proceedings before the Juvenile Court or the Tribal Court.

## [12.3] Tribal Code Examples

### Sault St. Marie Tribal Code

#### CHAPTER 36: JUVENILE CODE

#### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

##### **36.402 Rights of Parties in Juvenile Proceedings.**

- (2) In a proceeding on a petition alleging that a child is a juvenile offender:
- (a) An out-of-court statement that would be inadmissible in a criminal matter in Tribal Court shall not be received in evidence.
  - (b) Evidence illegally seized or obtained shall not be received in evidence to establish the allegations of a petition.

### The Cherokee Code of the Eastern Band of the Cherokee Nation

#### **Chapter 7A - JUVENILE CODE**

#### **ARTICLE II. - SCREENING OF DELINQUENCY AND UNDISCIPLINED PETITIONS**

##### **Sec. 7A-46.—Rules of evidence.**

Where delinquent or undisciplined behavior is alleged and the allegation is denied, the court shall proceed in accordance with rules of evidence applicable to criminal cases. In addition, no statement made by a juvenile to the intake counselor during the preliminary inquiry and evaluation process shall be admissible prior to the dispositional hearing.

### **Absentee-Shawnee Tribe of Indians of Oklahoma**

#### TITLE 2 JUVENILE CODE

#### **Chapter One**

##### **Section 111. Hearing**

- A. **Findings of Fact.** The judge, or in the proper case, the jury, shall be trier of fact and shall base the findings upon the requirement that each allegation must be proved beyond a reasonable doubt. Such findings shall be made only upon evidence which is admissible under the rules of the Tribal Court.

## [12.4] Tribal Code Commentary

Many tribes have based their evidentiary provisions upon the 1989 BIA Tribal Juvenile Justice Code. The alternative University of Washington's Center of Indigenous Research and Justice Model Tribal Juvenile Code was completed in the fall of 2014 and has only recently been made available to the public. It includes comprehensive, juvenile-specific, evidentiary provisions that would be very useful in protecting both the welfare and rights of youth and their families in tribal juvenile court systems (incorporating the 1989 BIA Tribal Juvenile Justice Code's evidentiary provisions and adding in special provisions governing the admissibility of youth statements acquired as part of an interrogation). However, it provides a right to paid-for attorneys for youth and their parents, guardians, and custodians at various stages and more comprehensive evidentiary rules tailored to protecting youth, which will necessitate skillful advocacy (at the level of a licensed attorney).

The 1989 BIA Tribal Juvenile Justice Code makes the following inadmissible "in a proceeding on a petition alleging that a child is a 'juvenile offender'":

- An out-of-court statement (by anyone) that would be inadmissible in a criminal matter in tribal court.
- Evidence illegally seized or obtained.
- Statements of a child made while in custody (unless advised by counsel).
- A valid out-of-court admission or confession by the child (unless it is corroborated by other evidence).
- The fact that the child has been a party to a Family In Need of Services (FINS) proceeding and any information obtained during such proceeding.

The 1989 BIA Tribal Juvenile Justice Code evidence provisions are modified and tailored to tribal juvenile court process (as informed by U.S. Supreme Court precedent on fair juvenile process and given the experience of the state juvenile justice systems) and are the preferred alternative to a tribe's wholesale application of the federal rules of evidence used in adult criminal proceedings to tribal juvenile proceedings (and the preferred alternative to the random adoption of rules of evidence from various sources). However, tribes prioritizing a paid-for right to counsel for their youth and their families should consider following the University of Washington's model code provisions mentioned previously.

The Sault Ste. Marie Tribe's Section 36.402 incorporates two limitations on the admissibility of evidence: out-of-court statements that would be inadmissible in a criminal matter in tribal court and evidence illegally seized or obtained. There is no limit on admitting a youth's statement or confession as evidence. Contrast this with Section 111 A of the Absentee-Shawnee Juvenile statute, which incorporates the tribe's entire body of rules of evidence. The Eastern Band of Cherokee also incorporate the evidence code used in the adult court to juvenile offender adjudications but exclude

any statements made by the juvenile to the intake counselor during the preliminary inquiry and evaluation process. The purpose of this type of exclusion is to ensure that the youth will be able to speak freely prior to adjudication, that the matter be resolved preadjudication, and that the youth will have received the assistance and/or treatment that he or she needed. The Eastern Band of Cherokee’s approach keeps the prehearing phases informal where the focus can then be on screening, identification of youth and family problems, and rehabilitation. The Absentee-Shawnee Tribe of Indians of Oklahoma code is an example of a law requiring that there be sufficient evidence presented at an adjudication to meet the “beyond a reasonable doubt” standard. This is the highest standard of proof and is required in criminal cases.

## [12.5] Exercises

The following exercises are meant to guide you in writing the evidence section of the tribal juvenile code.

- Find and examine your tribal court code provisions or court rules governing rules of evidence—is there a special set of evidence rules applicable to your juvenile court?
- Do your rules of evidence provide special protections against using false or coerced confessions (e.g., obtained during a police interrogation) in your juvenile court to find that the juvenile is guilty of committing the alleged offense?
- Do your rules of evidence provide special protections against using statements or admissions made during the intake, treatment, or case management process in your juvenile court to find that the juvenile is guilty of committing the alleged offense?
- Do your rules of evidence require that the juvenile judge determine that a youth’s admission in court is voluntarily, intelligently, and knowingly made and that he or she understands his or her rights and the consequences of pleading guilty, before accepting the youth’s guilty plea?
- Do your rules of evidence allow a youth’s statement, admission, or confession, without other evidence, to be used as the sole evidence of guilt in juvenile proceedings?
- Do your evidence rules allow third-party “out-of-court-statements” (otherwise known as “hearsay” and sometimes referred to as gossip) to be used as evidence against a youth in juvenile proceedings?
- What types of information would be more or less reliable for the court to use?

## Read and Discuss\*

### Should we include statutory protections against false confessions?

A false confession is an admission of guilt in a crime in which the confessor is not responsible for the crime. False confessions can be induced through coercion or by the mental disorder or incompetency of the accused. Even though false confessions might appear to be an exceptional and unlikely event, they occur on a regular basis in case law, which is one of the reasons why jurisprudence has established a series of rules to detect, and subsequently reject, false confessions.

False confessions can be categorized into three general types, as outlined by Saul M. Kassin in an article for *Current Directions in Psychological Science*:

- **Voluntary false confessions** are those that are given freely, without police prompting. Sometimes they may be sacrificial, to divert attention from the actual person who committed the crime.
- **Compliant false confessions** are given to escape a stressful situation, avoid punishment, or gain a promised or implied reward.
- **Internalized false confessions** are those in which the person genuinely believes that they have committed the crime, as a result of highly suggestive interrogation techniques.

According to the Innocence Project, approximately 25% of convicted criminals ultimately exonerated had, in fact, confessed to the crime. . . . The high pressure generated may push innocent individuals to produce a confession.

### Central Park Jogger (1989)

In the Central Park jogger case, on April 19, 1989, five teens aged from 14 to 16 were arrested and each confessed on videotape to the crime of attacking and raping a jogger and implicated each other. They later repudiated these confessions and maintained their innocence. The five were: Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana, and Kharey Wise. In 1989, the police were aware that an unidentified sixth person had left semen on the victim's body. In 2002, Matias Reyes, a convicted murderer and rapist, admitted that he was responsible for the rape and attack of the jogger. The DNA obtained from the crime scene matched Reyes. New York state justice Charles J. Tejada vacated the convictions of five defendants on December 19, 2002. Yusef Salaam served six and a half years in prison. Kharey Wise was imprisoned until summer 2002, which was when his sentence was completed.

\*Taken from Wikipedia—False Confessions. Go to [http://en.wikipedia.org/wiki/False\\_confession](http://en.wikipedia.org/wiki/False_confession)

# Chapter 13: Taking a Child into Custody

## [13.1] Overview

This chapter sets out a procedure for taking an alleged juvenile offender into custody. Most juvenile courts generally allow for youth to be taken into custody without a warrant if the law enforcement officer reasonably believes that the youth is delinquent, in need of supervision, dependent, abused, or neglected. In the case of truancy, disobedience, or neglect, in any system the legal process should begin with a summons unless waiting for the court's permission would result in an unnecessary and dangerous delay.

This section of the code should address the following:

- Under what circumstances a child can be taken into custody;
- Who decides when a child is placed in custody;
- Where a child can be placed if in custody;
- Time limits on how long a child can remain in custody;
- Notification of family; and
- Process that must be followed when a child is in custody, including when release is required.

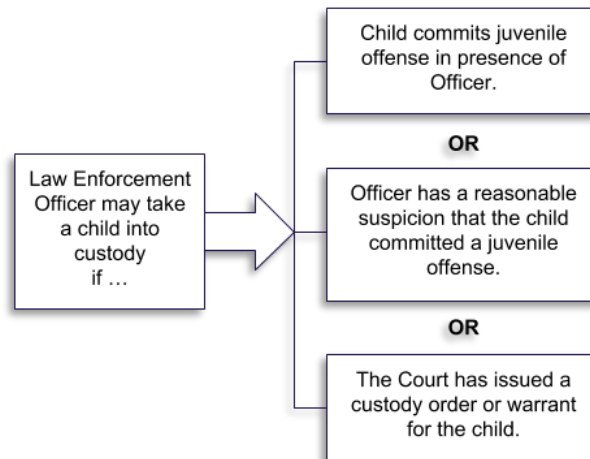
The detention of juvenile offenders must comply with the [Juvenile Justice and Delinquency Prevention Act of 1974](#) (PL 96-509) which provides that (1) juvenile status offenders and nonoffenders are not to be placed in secure detention facilities; (2) suspected or adjudicated juvenile delinquents are not to be detained or confined in facilities allowing regular contact with incarcerated adults; and (3) no juvenile is to be detained or confined in any jail or lockup for adults except in low population density areas or where appropriate facilities are unavailable. Many tribal juvenile justice systems have had difficulty meeting the requirements of this act.

The court must designate appropriate juvenile facilities for various types of alleged “juvenile offenders” and also designate the appropriate juvenile official at these facilities to make detention decisions. Keep in mind that a Native youth has probably already experienced substantial trauma in his or her life and the event of being taken into custody by a law enforcement officer could add to that trauma. There should be a preference to place children in their homes or with a relative. Placement in foster care or other temporary care may also be appropriate in some cases. The court should exam what is reasonable to keep the youth and community safe. Communication among the

juvenile system personnel and other agencies is vitally important to find the least restrictive setting for the youth.

### Section 1-8 A. Taking A Child Into Custody

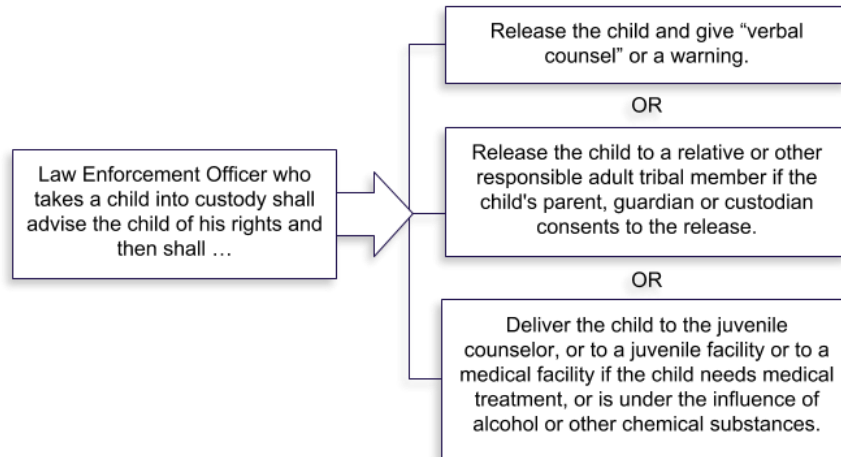
1989 BIA Tribal Juvenile Justice Code



The [1989 BIA Tribal Juvenile Justice Code](#), Section 1-8 A, provides that a law enforcement officer may take a child into custody without a warrant where the youth commits a juvenile offense in the officer's presence or where the officer has a "reasonable suspicion" that the youth has committed a juvenile offense. "Reasonable suspicion" is defined in *Black's Law Dictionary* as "a particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal [here delinquent] activity."

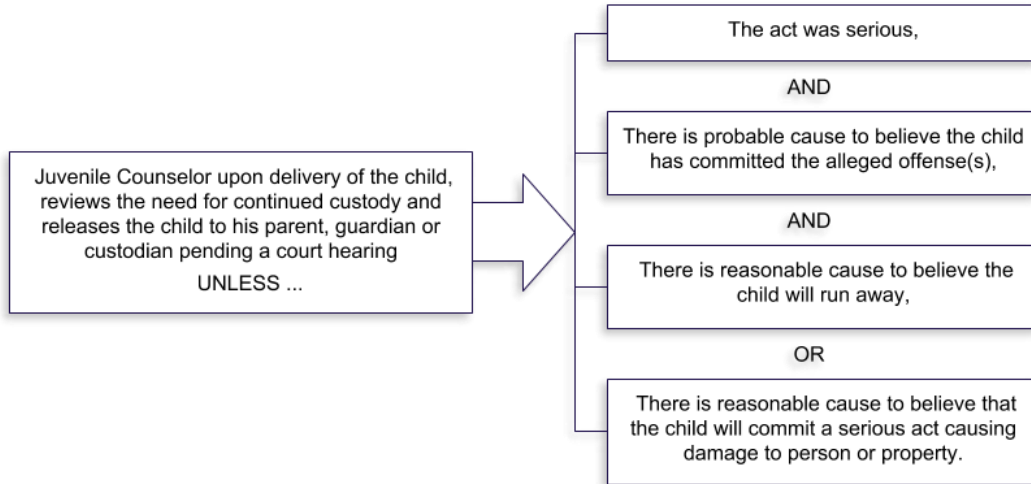


**Section 1-8 C. Release or Delivery from Custody**  
1989 BIA Tribal Juvenile Justice Code



The [1989 BIA Tribal Juvenile Justice Code](#), Section 1-8 C, provides that once a law enforcement officer has taken a youth into custody, he must advise the youth of his or her rights and then must either release the child to his or her parent, guardian, or custodian (or to a responsible adult tribal member with the consent of the parent, guardian, or custodian), or deliver the youth to the designated juvenile intake officer. In those cases in which the youth is in need of immediate treatment or in which he or she is under the influence of alcohol and/or drugs, he or she may be delivered to a medical facility.

**Section 1-8 D. Review by Juvenile Counselor or Juvenile Facility**  
1989 BIA Tribal Juvenile Justice Code



The 1989 BIA Tribal Juvenile Justice Code, Section 1-8 D, provides that where a youth has been taken into custody and then delivered to the appropriate juvenile intake officer, that officer must then review the need for continued custody and release the youth to his or her parent, guardian, or custodian pending a court hearing, unless the alleged act constitutes a serious juvenile offense, there is probable cause to believe that the youth committed it, and/or there is reasonable cause to believe that the youth will run away, and/or there is reasonable cause to believe that the youth will commit a future serious act to a person or property.

## [13.2] Model Code Examples

### (1989) BIA Tribal Juvenile Justice Code

#### 1-8 JUVENILE OFFENDER—TAKING INTO CUSTODY

##### **1-8 A. Taking a Child Into Custody**

A law enforcement officer may take a child into custody when:

1. the child commits a “juvenile offense” in the presence of the officer; or
2. the officer has a reasonable suspicion to believe a “juvenile offense” has been committed by the child being detained; or
3. an appropriate custody order or warrant has been issued by the court authorizing the taking of a particular child.

##### **1-8 B. Provision of Rights**

At the time the child is taken into custody as an alleged “juvenile offender,” the arresting officer shall give the following warning:

1. the child has a right to remain silent;
2. anything the child says can be used against the child in court;
3. the child has a right to the presence of his parent, guardian, or custodian and/or counsel during questioning, and;
4. the child has a right to an advocate or attorney at his own expense.

##### **1-8 C. Release or Delivery from Custody**

A law enforcement officer taking a child into custody shall give the warnings listed in section 1-8B to any child he takes into custody prior to questioning and then shall do one of the following:

1. release the child to the child’s parent, guardian or custodian and issue verbal counsel or warning as may be appropriate; or
2. release the child to a relative or other responsible adult tribal member if the child’s parent, guardian or custodian consents to the release. (If the child is ten (10) years of age or older, the child and his parent, guardian or custodian must both consent to the release);  
or

3. deliver the child to the juvenile counselor, or to a juvenile facility as designated by the court, or to a medical facility if the child is believed to need prompt medical treatment, or is under the influence of alcohol or other chemical substances.

#### **1-8 D. Review by Juvenile Counselor or Juvenile Facility**

The juvenile counselor or juvenile official at the juvenile facility (as designated by the court) shall, immediately upon delivery of the child for custody, review the need for continued custody and shall release the child to his parent, guardian or custodian in order to appear at the hearing on a date to be set by the court, unless:

1. the act is serious enough to warrant continued detention and;
2. there is probable cause to believe the child has committed the offense(s) alleged; and
3. there is reasonable cause to believe the child will run away so that he will be unavailable for further proceedings; or
4. there is reasonable cause to believe that the child will commit a serious act causing damage to person or property.

#### **1-8 E. Notification of Family**

If a child is taken into custody and not released to his parent, guardian or custodian, the person taking the child into custody shall immediately attempt to notify the child's parent, guardian or custodian. All reasonable efforts shall be made to advise the parent, guardian or custodian of the reason for taking the child into custody and the place of continued custody. Such reasonable efforts shall include telephone and personal contacts at the home or place of employment or other locations where the person is known to frequent. If notification cannot be provided to the child's parent, guardian or custodian, the notice shall be given to a member of the extended family of the parent, guardian or custodian and to the child's extended family.

#### **1-8 F. Criteria for Selecting Juvenile Facility**

If the juvenile counselor or juvenile official at the juvenile facility (as designated by the court) determines that there is a need for continued custody of the child in accordance with section 1-8D of this code, then the following criteria shall be used to determine the appropriate juvenile facility for the child:

1. A child may be detained in a Secure Juvenile Detention Facility (as defined in section 1-1C of this code) as designated by the court only if one or more of the following conditions are met:

- (a) the child is a fugitive from another jurisdiction wanted for a felony offense; or
  - (b) the child is charged with murder, sexual assault, or a crime of violence with a deadly weapon or which has resulted in a serious bodily injury; or
  - (c) the child is uncontrollable and has committed a serious physical assault on the arresting officer or on other security personnel while resisting arrest or detention; or
  - (d) the child is charged with committing one of the following acts which would be an offense if the child were an adult: vehicular homicide, abduction, rape, arson, burglary or robbery or
  - (e) the child is already detained or on conditioned release for another “juvenile offense,”
  - (f) the child has a demonstrable recent record of willful failures to appear at juvenile court proceedings; or
  - (g) the child has made a serious escape attempt; or
  - (h) the child requests in writing that he be given protection by being confined in a secure confinement area and there is a present and immediate threat of serious physical injury to the child.
2. A child may be housed in a Juvenile Shelter Care Facility (as defined in section 1-1C of this code) as designated the court only if one of the following conditions exist:
- (a) one of the conditions described in section 1-8F(1) above exists; or
  - (b) the child is unwilling to return home or to the home of an extended family member; or
  - (c) the child’s parent, guardian, custodian, or an extended family member is unavailable, unwilling, or unable to permit the child to return to his home;
  - (d) there is an evident and immediate physical danger to the child in returning home, and all extended family members are unavailable, unwilling, or unable to accept responsibility for temporary care and custody of the child.
3. A child may be referred to an Alcohol or Substance Abuse Emergency Shelter or Halfway House (as defined in section 1-1C of this code) if it is determined that there is a need for continued custody of the child in accordance with section 1-8D of this code and (1) the child has been arrested or detained for a “juvenile offense” relating to alcohol or

substance abuse, (2) there is space available in an alcohol or substance abuse emergency shelter or halfway house designated by the court; and (3) the child is not deemed to be a danger to himself or others.

**University of Washington**  
**Center of Indigenous Research and Justice**  
[Model Tribal Juvenile Code](#)  
**CHAPTER 2 DELINQUENCY**

**2.03 CUSTODY AND RELEASE**

**2.03.110 Custody Orders**

The Juvenile Court may issue a written order that a law enforcement officer shall take a child into immediate custody if:

- (a) the issuance of a custody order is authorized under § 2.01.170; or
- (b) the Juvenile Court finds, based on a filed affidavit or sworn testimony before the Juvenile Court, that there is probable cause to believe:
  - (1) the child has violated conditions of release imposed by the Juvenile Court under § 2.05.170; or
  - (2) the child has committed a delinquent act or has violated a disposition order entered by the Juvenile Court under § 2.13.230, and:
    - (A) the conduct, condition or surroundings of the child pose a substantial risk to the health, welfare, person or property of the child or others; or
    - (B) there is a substantial risk that the child may leave or be removed from the jurisdiction of the Juvenile Court, or will not be brought before the Juvenile Court, notwithstanding the service of a summons.

**2.03.130 Taking a Child into Custody**

- (a) A law enforcement officer may take a child into custody if:
  - (1) the Juvenile Court has issued a custody order in accordance with § 2.03.110; or
  - (2) the officer has probable cause to believe the child has committed a delinquent act.

- (b) Whenever a child is taken into custody pursuant to the provisions of subsection (a), the law enforcement officer taking the child into custody shall advise the child as required by § 2.04.130(a):
  - (1) at the earliest reasonable opportunity; and
  - (2) whether or not the law enforcement officer intends to interrogate the child.

### **2.03.150 Release or Delivery from Custody**

- (a) A law enforcement officer taking a child into custody without a custody order or warrant shall:
  - (1) if the law enforcement officer determines that no further action is required, release the child to the child's parent, guardian or custodian, and issue verbal counsel or a warning as may be appropriate;
  - (2) if the law enforcement officer determines that the matter should be referred to the juvenile case coordinator pursuant to the provisions of Chapter 3, proceed in accordance with § 3.03.150; or
  - (3) if the law enforcement officer determines that the matter should be reviewed by the juvenile case coordinator pursuant to the provisions of this chapter:
    - (A) release the child to the child's parent, guardian or custodian upon their promise to bring the child before the Juvenile Court upon the issuance of a summons under [GP/Summons]; or
    - (B) if the law enforcement officer determines that the child cannot be safely released to the child's parent, guardian or custodian, deliver the child to the juvenile case coordinator or to a juvenile facility designated by the Juvenile Court.
- (b) When the law enforcement officer believes that the child is in need of prompt medical attention, the law enforcement officer shall deliver the child to a medical facility or otherwise obtain such medical attention for the child before proceeding under subsection (a).
- (c) Upon releasing the child to the child's parent, guardian or custodian, the law enforcement officer shall refer the child's parent, guardian or custodian to any social, community, or tribal services or resources which may be appropriate for addressing the needs of the child and the child's parent, guardian or custodian.

### **2.03.170 Notification of Parents and Juvenile Case Coordinator**

- (a) If a child is taken into custody and not released, the law enforcement officer taking the child into custody shall immediately notify:
  - (1) the child's parent, guardian or custodian; and
  - (2) the juvenile case coordinator.
- (b) All reasonable efforts shall be made to advise the parent, guardian or custodian of the reason the child was taken into custody, and the location where the child is being held.
- (c) If the child's parent, guardian or custodian cannot be notified, all reasonable efforts shall be made to notify a member of the child's extended family.
- (d) For the purposes of this section, "reasonable efforts" shall include telephone and personal contacts at the home, place of employment, or other locations the person to be notified is known to frequent.

### **2.03.190 Review by Juvenile Case Coordinator**

- (a) Upon being notified that a child has been taken into custody and not released, the juvenile case coordinator shall immediately review the need for continued detention under § 2.05.110, and shall:
  - (1) if the juvenile case coordinator determines that no further action is required, release the child to the child's parent, guardian or custodian;
  - (2) if the juvenile case coordinator determines that the matter should be addressed pursuant to the provisions of Chapter 3, proceed in accordance with § 3.03.190; or
  - (3) if the juvenile case coordinator determines that the matter requires further action in accordance with the provisions of this chapter:
    - (A) release the child to the child's parent, guardian or custodian upon their promise to bring the child before the Juvenile Court upon the issuance of a summons under [GP/Summons]; or
    - (B) if the juvenile case coordinator determines that continued detention is necessary and authorized under § 2.05.110, arrange for the placement of the child in accordance with § 2.05.150.



- (b) Upon releasing the child to the child's parent, guardian or custodian, the juvenile case coordinator shall refer the child's parent, guardian or custodian to any social, community, or tribal services or resources which may be appropriate for addressing the needs of the child and the child's parent, guardian or custodian.
- (c) If the juvenile case coordinator does not release the child to the child's parent, guardian or custodian, the juvenile case coordinator shall immediately:
  - (1) notify the child's parent, guardian or custodian in accordance with § 2.03.170;
  - (2) file written notice in the Juvenile Court of:
    - (A) the reason the child was taken into custody;
    - (B) the location where the child is being detained; and
    - (C) the need to conduct a detention hearing in accordance with § 2.05.230;
  - (3) provide copies of the written notice required under subsection (c)(2) to the child, the child's parent, guardian or custodian, the juvenile presenting officer, and counsel for the child; and
  - (4) inform the child of the steps taken by the juvenile case coordinator to comply with the requirements of this subsection.
- (d) Where counsel has not already been appointed or retained to represent the child, the written notice required by subsection (c)(2) shall be provided to the juvenile advocate.

#### **2.03.210 Release to Relative or Responsible Adult**

Where the provisions of this chapter permit or require the release of a child to the child's parent, guardian or custodian, the child may instead be released to a relative or other responsible adult, if the child's parent, guardian or custodian consents to the release.

## [13.3] Tribal Code Examples

### Sault Ste. Marie Tribal Code

#### CHAPTER 36: JUVENILE CODE

#### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

##### **36.403 Taking a Child into Custody.**

- (1) A law enforcement officer may take a child into custody when:
  - a. The child commits a juvenile offense in the presence of the officer.
  - b. The officer has a reasonable suspicion to believe a juvenile offense has been committed by the child being detained.
  - c. An appropriate custody order or warrant has been issued by the Court authorizing the taking of a particular child.
- (2) At the time the child is taken into custody as an alleged juvenile offender, the arresting officer shall give the following warning:
  - a. The child has the right to remain silent.
  - b. Anything the child says can be used against the child in court.
  - c. The child has a right to the presence of his parent, guardian, or custodian and/or counsel during questioning.
  - d. The child has a right to an advocate or attorney at his own expense.
- (3) A law enforcement officer taking a child into custody shall give the warning listed above to any child he takes into custody prior to questioning and then shall do one of the following:
  - a. Release the child to the child's parent, guardian, or custodian and issue verbal counsel or warning as may be appropriate.
  - b. Release the child to a relative or other responsible adult member if the child's parent, guardian, or custodian consents to the release. (If the child is twelve [12] years of age or older, the child and his parent, guardian or custodian must both consent to release).
  - c. Deliver the child to the juvenile probation officer, or to a juvenile facility as designated by the Court, or to a medical facility if the child is believed to need prompt medical treatment or is under the influence of alcohol or other chemical substances.

- (4) The Juvenile Probation Officer shall, immediately upon delivery of the child for custody, review the need for continued custody and shall release the child to his parent, guardian, or custodian in order to appear at the hearing on a date to be set by the Court, unless:
  - a. The act is serious enough to warrant continued detention.
  - b. There is probable cause to believe the child has committed the offense(s) alleged.
  - c. There is reasonable cause to believe the child will run away so that he will be unavailable for further proceedings.
  - d. There is reasonable cause to believe that the child will commit a serious act causing damage to person or property.
- (5) If a child is taken into custody and not released to his parent, guardian, or custodian, the person taking the child into custody shall immediately attempt to notify the child's parent, guardian, or custodian. All reasonable efforts shall be made to advise the parent, guardian, or custodian of the reason for taking the child into custody and the place of continued custody. Such reasonable efforts shall include telephone and personal contacts at the home or place of employment or other locations where the person is known to frequent. If notification cannot be provided to the child's parent, guardian, or custodian, the notice shall be given to a member of the extended family of the parent, guardian, or custodian and to the child's extended family.
- (6) If the Juvenile Probation Officer determines that there is a need for continued custody of the child in accordance with subsection (4) of this Chapter, then the following criteria shall be used to determine the appropriate juvenile facility for the child:
  - a. a child may be detained in a secure juvenile detention facility as designated by the Court only if one or more of the following conditions are met:
    - i. The child is a fugitive from another jurisdiction wanted for a felony offense.
    - ii. The child is charged with murder, sexual assault or a crime of violence, a crime involving a deadly weapon or which has resulted in a serious bodily injury.
    - iii. The child is uncontrollable and has committed a serious physical assault on the arresting officer or on other security personnel while resisting arrest or detention.
    - iv. The child is charged with committing one of the following acts which would be an offense if the child were an adult: vehicular homicide, abduction, rape, arson, assault, domestic assault, battery, burglary, or robbery.

- v. The child is already detained or on conditional release for another juvenile offense.
  - vi. The child has demonstrable recent record of willful failures to appear at Juvenile Division proceedings.
  - vii. The child has made a serious escape attempt.
  - viii. The child requests in writing that he be given protection by being confined in a secure confinement area and there is a present and immediate threat of serious physical injury to the child.
- b. A child may be housed in a juvenile shelter care facility as designated by the Court only if one of the following conditions exist:
- i. One of the conditions described in subsection (a) above exists.
  - ii. The child is unwilling to return home or to the home of an extended family member.
  - iii. The child's parent, guardian, custodian, or extended family member is unavailable, unwilling, or unable to permit the child to return to his home.
  - iv. There is an evident and immediate physical danger to the child in returning home, and all extended family members are unavailable, unwilling, or unable to accept responsibility for temporary care and custody of the child.
- c. A child may be referred to an alcohol or substance abuse emergency shelter or halfway house if it is determined that there is a need for continued custody of the child in accordance with 36.403 of this Chapter and:
- i. The child has been arrested or detained for a juvenile offense relating to alcohol or substance abuse.
  - ii. There is space available in an alcohol or substance abuse emergency shelter or halfway house designated by the Court.
  - iii. The child is not deemed to be a danger to himself or others.

**The Cherokee Code of the Eastern Band of the Cherokee Nation**

**Chapter 7A - JUVENILE CODE**

**ARTICLE III. - TEMPORARY CUSTODY; SECURE AND NONSECURE CUSTODY;  
CUSTODY HEARINGS**

(Sec. 7A-19. Omitted)

**Sec. 7A-20. Duties of person taking juvenile into temporary custody.**

- (a) A person who takes a juvenile into custody without a court order under section 7A-19 shall proceed as follows:
- 1) Notify the juvenile's parent, guardian, or custodian that the juvenile has been taken into temporary custody and advise the parent, guardian, or custodian of his right to be present with the juvenile until a determination is made as to the need for secure or nonsecure custody. Failure to notify the parent that the juvenile is in custody shall not be grounds for release of the juvenile;
  - 2) Release the juvenile to his parents, guardian or custodian if the person having the juvenile in temporary custody decides that continued custody is unnecessary;
  - 3) If the juvenile is not released under subsection (2), the person having temporary custody shall proceed as follows: In the case of a juvenile alleged to be delinquent or undisciplined, he shall request a petition be drawn. Once the petition has been drawn and verified, the person shall communicate with the intake counselor who shall consider prehearing diversion. If the decision is made to file a petition, the intake counselor shall contact the Judge or person delegated authority pursuant to Section 7A-21 if other than the intake counselor, for a determination of the need for continued custody.
- (b) A juvenile taken into temporary custody under this article shall not be held for more than 12 hours unless:
- 1) A petition or motion for review has been filed by an intake counselor, and
  - 2) An order for secure or nonsecure custody has been entered by a Judge.

**Sec. 7A-21. Authority to issue custody orders.**

(1. and 2. Omitted)

- 3) In the case of any juvenile alleged to be within the jurisdiction of the court, when the Judge finds it necessary to place the juvenile in custody, he may order that the juvenile be

placed in secure or nonsecure custody pursuant to criteria set out in section 7A-22. Any Judge shall have the authority to issue secure and nonsecure custody orders.

**Sec. 7A-22. Criteria for secure or nonsecure custody.**

- (a) Nonsecure custody shall be rendered unless secure custody is appropriate under the criteria set out in subsections (b), (c) and (d) of this section.
- (b) When a request is made for secure custody, the Judge may order secure custody only where he finds there is a reasonable factual basis to believe that the juvenile actually committed the offense as alleged in the petition, and:
  - 1) That the juvenile is presently charged with one or more felonies, or
  - 2) That the juvenile has willfully failed to appear on the pending delinquency charge or has a record of willful failures to appear at court proceedings, or
  - 3) That by reason of the juvenile's threat to flee from the court's jurisdiction or circumstances indicating preparation or design to flee from the court's jurisdiction, there is reasonable cause to believe the juvenile will not appear in court on a pending delinquency charge unless he is detained, or
  - 4) That the juvenile is an absconder from any training school or facility in this or another state, or
  - 5) That the juvenile has a recent record of adjudications for violent conduct resulting in serious physical injury to others, the petition pending is for delinquency and the charge involves physical injury, or
  - 6) That by reason of the juvenile's recent self-inflicted injury or attempted self-injury there is reasonable cause to believe the juvenile should be detained for his own protection for a period of less than 24 hours while action is initiated to determine the need for inpatient hospitalization, provided that the juvenile has been refused admittance by any appropriate hospital, or
  - 7) That the juvenile alleged to be undisciplined by virtue of his being a runaway may be detained for a period of no more than 82 hours to facilitate evaluation of the juvenile's need for medical or psychiatric treatment or to facilitate reunion with his parents.
- (c) When a juvenile has been adjudicated delinquent, the Judge may order secure or nonsecure custody pending the dispositional hearing or pending placement of a

delinquent juvenile. The Judge may also order secure custody for a juvenile who is alleged to have violated the terms of his probation or conditional release.

- (d) In determining whether secure custody should be ordered, the Judge should consider the nature of the circumstances of the offense; the weight of the evidence against the juvenile; the juvenile's family ties, character, mental condition, and school attendance record; and whether the juvenile is on conditional release. If the criteria for secure custody as set out in subsection (b) or (c) are met, the Judge may enter an order directing an officer to assume custody of the juvenile and to take the juvenile to the place designated in the order.

**Sec. 7A-23. Order for secure or nonsecure custody.**

- (a) The custody order shall be in writing and shall direct a law enforcement officer to assume custody of the juvenile and to make due return on the order. A copy of the order shall be given to the juvenile's parent, guardian, or custodian by the official executing the order. If the order is for secure custody, copies of the petition and custody order shall accompany the juvenile to the detention facility or holdover facility of the jail.
- (b) An officer receiving an order for custody which is complete and regular on its face may execute it in accordance with its terms and need not inquire into its regularity or continued validity, nor does he incur criminal or civil liability for its due service.

**Sec. 7A-24. Place of secure or nonsecure custody.**

- (a) A juvenile meeting the criteria set out in Section 7A-22(a) may be placed in nonsecure custody with the Department of Social Services or an appropriate person designated in the order for temporary residential placement in:
  - 1) A licensed foster home or a home otherwise authorized by law to provide such care, or
  - 2) Any other home or facility approved by the court and designated in the order.
- (b) A juvenile meeting the criteria set out in section 7A-22(b) may be temporarily detained in an approved detention home or regional detention facility which shall be separate from any jail, lockup, prison, or other adult penal institution.

## [13.4] Tribal Code Commentary

Please note that a good number of tribes have used the 1989 BIA Tribal Juvenile Justice Code provisions as a starting point. The alternative University of Washington's Center of Indigenous Research and Justice Model Tribal Juvenile Code provisions were completed and made public in the fall of 2014 and at the time of first publication of this resource, tribes had not yet reviewed them. The 1989 BIA Tribal Juvenile Justice Code provisions allow a law enforcement officer to take custody of a youth given only a "reasonable suspicion"<sup>26</sup> to believe that a juvenile offense has been committed while the University of Washington provisions require the higher standard of "probable cause."<sup>27</sup>

The Sault Ste. Marie code allows a law enforcement officer to take a child into custody when the child commits a juvenile offense in the presence of the officer, the officer has a reasonable suspicion to believe a juvenile offense has been committed, or the juvenile court has issued a custody order. This is a fairly standard provision. The juvenile is read his rights and then the officer must decide what to do with the child. This section is very similar to the 1989 Tribal Juvenile Justice Code and the diagrams earlier in the chapter outline the potential responses.

The Eastern Band of Cherokee follows this process when a youth is taken into custody without a court order.

- Notify the juvenile's parent, guardian, or custodian that a child is in custody and advise them of their right to be present when a determination is made as to the need for "secure or nonsecure" custody.
- Release the juvenile to parent, guardian, or custodian if the officer believes continued custody is unnecessary.
- If not released, then the officer requests that a petition be drawn. The petition goes to the intake counselor to consider prehearing diversion. If a decision is made to file a petition the intake counselor contacts the judge for a determination of continued custody.
- No juvenile can be held for more than twelve hours unless a petition is filed by the intake counselor and an order for secure or nonsecure custody has been entered by a judge.

The Eastern Band of Cherokee uses the terms *secure* and *nonsecure custody*. Nonsecured custody is a placement with social services or another person used for temporary residential placement in a

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<sup>26</sup> According to *Black's Law Dictionary*, a "reasonable suspicion" is a "particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity," or here, of delinquent activity.

<sup>27</sup> According to *Black's Law Dictionary*, a law enforcement officer has "probable cause" if he or she has "a reasonable ground to suspect that a person has committed or is committing a crime . . . more than a bare suspicion but less than evidence that would justify a conviction." Here, again, we would be looking at whether a law enforcement officer had a reasonable ground to suspect that a youth has committed a delinquent act.



licensed foster home or any other home or facility approved by the court. Some communities have safe homes for youth in these situations. A secure facility would include a regional detention facility or a detention home, although the code requires that the juvenile must not come into contact with adult prisoner in a detention facility.

A judge can order secured custody of a juvenile accused of offending only if the juvenile:

- Is charged with one or more felonies.
- Has willfully failed to appear on this or other delinquency proceedings.
- Threatens or has made plans to flee the jurisdiction.
- Is an absconder from a training school or facility.
- Has a recent record of violent conduct resulting in serious bodily harm to others.
- Has recent self-inflicted injury and should be detained for his own protection for a period of twenty-four hours while action is initiated to determine need for inpatient hospitalization.
- Is alleged to be a runaway and may be detained for a period of no more than eighty-two hours to facilitate evaluation of the juvenile's need for medical or psychiatric treatment or to facilitate reunion with his parents.

## [13.5] Exercises

The following exercises are meant to guide you in writing provisions governing taking a youth into custody and placing youth in a secure juvenile detention facility or in a juvenile shelter care facility under the tribal juvenile code.

- Find and examine your juvenile code's provisions governing the taking of youth into custody.
  - Under what circumstances can a youth be taken into custody?
  - What are the parental/guardian/custodian notification requirements?
  - When and where may a youth be placed/detained?
  - For how long?
- Make a list of current placement/detention options for youth.

Make a list of the types of placement/detentions options you would like to develop or contract for.

## **Read and Discuss\***

**What happens to youth in secure detention facilities in your area?**

National findings:

- Youth are physically and emotionally separated from their families and communities
- Youth find themselves in an environment of chaos and violence
- Youth experience neglect
- Youth become depressed and many become suicidal
- Youth will have an chance of recidivism (more delinquency and/or crime when they get out)
- Youth will be mixed into a “dumping ground of mentally ill youth”
- If a person is mentally ill already they will get worse

\*Taken from “The Dangers of Detention: The Impact of Incarcerating Youth in Detention and other Secure Detention Facilities,” The Justice Policy Institute Report.

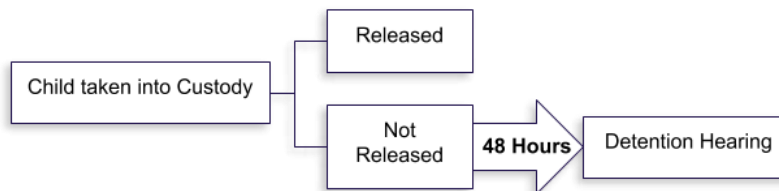
# Chapter 14: Detention Hearings

## [14.1] Overview

When a youth is not released to his or her parents soon after being taken into custody, a detention hearing is held to determine whether further detention is necessary. This chapter describes the purposes of a detention hearing, the notice requirements, the detention hearing procedure, the standards to be considered, the finding at the hearing, and provisions for a rehearing.

Keep in mind that the detention of juveniles should meet the requirements of the [Delinquency Prevention Act of 1974](#), which provides that status offenders (runaways, truants, or curfew violators) and nonoffenders (abuse/neglect victims) are not to be placed in secured detention facilities. Those youths suspected or adjudicated juvenile delinquents are not to be confined in facilities allowing regular contact with adults. If placed in a facility where adults are also confined, they must be separated by both sight and sound from the adult population.

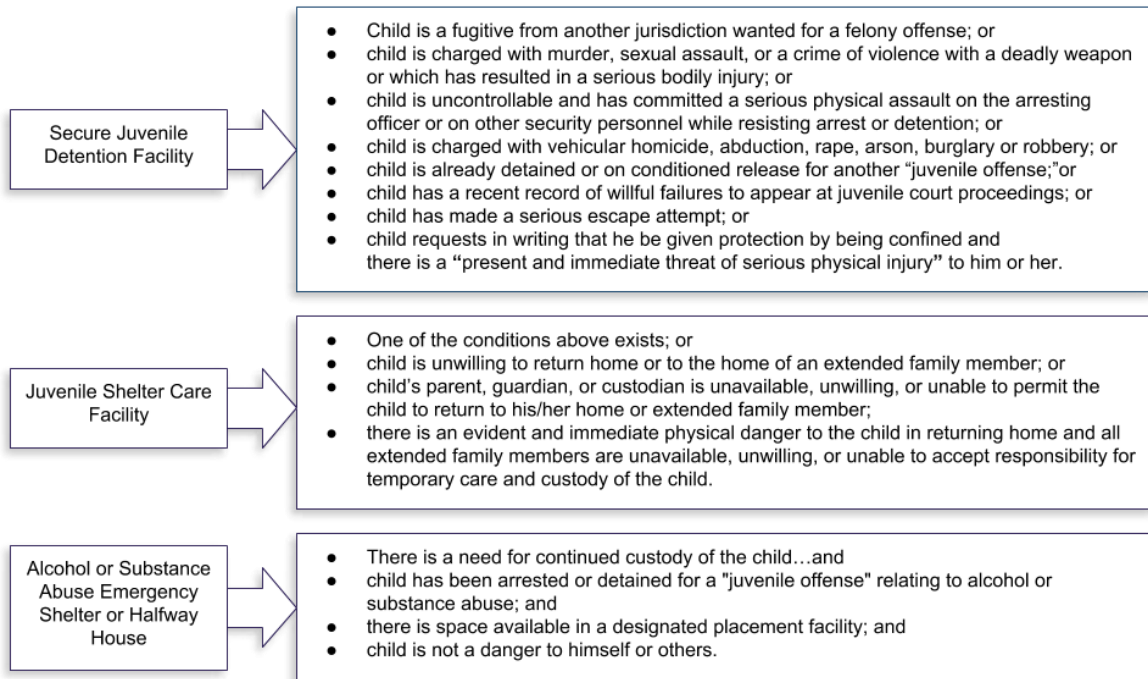
### Section 1-9 A. Juvenile Offender--Requirement of Detention Hearing 1989 BIA Tribal Juvenile Justice Code



Under [Section 1-9](#) of the [1989 BIA Tribal Juvenile Justice Code](#) if a youth is taken into custody and is not released, a detention hearing must be held within forty-eight hours. Notice of the hearing must be given to the youth, his or her “parent, guardian, or custodian,” and his or her advocate or attorney as soon as the hearing is set. These detention hearings must be conducted in juvenile court separate from other hearings. They must also be closed to the general public. At the detention hearing the judge must advise the youth and his or her parent, guardian, or custodian of their rights. The purpose of the hearing is to determine whether the detention criteria has been met for continued detention and, if it is met, whether the criteria has been met for placement in a secure detention facility versus a juvenile shelter care facility or whether the child should be referred to an alcohol or substance abuse emergency shelter or halfway house.

## Section 1-8 F. Criteria for Selecting Juvenile Facility

### 1989 BIA Tribal Juvenile Justice Code



The 1989 BIA Tribal Juvenile Justice Code requires that both juvenile counselors and judges determine whether certain criteria have been met before continuing custody of a youth. See excerpt of 1989 BIA Tribal Juvenile Justice Code, Section 1-8 D in the following text. The 1989 Tribal Juvenile Justice Code also requires that juvenile counselors and judges determine whether further criteria have been met in deciding where to place youth—whether in a secure detention facility, a juvenile shelter care facility, or an alcohol or substance abuse emergency shelter or halfway house. The criteria for placement in secure detention are the most difficult to meet. A juvenile counselor or judge must find that one or more of the conditions set out in the following diagram exist before placement is warranted and required under the 1989 BIA Tribal Juvenile Justice Code. The 1989 BIA Tribal Juvenile Justice Code favors the release of youth to parents, guardian, custodian, or extended family and the placement of youth in a secure juvenile detention facility only as a last resort.

## [14.2] Model Code Examples

### (1989) BIA Tribal Juvenile Justice Code

#### 1-9 JUVENILE OFFENDER—DETENTION HEARING

##### **1-9 A. Requirement of Detention Hearing**

Where a child who has been taken into custody is not released, a detention hearing shall be convened by the court within forty-eight (48) hours, inclusive of holidays and weekends, of the child's initial detention under chapter 1-8 of this code.

##### **1-9 B. Purpose of Detention Hearing**

The purpose of the detention hearing is to determine:

1. whether probable cause exists to believe the child committed the alleged "juvenile offense"; and
2. whether continued detention is necessary pending further proceedings.

##### **1-9 C. Notice of Detention Hearing**

Notice of the detention hearing shall be given to the child and the child's parent, guardian or custodian and the child's counsel as soon as the time for the detention hearing has been set. The notice shall contain:

1. the name of the court;
2. the title of the proceedings;
3. a brief statement of the "juvenile offense" the child is alleged to have committed; and
4. the date, time, and place of the detention hearing.

##### **1-9 D. Detention Hearing Procedure**

Detention hearings shall be conducted by the juvenile court separate from other proceedings. At the commencement of the detention hearing, the court shall notify the child and the child's parent, guardian or custodian of their rights under chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties or the court shall be admitted.

##### **1-9 E. Standards to Be Considered at Detention Hearing**

The court shall consider the evidence at the detention hearing as it pertains to the detention criteria set forth in sections 1-8D and 1-8F of this code.

### **1-9 F. Finding at Detention Hearing**

The court shall issue a written finding stating the reasons for release or continued detention of the child. If the court determines that there is a need for continued detention, the court shall specify where the child is to be placed until the adjudicatory hearing.

## **1-8 JUVENILE OFFENDER—TAKING INTO CUSTODY**

### **1-8 F. Criteria for Selecting Juvenile Facility**

If the juvenile counselor or juvenile official at the juvenile facility (as designated by the court) determines that there is a need for continued custody of the child in accordance with section 1-8D of this code, then the following criteria shall be used to determine the appropriate juvenile facility for the child:

1. A child may be detained in a Secure Juvenile Detention Facility (as defined in section 1-1C of this code) as designated by the court only if one or more of the following conditions are met:
  - (a) the child is a fugitive from another jurisdiction wanted for a felony offense; or
  - (b) the child is charged with murder, sexual assault, or a crime of violence with a deadly weapon or which has resulted in a serious bodily injury; or
  - (c) the child is uncontrollable and has committed a serious physical assault on the arresting officer or on other security personnel while resisting arrest or detention;  
or
  - (d) the child is charged with committing one of the following acts which would be an offense if the child were an adult: vehicular homicide, abduction, rape, arson, burglary or robbery or
  - (e) the child is already detained or on conditioned release for another “juvenile offense;”
  - (f) the child has a demonstrable recent record of willful failures to appear at juvenile court proceedings; or
  - (g) the child has made a serious escape attempt; or

- (h) the child requests in writing that he be given protection by being confined in a secure confinement area and there is a present and immediate threat of serious physical injury to the child.
2. A child may be housed in a Juvenile Shelter Care Facility (as defined in section 1-1C of this code) as designated the court only if one of the following conditions exist:
- (a) one of the conditions described in section 1-8F(1) above exists; or
  - (b) the child is unwilling to return home or to the home of an extended family member; or
  - (c) the child's parent, guardian, custodian, or an extended family member is unavailable, unwilling, or unable to permit the child to return to his home;
  - (d) there is an evident and immediate physical danger to the child in returning home, and all extended family members are unavailable, unwilling, or unable to accept responsibility for temporary care and custody of the child.
3. A child may be referred to an Alcohol or Substance Abuse Emergency Shelter or Halfway House (as defined in section 1-1C of this code) if it is determined that there is a need for continued custody of the child in accordance with section 1-8D of this code and (1) the child has been arrested or detained for a "juvenile offense" relating to alcohol or substance abuse, (2) there is space available in an alcohol or substance abuse emergency shelter or halfway house designated by the court; and (3) the child is not deemed to be a danger to himself or others.

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**University of Washington**  
**Center of Indigenous Research and Justice**  
[Model Tribal Juvenile Code](#)  
**CHAPTER 2 DELINQUENCY**

**2.05 DETENTION AND ALTERNATIVES**

**2.05.010 Adoption and Safe Families Act Compliance**

- (a) Before entering an order authorizing detention, the Juvenile Court shall determine, on a case-by-case basis:
  - (1) whether continuation in the home of the child's parent, guardian or custodian is contrary to the child's welfare; and

- (2) whether there are available services that would prevent or eliminate the need for detention.
- (b) If the child can be returned to the custody of the child's parent, guardian or custodian through the provision of services to prevent or eliminate the need for removal, the Juvenile Court shall release the child to his or her parent, guardian or custodian, and order that those services be provided.
- (c) If the child cannot be returned to the custody of the child's parent, guardian or custodian, the juvenile case coordinator shall, as soon as possible, provide referrals for services to enable the child's parent, guardian, or custodian to obtain any assistance that may be needed to effectively provide the care and control necessary for the child to return to the home.
- (d) Upon entering an order authorizing detention, and in no event later than 60 days following the child's removal from the home of the child's parent, guardian or custodian, the Juvenile Court shall determine whether reasonable efforts have been made to safely maintain the child in the home.
- (e) Upon making the determinations required by this section, the Juvenile Court shall enter written findings of fact referencing any and all evidence relied upon in reaching its decision.

#### **2.05.110 Detention - Grounds**

- (a) A child shall not be detained unless:
  - (1) there is probable cause to believe the child has committed a delinquent act;
  - (2) no less restrictive alternatives will suffice; and
  - (3) there is clear and convincing evidence that the child should be detained because:
    - (A) such detention is necessary to avert a substantial risk to the health, welfare, person or property of the child or others; or
    - (B) there is a substantial risk that the child may leave or be removed from the jurisdiction of the Juvenile Court.
- (b) A child shall not be detained for any of the following reasons:
  - (1) to treat or rehabilitate the child prior to adjudication;



- (2) to punish the child or to satisfy demands by a victim, the police, or the community;
- (3) to allow a parent to avoid his or her legal responsibilities;
- (4) to permit more convenient administrative access to the child; or
- (5) to facilitate further interrogation or investigation.

#### **2.05.130 Least Restrictive Alternatives**

- (a) When a child is detained or subject to conditional or supervised release pursuant to the provisions of this chapter, the Juvenile Court shall order only the least restrictive conditions or placement consistent with:
  - (1) the best interests of the child; and
  - (2) the safety of the community.
- (b) Whenever the Juvenile Court orders the detention of a child, or enters an order imposing conditions upon the child's release, the order shall include a statement of the Juvenile Court's reasons for rejecting less restrictive alternatives.

#### **2.05.150 Place of Detention**

- (a) A child alleged to have committed a delinquent act may be detained only in:
  - (1) a licensed foster home or a home approved by the Juvenile Court, which may be a public or private home or the home of a noncustodial parent or of a relative;
  - (2) a juvenile residential care facility such as a group home, staff-secure facility, or other residential facility operated by a licensed child welfare agency;
  - (3) a secure juvenile detention facility designated by the Juvenile Court; or
  - (4) a residential treatment facility, detoxification facility, or halfway house, if there is evidence of recent or ongoing alcohol or substance abuse by the child, and:
    - (A) there is clear and convincing evidence that such placement is necessary to avert a substantial risk to the health or welfare of the child; or
    - (B) detention is otherwise necessary and authorized under § 2.05.110, and the child requests or agrees to such placement in lieu of a more restrictive placement.

- (b) Detention in a secure juvenile detention facility shall in all cases be subject to the time limits set forth in § 2.13.250.

### **2.05.170 Alternatives to Detention**

- (a) Before ordering that a child be detained, the Juvenile Court shall consider less restrictive alternatives such as:
  - (1) a court-imposed curfew;
  - (2) a requirement that the child or the child's parent, guardian or custodian report to the juvenile case coordinator at specified intervals;
  - (3) an order requiring the child to remain at home at all times when the child is not:
    - (A) in the presence of the child's parent, guardian or custodian;
    - (B) attending school or participating in other activities approved by the Juvenile Court; or
    - (C) legally required to be elsewhere;
  - (4) electronic home monitoring or similar means of monitoring the child's whereabouts;
  - (5) community supervision; and
  - (6) other types of conditional or supervised release.
- (b) Conditions of release the Juvenile Court may impose under subsection (a) shall not include bail, but may include:
  - (1) law-abiding behavior, including refraining from using or possessing alcohol or nonprescribed drugs;
  - (2) regular school attendance or continuation in a course of study designed to lead to achieving a high school diploma or the equivalent;
  - (3) compliance with a statutory curfew;
  - (4) compliance with orders prohibiting or restricting contact between the child and the alleged victim or other persons or locations connected with the alleged delinquent act;

- (5) other reasonable conditions calculated to ensure the child's appearance at future hearings and to protect the safety of the child and the community.

#### **2.05.230 Detention Hearing - Requirement and Time Limit**

- (a) Whenever a child is taken into custody pursuant to the provisions of this chapter and is not released, the Juvenile Court shall conduct a detention hearing within forty-eight (48) hours.
- (b) If the forty-eight (48) hour time limit imposed by subsection (a) would expire on a weekend or holiday, the Juvenile Court shall conduct the detention hearing on the first business day after the child is taken into custody.
- (c) Notwithstanding the provisions of [GP/Hearings – Continuances], the detention hearing shall not be continued so as to fall outside the time limits imposed by this section.
- (d) If the detention hearing is not held within the time limits imposed by this section, the child shall be released:
  - (1) to the child's parent, guardian or custodian;
  - (2) to a relative or other responsible adult in accordance with § 2.03.210; or
  - (3) to a juvenile shelter care facility or an appropriate service agency until the child's parent, guardian or custodian can be notified.

#### **2.05.250 Detention Hearing - Notice**

- (a) Written notice of the detention hearing:
  - (1) shall be served on the child, the child's parent, guardian or custodian, and counsel for the child as soon as the time for the detention hearing has been set;
  - (2) shall in all other respects be served in accordance with [GP/Summons or Other Notice – Service];
  - (3) shall contain the name of the court, the nature and purpose of the proceedings, and the date, time, and place of the hearing;
  - (4) shall advise the parties of their rights under the provisions of this title; and
  - (5) shall specify the delinquent act the child is alleged to have committed.
- (b) Where counsel has not already been appointed or retained to represent the child, the written notice required by subsection (a) shall be served on the juvenile advocate.

### **2.05.270 Detention Hearing - Purpose**

The Juvenile Court shall conduct the detention hearing for the purpose of determining:

- (a) whether there is probable cause to believe the child has committed a delinquent act, unless the Juvenile Court has entered a finding of probable cause, in accordance with § 2.05.290 or § 2.09.150, at a prior hearing;
- (b) whether the child can be released without conditions;
- (c) if the child cannot be released without conditions, what alternatives to detention or conditions of release, imposed in accordance with § 2.05.170, would render detention unnecessary; and
- (d) if detention is necessary and authorized under § 2.05.110, where the child should be placed pending the child's next appearance before the Juvenile Court.

### **2.05.290 Order on Detention Hearing**

- (a) At the detention hearing, the Juvenile Court shall enter a written order releasing the child without conditions unless the Juvenile Court finds, based on a filed affidavit or sworn testimony before the Juvenile Court, that there is probable cause to believe the child has committed a delinquent act.
- (b) If the Juvenile Court finds that there is probable cause to believe the child has committed a delinquent act, the Juvenile Court shall, at the conclusion of the detention hearing, enter a written order:
  - (1) releasing the child without conditions;
  - (2) releasing the child from custody, and setting forth conditions of release imposed in accordance with § 2.05.170; or
  - (3) specifying where the child is to be detained until the next hearing.
- (c) If the child is in custody as the result of a failure to appear before the Juvenile Court, the written order entered by the Juvenile Court shall be consistent with the provisions of § 2.01.170.
- (d) If the child is to be detained in a secure juvenile detention facility, the written order shall specify the date and time of the first detention review hearing to be held in accordance with § 2.05.330.

- (e) No provision of this chapter shall be interpreted to prohibit the Juvenile Court from releasing the child from detention prior to the appointment or appearance of counsel for the child.

## [14.3] Tribal Code Examples

### Sault St. Marie Tribal Code

#### **CHAPTER 36: JUVENILE CODE**

#### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

##### **36.404 Detention Hearing.**

- (1) Where a child who has been taken into custody is not released, a detention hearing shall be convened by the Court within seventy-two (72) hours, inclusive of holidays and weekends, of the child's initial detention.
- (2) The purpose of the detention hearing is to determine:
  - (a) Whether probable cause exists to believe the child committed the alleged juvenile offense.
  - (b) Whether continued detention is necessary pending further proceedings.
- (3) Notice of the detention hearing shall be given to the child and the child's parent, guardian, or custodian and the child's counsel as soon as the time for the detention hearing has been set. The notice shall contain:
  - (a) The name of the court.
  - (b) The title of the proceeding.
  - (c) A brief statement of the juvenile offense the child is alleged to have committed.
  - (d) The date, time, and place of the detention hearing.
- (4) Detention hearings shall be conducted by the Juvenile Division separate from other proceedings. At the commencement of the detention hearing, the Court shall notify the child and the child's parent, guardian, or custodian of their rights under '36.402 of this Chapter.
- (5) The Court shall consider the evidence at the detention hearing as it pertains to the detention of the child. If the Court determines that there is a need for continued

detention, the Court shall specify where the child is to be placed until the adjudicatory hearing.

- (6) The Court shall issue a written finding stating the reasons for release or continued detention of the child. If the Court determines that there is a need for continued detention, the Court shall specify where the child is to be placed until the adjudicatory hearing.
- (7) If the child is not released at the detention hearing, and a parent, guardian, custodian, or relative was not notified of the hearing and did not appear or waive appearance at the hearing, the Court shall rehear the detention matter without unnecessary delay upon the filing of a motion for rehearing and a declaration stating the relevant facts.

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## **The Cherokee Code of the Eastern Band of the Cherokee Nation**

### **Chapter 7A - JUVENILE CODE**

#### **ARTICLE III. - TEMPORARY CUSTODY; SECURE AND NONSECURE CUSTODY; CUSTODY HEARINGS**

(7A-19. through 7A-24 Omitted)

##### **Sec. 7A-25. Hearing to determine need for continued secure or nonsecure custody.**

- (a) No juvenile shall be held under a custody order for more than five calendar days without a hearing on the merits or a hearing to determine the need for continued custody. In every case in which an order has been entered by an official exercising authority delegated pursuant to chapter 21 of this Code, a hearing to determine the need for continued custody shall be conducted on the day of the next regularly scheduled session of court, if such session precedes the expiration of the five calendar day period.
- (b) Any juvenile who is alleged to be delinquent shall be advised of his right to have an attorney represent him.
- (c) At a hearing to determine the need for continued custody, the Judge shall receive testimony and shall allow the juvenile and his parent, guardian, or custodian an opportunity to introduce evidence, to be heard in their own behalf, and to examine witnesses. The Tribe shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that restraints on the juvenile's liberty are necessary and that no less intrusive alternative will suffice. The Judge shall not be bound by the usual rules of evidence at such hearings.
- (d) The Judge shall be bound by criteria set forth in section 7A-22 in determining whether continued custody is warranted.

- (e) The Judge shall impose the least restrictive interference with the liberty of a juvenile who is released from secure custody including:
  - 1. Release on the written promise of the juvenile’s parent, guardian, or custodian to produce him in court for subsequent proceedings, or
  - 2. Release into the care of a reasonable person or organization, or
  - 3. Release conditioned on restrictions on activities, associations, residence, or travel if reasonably related to securing the juvenile’s presence in court, or
  - 4. Any other conditions reasonably related to securing the juvenile’s presence in court.
  
- (f) If the Judge determines that the juvenile meets the criteria in section 7A-22 and should continue in custody, he shall issue an order to that effect. The order shall be in writing with appropriate findings of fact. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

## [14.4] Tribal Code Commentary

Please note that a good number of tribes have used the 1989 BIA Tribal Juvenile Justice Code provisions as a starting point. The alternative University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code provisions were completed and made public in the fall of 2014 and at the time of first publication of this resource, tribes had not yet reviewed them.

The Sault Ste. Marie statute requires a hearing be held within seventy-two hours of the time of the youth’s initial detention. The statute gives a judge the authority to use his or her discretion in determining whether continued detention is warranted or required.

Criteria for continued detention of youth at detention hearing—The Sault Ste. Marie statute at Section 36.404 (5) omits the criteria, set out at 1989 Tribal Juvenile Justice Code Section 1-9 E for when a judge determines whether continued detention is warranted or required: “The court shall consider the evidence at the detention hearing as it pertains to the detention criteria set forth in sections 1-8 D and 1-8 F of this code.” Compare: “The Court shall consider the evidence at the detention hearing as it pertains to the detention of the child” at Sault Ste. Marie statute, Section 36.404 (5). This is a significant omission as it gives the judge total discretion to decide whether to continue to detain a youth and where to detain the youth.

## [14.5] Exercises

The following exercises are meant to guide you in writing the detention hearing section of the tribal juvenile code.

- Find and examine your juvenile code’s provisions governing the detention hearing and placement/detention alternatives—what are the designated placement/detention options?
- Make a list of the actual placement/detention options available both in your community and in neighboring towns/cities.
- Make a list of what placement/detention options you would like to develop or contract for in your community and/or in neighboring towns/cities.

### Read and Discuss\*

#### Should we consider developing an adolescent “respite care” program?

Attention Homes’ Adolescent Residential Care program provides residential treatment to adolescents in crisis. We offer them emotional and behavioral support in a safe, structured, RCCF-licensed (Residential Child Care Facility) home-like setting. We use a systems approach to improve family dynamics and relationships. This program operates out of our Chase Court home.

**Service Demographic**—Services are provided to youth, ages 12–18, who are abused, neglected, troubled, delinquent, recovering, from families in crisis and/or are beyond the control of their parents. Residents are typically referred to us through social services departments or the court and juvenile systems. Teens may be privately referred through their families. Services are provided on a sliding scale fee structure based on income level and family size.

**Evidence-based Practices**—Our program’s design is based on best practices of successful youth residential care programs displaying the following characteristics: “family involvement, supervision and support by caring adults, a skill-focused curriculum, service coordination, development of individual plans, positive peer influence, building self-esteem, family-like atmosphere, and planning and support for post-program life” (Colorado State University Social Work Research Center).

Attention Homes’ behavior change program, “Choices,” is a strength-based system of choices and consequences supported by Cognitive Behavioral Therapy (CBT). CBT teaches residents positive decision-making skills. CBT is an intervention of choice for many RCCFs and is also used to teach residents to better manage their emotions and resulting behavior.

**Respite/Extended Care**—Teens develop an individual behavior plan, participate in group curriculum and learn how to regulate and stabilize their behavior and emotions through our behavioral level system.



**Substance Abuse**—Youth practice skills to learn how to function sober in the larger community. They participate in NA/AA, psycho-educational and life skills groups, and are helped finding part-time employment and important educational opportunities.

**Transitional Living**—Teens may stay up to several months before moving on to a safe and appropriate long-term placement. While at Attention Homes they learn independent living skills, and have help in finding part-time employment and important educational opportunities.

**Services**—Boys and girls living in our Adolescent Residential Care program are provided the following services:

- Safety, stability, security and supervision in a highly structured, RCCF-licensed, home-like environment
- Shelter and healthy meals
- Case management and individual, group and family coaching
- “Choices” behavioral-change level system program anchored in cognitive behavioral therapy
- In-home psycho-educational groups
- Regular attendance at Alcoholics Anonymous/Narcotics Anonymous groups
- Frequent, random poly-urine analysis screens
- Opportunities to practice pro-social skills
- Community-based living norms for home, school, work and recreation
- Access to accredited educational options and job training
- Access to physical, dental and mental health care
- Access to recreational activities and community service projects
- Life skills lessons and positive adult role models
- Access to part-time employment
- Experiential educational opportunities
- Optional aftercare services

\*Taken from “The Dangers of Detention: The Impact of Incarcerating Youth in Detention and other Secure Detention Facilities,” The Justice Policy Institute Report, <http://www.justicepolicy.org>.



# Chapter 15: Informal Adjustment in Juvenile Proceedings

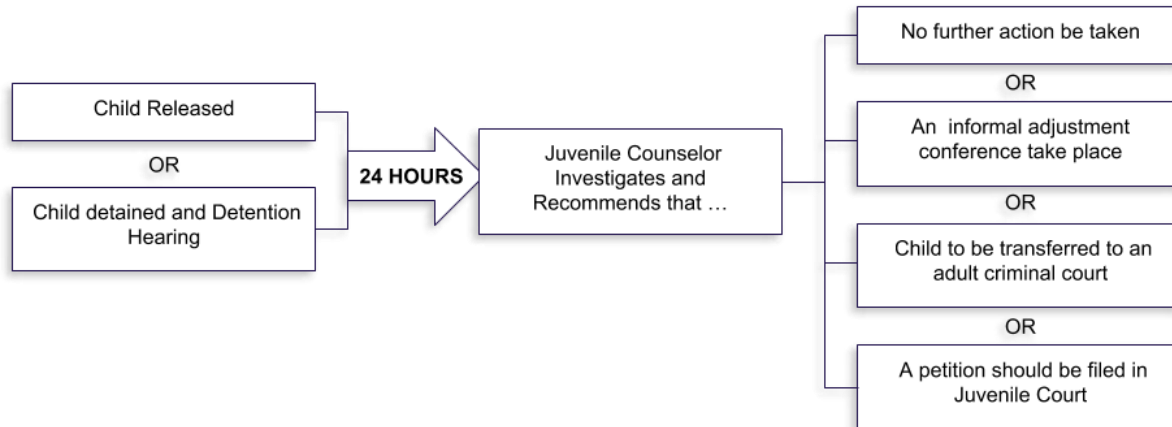
## [15.1] Overview

The “informal adjustment” is a critical stage in the juvenile proceedings. It diverts the child away from the formal judicial proceeding and instead offers ways to provide help and accountability for the child with less formality. It prevents the child from being labeled a juvenile offender.

The manner in which the informal adjustment is applied may vary slightly from one court to the next, but the example of the 1989 BIA Tribal Juvenile Justice Code is typical of how it might be applied. The 1989 BIA Tribal Juvenile Justice Code, Section 1-10 A, provides for a “juvenile counselor” to review, investigate, and recommend. The juvenile counselor must do this within twenty-four hours of a youth being released from custody or within twenty-four hours of any detention hearing. The juvenile counselor may recommend that no further action be taken, that the youth and his or her parents, guardian, or custodian participate in an “informal adjustment conference,” that a presenting officer, or in some tribal jurisdictions, the prosecutor, petition to transfer the youth to adult criminal court, or that the presenting officer/prosecutor file a juvenile delinquency petition in juvenile court.

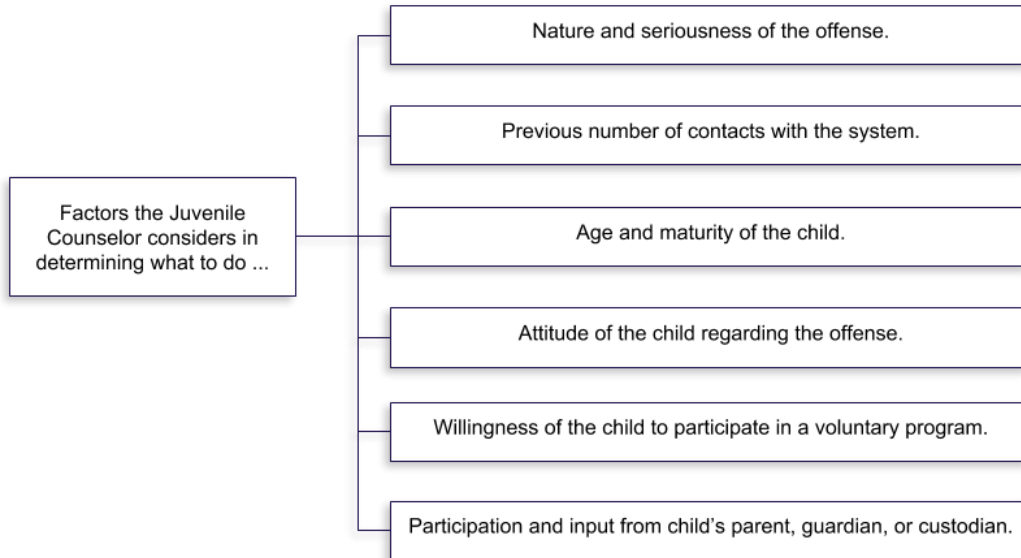
Under the 1989 BIA Tribal Juvenile Justice Code, Section 1-10 B.1, the juvenile counselor determines whether “adjustments or agreements” may be made to avoid the filing of a petition in the juvenile court. Under Section 1-10 B.2, the juvenile counselor must consider a list of factors in determining whether to recommend the filing of a formal petition in juvenile court. See the following diagram for each factor.

**Section 1-10 A. Juvenile Offender--Initiation of Proceedings--Investigation  
by Juvenile Counselor**  
1989 BIA Tribal Juvenile Justice Code

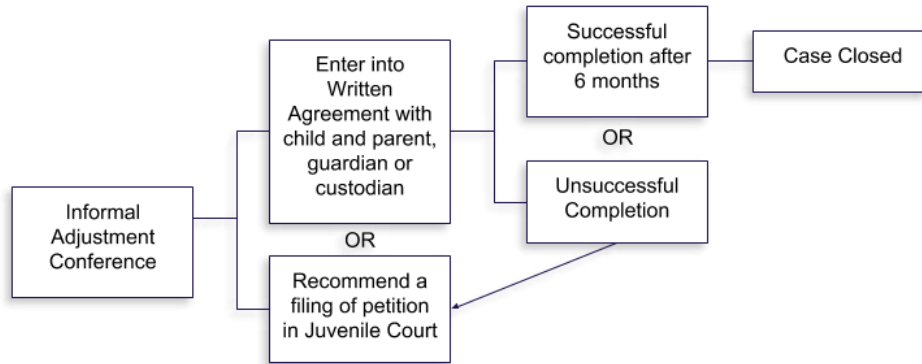


Section 1-10 A of the [1989 BIA Tribal Juvenile Justice Code](#) sets out the process and requirements for an informal conference. The purpose of the conference is to discuss alternative courses of action, including “diversion programs.” If the youth and his parents, guardian, or custodian are agreeable, they may enter into a written agreement specifying the terms and conditions of the given diversion program. Under the 1989 BIA Tribal Juvenile Justice Code, the “informal adjustment period” is limited to six months. If the youth successfully completes his or her diversion program (a.k.a. agreement with its terms and conditions) within this time frame, the case is closed and no further action is required or taken. If, however, the youth fails to successfully complete his or her diversion program, the juvenile counselor may recommend that the presenting officer or prosecutor file a petition in juvenile court, thus initiating the juvenile court process. If a youth and his or her parent, guardian, or custodian, does not wish to participate in any diversion program, they may decline to do so and the juvenile counselor must recommend that the presenting officer/prosecutor file a petition in juvenile court.

**Section 1-10 B. 2. Juvenile Offender--Initiation of Proceedings--Informal Adjustment**  
1989 BIA Tribal Juvenile Justice Code



**Section 1-10 C. Juvenile Offender--Initiation of Proceedings--Informal Conference**  
 1989 BIA Tribal Juvenile Justice Code



There are all kinds of assessments, evaluations, examinations, services, treatment, and programs that may comprise any given type of “diversion program.” The terms and conditions for these make up the terms and conditions that go into the agreement signed by the youth and his or her parent, guardian, or custodian. Diversion programs are the core of any effective tribal juvenile justice system and may require referrals, consent decrees, and/or sentencing orders or other types of court orders that “divert” youth. The U.S. Department of Justice through its Office of Juvenile Justice and Delinquency Prevention lists and describes evidence-based models for juvenile programming. They divide these into the categories of “immediate sanctions,” “intermediate sanctions,” “residential,” and “reentry.”

The immediate sanctions may be applicable through referral by a juvenile counselor as part of an informal adjustment period. Some of the intermediate sanctions, residential, and reentry options are likely to require a court order for various reasons. See the following chart for a list of applicable models. Many of the special courts or special calendars are described in [Section 2.4 Collaborative Justice Courts in the Juvenile Court Systems](#) of this resource. Also, go to [OJJDP’s Model Programs Guide](#) for a full description of the model and evaluation research on the model’s efficacy.

## **OJJDP Model Programs Guide for Juvenile Services and Programming**

<http://www.ojjdp.gov/mpg>

Immediate Sanctions	Intermediate Sanctions	Residential	Reentry
Afterschool/Recreation	Afterschool/Recreation	Cognitive Behavioral Treatment	Aftercare
Cognitive Behavioral Treatment	Cognitive Behavioral Treatment	Correctional Facilities	Cognitive Behavioral Treatment
Conflict Resolution/Interpersonal Skills	Day/Evening Reporting Center	Day/Evening Reporting Center	Day/Evening Reporting Center
Diversion	Drug Court	Group Home	Reentry Court
Drug/Alcohol Therapy/Education	Drug/Alcohol Therapy/Education	Residential Treatment Centers	Vocational/Job Training
Family Therapy	Family Therapy	Wilderness Camps	
Gender-Specific Programming	Gender-Specific Programming		
Parent Training	Home Confinement		
Teen/Youth Court	Mental Health Court		
Restorative Justice	Probation Services		
Wraparound/Case Management	Restorative Justice		
	Shelter Care		
	Wraparound/Case Management		

## Quick Reference: 16 Steps for Planning a Diversion Program\*

### A. Purpose

1. **Objectives:** The main purpose(s) for developing a diversion program will need to be identified.
  - What will be the primary objectives of the diversion program?
  - In your community, what stakeholders from the juvenile justice public/private youth services systems will be involved to provide input and support in shaping the development of your diversion program?
2. **Referral Decision Points:** There are various points within the juvenile justice processing continuum where youth can be targeted for diversion.
  - At what point or points will referral decisions be made?
  - Who, within the processing spectrum, will be responsible for making the decision to divert youth?
3. **Extent of Intervention:** The diversion program must consider the kind and degree of intervention it will have in the youth's life.
  - What degree of intervention(s) will the program utilize?
  - Will the program provide the youth with a written contract (either formal or informal)?

### B. Oversight

4. **Operations:** It is necessary to determine who will have primary responsibility for implementing and operating the diversion program and what the level of community oversight will be.
  - What agency or entity will establish and maintain the program policies, provide staffing, and take responsibility for program outcomes?
  - Will an advisory board or panel be developed to oversee the development of policies and procedures for the diversion program?
  - How will the engagement and buy in of stakeholders be obtained?
5. **Funding:** Jurisdictions developing or implementing a diversion program must determine how the program will be funded and sustained for both the short and the long run.



- How will the diversion program be funded?
- Are secure funding streams currently in place that can help to sustain the program in the future?
- Has the possibility of using other local, state, or federal resources to help support the diversion program or key aspects of the program been explored?

### C. Intake Criteria

6. **Referral and Eligibility:** A diversion program will need to establish criteria that specify who is eligible for entry into the diversion program.
  - What youth will be eligible for diversion?
  - What offenses will be accepted for diversion? Are there any offenses that might make a youth ineligible and will there be options for discretion?
  - Are there any offenses that might make a youth ineligible and will there be options for discretion?
7. **Screening and Assessment:** Diversion programs may utilize evidence-based screening and assessment tools to assess risk, needs, and behavioral or mental health problems.
  - Will any screening and/or assessment methods/tools be used to determine a youth's eligibility, and if so, how will these tools be chosen and who will administer them?
  - For what purposes will screening and assessment be used?
  - Are there any protocols in place to deal with the sensitive nature of information collected and how, if at all, it can be shared among child-serving agencies?

### D. Operation Policies

8. **Participant Requirements:** It is important to determine the conditions and responsibilities youth will have to follow in order to ensure meaningful program participation.
  - What obligations and conditions will the program require for the youth's participation and successful completion?
  - How will requirements focus on youths' strengths, address behavioral health needs, satisfy victim concerns, and involve community efforts?

9. **Services:** The diversion program will need to consider what services, if any, will be provided to the youth by the program or through referral to community-based services, as well as how those services will be administered.
- What services will be provided for the youth while participating in the diversion program?
  - Will the diversion program need to perform an inventory of community services, and if so, who will be responsible for this effort?
  - Will the diversion program encourage or require the youth's family to participate in services?
  - Are there any agreements in place or MOU among the program and community service providers that will better facilitate services to the youth?
10. **Incentives:** Incentives should be employed by a diversion program in order to motivate youth and caretakers to meet the terms of the diversion program and to ensure successful program completion.
- Will the diversion program use any incentives to motivate youth and/or caretakers throughout the diversion process? If so, what forms of incentives will be used?
  - Is the use of incentives economically feasible for the diversion program and what funding source will support incentives?
  - Will the court agree to dropping charges against the youth or expunging records once the youth successfully completes the terms of diversion?
11. **Consequences of Failure to Comply:** Consequences must be specified for youth since some may have trouble fulfilling the terms of their diversion, either by failing to comply with the program's requirements or by declining to participate altogether.
- Will there be any negative consequences for youth who fail to comply with the diversion program's requirements? If so, what will these sanctions be?
  - Will the youth ultimately be formally processed for failing to comply with diversion?
12. **Program Completion/Exit Criteria:** Criteria must be established that will define when a youth has successfully completed the terms of their diversion and is ready to exit the program.

- How will the diversion program monitor a youth's success or failure during program participation?
- How will successful program completion be defined, and will there be established exit criteria?

#### E. Legal Protections

13. **Information Use:** The diversion program will need to consider what procedures and protocols should be in place that will establish how sensitive information is collected and will be kept confidential.

- What will be the conditions/guidelines for the use of information obtained during the youth's participation in the diversion program?
- How will policies concerning the collection and use of information be clearly established and conveyed to youth and caretakers prior to participation in diversion?

14. **Legal Counsel:** In the absence of a state statute or local policies, the program should have established guidelines for the role of counsel.

- What role will defense counsel play? Are there local policy provisions in place or statutory guidelines that establish the role of counsel?
- Will the diversion program make counsel available to youth and family?

#### F. Quality

15. **Program Integrity:** It is important to carefully attend to the diversion program's development and maintenance to ensure continued quality and program fidelity.

- Are there clear policies and procedures that will be put into manual form for program personnel to maintain program quality and fidelity?
- How will training be developed and delivered for diversion program personnel?
- How will information be collected and in what formats?
- Will the program conduct a process evaluation?

16. **Outcome Evaluation:** To ensure the diversion program is meeting its objectives and goals, a record keeping and data collection system should be in place to assist in providing periodic evaluations.

- What kind of record keeping and data collection will be used to provide periodic evaluations of the diversion program and monitor achievement of goals and objectives?
- What youth and program outcomes will be used to measure success?

\*Taken from Attention Homes—Boulder Colorado—Adolescent Residential Care Program. Go to [www.attentionhomes.org](http://www.attentionhomes.org)

## [15.2] Model Code Examples

### (1989) BIA Tribal Juvenile Justice Code 1-10 Juvenile Offender—Initiation of Proceedings

#### **1-10 A. Investigation by the Juvenile Counselor**

The juvenile counselor shall make an investigation within twenty-four (24) hours of the detention hearing or the release of the child to his parent, guardian, or custodian, to determine whether the interests of the child and the public require that further action be taken. Upon the basis of his investigation, the juvenile counselor shall:

1. recommend that no further action be taken; or
2. suggest to the child and the child's parent, guardian, or custodian that they appear for an informal adjustment conference under sections 1- 10B and 1-10C of this code; or
3. request the juvenile presenter to begin transfer to adult tribal court proceedings under chapter 1-3 of this code; or
4. recommend that the juvenile presenter file a petition under section 1-10D of this code. The petition shall be filed within forty-eight (48) hours if the child is in custody. If the child has been previously released to his parent, guardian, custodian, relative, or responsible adult, the petition shall be filed within ten (10) days.

#### **1-10 B. Informal Adjustment**

1. During the course of the preliminary investigation to determine what further action shall be taken, the juvenile counselor shall confer with the child and the child's parent, guardian or custodian for the purpose of effecting adjustments or agreements that make the filing of the petition unnecessary.
2. The juvenile counselor shall consider the following factors in determining whether to proceed informally or to file a petition:

- a. nature and seriousness of the offense;
- b. previous number of contacts with the police, juvenile counselor, or the court;
- c. age and maturity of the child;
- d. attitude of the child regarding the offense;
- e. willingness of the child to participate in a voluntary program, and;
- f. participation and input from the child's parent, guardian, or custodian.

#### **1-10 C. Informal Conference**

1. After conducting a preliminary investigation, the juvenile counselor shall hold an informal conference with the child and the child's parent, guardian, or custodian to discuss alternative courses of action in the particular case.
2. The juvenile counselor shall inform the child, the child's parent, guardian, or custodian of their basic rights under chapter 1-7 of this code. Statements made by the child at the informal conference shall not be used against the child in determining the truth of the allegations in the petition.
3. At the informal conference, upon the basis of the information obtained during the preliminary investigation, the juvenile counselor may enter into a written agreement with the child and the child's parent, guardian, or custodian specifying particular conditions to be observed during an informal adjustment period, not to exceed six (6) months. The child and the child's parent, guardian, or custodian shall enter into the agreement with the knowledge that consent is voluntary and that they may terminate the adjustment process at any time and petition the court for a hearing in the case.
4. The child shall be permitted to be represented by counsel at the informal conference.
5. If the child does not desire to participate voluntarily in a diversion program, the juvenile counselor shall recommend that the juvenile presenter file a petition under section 1-10D of this code.
6. Upon the successful completion of the informal adjustment agreement, the case shall be closed and no further action taken in the case.
7. If the child fails to successfully complete the terms of his informal adjustment agreement, the juvenile counselor may recommend that a petition be filed in the case under section 1-10D of this code.

**CHAPTER 2 DELINQUENCY**

**2.06 PRELIMINARY INVESTIGATION AND RECOMMENDATION**

**2.06.110 Preliminary Investigation - Requirement**

Whenever a child is alleged to have committed a delinquent act, the juvenile case coordinator shall conduct a preliminary investigation to determine whether the interests of the child or the community require that further action be taken.

**2.06.130 Preliminary Investigation - Time Limit**

The juvenile case coordinator shall conduct the preliminary investigation:

- (a) within twenty-four (24) hours after the detention hearing, if the child remains in custody;  
or
- (b) within five (5) days after the detention hearing, if the child has been released on conditions pursuant to § 2.05.170.

**2.06.150 Informal Conference - Requirement**

- (a) Subject to the provisions of § 2.06.190, the juvenile case coordinator shall, during the course of the preliminary investigation, conduct an informal conference to include:
  - (1) the child;
  - (2) the child's parent, guardian or custodian; and
  - (3) counsel for the child.
- (b) Where counsel has not already been appointed or retained to represent the child, the juvenile case coordinator shall notify the juvenile advocate prior to conducting the informal conference.

**2.06.170 Informal Conference - Purpose and Conduct**

- (a) The purpose of the informal conference shall be to identify and discuss services, interventions, agreements or other alternatives which would render the filing of a delinquency petition unnecessary.

- (b) To the extent possible, the informal conference shall be treated as a nonadversarial effort to resolve the issues presented by the child's alleged conduct, without the intervention of the Juvenile Court.
- (c) Subsection (b) shall not be interpreted:
  - (1) to require the waiver of any right or privilege by the child or the child's parent, guardian or custodian, including but not limited to the privilege against self-incrimination;
  - (2) to require disclosure by counsel for the child of any matter that would otherwise be confidential or protected from disclosure by any applicable rule or statute;
  - (3) to relieve counsel for the child of any ethical or professional obligations otherwise imposed by statute, rules of professional conduct or similar court rules; or
  - (4) to require counsel for the child to proceed in a manner that is inconsistent with those obligations.
- (d) Statements made by the child at the informal conference shall be inadmissible, in any subsequent hearing or proceedings, as evidence that the child committed a delinquent act, but may be considered at a disposition hearing conducted in accordance with § 2.13.150.

#### **2.06.190 Informal Conference - Attendance and Participation Voluntary**

- (a) Prior to conducting the informal conference, the juvenile case coordinator shall inform the child and the child's parent, guardian or custodian:
  - (1) of their rights under the provisions of this title;
  - (2) of the nature and purpose of the informal conference; and
  - (3) that participation in the informal conference is voluntary.
- (b) The juvenile case coordinator shall conduct the informal conference:
  - (1) without the participation of the child, if the child declines to attend or participate;  
or
  - (2) without the participation of the child's parent, guardian or custodian, if:
    - (A) the child's parent, guardian or custodian declines to attend or to participate; and

- (B) the child's parent, guardian or custodian consents to the child's participation.
- (c) If the child declines to attend or to participate directly in the informal conference, counsel for the child may, to the extent that such efforts are consistent with counsel's professional and ethical obligations to the child:
  - (1) attend and participate in the informal conference on behalf of the child; and
  - (2) otherwise confer with the juvenile case coordinator to further the purpose of the informal conference, as set forth in § 2.06.170.

### **2.06.210 Recommendation by Juvenile Case Coordinator**

Upon concluding the preliminary investigation, the juvenile case coordinator shall make one of the following recommendations to the juvenile presenting officer:

- (a) The juvenile case coordinator shall recommend that no further action be taken in the matter, if the juvenile case coordinator determines that:
  - (1) the alleged facts are insufficient to support the filing of a delinquency petition ; or
  - (2) the best interests of neither the child nor the community require that further action be taken.
- (b) The juvenile case coordinator shall recommend that the child and the child's parent, guardian or custodian enter into a diversion agreement in accordance with § 2.07.110, if the juvenile case coordinator determines that:
  - (1) the alleged facts are sufficient to support the filing of a delinquency petition; and
  - (2) the interests of both the child and the community may be adequately addressed through one or more of the diversion options set forth in § 2.07.150.
- (c) The juvenile case coordinator shall recommend the initiation of proceedings under Chapter 3 of this title, if the juvenile case coordinator determines that:
  - (1) the alleged facts are sufficient to support the filing of a request for services under § 3.05.110;
  - (2) the best interests of both the child and the community may be adequately addressed through child-in-need-of-services proceedings.



- (d) The juvenile case coordinator shall recommend that the juvenile presenting officer file a delinquency petition in accordance with § 2.08.110, if the juvenile case coordinator determines that:
  - (1) the alleged facts are sufficient to support the filing of a delinquency petition;
  - (2) the best interests of either the child or the community require the intervention of the Juvenile Court; and
  - (3) the best interests of either the child or the community cannot be adequately addressed through proceedings conducted pursuant to Chapter 3 of this title.

#### **2.06.230 Recommendation - Factors to Be Considered**

In determining the appropriate recommendation to be made in accordance with § 2.06.210, the juvenile case coordinator shall consider factors including:

- (a) the nature and seriousness of the alleged act;
- (b) the child's previous contacts with the police, the juvenile case coordinator, or the Juvenile Court;
- (c) the age, maturity, and individual circumstances of the child;
- (d) the willingness of the child to participate in a voluntary program;
- (e) the participation and input of the child's parent, guardian or custodian;
- (f) any statement by the complainant or the alleged victim expressing support for diverting the matter or addressing the matter informally and without the intervention of the Juvenile Court;
- (g) the likelihood that services and resources to meet the child's needs can be identified and secured without the intervention of the Juvenile Court.

#### **2.06.250 Notice to Juvenile Court**

- (a) The juvenile presenting officer shall immediately file written notice in the Juvenile Court whenever:
  - (1) the Juvenile Court has entered a detention order, or any order imposing restrictions or other conditions or obligations upon the child in connection with the matter; and
  - (2) the juvenile presenting officer, having received and considered the recommendation of the juvenile case coordinator, determines that:

- (A) no further action should be taken in the matter;
  - (B) the matter should proceed by way of a diversion agreement; or
  - (C) the matter should proceed under Chapter 3 of this title.
- (b) Upon the filing of the written notice required by subsection (a):
- (1) the Juvenile Court shall enter a written order releasing the child from any detention, restrictions or other conditions or obligations previously imposed in connection with the matter; and
  - (2) if the child is being detained, the juvenile case coordinator shall ensure that the child is released within 12 hours of the entry of the order of release.

## **2.07 DIVERSION AGREEMENT**

### **2.07.110 Diversion Agreement - Form and Substance**

- (a) Upon the juvenile presenting officer's acceptance of a recommendation for diversion pursuant to § 2.06.210(b), the child and the child's parent, guardian or custodian may enter into a written diversion agreement with the juvenile case coordinator.
- (b) The diversion agreement shall specify particular conditions, which may include any of the options specified in § 2.07.150, to be fulfilled by the child and the child's parent, guardian or custodian over a period not to exceed six (6) months.
- (c) The juvenile case coordinator shall advise the child and the child's parent, guardian or custodian, and the written diversion agreement shall state:
  - (1) that entry into a diversion agreement is voluntary, and that the child or the child's parent, guardian or custodian may withdraw from the diversion agreement at any time; and
  - (2) that withdrawal from the diversion agreement may lead to the filing of a delinquency petition.

### **2.07.130 Diversion Agreement - Fulfillment of Conditions**

- (a) If the child and the child's parent, guardian or custodian fulfill the conditions of the diversion agreement, no further action shall be taken in the matter.
- (b) If the child or the child's parent, guardian or custodian do not fulfill the conditions of the diversion agreement, the juvenile case coordinator may:

- (1) confer with the child and the child's parent guardian or custodian for the purpose of effecting necessary or recommended modifications to the diversion agreement;  
or
  - (2) recommend that the juvenile presenting officer file a delinquency petition in accordance with § 2.08.110.
- (c) Upon finding by a preponderance of the evidence that the child and the child's parent, guardian or custodian have fulfilled the conditions of the diversion agreement, the Juvenile Court shall dismiss with prejudice any subsequent delinquency petition arising out of the alleged incident.

### **2.07.150 Diversion Options**

- (a) Subject to the provisions of subsection (b), the conditions of a diversion agreement entered into pursuant to § 2.07.110, an order deferring adjudication entered in accordance with § 2.10.130, or an order deferring disposition entered in accordance with § 2.13.170(b), may include any of the following:
- (1) referral of the child or the child's parent, guardian or custodian to social, community, or tribal services or resources appropriate for addressing the needs of the child and the child's parent, guardian or custodian;
  - (2) referral of the matter to a tribal elders panel, community accountability board, tribal council, or other forum suitable for addressing the needs of both the child and the community;
  - (3) participation in tribal peacemaking or other extrajudicial alternatives for resolving conflicts or disputes;
  - (4) participation by the child in cultural, educational, or other programs or activities aimed at rehabilitation, community involvement, or competency development, or which are otherwise appropriate for addressing the child's needs;
  - (5) participation by the child or the child's parent, guardian or custodian in an educational or counseling program designed to deter delinquent acts or other conduct or conditions which would be harmful to the child or society;
  - (6) participation by the child's parent, guardian or custodian in an educational or counseling program designed to contribute to their ability to care for and supervise the child, including but not limited to parenting classes;

- (7) a requirement that the child or the child's parent, guardian or custodian undergo medical, psychological, or psychiatric examination or treatment,
  - (8) a requirement that the child pay restitution;
  - (9) performance by the child of community service;
  - (10) a requirement that the child maintain satisfactory school attendance, or otherwise pursue a course of study designed to lead to achieving a high school diploma or the equivalent;
  - (11) participation by the child in structured after-school, evening, or other court approved programs appropriate for addressing the needs of the child and providing for the safety of the community; and
  - (12) other reasonable conditions aimed at:
    - (A) holding the child accountable for his or her actions;
    - (B) providing for the safety and protection of the community; or
    - (C) promoting the development of competencies which will enable the child to become a responsible and productive member of the community.
- (b) The conditions of a diversion agreement entered into pursuant to § 2.07.110, an order deferring adjudication entered in accordance with § 2.10.130, or an order deferring disposition entered in accordance with § 2.13.170(b):
- (1) shall not include detention in a secure juvenile detention facility, nor participation in alternative programs or services specifically intended as alternatives to secure detention or otherwise directed solely at meeting the needs of adjudicated youth; and
  - (2) shall not include a requirement that the child's parent, guardian, or custodian undergo medical, psychological, or psychiatric treatment, unless such treatment is:
    - (A) recommended by a qualified medical, psychological, or psychiatric professional; and
    - (B) necessary to:
      - (i) address conditions which contributed to the alleged delinquent act; or
      - (ii) allow the child to remain with or be returned to the custody of the child's parent, guardian or custodian.

## [15.3] Tribal Code Examples

### Pascua Yaqui Tribe Code

#### TITLE 5 – CIVIL CODE

#### CHAPTER 7 – JUVENILES

#### SUBCHAPTER B JUVENILE OFFENSES

#### Section 120 Informal Adjustment (5 PYTC § 7-120)

- (A) During the course of the preliminary investigation to determine what further action shall be taken, the juvenile counselor and presenting officer shall confer with the child and the child's parents for the purpose of effecting adjustments or agreements that make the filing of the petition unnecessary.
- (B) The presenting officer shall consider the following factors in determining whether to proceed informally or to file a petition:
  - (1) Nature and seriousness of the offense.
  - (2) Previous number of contacts with police, juvenile counsel or the Court.
  - (3) Age and maturity of the child.
  - (4) Attitude of the child regarding the offense.
  - (5) Willingness of the child to participate in a voluntary program.
  - (6) Participation and input of the child's parents.
- (C) Informal Conference.
  - (1) After conducting the preliminary investigation, the presenting officer shall hold an informal conference with the child and the child's parents, guardian, or custodian to discuss alternative courses of action in the particular case.
  - (2) The presenting officer shall inform the child, the child's parents, guardian, or custodian of their basic rights under 3 PYT R.Juv.P. Rule 20. Statements made by the child at the informal conference shall not be used against the child in determining the truth of the allegations in the petition.
  - (3) At the informal conference upon the basis of information obtained during the preliminary investigations, the presenting officer may enter into a written agreement with the child and the child's parents, guardian, or custodian, specifying particular conditions to be observed during the informal adjustment

period, not to exceed six months. The child and the child's parents, guardian, or custodian, shall enter into the agreement with the knowledge that consent is voluntary and that they may terminate the adjustment process at any time and petition the Court for a hearing on the case.

- (4) The child is permitted to be represented by counsel at the informal conference.
- (5) If the child does not desire to participate voluntarily in a diversion program, the presenting officer shall file a petition under 3 PYT R.Juv.P. Rule 50.
- (6) Upon successful completion of the informal adjustment agreement, the case shall be closed with no further action taken in the case.
- (7) If the child fails to complete the terms of his informal adjustment agreement, the presenting officer may file a petition in the case under 3 PYT R.Juv.P. Rule 50.

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### **Sault St. Marie Tribal Code**

#### **CHAPTER 36: JUVENILE CODE**

#### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

##### **36.405 Bekaadziwiin (Peaceful Life)**

- (1) The Sault Ste. Marie Chippewa Tribal Court shall promulgate the guidelines governing Peacemaking.
- (2) The Tribal Prosecutor shall present cases that meet the Bekaadziwiin guidelines to the Tribal Peacemaking Committee. The Tribal Peacemaking Committee shall review all cases presented and shall:
  - a. decide not to proceed with any action.
  - b. refer the matter to Bekaadziwiin for peacemaking.
  - c. develop a case plan for the juvenile.
  - d. refer the matter to the Juvenile Division.
- (3) The Tribal Peacemaking Committee may request the Tribal Prosecutor to file a formal petition upon a finding that the case plan has not been substantially followed.
- (4) The Peacemakers shall have the authority to hear the following cases consistent with the established Bekaadziwiin guidelines:

- a. any juvenile offenses.
- b. any juvenile status offenses.
- c. any other cases that are referred by the Tribal Court.
- d. cases from individual Tribal members requesting to voluntarily access Peacemaking.

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**Warm Springs Tribal Code**

**Chapter 360 Juveniles**

**II. JUVENILE PROCEDURE**

**360.220 Diversion.**

- (1) Upon the petition of the Juvenile Coordination/Presenting Officer or any interested party, and based upon a written diversion plan agreed to by the Juvenile Coordinator/Presenting Officer, the juvenile and the juvenile's parent(s), guardian, or custodian, the Juvenile Judge may direct that the case proceed to a diversion program, provided that the following conditions are met:
  - (a) The admitted facts bring the case within the jurisdiction of the Juvenile Court;
  - (b) An informal disposition of the matter would be in the best interests of the juvenile and the Warm Springs Tribe; and
  - (c) The juvenile and his or her parent, guardian, or custodian voluntarily consent to an informal disposition of the matter.
- (2) The written diversion plan, which shall be presented to the Juvenile Judge with a petition for approval of diversion, as provided in Section (1) above, shall consider a number of alternatives to a formal jurisdictional hearing in Juvenile Court. Alternatives shall include, but are not limited to, the following:
  - (a) Refer the juvenile and the parent, guardian, or custodian to a community agency for needed assistance;
  - (b) Order terms of supervision, calculated to assist and benefit the juvenile, which regulate the juvenile's activities and which are within the ability of the juvenile to perform;
  - (c) Accept an offer of restitution if voluntarily made by the juvenile.
- (3) A program for diversion of a juvenile matter shall not exceed twelve (12) months in duration.

- (4) The Juvenile Coordinator/Presenting Officer shall, during the course of the diversion program, review the juvenile's progress every thirty (30) days. At the end of the first thirty (30) days, and every thirty (30) days thereafter during the period of the diversion program, the Juvenile Coordinator/Presenting Officer shall submit a monthly report on the status of the diversion program to the Juvenile Judge. If, at any time after the initial thirty (30) day period but before the end of the diversion program, the Juvenile Coordinator/Presenting Officer determines that satisfactory progress is not being achieved, the Juvenile Coordinator/Presenting Officer shall request that the Court schedule a formal jurisdictional hearing in the matter. Upon the juvenile's satisfactory completion of the informal diversion program, the petition will be dismissed.

## [15.4] Tribal Code Commentary

The Pascua Yaqui statute at Section 120 is almost identical to the 1989 BIA Tribal Juvenile Justice Code at Sections 1-10 B and C. The only significant difference is the omission of “guardian or custodian” in its Section 120(A) and 120 (B)(6). Compare the 1989 BIA Tribal Juvenile Justice Code's Section 1-10 B.1. “During the course of the preliminary investigation to determine what further action shall be taken, the juvenile counselor shall confer with the child and the child's parent, guardian or custodian. . . .” Also compare the 1989 BIA Tribal Juvenile Justice Code's Section 1-10 B.2. “The juvenile counselor shall consider the following factors in determining whether to proceed informally or to file a petition: . . . (f) participation and input from the child's parent, guardian, or custodian.” These omissions of “guardian or custodian” in the Pascua Yaqui statute appear to be inadvertent as later sections include this language.

The 1989 BIA Tribal Juvenile Justice Code was finalized before the launch of a national wraparound case management initiative in the early 2000s. Contemporary tribal juvenile justice codes should include, within the role and mandates of their equivalent of “Juvenile Counselor,” the duty to conduct case management activities, preferably of the “wraparound” type that ensures tailored, individualized, and comprehensive case management for youth and their families.

The Sault Ste. Marie Tribal Code at Section 36.405 replaces the 1989 BIA Tribal Juvenile Justice Code's “informal adjustment” process with a designated “peacemaking” process. The purpose and nature of the Sault Ste. Marie peacemaking process is set out in a separate set of guidelines. The prosecutor is authorized to take cases to a Peacemaking Committee that then will decide whether to proceed with peacemaking, do nothing, develop a case plan, or refer the entire matter back to the juvenile court system. We note that while it is the prerogative of sovereign tribal nations to further local values, ways, and priorities, it would be in the interest of these nations to add such peacemaking or other traditional or hybrid processes onto their informal adjustment processes, rather than replacing the informal adjustment process wholesale—to accommodate diversions to additional programs like wellness court (drug court), or any of the many programs or services listed



in the preceding table, and where such program or service is not covered as part of the peacemaking program.

The Warm Springs Code is somewhat similar to the 1989 BIA Tribal Juvenile Justice Code; however it references specific types of adjustments such as:

- Referring the juvenile and the parent, guardian, or custodian to a community agency for assistance.
- Prescribing terms of supervision that assist and benefit the juvenile by regulating the juvenile's activities.
- Accepting an offer of restitution voluntarily made by the juvenile.

It also requires the diversion plan be submitted to the judge for approval. Supervision can be up to one year and at a minimum monthly monitoring is required by statute.

## [15.5] Exercises

The following exercises are meant to guide you in developing the informal adjustment sections of the tribal juvenile code.

- Find and examine your juvenile code to determine whether you have “informal adjustment” provisions (or any process where a juvenile counselor or probation officer assists youth and their families with a case plan and/or treatment plan before a hearing or trial takes place). What factors make the youth eligible for this?
- Identify who is responsible for such case management and/or treatment planning.
- Make a list of available services (health care, mental health, substance use/abuse, etc.).
- Make a list of available diversion programs (mentoring, educational, therapeutic, cultural, wellness court, teen court, peacemaking, mediation, etc.).
- Make a list of desired but as of yet unavailable services and programs

## Read and Discuss\*

**Should your tribe require early and follow-up mental health screening and assessments for youth involved in the juvenile justice system by statute?**

“[R]egardless of the level of care or geographic region of the country, the majority of youth in the juvenile justice system meet the criteria for at least one mental health diagnosis. Overall 70.4 percent of youth were diagnosed with at least one mental health disorder, with girls experiencing a higher rate of disorders (81%) when compared to males (66.8%). For many of the youth in the study their mental health status was complicated by the presence of more than one disorder. Of those youth who were diagnosed with a mental health disorder, 79.1 percent met criteria for at least one other mental health diagnosis. The majority of youth who met criteria for a mental health diagnosis were also diagnosed with a co-occurring substance use disorder. Among those youth with at least one mental health diagnosis, approximately 60 percent also met criteria for a substance use disorder.”

Selected “Core Principles”:

- Youth should not have to enter the juvenile justice system solely in order to access mental health services or because of their mental illness.
- Whenever possible and when matters of public safety allow, youth with mental health needs should be diverted into evidence-based treatment in a community setting.
- If diversion out of the juvenile justice system is not possible, youth should be placed in the least restrictive setting possible, with access to evidence-based treatment.
- Information collected as part of a preadjudicatory mental health screen should not be used in any way that might jeopardize the legal interests of youth as defendant.
- Whenever possible, families and/or caregivers should be partners in the development of treatment decisions and plans made for their children.
- Multiple systems bear responsibility for these youth. While at different times, a single agency may have primarily responsibility, these youth are the community’s responsibility and all responses developed for these youth should be collaborative in nature, reflecting the input and involvement of the mental health, juvenile justice, and other systems.

\*Taken from Kathleen R. Skowrya and Joseph J. Cocozza, PhD, “Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System,” a report by the National Center for Mental Health and Juvenile Justice Policy Research Associates, Inc. (2007).

# Chapter 16: Petition for Juvenile Offender Proceedings

## [16.1] Overview

Juvenile court proceedings begin with the filing of a petition naming the youth and sometimes the parents/guardians, alleging that the youth has committed a juvenile offense. It varies with respect to who is authorized to file a petition.

A petition generally begins with the words “in the interest of.” Petitions tend to give the name and age of the youth and the names and address of the parents. Petitions typically indicate whether a minor is currently detained and when they were taken into custody. A tribal petition would contain a provision consistent with the code provision relating to tribal affiliation and/or residence in the tribal nation that gives the juvenile court jurisdiction over certain youth. They must also contain a statement of the facts that bring the youth within the jurisdiction of the juvenile court. The petition may also contain allegations related to the child’s need for treatment or rehabilitation. Once completed, a petition is then filed with the prosecutor who then decides whether or not to prosecute. If he does so, proper notice must be given to the youth and his or her parents or guardian. The petition in every sense must be consistent with your code provisions.

## 16.2] Model Code Example

[\(1989\) BIA Tribal Juvenile Justice Code](#)

### [1-10 JUVENILE OFFENDER—INITIATION OF PROCEEDINGS](#)

#### **1-10 A. Investigation by the Juvenile Counselor**

The juvenile counselor shall make an investigation within twenty-four (24) hours of the detention hearing or the release of the child to his parent, guardian or custodian, to determine whether the interests of the child and the public require that further action be taken. Upon the basis of his investigation, the juvenile counselor shall:

1. recommend that no further action be taken; or
2. suggest to the child and the child’s parent, guardian or custodian that they appear for an informal adjustment conference under sections 1- 10B and 1-10C of this code; or
3. request the juvenile presenter to begin transfer to adult tribal court proceedings under chapter 1-3 of this code; or

4. recommend that the juvenile presenter file a petition under section 1-10D of this code. The petition shall be filed within forty-eight (48) hours if the child is in custody. If the child has been previously released to his parent, guardian, custodian, relative or responsible adult, the petition shall be filed within ten (10) days.

#### **1-10 D. Filing and Content of Petition**

Formal “juvenile offender” proceedings shall be instituted by a petition filed by the juvenile presenter on behalf of the tribe and in the interests of the child. The petition shall be entitled, “In the matter of \_\_\_\_\_, a child” and shall set forth with specificity:

1. the name, birthdate, residence, and tribal affiliation of the child;
2. the names and residences of the child’s parent, guardian or custodian;
3. a citation to the specific section(s) of this code which give the court jurisdiction over the proceedings;
4. a citation to the criminal statute or other law or ordinance which the child is alleged to have violated;
5. a plain and concise statement of facts upon which the allegations are based, including the date, time and location at which the alleged acts occurred; and
6. whether the child is in custody and, if so, the place of detention and time he was taken into custody.

#### **1-10 E. Issuance of Summons**

After a “juvenile offender” petition has been filed, the court shall direct the issuance of summons to:

1. the child;
2. the child’s parent, guardian or custodian;
3. the child’s counsel;
4. appropriate medical and/or alcohol rehabilitation experts, and;
5. any other person the court deems necessary for the proceedings.

#### **1-10 F. Content of the Summons**

The summons shall contain the name of the court, the title of the proceedings, and the date, time, and place of the hearing. The summons shall also advise the parties of their applicable rights under chapter 1-7 of this code. A copy of the petition shall be attached to the summons.

#### **1-10 G. Service of the Summons**

The summons shall be served upon the parties at least five (5) days prior to the hearing. The summons shall be delivered personally by a law enforcement official or appointee of the court. If the summons cannot be delivered personally, the court may deliver it by registered mail. If the summons cannot be delivered by registered mail, it may be by publication. A party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing.

## **[16.3] Tribal Code Example**

### **Sault Ste. Marie Tribal Code**

#### **CHAPTER 36: JUVENILE CODE**

#### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

(36.401 through 36.405 Omitted)

#### **36.406 Filing and Content of Petition.**

Formal juvenile offender proceedings shall be instituted by a petition filed by the prosecutor on behalf of the Tribe and in the interests of the child. The petition shall set forth with specificity:

- (1) The name, birth date, residence, and tribal affiliation of the child.
- (2) The names and residences of the child's parents, guardian, or custodian.
- (3) A citation to the specific section(s) of this Chapter which give the Court jurisdiction over the proceedings.
- (4) A citation to the criminal statute or other law or ordinance which the child is alleged to have violated.
- (5) A plain and concise statement of facts upon which the allegations are based, including the date, time, and location at which the alleged acts occurred.
- (6) Whether the child is in custody and, if so, the place of detention and time he was taken into custody.

### **36.407 Issuance of Summons.**

- (1) After a juvenile offender petition has been filed, the Court shall direct the issuance of summons to:
  - (a) The child.
  - (b) The child's parents, guardian, or custodian.
  - (c) The child's counsel.
  - (d) Appropriate medical and/or alcohol rehabilitation experts.
  - (e) Any other person the Court deems necessary for the proceedings.
- (2) The summons shall contain the name of the Court, the title of the proceedings, and the date, time, and place of the hearing. The summons shall also advise the parties of their applicable rights under '36.402 of this Chapter. A copy of the petition shall be attached to the summons.
- (3) The summons shall be served upon the parties at least seven (7) days prior to the hearing. The summons shall be delivered personally by a law enforcement officer or appointee of the Court. If the summons cannot be delivered personally, the Court may deliver it by registered mail. If the summons cannot be delivered by registered mail, it may be by publication. A party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing.

## **[16.4] Tribal Code Commentary**

Section 36.406 of the Sault Ste. Marie Tribal Code sets out the requirements for filing and content of the petition. These are identical to the requirements set out under Section 1-10 D of the 1989 BIA Tribal Juvenile Justice Code. Most other tribal code provisions are similar as well, so no further examples were given.

Section 36.407 of the Sault Ste. Marie Tribal Code increases the number of days for serving a summons on the parties to seven, as opposed to the 1989 Tribal Juvenile Justice Code's five days at Section 1-10 G.

See sample petition in the following text based upon the 1989 BIA Tribal Juvenile Justice Code

**In the Juvenile Court of the X Tribe**

IN THE MATTER OF:  
(                    ) CHILD.

PETITION FOR  
A FINDING THAT  
CHILD IS A  
JUVENILE OFFENDER

I, \_\_\_\_\_, Presenting Officer, on oath state on information and belief:

1. That \_\_\_\_\_ is a male/female, born on \_\_\_\_\_, who is eligible for membership/a member of \_\_\_\_\_ Tribe, who resides or may be found at \_\_\_\_\_, X reservation, in X state.

2. The names and residence addresses of the child's parents are:

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The child and the persons named in this paragraph are designated respondents.

3. The Juvenile Court has original and exclusive jurisdiction over this matter where:

The child resides within the X reservation.

OR

The child is domiciled within the X reservation.

AND

The child is alleged to be a "juvenile offender" under Section X of the Juvenile Justice Code.

AND

The child is alleged to have committed a "juvenile offense," by allegedly violating the following criminal provision: \_\_\_\_\_, at Section X, of the Law and Order Code of the X Tribe.

AND

At the time of the alleged commission of the juvenile offense, the child was under the age of eighteen (18).

4. The following is a plain and concise statement of facts upon which the allegations are based, including the date, time, and location at which the alleged acts occurred:

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5. The child:

Was not taken into custody.

Was taken into custody at \_\_\_\_\_ a.m./p.m. on \_\_\_\_\_ date, and was placed with

The child is/is not presently in custody.

6. It is in the best interests of the child and the public that the child be adjudged a “juvenile offender.”

I have read the Petition for a Finding that a Child is a Juvenile Offender and do hereby swear that the facts contained herein are true and correct to the best of my knowledge and belief.

\_\_\_\_\_  
Presenting Officer of the X Tribe

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 201X.

\_\_\_\_\_  
Notary Public

## [16.5] Exercises

The following exercises are meant to guide you in developing the petition section of the tribal juvenile code.

- Find and examine your juvenile code’s provisions governing the drafting and filing of “petitions” or “complaints.”
  - Who is responsible for drafting and filing petitions/complaints with the juvenile court?
  - What types of information must they include?
  - Who is responsible for arguing before the judge on behalf of the petition/complaint in the tribal juvenile court?
- Make a list of the pros and cons of having your tribal social worker, child protection worker, juvenile counselor, or juvenile probation officer do the petitioning/complaining in juvenile court.
- Many tribes designate a tribal prosecutor or presenting officer to be responsible for the petition/complaint drafting/filing/arguing process. Is this desirable in your juvenile justice system?



## Read and Discuss

What is the purpose of the petition? Who fills it out and signs it? What does it look like?

Tribal Trends:

- The purpose of the petition is to invoke the jurisdiction of the juvenile court, to begin the fact-finding process to determine whether the youth committed a juvenile offense (if he or she does not admit to it), and to review the need for (continued or additional) services, treatment, and/or (continued) detention or placement.
- Tribal courts vary in assigning the duty of petition drafting/signing and making arguments to the juvenile court. Some tribes use a “presenting officer” or “prosecutor,” others use a “juvenile probation officer,” or “juvenile counselor.” Still others use a “social worker” or “child protection worker” to handle the petitions.
- Petition templates should be drafted to fit the requirements of each tribe’s juvenile statute and the tribal criminal statute, as well as any statutes governing relevant diversion programs like peacemaking or wellness court.



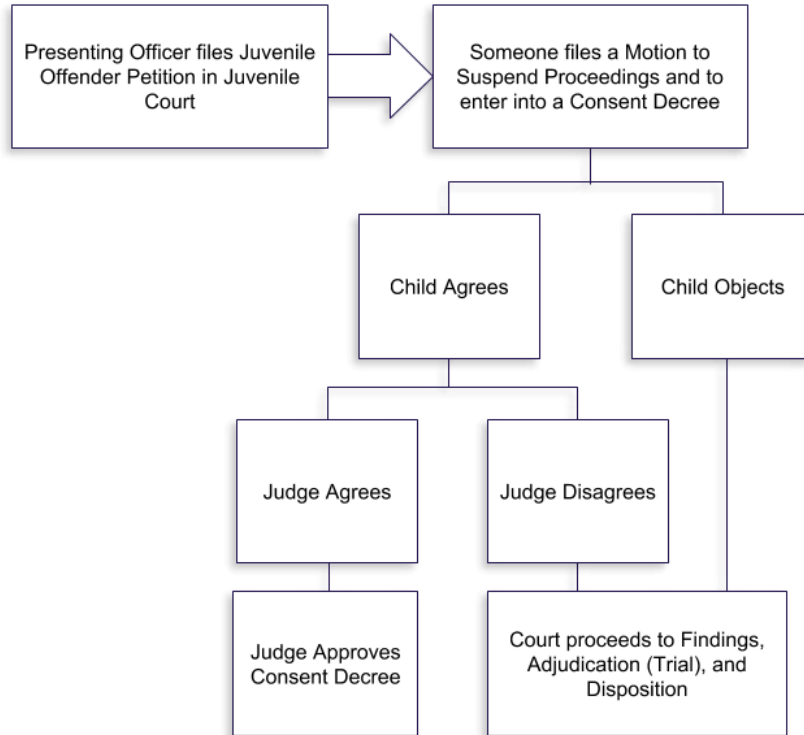
# Chapter 17: Presenting Officer/Prosecutor and Consent Decrees

## [17.1] Overview

Under the [1989 BIA Tribal Juvenile Justice Code](#), there is a second opportunity, after a petition has been filed in juvenile court, for a youth and his or her family to enter into a conditioned agreement for services and/or treatment. This type of agreement is called a “consent decree.” Under the 1989 BIA Tribal Juvenile Justice Code at Section 1-11 A, after a petition is filed, but before the judge has “entered a judgment” (issued a court order deciding whether or not the youth has committed a juvenile offense), the youth’s advocate or attorney, or the presenting officer or prosecutor, may file a motion with the court seeking to stop the court proceedings and to have a negotiated consent decree approved by the judge. This would suspend the court proceedings to see if the youth and his or her family can successfully complete requirements of the consent decree.

If the youth or his or her family objects to this process, the judge will not approve it and will proceed with the juvenile court process. If the youth and his or her family want to enter into a consent decree, the judge must still approve it before it is effective. Under the 1989 BIA Tribal Juvenile Justice Code at Section 1-11 C, a consent decree remains in force for six months. The juvenile counselor and/or the youth and his or her family may request an extension for another six months for additional services and/or treatment. If the youth and his or her family fail to fulfill the terms of the consent decree by the deadline, the presenting officer or prosecutor may file a petition to revoke the consent decree and to proceed on the original petition in juvenile court. If the youth and his or her family successfully meet the terms of the consent decree, the original petition must be dismissed with prejudice (meaning that it cannot be refiled later for the same underlying alleged offense). See 1989 BIA Tribal Juvenile Justice Code [Section 1-11 F](#).

**Section 1-11 Juvenile Offender--Consent Decree**  
1989 BIA Tribal Juvenile Justice Code



## [17.2] Model Code Example

[\(1989\) BIA Tribal Juvenile Justice Code](#)

### [1-11 JUVENILE OFFENDER—CONSENT DECREE](#)

#### 1-11 A. Availability of Consent Decree

At any time after the filing of a “juvenile offender” petition, and before the entry of a judgment, the court may, on motion of the juvenile presenter or that of counsel for the child, suspend the proceedings and continue the child under supervision in his own home under terms and conditions negotiated with the juvenile counselor and agreed to by all the parties affected. The court’s order continuing the child under supervision under this section shall be known as a “consent decree.”

### **1-11 B. Objection to Consent Decree**

If the child objects to a consent decree, the court shall proceed to findings, adjudication, and disposition of the case. If the child does not object, but an objection is made by the juvenile presenter after consultation with the juvenile counselor, the court shall, after considering the objections and the reasons given, proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

### **1-11 E. New Juvenile Offense Complaint**

If, either prior to discharge or expiration of the consent decree, a new “juvenile offender” complaint is filed against the child and the juvenile counselor has conducted a preliminary inquiry and authorized the filing of a petition upon a finding that informal adjustment is not in the best interest of the child and public, the juvenile presenter may:

1. file a petition to revoke the consent decree in accordance with the section 1-11D of this code; or
2. file a petition on the basis of the new complaint which has been filed against the child.

## **[17.3] Tribal Code Example**

### **Sault Ste. Marie Tribal Code**

#### **CHAPTER 36: JUVENILE CODE**

#### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

- (1) At any time after the filing of a juvenile offender petition, the Court may, on motion of the prosecutor or that of counsel for the child, suspend the proceedings and continue the child under supervision in his own home under terms and conditions negotiated with the juvenile probation officer and agreed to by all the parties affected. The Court’s order continuing the child under supervision pursuant to this section shall be known as a consent decree.
- (2) A consent decree shall remain in force for six (6) months unless the child is discharged sooner by the juvenile probation officer. Prior to the expiration of the six (6) months period, and upon the application of the juvenile probation officer or any other agency supervising the child under a consent decree, the Court may extend the decree for an additional six (6) months in the absence of objection to extension by the child. If the child objects to the extension, the Court shall hold a hearing and make a determination on the issue of extension.

- (3) [Reserved]
- (4) If, either prior to a discharge by the juvenile probation officer or expiration of the consent decree, the child fails to fulfill the terms of the decree, the prosecutor may file a petition to revoke the consent decree. Proceedings on the petition shall be conducted according to '36.410 of this Chapter. If the child is found to have violated the terms of the consent decree, the Court may:
  - (a) Extend the period of the consent decree.
  - (b) Make any other disposition which would have been appropriate in the original proceeding.
- (5) If, either prior to discharge or expiration of the consent decree, a new juvenile offender complaint is filed against the child, the prosecutor may:
  - (a) File a petition to revoke the consent decree in accordance with subsection (4) of this Chapter.
  - (b) File a petition on the basis of the new complaint which has been filed against the child.

#### **36.409 Dismissal of Petition.**

A child who is discharged by or who completes a period under supervision without reinstatement of the original juvenile offense 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. Nothing in this section precludes a civil suit against the child for damages arising from this conduct.

#### **36.410 Preliminary Hearing**

- (1) The Court shall conduct a preliminary hearing within fourteen (14) days of the date of filing the petition or in cases of alternative sentencing within fourteen (14) days of the filing of the petition to revoke a consent decree.
- (2) The Court shall read the allegations of the petition in open Court unless waived and shall advise the child and parents of the rights in Section 36.402. After advising the child and parents of the rights, the Court shall allow the child an opportunity to deny or admit the allegations and make a statement of explanation.
- (3) If the child admits the allegations, the Court may proceed directly to disposition pursuant to Section 36.413.

## [17.4] Tribal Code Commentary

The Sault Ste. Marie statute after Section 36.408 (1) and before Section 36.408 (2) omits the paragraph (Section 1-11 B. of the 1989 BIA Tribal Juvenile Justice Code):

If the child objects to a consent decree, the court shall proceed to findings, adjudication, and disposition of the case. If the child does not object, but an objection is made by the juvenile presenter after consultation with the juvenile counselor, the court shall, after considering the objections and the reasons given, proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

The 1989 BIA Tribal Juvenile Justice Code provision at Section 1-11 B. provides for the youth and/or the presenting officer or prosecutor to object to the proposed consent decree. Under, Section 1-11 B, if the youth objects, the matter must proceed to findings, adjudication, and disposition. Under Section 1-11 B, if the presenting officer or prosecutor objects, the final decision is left to the judge. This 1989 BIA Tribal Juvenile Justice Code provision may be undesirable if the tribe wants the judge to use his or her discretion to decide whether to dismiss a petition even if a youth will not agree to a consent decree, and the judge would still be using his or her discretion to decide whether to approve a consent decree even absent the language regarding the objection of a presenting officer or prosecutor.

The 1989 BIA Tribal Juvenile Justice Code at Section 1-11 E. states:

If either, prior to discharge or expiration of the consent decree, a new “juvenile offender” complaint is filed against the *child and the juvenile counselor has conducted a preliminary inquiry and authorized the filing of a petition upon a finding that informal adjustment is not in the best interest of the child and public*, the juvenile presenter may: 1. file a petition to revoke the consent decree in accordance with the section 1-11 D of this code; or 2. file a petition on the basis of the new complaint which has been filed against the child.

The Sault Ste. Marie statute at Section 36.408 (4) omits the language: “and the juvenile counselor has conducted a preliminary inquiry and authorized the filing of a petition upon a finding that informal adjustment is not in the best interest of the child and public” from the 1989 Tribal Juvenile Justice Code at Section 1-11 E. The Sault Ste. Marie statute removes the requirement that would handicap the presenting officer or prosecutor in seeking to revoke an original consent decree. Under the 1989 BIA Tribal Juvenile Justice Code language, a presenting officer or prosecutor would not be authorized to seek to revoke the consent decree for the first offense before and unless a juvenile counselor decided to recommend the filing of a petition in juvenile court for a second offense. The Sault Ste. Marie provision gives presenting officers and prosecutors more discretion to revoke an original consent decree given a subsequent new offense. However, it definitely prejudices the youth and his or her family by taking away their existing chance to succeed in their services and treatment. In deciding which approach to follow, a tribe should consider what entity in their system would be

in the best position to make case-by-case decisions about whether a youth and his or her family can succeed in a given case plan—the juvenile counselor/probation officer, or the presenting officer/prosecutor?

The Sault Ste. Marie statute at Section 36.410 provides for a preliminary hearing for the purpose of revoking consent decrees and gives the youth an opportunity to deny or admit to the allegations of the petition and to explain anything they would like to explain. The preliminary hearing functions like an arraignment in a criminal proceeding where a criminal defendant is given a chance to plead and where other preliminary matters are handled prior to a trial.

## [17.5] Exercises

The following exercises are meant to guide you in developing the consent decree sections of the tribal juvenile code.

- Find and examine your juvenile code’s provisions governing the “consent decrees,” if any.
  - Who is authorized to file petitions/motions for consent decrees in the juvenile court?
  - What services and/or programs are available to youth through the consent decree?
  - What are the requirements for granting a consent decree?
  - What happens to the youth if the judge will not grant a consent decree?
  - What happens if a consent decree is not successfully completed or violated in some way by the youth?
- Make a list of the pros and cons of having a consent decree process in your juvenile justice system.

## Read and Discuss\*

- **When do consent decrees work? For what types of youth with what types of problems?**
- **Does the use of the consent decree really depend upon what services and programs are available?**
- **How do we assure that consent decrees will be made available to youth and their families in a way that is fair and reasoned?**

Montana findings:

- Cases involving American Indian juveniles were 50 percent to 80 percent less likely to be resolved through a consent decree after petition for adjudication.
- Cases were more likely to result in consent decrees when the juvenile was a school dropout and where the current offense was a felony offense that was something other than an offense against property.



- Consent decree outcomes were less likely when the cases involved male juveniles, juveniles with a history of mental illness, and in cases in which the current offense was a drug offense.

\*Taken from Report: “Assessing the Mechanisms That Contribute to Disproportionate Minority Contact in Montana’s Juvenile Justice Systems,” December 2012, Social Science Research Laboratory University of Montana, Missoula.  
<http://mbcc.mt.gov/data/SAC/RAI/DMCAssessRep.pdf>.



# Chapter 18: Adjudications in Juvenile Proceedings

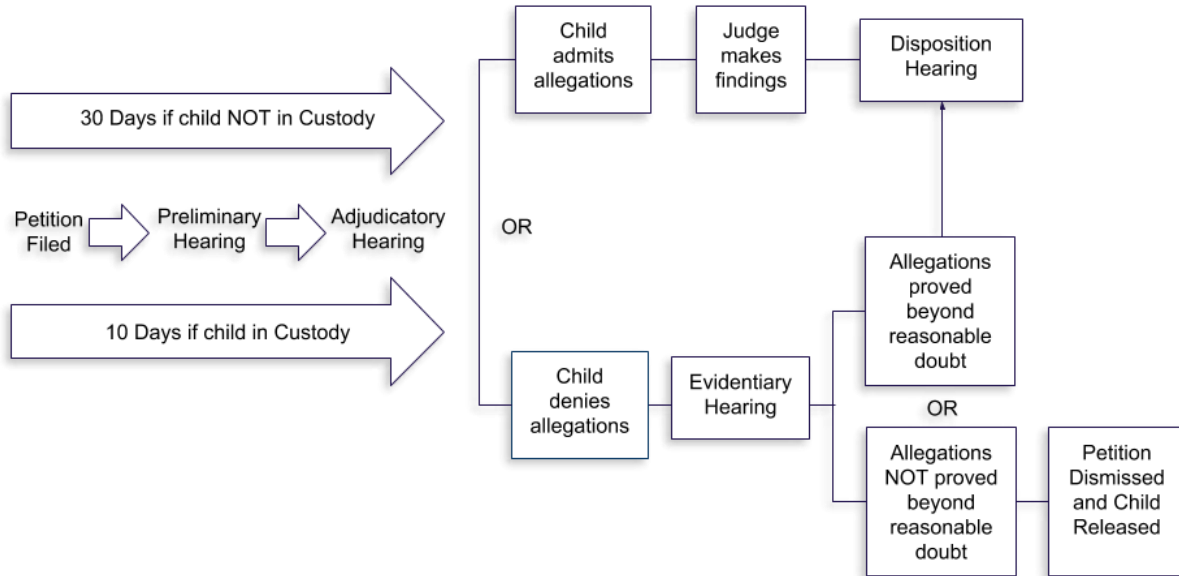
## [18.1] Overview

Under the 1989 BIA Tribal Juvenile Justice Code, Section 1-12, the purpose of the adjudicatory hearing is to determine whether a youth has committed a “juvenile offense.” The proceedings are closed to the general public. The timing requirements vary depending upon whether the youth has been taken into custody. If the youth is in custody, the adjudicatory hearing must be held within ten days of the filing of the petition. Otherwise, the hearing must be held within thirty days of the filing of the petition.

If the youth admits to the allegations in the petition the judge must make a record of his or her findings and schedule a disposition hearing. Alternatively, if the judge finds on the basis of proof beyond a reasonable doubt that the allegations contained in the petition are true, the judge must make a record of his or her findings and schedule a disposition hearing.

In adjudicatory hearings the judge determines whether the youth is to continue in an out-of-home placement pending disposition. If the judge finds that the allegations in the petition have not been established beyond a reasonable doubt, he or she dismisses the petition and releases the youth. The U.S. Supreme Court held in *In re Winship*, 397 U.S. 358 (1970), that when a state undertakes to prove a child delinquent for committing a criminal act, it must do so beyond a reasonable doubt.

**Section 1-12 Juvenile Offender--Adjudicatory Proceedings**  
1989 BIA Tribal Juvenile Justice Code



## [18.2] Model Code Example

[\(1989\) BIA Tribal Juvenile Justice Code](#)

### [1-12 JUVENILE OFFENDER—ADJUDICATION PROCEEDINGS](#)

#### 1-12 A. Purpose and Conduct of Adjudicatory Hearing

Hearings on “juvenile offender” petitions shall be conducted by the juvenile court separate from other proceedings. The court shall conduct the adjudicatory hearing for the sole purpose of determining whether the child has committed a “juvenile offense” At the adjudicatory hearing, the child and the child’s parent, guardian or custodian shall have the applicable rights listed in chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.

#### 1-12 B. Time Limitations on Adjudicatory Hearings

If the child remains in custody, the adjudicatory hearing shall be held within ten (10) days of receipt of the “juvenile offender” petition by the juvenile court. If the child is released from custody or was not taken into custody, then the adjudicatory hearing shall be held within thirty (30) days of receipt of the “juvenile offender” petition by the juvenile court.

#### **1-12 C. Notice of Hearing**

Notice of the adjudicatory hearing shall be given to the child and the child’s parent, guardian or custodian, the child’s counsel and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10F and 1-10G of this code.

#### **1-12 D. Denial of Allegations**

If the allegations in the “juvenile offender” petition are denied, the juvenile court shall set a date, in accordance with section 1-12B above, to hear evidence on the petition.

#### **1-12 E. Admission of Allegations**

If the child admits the allegations of the petition, the juvenile court shall consider a disposition only after a finding that:

1. the child fully understands his rights under chapter 1-7 of this code, and fully understands the consequences of his admission;
2. the child voluntarily, intelligently, and knowingly admits all facts necessary to constitute a basis for juvenile court action; and
3. the child has not, in his statements on the allegations, set forth facts, which if found to be true, would be a defense to the allegations.

#### **1-12 F. “Juvenile Offender” Finding After Admission**

If the court finds that the child has validly admitted the allegations contained in the petition, the court shall make and record its finding and schedule a disposition hearing in accordance with chapter 1-14 of this code. Additionally, the court shall specify in writing whether the child is to be continued in an out of the home placement pending the disposition hearing.

#### **1-12 G. “Juvenile Offender” Finding After Hearing**

If the court finds on the basis of proof beyond a reasonable doubt that the allegations contained in the petition are true, the court shall make and record its finding and schedule a disposition hearing in accordance with chapter 1-14 of this code. Additionally, the court shall specify in writing whether the child is to be continued in an out of home placement pending the disposition hearing.

## 1-12 H. Dismissal of Petition

If the court finds that the allegations on the “juvenile offender” petition have not been established beyond a reasonable doubt it shall dismiss the petition and order the child released from any detention imposed in connection with the proceeding.

# [18.3] Tribal Code Example

## Sault Ste. Marie Tribal Code

### CHAPTER 36: JUVENILE CODE

#### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

- (1) Hearings on juvenile offender petitions shall be conducted by the Juvenile Division separate from other proceedings. The Court shall conduct the adjudicatory hearing for the sole purpose of determining whether the child has committed a juvenile offense. At the adjudicatory hearing, the child and the child’s parent, guardian, or custodian shall have the applicable rights listed in '36.402 of this Chapter.
- (2) If the child remains in custody, the adjudicatory hearing shall be held within fourteen (14) days after the preliminary hearing. If the child is released from custody or was not taken into custody, then the adjudicatory hearing shall be held within thirty (30) days after the preliminary hearing by the Juvenile Division.
- (3) Notice of the adjudicatory hearing shall be given to the child and the child’s parent, guardian or custodian, the child’s counsel and any other person the Court deems necessary for the hearing at least seven (7) days prior to the hearing pursuant to '36.407.
- (4) If the allegations in the juvenile offender petition are denied, the Juvenile Division shall set a date to hear evidence on the petition.
- (5) If the child admits the allegations of the petition, the Juvenile Division shall consider disposition only after a finding that:
  - (a) The child fully understands his rights pursuant to '36.402, and fully understands the consequences of his admission.
  - (b) The child voluntarily, intelligently and knowingly admits all facts necessary to constitute a basis for Juvenile Division action.
  - (c) The child has not, in his statements on the allegations, set forth facts, which if found to be true, would be a defense to the allegations.

- (6) If the Court finds that the child has validly admitted the allegations contained in the petition, the Court shall make and record its findings and schedule a disposition hearing in accordance with '36.412 of this Chapter. Additionally, the Court shall specify in writing whether the child is to be continued in an out of the home placement pending the disposition hearing.
- (7) If the Court finds on the basis of proof beyond a reasonable doubt that the allegations contained in the petition are true, the Court shall make and record its findings and schedule a disposition hearing in accordance with '36.402 of this Chapter. Additionally, the Court shall specify in writing whether the child is to be continued in an out of home placement pending the disposition hearing.
- (8) If the Court finds that the allegations on the juvenile offender petition have not been established beyond a reasonable doubt, it shall dismiss the petition and order the child released from any detention imposed in connection with the proceeding.

## [18.4] Tribal Code Commentary

The Sault Ste. Marie statute at Section 36.411(1) omits the language from the 1989 BIA Tribal Juvenile Justice Code, Section 1-12 A, which excludes the public from the adjudicatory hearing: “The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.” The literature on adolescent development recommends that these proceedings be closed to the public to avoid further stigmatizing youth and causing them present and future harm.

The Sault Ste. Marie statute at Section 36.411(2) increases the number of days for the holding of an adjudicatory hearing if a youth is in custody: “If the child remains in custody, the adjudicatory hearing shall be held within fourteen (14) days after the preliminary hearing.” Compare the Section 1-12 B from the 1989 BIA Tribal Juvenile Justice Code: “If the child remains in custody, the adjudicatory hearing shall be held within ten (10) days of receipt of the ‘juvenile offender’ petition by the juvenile court.” The Sault Ste. Marie statute contains a “preliminary hearing” stage not included in the 1989 BIA Tribal Juvenile Justice Code. Preliminary hearings are a necessary part of any court process. Although they were not provided for under the 1989 BIA Tribal Juvenile Justice Code, it would still be possible to use them but they would have to take place before the adjudicatory hearing and within the tight time frames of the code. This likely explains the increase in the time limit under the Sault Ste. Marie statute.

The Sault Ste. Marie statute at Section 36.411 (3) increases the number of days for providing notice of the adjudicatory hearing: “Notice of the adjudicatory hearing shall be given to the child and the child’s parent, guardian, or custodian, the child’s counsel and any other person the Court deems necessary for the hearing at least seven (7) days prior to the hearing pursuant to '36.407.” Compare

the 1989 Tribal Juvenile Justice Code provision at Section 1-12 C: “Notice of the adjudicatory hearing shall be given . . . at least five (5) days prior to the hearing. . . .” The Sault Ste. Marie provision is more protective of the youth’s rights in the sense that it provides two additional days of notice and thus preparation for the hearing.

## [18.5] Exercises

The following exercises are meant to guide you in developing the adjudication sections of the tribal juvenile code.

- Find and examine your juvenile code provisions governing “hearings” and/or “adjudications.” How soon after the filing of petition must your juvenile judge hold a hearing?
- What “findings” are the judge required to make (“juvenile delinquent,” “juvenile offender,” “status offender,” “FINS,” etc.)?
- What “standard of proof” is required to prove that a youth is a “juvenile delinquent” or “juvenile offender,” (e.g., “proof beyond a reasonable doubt”)?

### Read and Discuss\*

**When do you think that a trial (adjudication) is necessary and what protections should youth have?**

#### **Facts and Case Summary: In re Gault 387 U.S. 1 (1967)**

Gerald (“Jerry”) Gault was a fifteen-year-old accused of making an obscene telephone call to a neighbor, Mrs. Cook, on June 8, 1964. After Mrs. Cook filed a complaint, Gault and a friend, Ronald Lewis, were arrested and taken to the Children’s Detention Home. Gault was on probation when he was arrested, after being in the company of another boy who had stolen a wallet from a woman’s purse.

At the time of the arrest related to the phone call, Gault’s parents were at work. The arresting officer left no notice for them and did not make an effort to inform them of their son’s arrest. When Gault’s mother did not find Gault at home, she sent his older brother looking for him. They eventually learned of Gault’s arrest from the family of Ronald Lewis. When Mrs. Gault arrived at the Detention Home, she was told that a hearing was scheduled in juvenile court the following day.

The arresting officer filed a petition with the court on the same day of Gault’s initial court hearing. The petition was not served on Gault or his parents. In fact, they did not see the petition until more than two months later, on August 17, 1964, the day of Gerald’s *habeas corpus* hearing. The June 9 hearing was informal. Not only was Mrs. Cook not present, but no transcript or recording was made, and no one was sworn in prior to testifying. Gault was questioned by the judge and there are



conflicting accounts as to what, if anything, Gault admitted. After the hearing, Gault was taken back to the Detention Home. He was detained for another two or three days before being released. When Gault was released, his parents were notified that another hearing was scheduled for June 15, 1964.

Mrs. Cook was again not present for the June 15th hearing, despite Mrs. Gault's request that she be there "so she could see which boy that done the talking, the dirty talking over the phone." Again, no record was made and there were conflicting accounts regarding any admissions by Gault. At this hearing, the probation officers filed a report listing the charge as lewd phone calls. An adult charged with the same crime would have received a maximum sentence of a \$50 fine and two months in jail. The report was not disclosed to Gault or his parents. At the conclusion of the hearing, the judge committed Gault to juvenile detention for six years, until he turned 21.

Gault's parents filed a petition for a writ of *habeas corpus*, which was dismissed by both the Superior Court of Arizona and the Arizona Supreme Court. The Gaults next sought relief in the Supreme Court of the United States. The Court agreed to hear the case to determine the procedural due process rights of a juvenile criminal defendant.

\* Taken from the U.S. Courts website maintained by the Administrative Office of the U.S. Courts on behalf of the Federal Judiciary, FACTS AND CASE SUMMARY: IN RE GAULT. Go to <http://www.uscourts.gov/educational-resources/get-involved/constitution-activities/sixth-amendment/right-counsel/facts-case-summary-gault.aspx>.



# Chapter 19: Predisposition Studies in Juvenile Proceedings

## [19.1] Overview

In the state systems, after a determination in an adjudicatory hearing that the allegations in the petition are true and that a “wardship” is necessary, a dispositional hearing is set to determine the final disposition of the case.<sup>28</sup> When a youth is found to be a “ward of the court” it means that the court, as an agency of the state, has found it necessary to act in place of the youth’s parents (*in loco parentis*). The decisions normally made by the parents are then made by a representative of the court, usually the juvenile probation officer in consultation with the juvenile court judge. States vary as to whether the dispositional hearing must be separate from adjudicatory hearings. In some states the two hearings are separate because different procedures and rights are involved (criminal versus civil standards).

Between the adjudicatory hearing and the dispositional hearing, the probation officers obtain further information to assist the judge in deciding the final disposition of the case. These are called “social background investigations” and “individualized justice” is the goal. The results of these investigations, including interviews with people in the community, are put in a report for the judge. The “probative value” of this information, or its value as proof, might not be as reliable, and in the state systems, it can be challenged in the dispositional hearing. As a result of the Kent decision ([Kent v. United States, 1966](#)), the youth, through his or her attorney, has the right to review the contents of a report containing the results of a social background investigation in certain hearings because there is no irrefutable presumption of accuracy in these reports. In the state systems, this right has been extended to dispositional hearings.

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<sup>28</sup> Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

**Section 1-13 G. Juvenile Offender--Predisposition Studies--Reports and Examinations**  
1989 BIA Tribal Juvenile Justice Code



Under the [1989 BIA Tribal Juvenile Justice Code](#), at [Section 1-13](#), the judge directs the juvenile counselor to prepare and draft a “predisposition study and report.” The report must cover information about the child, his or her family, his or her environment, and “any other matter” relevant to his or her treatment or “other appropriate disposition of the case.” The report must also contain a plan for the child aimed at resolving the problems identified in the petition.

The judge may also order medical assessments, testing by psychiatrist, psychologist, or psychometrician, and/or an examination of the child and/or his or her parent(s) or custodian(s), where they consent, by a physician, psychiatrist, or psychologist. Evaluations, assessments, and dispositional reports must be submitted to the juvenile court and the parties no later than three days before the scheduled hearing date. A psychometrician is a person, for example a clinical psychologist, who is skilled in the administration and interpretation of objective psychological tests.

## [19.2] Model Code Example

[\(1989\) BIA Tribal Juvenile Justice Code](#)  
[1-13 Juvenile Offender—Predisposition Studies: Reports and Examinations](#)

### 1-13 A. Predisposition Study and Report

The court shall direct the juvenile counselor to prepare a written predisposition study and report for the court concerning the child, the child’s family, environment, and any other matter relevant to need for treatment or other appropriate disposition of the case when:

1. the child has been adjudicated as a “juvenile offender”; or
2. a notice of intent to admit the allegations of the petition has been filed.

## [19.3] Tribal Code Example

### Sault Ste. Marie Tribal Code

#### CHAPTER 36: JUVENILE CODE

#### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

- (1) The Court may direct the juvenile probation officer to prepare a written disposition study and report for the Court concerning the child, the child's family, environment, and any other matter relevant to need for treatment or other appropriate disposition of the case when:
  - a. The child has been adjudicated as a juvenile offender.
  - b. A notice of intent to admit the allegations of the petition has been filed.
  - c. Upon request of the Juvenile Division.
- (2) The report shall contain a specific plan for the child, aimed at resolving the problems presented in the petition. The report shall contain a detailed explanation showing the necessity for the proposed plan of disposition and the benefits to the child under the proposed plan. Preferences shall be given to the dispositional alternatives which are least restrictive of the child's freedom and are consistent with the interests of the community.
- (3) The Juvenile Division may order a medical assessment of a child arrested or detained for a juvenile offense relating to or involving alcohol or substance abuse to determine the mental or physical state of the child so that appropriate steps can be taken to protect the child's health and well-being.
- (4) Where there are indications that the child may be emotionally disturbed or developmentally disabled, the Court, on a motion by the prosecutor or that of counsel for the child, may order the child to be tested by a qualified psychiatrist, psychologist or licensed psychometrician prior to a hearing on the merits of the petition. An examination made prior to the hearing, or as part of the predisposition study and report, shall be conducted on an outpatient basis unless the Court finds that placement in a hospital or other appropriate facility is necessary.
- (5) The Court may order an examination of a child adjudicated as a juvenile offender by a physician, psychiatrist, or psychologist. The Court may also, following the adjudicatory hearing, order the examination by a physician, psychiatrist, or psychologist of a parent or custodian who gives his consent and whose ability to care for or supervise a child is an issue before the Court at the dispositional hearing.

- (6) The Court may order that a child adjudicated as a juvenile offender be transferred to an appropriate facility for a period of not more than sixty (60) days for purposes of diagnosis with direction that the Court be given a written report at the end of that period indicating the disposition which appears most suitable.
- (7) Evaluations, assessments, dispositional reports and other material to be considered by the Court in a juvenile hearing shall be submitted to the Court and to the parties no later than three (3) days before the scheduled hearing date. A declaration including reasons why a report has not been completed shall be filed with the Court no later than three (3) days before the scheduled hearing date if the report will not be submitted before the deadline. The Court may in its discretion dismiss a petition if the necessary reports, evaluations, or other materials have not been submitted in a timely manner.

## [19.4] Tribal Code Commentary

The Sault Ste. Marie provisions and the 1989 BIA Tribal Juvenile Justice Code provisions are nearly identical. The one significant difference is the Sault Ste. Marie Tribe's addition, at Section 36.412, that the judge may order a predisposition study and report even when a child is not admitting to, or has not been adjudged, a "juvenile offender":

- (1) The Court may direct the juvenile probation officer to prepare a written disposition study and report for the Court concerning the child, the child's family, environment, and any other matter relevant to need for treatment or other appropriate disposition of the case when:
  - a. The child has been adjudicated as a juvenile offender.
  - b. A notice of intent to admit the allegations of the petition has been filed.
  - c. Upon request of the Juvenile Division.

This addition gives the juvenile court judge the discretion to order a predisposition study and report at any point in the process, regardless of whether the youth will admit to, or be proven to be, a juvenile offender. The upside is increased power in the judge to look out for the youth's needs at any point in the process. The downside is that the judge now has the power to, in a sense, snoop around in the youth's affairs before he or she has admitted to committing, or is shown to have committed, a juvenile offense.

## [19.5] Exercises

The following exercises are meant to guide you in writing the predisposition studies and reports section of the tribal juvenile code.

- Find and examine your juvenile code’s provision for drafting studies or reports prior to a [disposition] hearing.
  - Who is responsible for doing this?
  - What information is this person supposed to get?
  - Where is this person supposed to get his or her information?
  - Do you think this information is reliable?
  - What would make it more reliable?

### Read and Discuss\*

**Should predisposition reports be drafted “in the best interests of the child”?**

**Should they be relied upon for determining guilt or only for determining disposition (treatment, placement, punishment, reparations)?**

“Once a youth is adjudicated a delinquent youth or a status offender, the court decides the most appropriate sanction—referred to as formal disposition. Disposition is similar to sentencing in adult courts. Traditionally, disposition has been one of the key decision points at which the court considers ‘the best interests of the child.’ Disposition is imposed at the dispositional hearing, which is separated in time from adjudication hearings. After adjudication, but before the dispositional hearing, a predisposition report is usually written by a probation officer. Authorized by court order and statutory law, the report provides an evaluation of the youth and his or her background and social environment. The predisposition report attempts to provide assessment information to the judge so that disposition can be individualized and directed at rehabilitation. The predisposition report is commonly organized with three major sections: the offense section, a social history, and a summary and recommendation.”

- Offense Section
  - Official version of the offense
  - Commentary re: juvenile’s version of the offense
  - Prior record (including previous arrests, petitions, adjudications, and dispositions)
  - A victim impact statement
- Social History—Observations About . . .

- The juvenile and his or her family background
- Educational experiences and achievements
- Friends
- Employment
- Neighborhood context
- Summary and Recommendation (sometimes all the judge reads)
  - Evaluative summary highlighting key findings
  - Recommendation Re: Disposition

\*Taken from James W. Burfeind and Dawn Jeglum Bartusch, *Juvenile Delinquency: An Integrated Approach*, 2nd ed. (Sudbury, MA : Jones and Bartlett, 2011).



# Chapter 20: Disposition in Juvenile Proceedings

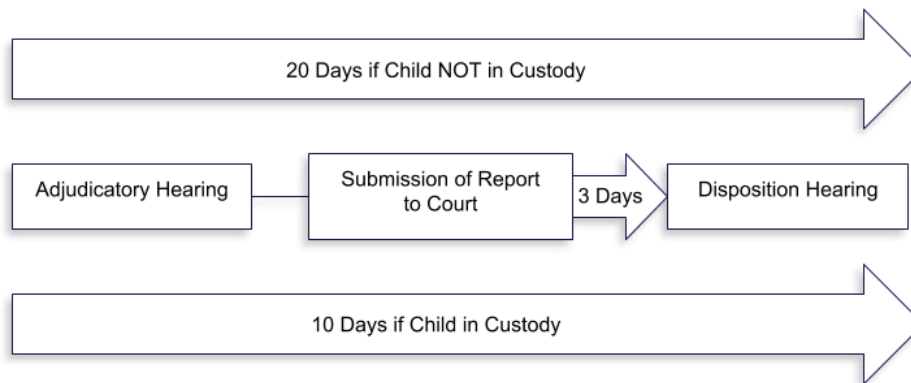
## [20.1] Overview

Under the [1989 BIA Tribal Juvenile Justice Code](#), a disposition hearing must be held within ten days of the adjudicatory hearing if the youth remains in custody. Otherwise, the disposition hearing must be held within twenty days of the adjudicatory hearing. The purpose of the disposition hearing is for the judge to decide the youth’s “supervision, care, and rehabilitation” based upon “all relevant and material evidence,” including the predisposition reports or other ordered reports or studies. The judge must also consider any alternative predisposition reports or recommendations provided by the youth or his or her advocate or attorney.

The disposition hearing is separate from the adjudicatory hearing. It is closed to the public. The youth and his parent(s), guardian(s) or custodian(s) are given the rights listed under Chapter 1-7 of the 1989 BIA Tribal Juvenile Justice Code.

### Sections 1-13 G. and 1-14 B. Juvenile Offender--Predisposition Studies and Disposition Hearings

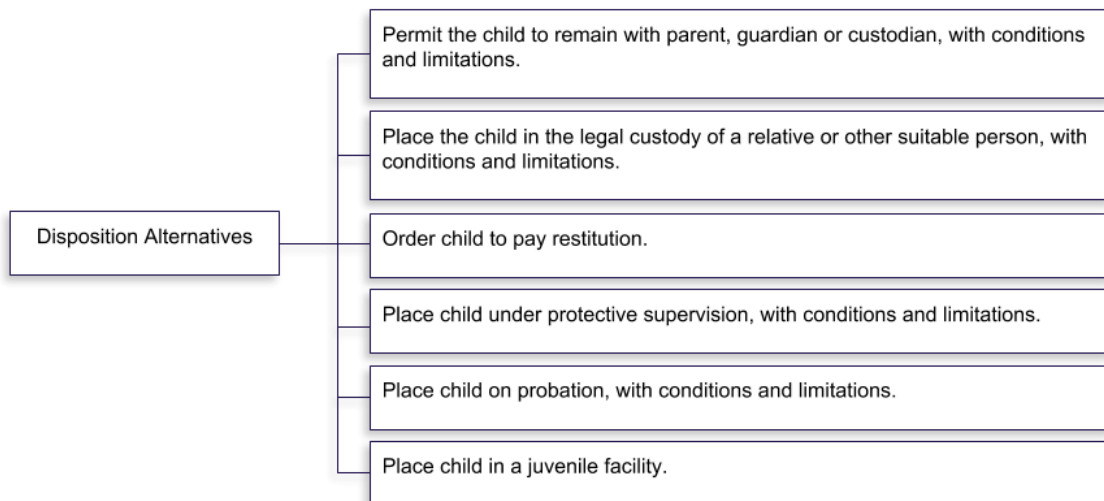
1989 BIA Tribal Juvenile Justice Code



Today there are many different kinds of community treatment programs and youth guidance centers. As a result, contemporary dispositions contain conditions for participation and completion of these programs. The dispositions of “probation” or “suspended sentence” may often require compulsory attendance at such a community-based treatment or rehabilitation program. If the youth violates these conditions, it may result in a revocation of probation or the unsuspending of his or her sentence. Most states specify a maximum amount of time for confining a youth. All generally terminate the effect of juvenile orders when they reach the age of majority. This results in discharging the youth from further obligation and control.

### Section 1-14 E. Juvenile Offender--Disposition Alternatives

1989 BIA Tribal Juvenile Justice Code



Under the 1989 BIA Tribal Juvenile Justice Code at Section 1-14 E, where a judge finds that a youth is a “juvenile offender,” he or she may determine how the youth will be supervised, cared for, and/or rehabilitated. The provision sets out six disposition alternatives: allowing a youth to remain with his or her parents (or guardian or custodian), placing the youth in the legal custody of a relative (or “other suitable person”), requiring that the youth pay restitution to anyone harmed, placing the youth under “protective supervision” (this means that the youth is allowed to remain with his or her parents, relative, or other suitable person, but that the court and a health or social services agency will be monitoring and providing services), placing the youth on probation, or placing the youth in a juvenile facility. All of these options are likely to be subject to specific conditions and limitations set by the judge and included in the court order.

## [20.2] Model Code Examples

### (1989) BIA Tribal Juvenile Justice Code 1-14 Juvenile Offender—Disposition Proceedings

#### **1-14 A. Purpose and Conduct of Disposition Hearing**

Disposition hearings shall be conducted by the juvenile court separate from other proceedings. The court shall conduct the disposition hearing to determine how to resolve a case after it has been determined at the adjudicatory hearing that the child has committed a specific “juvenile offense.” The court shall make and record its dispositional order in accordance with sections 1-14E and 1-15 of this code. At the disposition hearing, the child and the child’s parent, guardian, or custodian shall have the applicable rights listed in chapter 1-7 of this code. The public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and persons requested by the parties shall be admitted.

#### **1-14 B. Time Limitations on Disposition Hearings**

If the child remains in custody, the disposition hearing shall be held within ten (10) days after the adjudicatory hearing. If the child is released from custody or was not taken into custody, then the disposition hearing shall be held within twenty (20) days after the adjudicatory hearing.

#### **1-14 C. Notice of Disposition Hearing**

Notice of the disposition hearing shall be given to the child and the child’s parent, guardian, or custodian, the child’s counsel, and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10F and 1-10G of this code.

#### **1-14 E. Disposition Alternatives**

If a child is found by the court to be a “juvenile offender,” the court may make and record any of the following orders of disposition for the child’s supervision, care and rehabilitation:

1. permit the child to remain with his parent, guardian or custodian, subject to such conditions and limitations as the court may prescribe;
2. place the child in the legal custody of a relative or other suitable person, subject to such conditions and limitations as the court may prescribe;
3. order the child to pay restitution (as defined in section 1-1C of this code);

4. place the child under protective supervision (as defined in section 1-1C of this code) under such conditions and limitations as the court may prescribe;
5. place the child on probation (as defined in section 1-1C of this code) under such conditions and limitations as the court may prescribe; or
6. place the child in a juvenile facility designated by the court, including alcohol or substance abuse emergency shelter or halfway house, emergency foster home, foster home, group home, shelter home, or secure juvenile detention facility (see section 1-1C of this code for individual definitions).

#### **1-15 C. Hearing to Modify, Revoke, or Extend Disposition Order**

A hearing to modify, revoke, or extend the disposition order shall be conducted according to sections 1-14A, 1-14C, 1-14D, and 1-14E of this code.

#### **1-15 D. Automatic Termination of Disposition Order**

When the child reaches eighteen (18) years of age, all disposition orders shall automatically terminate, unless the original disposition order was made within one (1) year of the child's eighteenth (18th) birthday or after the child had reached eighteen (18) years of age, in which case the disposition order may not continue for more than one (1) year. The records concerning the child shall be destroyed according to section 1-20C of this code.

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### **University of Washington Center of Indigenous Research and Justice**

#### **[Model Tribal Juvenile Code](#)**

#### **CHAPTER 2 DELINQUENCY**

##### **2.13.230 Disposition Options**

- (a) Pursuant to § 2.13.170(b)(1), the Juvenile Court may enter written orders including any of the following, as best suited to the needs of the child and the safety of the community:
  - (1) an order permitting the child to remain with his or her parent, guardian or custodian, subject to such conditions and limitations as the Juvenile Court may prescribe;
  - (2) an order requiring the child or the child's parent, guardian or custodian to participate in an educational or counseling program designed to deter delinquent acts or other conduct or conditions which would be harmful to the child or society;

- (3) an order requiring the child's parent, guardian or custodian to participate in an educational or counseling program designed to contribute to their ability to care for and supervise the child, including but not limited to parenting classes;
  - (4) an order requiring the child or the child's parent, guardian or custodian to undergo a medical, psychological, or psychiatric evaluation, in accordance with § 2.12.170;
  - (5) an order requiring the child or the child's parent, guardian or custodian to undergo medical, psychological, or psychiatric treatment, where such treatment is:
    - (A) recommended by a qualified medical, psychological, or psychiatric professional; and
    - (B) necessary to:
      - (i) address conditions which contributed to the child's adjudication;  
or
      - (ii) allow the child to remain with or be returned to the custody of the child's parent, guardian or custodian.
  - (6) an order requiring the child to pay restitution;
  - (7) an order requiring the child to perform community service;
  - (8) an order requiring the child to attend structured after-school, evening, educational, vocational or other court-approved programs appropriate for meeting the needs of the child and providing for the safety of the community;
  - (9) an order prohibiting the child from driving a motor vehicle for a period not to exceed the date on which the child reaches 18 years of age;
  - (10) an order placing the child in the temporary legal custody of a relative or other suitable person, subject to such conditions and limitations as the Juvenile Court may prescribe;
  - (11) an order providing for supervised or conditional release in accordance with § 2.05.170; and
  - (12) an order providing for the detention or other out-of-home placement of the child in accordance with § 2.05.150.
- (b) If a child found by the Juvenile Court to have committed a delinquent act has not achieved a high school diploma or the equivalent, the Juvenile Court may enter a written

order requiring that the child pursue a course of study designed to lead to the achievement of a high school diploma or the equivalent.

## [20.3] Tribal Code Examples

### Sault Ste. Marie Tribal Code

#### **CHAPTER 36: JUVENILE CODE**

#### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

##### **36.413 Disposition Proceedings**

- (1) The Court shall conduct the disposition hearing to determine how to resolve a case after it has been determined at the adjudicatory hearing that the child has committed a specific juvenile offense. The Court shall make and record its dispositional order. At the disposition hearing, the child and the child's parent, guardian, or custodian shall have the applicable rights listed in '36.402 of this Chapter.
- (2) If the child remains in custody, the dispositional hearing shall be held within thirty (30) days after the adjudicatory hearing. If the child is released from custody or was not taken into custody, then the disposition hearing shall be held within sixty (60) days after the adjudicatory hearing.
- (3) Notice of the disposition hearing shall be given to the child and the child's parent, guardian, or custodian, the child's counsel and any other person the Court deems necessary for the hearing at least seven (7) days prior to the hearing in accordance with '36.407 of this Chapter.
- (4) In the disposition hearing, the Court may consider all relevant and material evidence determining the questions presented, including oral and written reports, and may rely on such evidence to the extent of its probative value even though not otherwise competent. The Court shall consider any predisposition report, physician's report, or social study it may have ordered and afford the child, the child's parent, guardian, or custodian and the child's counsel an opportunity to controvert the factual contents and conclusions of the report(s). The Court shall also consider the alternative predisposition report or recommendations prepared by the child or the child's counsel, if any.
- (5) If a child is found by the Court to be a juvenile offender, the Court may make and record any of the following orders of disposition for the child's supervision, care and rehabilitation:

- (a) Permit the child to remain with his parent, guardian, or custodian, subject to such conditions and limitations as the Court may prescribe.
- (b) Place the child in the legal custody of a relative or other suitable person, subject to such conditions and limitations as the Court may prescribe.
- (c) Order the child to pay restitution (as defined in '36.329 of this Chapter).
- (d) Place the child under protective supervision (as defined in '36.328 of this Chapter) under such conditions and limitations as the Court may prescribe.
- (e) Place the child on probation (as defined in '36.327 of this Chapter) under such conditions and limitations as the Court may prescribe.
- (f) Place the child in a juvenile facility designated by the Court, including alcohol or substance abuse, emergency shelter or halfway house, emergency foster home, foster home, group home, shelter home, or secure juvenile detention facility.

**36.414 Review, Modification, Revocation, Extension, or Termination of Dispositional Orders.**

- (1) Dispositional orders are to be reviewed at the Court's discretion at least once every six (6) months.
- (2) The Court may hold a hearing to modify, revoke or extend a disposition order at any time upon the motion of:
  - (a) The child.
  - (b) The child's parents, guardian, or custodian.
  - (c) The child's counsel.
  - (d) The juvenile probation officer.
  - (e) The prosecutor.
  - (f) The institution, agency, or person vested with legal custody of the child or responsibility for protective supervision.
  - (g) The Court on its own motion.
- (3) A hearing to modify, revoke or extend the disposition order shall be conducted according to '36.412.

- (4) When the child reaches seventeen (17) years of age, all disposition orders shall automatically terminate unless the original disposition order was made within one (1) year of the child's seventeenth (17th) birthday or after the child had reached seventeen (17) years of age, in which case the disposition order may not continue for more than one (1) year. The records concerning the child shall be destroyed according to '36.\*03 [*sic*] of this Chapter.

#### **36.415 Probation Violation Hearings.**

- (1) If a juvenile offender is placed on probation, the Court or the juvenile probation officer may prescribe limitations on the juvenile. This may include but is not limited to house arrest and curfews as well as community service activities.
- (2) If the juvenile fails to comply with the probation requirements or commits subsequent juvenile offenses or juvenile status offenses, the Court may conduct a probation violation hearing separate from a disposition review hearing pursuant to '36.413.
- (3) The Court Clerk shall issue a notice of hearing to the juvenile. The notice shall include a copy of the probation violation petition, and a notice that the probation violation hearing will occur and that the juvenile will need to have any and all witnesses at the Court on that day. The juvenile may contact the Court Clerk for issuance of any subpoenas necessary.
- (4) The juvenile probation officer shall file a petition alleging that the juvenile has violated the conditions of the probation. The petition shall include all relevant facts regarding the violation including any dates.
- (5) At the probation violation hearing, the Court may take any relevant testimony from the juvenile probation officer and the juvenile or the juvenile's parents, guardian, or custodian or anyone else the Court deems appropriate.
- (6) If the allegations in the probation violation petition are sustained by a preponderance of the evidence, the Court may order additional probation requirements or any other disposition that the Court is permitted to order pursuant to '36.412.



**Leech Lake Band of Ojibwe Judicial Code**

**Title 4: Juvenile Justice Code**

**4-13 JUVENILE OFFENDER - DISPOSITION PROCEEDINGS**

(A. through E. Omitted)

**Section 4-13 E. Outcome of Disposition Hearing**

If a child is found by the court to be a “juvenile offender,” the court may impose such conditions as reflective of the traditions and customs of the Band and which are reasonably designed to achieve the purpose and intent of this code. The conditions the court may impose for the child’s supervision, care, and rehabilitation include but are not limited to the following:

1. permit the child to remain with parent, guardian, or custodian, subject to such conditions and limitations as the court may prescribe;
2. restrict the child to his or her residence until further order of the court except as specifically provided in the order;
3. to regularly attend school and maintain passing grades of “C” or better in all courses;
4. require the child seek and/or undergo counseling and treatment, including inpatient treatment, as may be recommended in any chemical dependency, psychiatric or psychological evaluation ordered by the court;
5. place the child in the physical custody of a relative or other suitable person, subject to the conditions and limitations as the court may prescribe;
6. order the child to pay restitution;
7. place the child under protective supervision under such conditions and limitations as the court may prescribe;
8. place the child on probation under such conditions and limitations as the court may prescribe;
9. require the child to pay up to \$100 dollar fine for the first violation and no more than \$200 dollar fine for any subsequent violation;
10. require the child perform community service in such an amount and of such a nature as the court deems appropriate for the minor’s age, circumstances, and conduct;

11. require the child to refrain from associating with named individuals, if any, found by the court to be detrimental to the minor's ability to comply with its orders;
12. require the child abstain from the use and possession of alcohol, drugs, inhalants, and prohibited use of tobacco and over-the-counter medication;
13. require the child obey all tribal ordinances and all federal, state, and local laws;
14. require the child to apologize in writing or in a traditional manner or ceremony to any persons who have been victimized by the minor's conduct; including family members, Band officials, and/or community at large;
15. place the child in a juvenile facility designated by the court, including alcohol or substance abuse emergency shelter or halfway house, emergency foster home, foster home, group home, shelter home, or secure juvenile detention facility;
16. referral of the child and his parents, guardian, or custodian to an appropriate social services agency for participation in counseling or other treatment program as ordered by the court;
17. require any family members including the minor's parent(s), guardian, or custodian, that reside with or are in regular contact with the "juvenile offender" to fully cooperate with the Juvenile Service Coordinator, treatment providers, counselors, educators, or other service providers who are engaged in implementing the conditions of probation;
18. require any family members that reside with or are in regular contact with the "juvenile offender" undergo random urinalysis, chemical and psychological assessment, parenting classes, attend counseling sessions, and any other services the court deems are in the child's best interest;
19. require the Juvenile Service Coordinator to staff the case with Leech Lake Child Welfare child protection team; [and/or]
20. Order any other services the court deems in the child's best interest.

**The Cherokee Code of the Eastern Band of the Cherokee Nation**

**Chapter 7A—JUVENILE CODE**

**ARTICLE V. LAW ENFORCEMENT PROCEDURES IN DELINQUENCY PROCEEDINGS**

**Sec. 7A-53. Dispositional alternatives for delinquent juvenile.**

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives:

- (1) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:
  - a. Require that a juvenile be supervised in the juvenile's own home by the Eastern Band of Cherokee Indians Juvenile Services, a court counselor, or other personnel may be available to the parent, guardian, or custodian or the juvenile as the judge may specify; or
  - b. Place the juvenile in the custody of a parent, guardian, custodian, relative, agency offering placement services, or some other suitable person; or
  - c. Place the juvenile in the custody of the Eastern Band of Cherokee Indians Juvenile Services.
- (2) Excuse the juvenile from compliance with the compulsory school attendance law when the court finds that suitable alternative plans can be arranged by the family through other community resources for one of the following:
  - a. An education related to the needs or abilities of the juvenile including vocational education or special education;
  - b. A suitable plan of supervision or placement; or
  - c. Some other plan that the court finds to be in the best interests of the juvenile.
- (3) Order the juvenile to cooperate with a community-based program, an intensive substance abuse treatment program, or a residential or nonresidential treatment program. Participation in the programs shall not exceed 12 months.
- (4) Require restitution, full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The court may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the court shall not require

the juvenile to make immediate restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.

- (5) Impose a fine related to the seriousness of the juvenile's offense. If the juvenile has the ability to pay the fine, it shall not exceed the maximum fine for the offense if committed by an adult.
- (6) Order the juvenile to perform up to 100 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of the work and the number of hours required. The work shall be related to the seriousness of the juvenile's offense and in no event may the obligation to work exceed 12 months.
- (7) Order the juvenile to participate in the victim-offender reconciliation/mediation program.
- (8) Place the juvenile on probation under the supervision of a court counselor and impose any combination of the following conditions:
  - a. That the juvenile remain on good behavior;
  - b. That the juvenile shall not violate any laws;
  - c. That the juvenile not violate any reasonable and lawful rules of a parent, guardian, or custodian;
  - d. That the juvenile attend school regularly;
  - e. That the juvenile maintain passing grades in up to four courses during each grading period and meet with the court counselor and a representative of the school to make a plan for how to maintain those passing grades;
  - f. That the juvenile not associate with specified persons or be in specified places;
  - g. That the juvenile refrain from use or possession of any alcoholic beverage or controlled substance as described in section 14-25.2 of the Cherokee Code;
  - h. That the juvenile abide by a prescribed curfew;
  - i. That the juvenile submit to a warrantless search at reasonable times;
  - j. That the juvenile submit to substance abuse monitoring and treatment;
  - k. That the juvenile cooperate with electronic monitoring;
  - l. That the juvenile participate in a life skills or an educational skills program;

- m. That the juvenile possess no firearm, explosive device, or other deadly weapon;
  - n. That the juvenile report to a court counselor as often as required by the court counselor;
  - o. That the juvenile make specified financial restitution or pay a fine;
  - p. That the juvenile be employed regularly if not attending school; and
  - q. That the juvenile satisfy any other condition determined appropriate by the court
- (9) Prohibit the juvenile from operating a motor vehicle for as long as the court retains jurisdiction over the juvenile or for any shorter period of time;
- (10) Impose a curfew upon the juvenile;
- (11) Order that the juvenile not associate with specified persons or be in specified places;
- (12) Impose confinement on an intermittent basis in an approved detention facility. Confinement shall be limited to not more than five 24-hour periods, the timing of which is determined by the court in its discretion.
- (13) Order that the juvenile be confined in an approved juvenile detention facility for a term of up to 14 24-hour periods, which confinement shall not be imposed consecutively with intermittent confinement pursuant to subsection (12) of this section at the same dispositional hearing. The timing of this confinement shall be determined by the court in its discretion.
- (14) Order the juvenile to cooperate with placement in a wilderness program.
- (15) Order the juvenile to cooperate with placement in a residential treatment facility, an intensive nonresidential treatment program, an intensive substance abuse program, or in a group home, including but not limited to the Cherokee Children's Home.
- (16) Order the juvenile to cooperate with a supervised day program requiring the juvenile to be present at a specified place for all or part of every day or of certain days. The court also may require the juvenile to comply with any other reasonable conditions specified in the dispositional order that are designed to facilitate supervision.
- (17) Order the juvenile to participate in a regimented training program.
- (18) Order the juvenile to be placed on house arrest.
- (19) Suspend imposition of a more severe, statutorily permissible disposition with the provision that the juvenile meet certain conditions agreed to by the juvenile and specified

in the dispositional order. The conditions shall not exceed the allowable dispositions for the level under which disposition is being imposed.

- (20) Order the residential placement of a juvenile in a multipurpose group home.
- (21) Place the juvenile in a training school for a period of not less than six months. (Ord. No. 289, 7-17-00)

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## **TITLE XI CHOCTAW YOUTH CODE**

### **CHAPTER 3. JUVENILE OFFENDER PROCEDURE**

#### **§11-3-28 Dispositional Alternatives**

- (1) If a minor has been adjudged a juvenile offender, the Youth Court may make the following dispositions:
  - (a) place the minor on probation subject to conditions set by the Youth Court;
  - (b) upon consent of all parties, transfer disposition to a Court-approved alternative disposition forum such as Choctaw Teen Court subject to the terms and conditions of said alternative disposition which shall be approved by the Youth Court; or
  - (c) place the minor in an institution or facility for detention, or in the care of an agency designated by the Youth Court.
- (2) The dispositional orders are to be in effect for the time limit set by the Youth Court, but no order shall continue after the minor reaches the age of twenty-one (21) years of age.
- (3) The dispositional orders are to be reviewed at the Youth Court's discretion, but at least once every six (6) months.

## [20.4] Tribal Code Commentary

Please note that a good number of tribes have used the 1989 BIA Tribal Juvenile Justice Code provisions as a starting point. The alternative University of Washington Model Tribal Juvenile Code provisions were completed and made public in the fall of 2014 and at the time of first publication of this resource, tribes had not yet reviewed them.

The Sault Ste. Marie statute at Section 36.413 (1) omits the following language from the 1989 BIA Tribal Juvenile Justice Code at Section 1-14 A:

*“Disposition hearings shall be conducted by the juvenile court separate from other proceedings. (Emphasis added.) The court shall conduct the disposition hearing to determine how to resolve a case after it has been determined at the adjudicatory hearing that the child has committed a specific ‘juvenile offense.’”*

In the state systems there is a “bifurcated” hearing process, meaning that they do not hold the adjudicatory hearing and the disposition hearing in the same hearing. This is because there are different evidentiary rules applicable to each type of hearing. In an adjudicatory hearing only evidence bearing on “guilt” of the allegations contained in the petition is allowed, while at the disposition hearing, the judge may look at the totality of the youth’s circumstances. The danger in conflating the two hearings is that the judge may consider irrelevant but prejudicial information in determining guilt for a particular alleged act (e.g., information about a youth’s friends or the youth’s general home circumstances and/or conduct).

The Sault Ste. Marie statute at Section 36.413 (1) states: “The Court shall make and record its dispositional order.” It then omits the following language from the 1989 BIA Tribal Juvenile Justice Code at Section 1-14 A: “The court shall make and record its dispositional order *in accordance with sections 1-14E and 1-15 of this code.*”(Emphasis added). Section 1-14 E of the 1989 BIA Tribal Juvenile Justice Code specifies six dispositional alternatives. Section 1-15 of the 1989 BIA Tribal Juvenile Justice Code specifies the requirements for reviewing, modifying, revoking, and/or extending disposition orders. The Sault Ste. Marie omission may be insignificant with respect to the 1989 BIA Tribal Juvenile Justice Code Section 1-14 E in that the omission does not have a different legal effect where the 1989 BIA Tribal Juvenile Justice Code Section 1-14 E is discretionary for a judge in any case. However, there are mandatory requirements under 1989 BIA Tribal Juvenile Justice Code Section 1-15, such as the requirement that dispositional orders be reviewed once every six months or that disposition orders must automatically terminate at certain points. It appears that Sault Ste. Marie was attempting to give the judge more discretion in selecting dispositional alternatives and in the review, modification, revocation, extension, and/or automatic termination of disposition orders. This could undermine certain protections in the 1989 BIA Tribal Juvenile Justice Code provided for youth and their families.

The Sault Ste. Marie statute at Section 36.413 (1) omits the following highlighted language from the 1989 BIA Tribal Juvenile Justice Code at Section 1-14 A:

“At the disposition hearing, the child and the child’s parent, guardian or custodian shall have the applicable rights listed in chapter 1-7 of this code. *The public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and persons requested by the parties shall be admitted.*”(Emphasis added.)

The Sault Ste. Marie omission makes dispositional hearings open to the public. Scholars conducting research on adolescents recommend that juvenile proceedings remain closed to the public to avoid stigmatization and present and future harm to youth.

The Sault Ste. Marie statute at Section 36.413 (2) modifies the following italicized text:

- (2) If the child remains in custody, the dispositional hearing shall be held within *thirty (30) days* after the adjudicatory hearing. If the child is released from custody or was not taken into custody, then the disposition hearing shall be held within *sixty (60) days* after the adjudicatory hearing. (Emphasis added).

Compare the 1989 BIA Tribal Juvenile Justice Code at Section 1-14 B:

If the child remains in custody, the disposition hearing shall be held within *ten (10) days* after the adjudicatory hearing. If the child is released from custody or was not taken into custody, then the disposition hearing shall be held within *twenty (20) days* after the adjudicatory hearing. (Emphasis added.)

The Sault Ste. Marie provision increases the time limit for the holding of a dispositional hearing where a youth remains in custody (from 10 days to 30 days), and where a youth is not in custody (from 20 to 60 days). This gives the tribal court, its juvenile counselor, and other service providers more time to conduct investigations, reviews, evaluations, examinations, and assessments and to produce written recommendations to the judge. However, it also infringes upon the rights of the youth and his or her family by potentially extending the period of custody for up to twenty more days or simply delaying “sentencing” for up to forty more days. There is a delicate balance between the needs of the system and the needs and rights of youth and their families. The 1989 BIA Tribal Juvenile Justice Code provisions tend to default to the needs and rights of youth and their families. However, the timing of required process needs to be tailored to the realities of the tribal system—where the leadership, policy, and law of the system are accountable and responsive to those served.

The Sault Ste. Marie statute at Section 36.414 (4) modifies the following italicized text:

- (4) When the child reaches *seventeen (17) years* of age, all disposition orders shall automatically terminate unless the original disposition order was made within one (1) year of the child’s *seventeenth (17th) birthday* or after the child had reached *seventeen (17) years* of age, in



which case the disposition order may not continue for more than one (1) year. (Emphasis added).

Compare the 1989 BIA Tribal Juvenile Justice Code provision at Section 1-15 D:

When the child reaches eighteen (18) years of age, all disposition orders shall automatically terminate, unless the original disposition order was made within one (1) year of the child's eighteenth (18th) birthday or after the child had reached eighteen (18) years of age, in which case the disposition order may not continue for more than one (1) year.

The Sault Ste. Marie provision reduces the age from eighteen to seventeen for when disposition orders must automatically terminate. The Sault Ste. Marie Juvenile Court is empowered to exercise juvenile court jurisdiction only over those who may commit juvenile offenses before their seventeenth birthday. By contrast the 1989 BIA Tribal Juvenile Justice Code creates a juvenile court that may exercise jurisdiction over a youth who may commit a juvenile offense before their eighteenth birthday. The 1989 Tribal Juvenile Justice Code also provides for extensions of juvenile court jurisdiction beyond a youth's eighteenth birthday under certain circumstances (e.g., where a youth's disposition order was made within a year of or after his eighteenth birthday). Scholars and researchers studying adolescents argue that the brain is not fully developed until closer to age twenty-five. They advocate for an extension of juvenile court jurisdiction even beyond age eighteen where the circumstances warrant it.

The Sault Ste. Marie statute at Section 36.415 establishes a process for probation hearings and placing youth on probation. Potential outcomes include house arrest and curfew, among other conditions and limitations. Grounds for probation revocation must be proven by a preponderance of the evidence.

Many tribes use probation as the primary dispositional alternative for juvenile offenders. In the state systems probation is the most frequent disposition for juvenile offenders. With probation, a youth is released with the understanding that freedom is conditioned on continuing good behavior and compliance with the terms of probation. Violations of probation may result in a probation revocation and the imposition or execution of the original sentence. The terms of probation are approved and ordered by the judge and may take the form of agreeing to:

- Obey all laws
- Regularly attend school
- Not associate with delinquents or criminals
- Stay within the jurisdiction
- Regularly report to probation officer for counseling and supervision
- Curfews

- Alcohol and drug testing
- Counseling
- Community service
- Restorative justice (restitution, letters of apology, victim impact panels/classes, community service, victim/offender conferencing, community panels, restorative justice peer juries, restorative group conferencing, circle sentencing, etc.)

In the state systems the terms of probation must be reasonable and relevant to the offense for which probation was ordered (see, e.g., [People v. Dominguez](#) [1967] [condition that female not become pregnant not relevant to offense of robbery]).

## [20.5] Exercises

The following exercises are meant to guide you in developing the dispositions sections of the tribal juvenile code.

- Find and examine your juvenile code’s provisions setting out possible “dispositions”—make a list of the possible outcomes for youth under your juvenile code

Examples from other codes ...

- Youth to remain with parent, guardian, or custodian with conditions and limitations
- Youth placed with relative or other person with conditions and limitations
- Youth placed in respite care (temporary out-of-home placement with youth and family services and programming)
- Youth placed in shelter care (e.g., foster care)
- Youth and family referred to services (e.g., counseling/groups/classes, screening and assessment for physical and mental health services, and substance use/abuse and treatment services, etc.)
- Youth placed on probation with conditions and limitations
- Youth ordered to pay restitution
- Youth ordered to participate in victim-offender mediation, “circle process,” or “sentencing circles”
- Youth [and family] ordered to participate in family mediation or “peacemaking”
- Youth ordered to be placed in a residential treatment facility
- Youth ordered to be placed in a juvenile facility or secure juvenile detention facility

- Youth ordered to participate in a therapeutic docket (e.g., wellness [drug] court)
- Youth ordered to participate in a community-based program (e.g., a cultural program, mentoring programs, and/or teen court, etc.)

Make a list of other disposition options and/or diversion programs you wish to develop and include in your juvenile justice system.

## **Read and Discuss\***

**What disposition options are available locally and nonlocally?**

**The Boys Town Model (the “Boys Town Integrated Continuum of Care”):**

- **Residential Treatment Center**
  - A medically directed program in a secure environment for children with psychiatric disorders.
- **Intervention and Assessment Services**
  - Thirty-day program providing care for abused, neglected, runaway, and delinquent youth by removing them from dangerous situations, assessing their needs, and beginning to work toward family reunification or other permanent care.
- **Family Home Program**
  - Provides a family for children ages ten to eighteen. Six to eight boys or girls, many with serious emotional and behavioral problems, live in each single-family home with a married couple called Family Teachers. Children learn social skills, attend school, participate in extracurricular activities, and take part in daily chores and activities.
- **Foster Family Services**
  - Foster parents, trained and supported by Boys Town, who open up their homes in the community to children who need a safe place to live. The length of stay varies depending on the child’s needs. Foster parents work to reunify children with their parents or other caregivers, whenever possible.
- **In-Home Family Services**
  - The goal is to keep children in their home or to help them reunite with their family whenever possible. On call Family Consultants teach families how to handle issues after they arise and how to prevent them from becoming more disruptive.
- **Community Support Services**

- A wide variety of resources that can help children and families learn how to help themselves, or receive specialized care, or educational assistance.

\*Taken from Boys Town at <http://www.boystown.org>.

# Chapter 21: Nondelinquency Proceedings—Status Offenses/Family in Need of Services (FINS)

## [21.1] Overview

The states' Uniform Juvenile Court Act at Section 2(4) creates a category called “unruly child” that is distinct from a youth committing a delinquent act.<sup>29</sup> The unruly child category includes a youth who is engaged in activities that are noncriminal or one in which youth violations of the law (curfew violations, running away, etc.) are committed. These activities are also known as status offenses or activities that are only considered offenses because of the young age of the youth. If an adult engaged in the same act it would not be a crime.

There was a time when many states included status offenses in the delinquent behavior category. This resulted in youth being labeled delinquent and being subject to incarceration in secure juvenile detention facilities. The Uniform Juvenile Court Act recognized that an unruly child may need the assistance of the juvenile court but that this child should not be included in the delinquent category. Section 32 prohibits the placement of an “unruly child” in a juvenile detention facility unless the juvenile court finds that the youth is not amenable to treatment or rehabilitation.

Today, most states separate status offenses from delinquent acts and place them in a nondelinquent category called “in-need-of-supervision,” or some variant of this. This is important because it separates the nonserious violator, who is often a youth with a troubled home life (often due to neglect, a lack a parental supervision, and/or where the youth has experienced a family crisis). Often this youth is not necessarily someone with criminal tendencies. The juvenile court may then treat this youth differently, by supervising and assisting without labeling the youth delinquent or subjecting him or her to the same harsh procedural requirements (e.g., criminal standards of proof) or dispositions (such as secure detention).

Under Section 1-2 of the 1989 BIA Tribal Juvenile Justice Code, the juvenile court has “exclusive and original jurisdiction” over all proceedings where an “Indian child residing in or domiciled on the reservation” is alleged to be a “juvenile offender” and where the child’s family is alleged to be “in-

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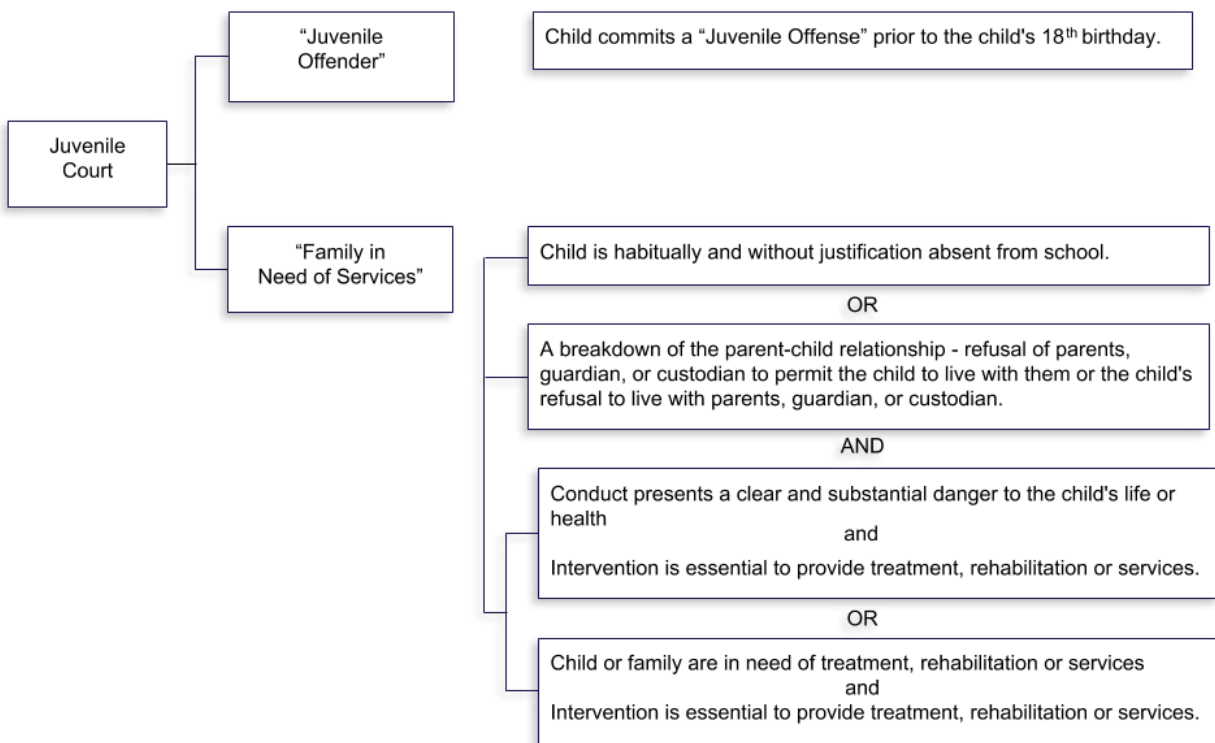
<sup>29</sup> Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

need-of-services” (a.k.a. FINS). Under Section 1-1 C (22) a “juvenile offender” is defined as a youth who commits a juvenile offense prior to his or her eighteenth birthday. A “juvenile offense” is defined as a criminal violation of the Law and Order Code committed by a person who was under the age of eighteen at the time the offense was committed (Section 1-1 C. (23)). Contrast this category with the FINS category. A FINS is defined as

- a family whose child has been habitually and without justification absent from school,
- a home where there has been a breakdown in the parent-child relationship such that they will not live together, and there is a clear and substantial danger to the child, or
- a situation in which the child or his family is in need of treatment or rehabilitation (Section 1-1 C. (14)).

These are essentially status offenses.

**Section 1-2 Jurisdiction of the Juvenile Court**  
1989 BIA Tribal Juvenile Justice Code

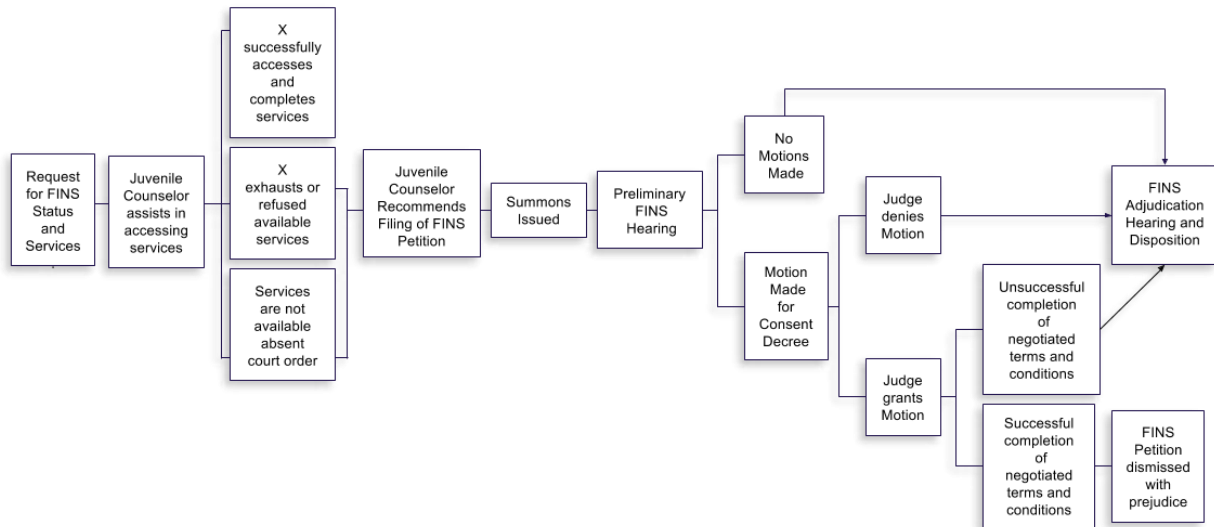


Under the 1989 BIA Tribal Juvenile Justice Code, the process for handling FINS cases mirrors the process for handling juvenile offenses with some key differences. A request for services may be submitted by the youth; his or her parent, guardian, or custodian; a social services worker; or the juvenile counselor. The juvenile counselor is then responsible for assisting the family in accessing services.

A formal Family In Need of Services (FINS) petition may be filed with the juvenile court if necessary. It may be necessary to obtain a court order to access certain types of services and/or treatment. After a petition has been filed, the juvenile presenter or prosecutor may enter into a consent decree or an agreement with the youth and his or her family to suspend the court proceedings to give the youth and the family time to successfully complete certain services or programs. If successful, the petition may be dismissed. If unsuccessful, the juvenile court process resumes and a hearing is scheduled.

The purpose of the FINS adjudicatory hearing is for the judge to determine whether there is “clear and convincing evidence” that the family is a “family-in-need-of-services.” If there is sufficient evidence to decide that this is the case, a disposition hearing is scheduled. The purpose of a FINS disposition hearing is for the judge to determine the placement, services, supervision, and/or legal custody of the youth and to refer or order services for the family. Placement of a FINS youth in a “juvenile shelter care facility” is permitted but cannot exceed thirty days. A “juvenile shelter care facility” is defined as “any juvenile facility, other than a school, that cares for juveniles or restricts their movement,” including an alcohol or substance abuse emergency shelter, halfway house, foster home, emergency foster home, group home, and shelter home. The 1989 BIA Tribal Juvenile Justice Code prohibits the confinement of a FINS youth in “an institution established for . . . juvenile offenders” or “a penal institution . . . used for the execution of sentences of persons convicted of crimes.

**Section 1-17 to 1-19 Family in Need of Services--Initiation of Proceedings**  
1989 BIA Tribal Juvenile Justice Code



Under the 1989 BIA Tribal Juvenile Justice Code, in order for a formal FINS petition to be granted by a judge, the petitioner must allege either that there is a breakdown in the parent-child relationship or that there are school absences. In the case of a breakdown in the parent-child relationship, the petitioner must allege that the family is a FINS; that the petitioner has exhausted or the youth/family has refused appropriate and available services; the youth/family have participated in counseling or refused to participate in counseling; the youth has been placed in the home of a relative or the youth has refused to be so placed; the youth has sought assistance at a juvenile shelter care facility or has refused such assistance; and the youth has been placed in a foster home or refused such placement



**Section 1-17 H. Family in Need of Services--Initiation of Proceedings--Petition--Additional  
Required Allegations for Breakdown in the Parent-Child Relationship**  
1989 BIA Tribal Juvenile Justice Code

Petition alleging ...  
"a breakdown in the parent-child relationship"  
MUST INCLUDE ALLEGATIONS THAT ...

The family is a "Family in Need of Services."

They have participated in counseling or refuse to do so.

The child has been placed with a relative or refused to be placed there.

The child sought assistance at a Juvenile Shelter Care Facility or refused such assistance.

AND

The child have been placed in a foster home or refused such placement.

Under the 1989 BIA Tribal Juvenile Justice Code, in order for a formal FINS petition to be granted by a judge, the petitioner must allege either that there is a breakdown in the parent-child relationship or that there are school absences.

In the case of alleged school absences (that are "habitual and unjustifiable"), the petitioner must allege that the family is a FINS, and a school official must file a declaration including the following allegations:

1. The school held a meeting to discuss the absences and the parent, guardian, or custodian refused to attend;
2. The school provided an opportunity for counseling or an opportunity to enroll in an alternative education program (if available);
3. The school has reviewed the child's status to determine whether learning problems exist and steps have been taken to overcome them;
4. A social worker has conducted an investigation to determine whether social problems may be a cause and if they are, appropriate action is taken; and

5. The school has sought assistance from appropriate agencies or has referred the matter to a social services agency for coordinating agencies and resources.

**Section 1-17 G. Family in Need of Services--Initiation of Proceedings--Petition--Additional Required Allegations for School Absence**

1989 BIA Tribal Juvenile Justice Code

Petition alleging ...  
“that a child is habitually and without justification  
absence from school”  
MUST INCLUDE ALLEGATIONS THAT ...

The family is a “Family in Need of Services.”

The school has held a meeting with the family or they have refused to attend.

The school provided an opportunity for counseling and an opportunity to enroll in an alternative educational program.

The school has conducted a review of the child's educational status (testing included medical, psychological, and/or educational) and steps have been taken to overcome learning problems.

A social worker has conducted an investigation to determine if there are social problems and action has been taken.

AND

The school has sought assistance from agencies and resources or has referred the matter to a local social services agency.

## [21.2] Model Code Example

### (1989) BIA Tribal Juvenile Justice Code

#### 1-16 FAMILY IN NEED OF SERVICES—INTERIM CARE

##### **1-16 A. Limitation on Taking into Custody**

No child whose family is the subject of a proceeding alleging that the family is “in need of services” (as defined in section 1-1 C of this code) may be taken into custody unless such taking into custody is in accordance with provision for “interim care” (as defined in section 1-1 C of this code) set forth in sections 1-16 A through 1-16 J of this code.

##### **1-16 B. Interim Care without Court Order**

A child may be taken into interim care by a law enforcement officer without order of the court only when:

1. the officer has reasonable grounds to believe that the child is in circumstances which constitute a substantial danger to the child’s physical safety; or
2. an agency legally charged with the supervision of the child has notified a law enforcement agency that the child has run away from a placement ordered by the court under chapter 1-19 of this code.

##### **1-16 C. Procedure for Interim Care**

A law enforcement official taking a child into custody under the interim care provisions of this code shall immediately:

1. inform the child of the reasons for the custody;
2. contact the juvenile counselor who shall designate placement of the child in an appropriate juvenile shelter care facility as designated by the court;
3. take the child to the placement specified by the juvenile counselor, or in the event of the unavailability of a juvenile counselor, to an appropriate juvenile shelter care facility as designated by the court; and,
4. inform the child’s family in accordance with section 1-16 D of this code.

##### **1-16 D. Notification of Family**

The law enforcement officer or the juvenile counselor shall immediately notify the child’s parent, guardian, or custodian of the child’s whereabouts, the reasons for taking the child into

custody, and the name and telephone number of the juvenile counselor who has been contacted. Efforts to notify the child's parent, guardian, or custodian shall include telephone and personal contacts at the home or place of employment or other locations where the person is known to frequent with regularity. If notification cannot be provided to the child's parent, guardian, or custodian, the notice shall be given to a member of the extended family of the parent, guardian, or custodian and to the child's extended family.

#### **1-16 E. Time Limitation on Interim Care**

Under no circumstances shall any child taken into interim care under section 1-16 B of this code be held involuntarily for more than forty-eight (48) hours.

#### **1-16 F. Restrictions on Placement**

A child taken into interim care shall not be placed in a jail or other facility intended or used for the incarceration of adults charged or convicted of criminal offenses. If a child taken into interim care is placed in a facility used for the detention of "juvenile offenders" or alleged "juvenile offenders," he must be detained in a room separate from the "juvenile offenders" or alleged "juvenile offenders."

#### **1-16 G. Restriction on Transportation**

A child taken into interim care shall not be placed or transported in any police or other vehicle which at the same time contains an adult under arrest, unless this section cannot be complied with due to circumstances in which any delay in transporting the child to an appropriate juvenile shelter care facility would be likely to result in substantial danger to the child's physical safety. Said circumstances shall be described in writing to the supervisor of the driver of the vehicle within forty-eight (48) hours after any transportation of a child with an adult under arrest.

#### **1-16 H. Voluntary Services**

The juvenile counselor shall offer and encourage the child and the child's family, guardian, or custodian to voluntarily accept social services.

#### **1-16 I. Voluntary Return Home**

If a child has been taken into interim care under the provisions of section 1-16B of this code and the child's parent, guardian, or custodian agree to the child's return home, the child shall be returned home as soon as practicable by the child's parent, guardian, or custodian or as arranged by the juvenile counselor.

#### **1-16 J. Shelter and Family Services Needs Assessment**

If the child refuses to return home and if no other living arrangements agreeable to the child and to the child's parent, guardian, or custodian can be made, a juvenile counselor shall offer the child shelter in an appropriate juvenile shelter care facility as designated by the court which is located as close as possible to the residence of the child's parent, guardian, or custodian. The juvenile counselor also shall refer the child and his family to an appropriate social services agency for a family services needs assessment.

## **1-17 FAMILY IN NEED OF SERVICES—INITIATION OF PROCEEDINGS**

### **1-17 A. Who May Submit Requests**

Requests stating that a family is "in need of services" may be submitted by the child; the child's parent, guardian, or custodian; an appropriate social services agency; and/or the juvenile counselor. A request stating that a child is habitually and without justification absent from school may also be submitted by an authorized representative of a local school board or governing authority of a private school but only if the request is accompanied by a declaration in which the authorized representative swears that the school has complied with each of the steps set forth in section 1-17G of this code.

### **1-17 B. Referral of Requests to Juvenile Counselor**

Requests stating that a family is "in need of services" shall be referred to the juvenile counselor, who shall assist either a child or a child's parent, guardian, or custodian in obtaining appropriate and available services as well as assisting in any subsequent filing of a petition alleging that the family is "in need of services."

### **1-17 C. Withdrawal of Request**

A request stating that a family is "in need of services" may be withdrawn by the party submitting the request at any time prior to the adjudication of any petition filed in the proceedings.

### **1-17 D. Authorization to File Petition**

A petition alleging that a family is "in need of services" shall not be filed unless the juvenile presenter has determined and endorsed upon the petition that the filing of the petition is in the best interest of the child and his family.

### **1-17 E. Petition—Required Signatures**

A petition alleging that a family is "in need of services" shall be signed by both the juvenile presenter and the party submitting the request as authorized in section 1-17 A of this code.

### **1-17 F. Petition—Form and Contents**

A petition alleging that a family is “in need of services” shall be entitled, “In the Matter of the Family of \_\_\_\_, a child,” and shall set forth with specificity:

1. the name, birth date, and residence address of the child and whether the child is the complainant or respondent in the proceedings;
2. the name and residence address of the parents, guardian, or custodian of the child and whether the parents, guardian, or custodian are the complainant or respondent in the proceedings;
3. that the family is a “family in need of services” as defined in section 1-1 C of this code.

### **1-17 H. Petition—Additional Required Allegations for Breakdown in the Parent-Child Relationship**

In addition to the allegations required under section 1-17 F of this code, a petition alleging that there is a breakdown in the parent-child relationship shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

1. the child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;
2. the child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative;
3. the child has sought assistance at an appropriate juvenile shelter care facility for runaways or the child has refused assistance from such a facility; and
4. the child has been placed in a foster home or the child has refused placement in a foster home.

### **1-17 I. Summons in a Family in Need of Services Proceeding**

After a petition alleging that a family is “in need of services” has been filed, summonses shall be issued directed to the child, the child’s parent, guardian, or custodian, their counsel and to such other persons as the court considers proper or necessary parties. The content and service of the summons shall be in accordance with sections 1-10 F and 1-10 G of this code.

## **1-18 FAMILY IN NEED OF SERVICES—CONSENT DECREE**

### **1-18 A. Availability of Consent Decree**

At any time after the filing of a petition alleging that a family is “in need of services,” and before the entry of a judgment, the court may, on motion of the juvenile presenter or that of the child, his parents, guardian, or custodian, or their counsel, suspend the proceedings and continue the family under supervision under terms and conditions negotiated with juvenile counselor and agreed to by all the parties affected. The court’s order continuing the family under supervision under this section shall be known as a “consent decree.”

#### **1-18 B. Objection to Consent Decree**

If the child or his parents, guardian, or custodian object to a consent decree, the court shall proceed to findings, adjudication, and disposition of the case.

#### **1-18 C. Court Determination of Appropriateness**

If the child or his parents, guardian, or custodian do not object, the court shall proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

#### **1-18 D. Duration of Consent Decree**

A consent decree shall remain in force for six months unless the family is discharged sooner by the juvenile counselor. Prior to the expiration of the six months period, and upon the application of the juvenile counselor or any other agency supervising the family under a consent decree, the court may extend the decree for an additional six months in the absence of objection to extension by the child or his parents, guardian, or custodian. If the child or his parents, guardian, or custodian object to the extension the court shall hold a hearing and make a determination on the issue of extension.

#### **1-18 E. Failure to Fulfill Terms and Conditions**

If, either prior to discharge by the juvenile counselor or expiration of the consent decree, the child or his parents, guardian, or custodian fail to fulfill the express terms and conditions of the consent decree, the petition under which the family was continued under supervision may be reinstated in the discretion of the juvenile presenter in consultation with the juvenile counselor. In this event, the proceeding on the petition shall be continued to conclusion as if the consent decree had never been entered.

#### **1-18 F. Dismissal of Petition**

After a family is discharged by the juvenile counselor or completes a period under supervision without reinstatement of the petition alleging that the family is in need of services, the petition shall be dismissed with prejudice.

## **1-19 FAMILY IN NEED OF SERVICES—HEARINGS AND DISPOSITION**

### **1-19 A. Conduct of Hearings**

“Family in need of services” hearings shall be conducted by the juvenile court separate from other proceedings. At all hearings, the child and the child’s family, guardian, or custodian shall have the applicable rights listed in chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.

### **1-19 B. Notice of Hearings**

Notice of all “family in need of services” hearings shall be given to the child, the child’s parent, guardian, or custodian, their counsel, and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10 F and 1-10 G of this code.

### **1-19 C. Adjudicatory Hearing**

The court, after hearing all of the evidence bearing on the allegations contained in the petition, shall make and record its findings as to whether the family is a “family in need of services.” If the court finds on the basis of clear and convincing evidence that the family is a “family in need of services,” the court may proceed immediately or at a postponed hearing to make disposition of the case. If the court does not find that the family is a “family in need of services” it shall dismiss the petition.

### **1-19 E. Disposition Hearing**

In that part of the hearing on dispositional issues all relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value even though not competent had it been offered during the part of the hearings on adjudicatory issues. The court shall consider any predisposition report, physician’s report or social study it may have ordered and afford the child, the child’s parent, guardian, or custodian and the child’s counsel an opportunity to controvert the factual contents and conclusions of the report(s). The court shall also consider the alternative predisposition report or recommendations prepared by the child or the child’s counsel if any.

### **1-19 F. Disposition Alternatives**



If the court finds that a family is a “family in need of services,” the court may make and record any of the following orders of disposition, giving due weight to the need to preserve the unity of the family whenever possible:

1. permit the child to remain with his parents, guardian, or custodian subject to those conditions and limitations the court may prescribe, including the protective supervision (as defined in section 1-1 C of this code) of the child by a local social services agency;
2. referral of the child and his parents, guardian, or custodian to an appropriate social services agency for participation in counseling or other treatment program as ordered by the court;
3. transfer legal custody of the child to any of the following if the family is found to be a “family in need of services” due to a breakdown in the parent-child relationship:
  - a. a relative or other individual who, after study by the juvenile counselor or other agency designated by the court, is found by the court to be qualified to receive and care for the child, or;
  - b. an appropriate agency for placement of the child in an appropriate juvenile shelter care facility (as defined in section 1-1 C of this code) for a period not to exceed thirty (30) days; with simultaneous directed referral of the family to a social services agency for counseling and/or other social assistance. A child may be placed under this section for an additional period not to exceed ninety (90) days after a hearing to determine the necessity of an additional placement.

#### **1-19 G. Restriction on Dispositional Placements**

The child shall not be confined in an institution established for the care and rehabilitation of “juvenile offenders” unless a child whose family is found to be “in need of services” is also found to be a “juvenile offender.” Under no circumstances shall a child whose family is found to be “in need of services” be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crimes.

#### **1-19 I. Termination of Disposition Order**

Any disposition order concerning a “family in need of services” shall remain in force for a period not to exceed six (6) months. The disposition order concerning a child whose family is found to be “in need of services” shall also automatically terminate when the child reaches his eighteenth (18th) birthday or is legally emancipated by the court.

## [21.3] Tribal Code Commentary

See Chapters 22 and 24 through 27 for detailed tribal code commentary on the separate topics of Family in Need of Services (FINS) interim care, FINS referral to juvenile counselor, FINS breakdown in parent-child relationship, FINS consent decrees, and FINS dispositions.

## [21.4] Exercises

The following exercises are meant to guide you in developing the general FINS sections of the tribal juvenile code.

- Find and examine your juvenile code’s provisions governing FINS or a comparable designation.
  - First determine whether these provisions govern child abuse/neglect or juvenile delinquency/status offenses—if child abuse/neglect, you may be in the wrong code
- Make a list of the types of (mis)conduct and/or circumstances that constitute a FINS or “status offense”
  - Truancy?
  - Curfew violations?
  - Running away?
  - Incurigibility?
  - Substance use?
  - Other?
- Check the “disposition” provisions of your juvenile code. Do they apply the same disposition alternatives to FINS youth and status offenders as they do to juvenile delinquents/offenders?
- Are your FINS youth/status offenders subject to secure juvenile detention?

## Read and Discuss\*

Do your tribal laws require that tribal and/or other agencies provide certain services to youth and their families before petitions may be filed in court?

What types of services would be critical?

The experience of the states and New York's innovative approach:

- The states have a long history of detaining status offenders, for example, placing chronically truant or runaway youth in secure detention facilities
- Several states have enacted “children in need of services” (“CHINS”) type processes to replace the status offender label and to create new social services or probation services for youth
- Today juvenile offenses laws vary greatly from JINS (Juveniles In Need of Supervision), CINA (Child In Need of Assistance), FINS, etc.
- New York's approach is to provide services first:
  - Early assessment of New York's approach indicates that such programs can result in fewer youth becoming court involved and more youth remaining at home
  - The New York statute requires state agencies to focus on family services first for “persons in need of supervision” (“PINS”)
  - The New York courts cannot accept a PINS petition unless the petitioner has already participated in family services
  - The statute requires that state agencies document their efforts to enroll youth and their families in appropriate, individualized community services which must include . . .
    - Providing families with information on local services that will alleviate the need to file a petition (short-term respite care, family crisis counseling, and dispute resolution programs, etc.)
    - Holding at least one conference with the youth and the family to discuss alternatives to filing a petition
    - Assessing whether the youth would benefit from residential respite care
    - Recording and analyzing whether diversion services are needed and whether they should be offered on an ongoing basis
    - A petition can be filed only if the agency indicates that it has terminated diversion services because there was not substantial likelihood that the youth or his or her family will benefit from further attempts

\*Taken from Jessica R. Kendall, *Juvenile Status Offenses: Treatment and Early Intervention*, Chicago, IL: American Bar Association, Division for Public Education, (2007).

# Chapter 22: Nondelinquency Proceedings—Family in Need of Services (FINS) Interim Care

## [22.1] Overview

Interim care in the state systems has to do with preadjudication or pretrial detention.<sup>30</sup> In the state systems there has been a long history of detaining both status offenders and juvenile offenders, and sadly even abandoned or maltreated children, in secure juvenile detention facilities, sometimes before a juvenile court has even exercised its jurisdiction over the youth. The 1989 Tribal Juvenile Justice Code provisions would remedy such practices and prevent harm to status offenders (a.k.a. “FINS eligible youth”) by authorizing taking them into custody only under certain circumstances (where there is a substantial danger to the youth’s physical safety or where they have run away from a placement) and limiting their placement to juvenile shelter care facilities.

## [22.2] Model Code Example

[\(1989\) BIA Tribal Juvenile Justice Code](#)

### [1-16 FAMILY IN NEED OF SERVICES—INTERIM CARE](#)

#### **1-16 A. Limitation on Taking into Custody**

No child whose family is the subject of a proceeding alleging that the family is “in need of services” (as defined in section 1-1 C of this code) may be taken into custody unless such taking into custody is in accordance with provision for “interim care” (as defined in section 1-1 C of this code) set forth in sections 1-16 A through 1-16 J of this code.

#### **1-16 B. Interim Care without Court Order**

A child may be taken into interim care by a law enforcement officer without order of the court only when:

1. the officer has reasonable grounds to believe that the child is in circumstances which constitute a substantial danger to the child’s physical safety; or

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<sup>30</sup> Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

2. an agency legally charged with the supervision of the child has notified a law enforcement agency that the child has run away from a placement ordered by the court under chapter 1-19 of this code.

#### **1-16 C. Procedure for Interim Care**

A law enforcement official taking a child into custody under the interim care provisions of this code shall immediately:

1. inform the child of the reasons for the custody;
2. contact the juvenile counselor who shall designate placement of the child in an appropriate juvenile shelter care facility as designated by the court;
3. take the child to the placement specified by the juvenile counselor, or in the event of the unavailability of a juvenile counselor, to an appropriate juvenile shelter care facility as designated by the court; and,
4. inform the child's family in accordance with section 1-16 D of this code.

## **[22.3] Tribal Code Commentary**

**Interim Care.** The Sault Ste. Marie statute omits the entire “FINS Interim Care” portion of the 1989 BIA Tribal Juvenile Justice Code at Subchapter 1-16. This subchapter prohibits taking a FINS youth into custody unless it is for purposes of “interim care” and where a law enforcement officer either has reasonable grounds to believe that the youth is in substantial danger or where an agency has reported that the youth has run away from a placement. In these instances, the provisions require that the law enforcement officer tell the youth why he or she is being taken into custody, arrange for placement, and notify the youth's family. The provisions limit involuntary interim care to forty-eight hours.

A FINS youth in interim care cannot be placed in a jail, and if placed with juvenile offenders, he or she must be detained in a separate room. The youth cannot be transported with adults under arrest. The provisions also specify that the youth and his or her family must be offered social services. Finally, if it is possible, the youth should be returned home, otherwise the juvenile counselor must offer “shelter in an appropriate juvenile shelter care facility . . . which is located as close as possible to the residence. . . .” Sault Ste. Marie's omission of the interim care provisions suggests that the tribe will permit status offenders to be taken into custody and detained like and with juvenile offenders. This is likely due to insufficient options and resources, but it is not recommended as it does not sufficiently protect mere status offending youth.

## [22.4] Exercises

The following exercises are meant to guide you in writing the interim care section of the tribal juvenile code. The following exercises are meant to guide you in developing the FINS interim care sections of the tribal juvenile code.

- Find and examine your juvenile code’s provisions governing interim care (placements for youth before they are brought to a juvenile court hearing). What are the required placement options and time limits for placement?
- Make a list of actual available, temporary, placement options for youth prior to court hearings in your community.
- In other jurisdictions they have “respite care” placements—temporary out-of-home placements for youth with services and programing for youth and their families. Make a list of the pros and cons for a respite care program in your community.

### Read and Discuss\*

**Is our tribe replicating the bad historical practices of states in detaining status offenders (FINS eligible youth) before tribal court hearings take place?**

Does the following description of past state practices sound familiar?

“The detention of juveniles prior to adjudication or disposition of their cases represents one of the most serious problems in the administration of juvenile justice. The problem is characterized by the very large numbers of juveniles incarcerated during this stage annually, the harsh conditions under which they are held, the high costs of such detention, and the harmful after-effects detention produces. These difficulties are caused or compounded by profound defects in the system of juvenile justice itself: the inadequacy of the information and the decision-making process that leads to detention, in the delays between arrest and ultimate disposition, and in the lack of visibility and accountability that pervades the process.”

\*Taken from *Standards Relating to Interim Status: Re Release, Control, and Detention of Accused Juvenile Offenders between Arrest and Detention*, Chicago: American Bar Association, (1979).





# Chapter 23: Nondelinquency Proceedings—Stand-Alone Status Offenses

## [23.1] Overview

In the state systems, state and federal policy makers have sought to distinguish youth who commit status offenses from youth who commit delinquent acts.<sup>31</sup> Status offenses are nondelinquent, noncriminal infractions that would not be offenses if the youth were an adult. They include running away, truancy, alcohol or tobacco possession, curfew violations, and circumstances in which youth are found to be beyond the control of their parent/guardian(s)—often called “ungovernability” or “incorrigibility.” Experts argue that status offenses are symptomatic of underlying personal, familial, community, and systemic issues, and unmet and unaddressed needs. Until the mid-1970s, the state juvenile delinquency systems handled status offenses that subjected youth to the same dispositional and probationary alternatives, including incarceration. However, many became concerned about the short- and long-term effects of detaining and institutionalizing nondelinquent youth.

In 1974, Congress encouraged states toward decriminalizing status offenses by enacting the [Juvenile Justice and Delinquency Prevention Act](#) (JJDP). States receiving federal grants under the JJDP agreed to prohibit the locked placement of youth charged with status offenses and pledged to reform their systems so that these youths and their families would receive family and community-based services. Nevertheless, every year, thousands of youth charged with only status offenses are placed in locked detention. Research has since proven that the secure detention of status offenders is both ineffective and dangerous:

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<sup>31</sup> Characterizations of state juvenile justice system policies and practices taken from the *National Standards for the Care of Youth Charged with Status Offenses*, Coalition for Juvenile Justice SOS Project, Washington DC, (2013); and Annie Salsich & Jennifer Trone, *From Courts to Communities: The Right Response to Truancy, Running Away, and Other Status Offenses*, The Vera Institute of Justice, Status Offense Reform Center, New York, New York (2013).

“Research and evidence-based approaches have proven that secure detention of status offenders is ineffective and frequently dangerous. Specifically, research has shown that:

- Detention facilities are often ill-equipped to address the underlying causes of status offenses.
- Detention does not serve as a deterrent to subsequent status-offending and/or delinquent behavior.
- Detained youth are often held in overcrowded, understaffed facilities—environments that can breed violence and exacerbate unmet needs.
- Almost 20 percent of detained status offenders and other non-offenders (e.g., youth involved with the child welfare system) are placed in living quarters with youth who have committed murder or manslaughter and 25 percent are placed in units with felony sex offenders.
- Placing youth who commit status offenses in locked detention facilities jeopardizes their safety and well-being, and may increase the likelihood of delinquent or criminal behavior.
- Removing youth from their families and communities prohibits them from developing the strong social networks and support systems necessary to transition successfully from adolescence to adulthood.”<sup>32</sup>

Courts nationwide are overburdened and slow to respond. They are not equipped to assess the underlying circumstances that result in a status offense and judges have few options and the court process is expensive. In the early 2000s state officials began experimenting with alternatives to processing status offenders in family and juvenile courts. A new paradigm emerged connecting families with services in their communities. This approach is grounded in the understanding that families can resolve the problems with guidance and support. Recent studies show responding to kids at home and in their communities is more cost-effective, developmentally appropriate, and more ethical than incarceration when there is no public-safety risk. In 2005 the Connecticut legislature prohibited the use of secure detention for status offenders. That year New York State narrowed the circumstances under which status offenders can be placed in even nonsecure detention facilities. Successful community-based responses have been established in Florida, New York State, Louisiana, and Washington State.<sup>33</sup>

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<sup>32</sup> *National Standards for the Care of Youth Charged with Status Offenses*, 12.

<sup>33</sup> *From Courts to Communities: The Right Response to Truancy, Running Away, and Other Status Offenses*, 5–6.

The hallmarks of an effective community-based system include:

1. **Diversion from court.** Keeping kids out of court requires having mechanisms in place that actively steer families away from the juvenile justice system and toward community-based services.
2. **An immediate response.** Families trying to cope with behaviors that are considered status offenses may need assistance right away from trained professionals who can work with them, often in their home, to de-escalate the situation. In some cases, families also benefit from a cool-down period in which the young person spends a few nights outside the home in a respite center.
3. **A triage process.** Through careful screening and assessment, the effective systems identify needs and tailor services accordingly. Some families require only brief and minimal intervention—a caring adult to listen and help the family navigate the issues at hand. At the other end of the spectrum are families that need intensive and ongoing support and services to resolve problems.
4. **Services that are accessible and effective.** Easy access is key. If services are far away, alienating, costly, or otherwise difficult to use, families may opt out before they can meaningfully address their needs. Equally important, local services must engage the entire family, not just the youth, and be proven to work based upon objective evidence.
5. **Internal assessment.** Regardless of how well new practices are designed and implemented, there are bound to be some that run more smoothly than others, at least at first. Monitoring outcomes and adjusting practices as needed are essential to be effective and also to sustain support for new practices.”<sup>34</sup>

Many if not most tribes funnel status offenses through their juvenile justice systems where out-of-home placements and even secure detention are likely results. Most of these systems use a standalone status offense approach, in contrast to a FINS-type process. The standalone status offense approach is when a tribe defines a list of status offenses and provides for a civil adjudication in name. However, it is a quasicriminal trial-like process to determine guilt. The process provides a range of dispositions, applied in a probation format, for youth as an alternative to adult criminal sanctions. Proponents of the FINS approach argue that the standalone “status offender” approach unnecessarily labels and stigmatizes youth (e.g., truants and runaways) as “offenders.” They further argue that the status offender approach fails to statutorily require tribal and other agencies to provide critical services to youth and their families before permitting the filing of petitions in tribal court, and it may fail to adequately authorize tribal court jurisdiction and powers over parents and other important family members. However, it would be workable to apply the FINS court process

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<sup>34</sup> Id. at p. 5.

to youth defined to be status offenders so that youth and their families benefit from family targeted and timely therapeutic interventions. This may be particularly important in tribal communities where most families are low income and where access to necessary counseling and mental health treatment may be available only through court order.

Because so many tribes use a standalone status offense approach we include examples in the following text. If used, this approach should be modified to include the FINS-type protections and interventions for youth and their families and for court jurisdiction and powers over family members.

## [23.2] Tribal Code Examples

### **The Cherokee Code of the Eastern Band of the Cherokee Nation**

#### **Chapter 7A - JUVENILE CODE**

#### **ARTICLE I. - IN GENERAL**

##### **Sec. 7A-2. Definitions.**

Unless the context clearly requires otherwise, the following words have the listed meanings:

(Note: Certain definitions were omitted)

- t. **Undisciplined juvenile** shall mean a juvenile who is less than 18 years of age who is unlawfully absent from school; who is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control, who is found in places where it is unlawful for a juvenile to be; who purchases, possesses, consumes, or receives a tobacco product; or who has run away from home.

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### **Native Village of Barrow Tribe Juvenile Delinquency Prevention and Rehabilitation Code**

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#### **1-2 DELINQUENT ACTS**

##### **1-2 E. Acts Which May Not Result in Secure Detention**

The acts set out in this subsection, when committed by a child, shall be deemed to be delinquent acts that would bring the child within the jurisdiction of the juvenile court pursuant to this Code, but due to the nature of these acts the juvenile court may not order secure detention as a rehabilitative remedy for a juvenile adjudged to have engaged in any of these acts.

1. **Possession, Consumption or Being under the Influence of Alcoholic Beverages:**  
Knowingly consuming, possessing, or being under the influence of alcoholic beverages.

Provided, however, that it is not a delinquent act for a juvenile to possess or consume alcoholic beverages for bona fide religious purposes based on tenets or teachings of a church or religious body, in a quantity limited to the amount necessary for religious purposes, and dispensed by a person recognized by the church or religious body.

2. **Possession or Use of Tobacco:** Knowingly possessing or using any cigarettes, cigars, or tobacco in any form. Provided, however, that it is not a delinquent act for a juvenile to possess or use tobacco for bona fide religious purposes based on tenets or teachings of a church or religious body, in a quantity limited to the amount necessary for religious purposes, and dispensed by a person recognized by the church or religious body.
3. **Soliciting Supply:** Wrongfully and willfully soliciting, inciting, or inducing any person to furnish him with cigarettes, cigars, or tobacco in any form, controlled substances, or alcoholic beverages.
4. **Sexual Conduct with a Juvenile:** Engaging in sexual conduct with a child. As used in this section, “sexual conduct” means any sexual touching or penetration and any unwanted exposure of genitalia. Provided, however, that “sexual conduct” does not include an act done for a bona fide medical purpose. Provided, further, that it shall not be considered a delinquent act if the actor is married to the child.
5. **Operation of Amusement Devices:** Playing or operating any amusement device during school hours.
6. **Restricted Places:** Entering any public building where alcoholic beverages are sold, distributed, or served when not in the company of a parent or guardian. This provision shall not apply to any restaurant or other facility whose primary business consists of serving food.
7. **Pulltab and Bingo Activities:** Entering any premises where a pulltab game or bingo activity is being conducted. This section does not apply to premises where the pulltab game or bingo activity is conducted in a separate section of the premises that is secured from viewing and entrance by juveniles.
8. **Driving without a License:** Operating an automobile, truck or other vehicle that requires licensing without a valid driver’s license. The age limits for driving vehicles that require licensing shall comply with State of Alaska requirements.
9. **Underage Driving:** For a juvenile under the age of twelve (12), driving a snowmachine, a three or four wheeler, or a boat without parental consent.
10. **Curfew Violation:** Violating the following curfew: A Village curfew for all juveniles shall be in effect during the school year between the hours of 10:00 P.M. and 6:00 A.M. on any evening on which the next day is a school day, and between the hours of midnight and

6:00 A.M. on any evening on which the next day is a Saturday, Sunday, or school holiday. During the summer months, a Village curfew will be in effect for all juveniles starting at midnight and ending at 6:00 A.M. A juvenile is not in violation of curfew if he is:

- (a) Accompanied by his or her parent or guardian;
- (b) On an errand at the written direction of his or her parent or guardian, without any detour or stop (written direction of his parent must be signed, timed and dated by the parent or guardian and must indicate the specific errand);
- (c) Involved in an emergency;
- (d) Engaged in, going to or returning from any employment activity, hunting, fishing, trapping, or other activities that are conducted outside the Village, without detour or stop;
- (e) On the public right-of-way immediately abutting the juvenile's residence or immediately abutting the residence of a next door neighbor, if the neighbor did not complain to the police department about the juvenile's presence;
- (f) Attending, going to, or returning home from, without any detour or stop, an official school, religious, or other recreational or Village activity such as church activities, Village dances, or meetings, supervised by adults and sponsored by the Native Village of Barrow, the City of Barrow, or another similar entity that takes responsibility for the juvenile; or
- (g) Exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, or the right of assembly.

\* Not available online, as of April 2015.

## [23.3] Tribal Code Commentary

Here we provide two examples of how tribes have handled status offenses. The Eastern Band of Cherokee code establishes what is considered the standard list of status offenses. Specifically, it defines an “undisciplined juvenile” as a juvenile who is “unlawfully absent from school,” “regularly disobedient and beyond disciplinary control,” “found in places where it is unlawful for a juvenile to be,” “who purchases, possesses, consumes, or receives a tobacco product,” or “who has run away from home.” In contrast, the Native Village of Barrow code defines a comprehensive list of “delinquent acts” but singles out a separate list where “the juvenile court may not order secure detention.” These include:

- Possession, consumption, or being under the influence of alcoholic beverages;
- Possession or use of tobacco;

- Soliciting supply (of cigarettes, cigars, tobacco, controlled substances, or alcoholic beverages);
- Sexual conduct with a juvenile;
- Operating an amusement device;
- Entering restricted places (public building where alcoholic beverages are sold, distributed, or served);
- Pulltab and bingo activities;
- Driving without a license;
- Underage driving; and
- Curfew violations.

In defining status offenses, it would be helpful for tribes to work closely with their treatment and youth services professionals to identify and define youth conduct that merits tribal juvenile court intervention for purposes of youth and family habilitation and rehabilitation. Status offenses should be defined with available services in mind to avoid involving youth in the system where remedial services are lacking for their identified need areas.

Of the twenty-five tribal juvenile statutes reviewed, nine contained either a FINS-type system or used a list of status offenses as part of their nondelinquency process (the delinquency process deals with juvenile offenses—that would be criminal violations if they were committed by adults). A subset of the twenty-five blends their FINS and status offender categories with their dependent children category (i.e., the court process that deals with maltreated children—those abandoned, abused, and/or neglected). This is not recommended as the purpose and process of these systems are different in important ways.

The consolidated list of FINS criteria and status offenses includes (see the following table for source):

- Absence from home/”runaway”;
- Absence from school/”truancy”;
- Curfew violations;
- Disobeys parents, guardian, or custodian/”unamenable to parental control”;
- Disorderly conduct;\*
- Endangers morals or health of self or others;
- Loitering about games of chance;
- Loitering about liquor establishment;
- Motor vehicle violations;
- Possession/consumption of alcohol;

- Possession/consumption of controlled substances;\*
- Use of inhalants; and
- Use of over-the-counter-drugs.

\*Technically a “criminal offense” versus a “status offense” in many tribes’ criminal statutes but singled out for treatment under a FINS- or status offense–type process in these tribes’ juvenile statutes.

<b>Tribe</b>	<b>FINS-Type System</b>	<b>Status Offenses</b>	<b>Citation</b>
<b>Absentee-Shawnee</b>	Disobeys parents; absent from home; or absent from school	n/a	Title 2 Juvenile Code, Section 3(h)
<b>Blackfeet</b>	n/a	Curfew violation; loitering about games of chance; loitering about retail liquor establishment; possession of alcohol; possession of drugs; truancy; inhaling; motor vehicle violations	Family Code, Chapter 4, Section 19
<b>Leech Lake</b>	n/a	Curfew violation; truancy; possession and/or consumption of alcohol and/or controlled substance; possession and/or consumption of tobacco; inhaling; use of over-the-counter drugs; disorderly conduct; running away	Title 4, Juvenile Justice Code, Section 4-2
<b>Pascua Yaqui</b>	Absent from school; curfew violation; runaway		Title 5 Civil Code, Chapter 7 Juveniles, Section 130
<b>Saginaw Chippewa</b>	n/a	Absence from school; disobeying parents, etc.; absent from home	Juvenile Code, Chapter 12.2, Section 12.224
<b>Sisseton-Wahpeton Oyate</b>	Truant, unamenable to parental control; runaway; habitually departs self to injure or endanger self or others	n/a	Chapter 38 Juvenile Code, Section 38-03-13
<b>Confederated Tribes of Umatilla</b>	n/a	Curfew violations; possession of alcohol; runaways; truancy violations	Juvenile Code Chapter 6 Juvenile Offenses, Section 6.04



<b>Winnebago</b>	Disobeys parents, etc.; absent from home; deports self to injure or endanger morals or health of self or others; absent from school	n/a	Title 4 Juvenile Procedure, Article I General Provisions, Section 4-102 (9)
<b>Pueblo of Zuni</b>	n/a	Absent from school; disobeys parents, etc., left home	Title IX, Children’s Code, Chapter 1 General Provisions, Section 9-1-3 (30)

## [23.4] Exercises

The following exercises are meant to guide you in writing the status offender section of the tribal juvenile code.

- Find and examine your juvenile code’s provisions defining “delinquent act,” “juvenile offense,” “juvenile crime,” “status offense,” and/or FINS or some variant. List the conduct or misconduct targeted.
- Identify which of these are true “status offenses” (conduct or misconduct that is not criminal and that may only be committed by a minor, e.g., truancy, curfew violations, running away, and possession and use of tobacco/inhalants)?
- Find and examine your juvenile code’s “disposition” section. Does your juvenile code treat juvenile offenders and status offenders the same?
- Make a list of the status offenses you wish to target

## Read and Discuss\*

### How should tribes deal with “status offenders”?

In juvenile cases, a “status offense” involves conduct that would not be a crime if it was committed by an adult—in other words, the actions are considered to be a violation of the law only because of the youth’s status as a minor (typically anyone under eighteen years of age).

### Types of Status Offenses

The kind of conduct that might constitute a status offense varies by state. The most common status offenses include:

- truancy (skipping school),
- violating a city or county curfew,

- underage possession and consumption of alcohol,
- underage possession and use of tobacco,
- running away, and
- ungovernability (being beyond the control of parents or guardians).

### **How States Handle Status Offenses**

Traditionally, status offenses were handled exclusively through the juvenile justice system. But in the 1960s and 1970s, many states began to view status offense violations as a warning signal that a child needed better supervision or some other type of assistance to avoid future run-ins with the law. This view is grounded in fact—research has linked status offenses to later delinquency.

For the most part, state goals in dealing with status offenses became threefold:

- to preserve families,
- to ensure public safety, and
- to prevent young people from becoming delinquent or committing crimes in the future.

In this vein, the 1974 Juvenile Justice and Delinquency Prevention Act emphasized “deinstitutionalizing” status offenses. This meant giving prosecutors broad discretion to divert status offense cases away from juvenile court and toward other government agencies that could better provide services to at-risk juveniles. Diverting a case before a delinquency petition was filed also allowed a young person to avoid the delinquent label—some believed that label itself impeded a juvenile’s chances for rehabilitation.

In 1997, only one in five status offense cases were formally processed by the courts, and even fewer status offense cases actually made it to juvenile court in the first place. That’s because law enforcement officers are less likely to refer status offense cases to juvenile court, compared with delinquency cases. Of those status offense cases that do get referred, 94% involve liquor law violations.

Today, most states refer to status offenders as “children or juveniles in need of supervision, services, or care.” A few states designate some status offenders as “dependent” or “neglected children,” and give responsibility for these young people over to state child welfare programs.

States approach status offenses in a number of different ways. In some states, a child who commits a status offense may end up in juvenile court. In other jurisdictions, the state’s child welfare agency is the first to deal with the problem. Some states have increased the use of residential placement for offenders, and others emphasize community-based programs. But, in all states, if informal efforts and programs fail to remedy the problem, the young person will end up in juvenile court.

\*Taken from NOLO. Go to <http://www.nolo.com/legal-encyclopedia/juvenile-law-status-offenses-32227.html>.

# Chapter 24: Nondelinquency Proceedings—Family in Need of Services (FINS) Referral to Juvenile Counselor

## [24.1] Overview

A Family in Need of Services (FINS) referral requirement to a juvenile counselor statutorily requires that FINS eligible youth and their families receive appropriate and available services before a FINS petition may be filed in the tribal juvenile court.<sup>35</sup>

## [24.2] Model Code Example

[\(1989\) BIA Tribal Juvenile Justice Code](#)

[1-17 FAMILY IN NEED OF SERVICES—INITIATION OF PROCEEDINGS](#)

### 1-17 A. Who May Submit Requests

Requests stating that a family is “in need of services” may be submitted by the child; the child's parent, guardian, or custodian; an appropriate social services agency; and/or the juvenile counselor. A request stating that a child is habitually and without justification absent from school may also be submitted by an authorized representative of a local school board or governing authority of a private school but only if the request is accompanied by a declaration in which the authorized representative swears that the school has complied with each of the steps set forth in section 1-17 G of this code.

### 1-17 B. Referral of Requests to Juvenile Counselor

Requests stating that a family is “in need of services” shall be referred to the juvenile counselor, who shall assist either a child or a child’s parent, guardian, or custodian in obtaining appropriate and available services as well as assisting in any subsequent filing of a petition alleging that the family is “in need of services.”

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<sup>35</sup> Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

## [24.3] Tribal Code Commentary

Referral of Requests to Juvenile Counselor—The Sault Ste. Marie statute omits 1989 BIA Tribal Juvenile Justice Code Section 1-17 B:

*Requests stating that a family is “in need of services” shall be referred to the juvenile counselor, who shall assist either a child or a child’s parent, guardian, or custodian in obtaining appropriate and available services as well as assisting in any subsequent filing of a petition alleging that the family is “in need of services.”*  
(Emphasis added.)

The 1989 BIA Tribal Juvenile Justice Code at Section 1-17 mandates that FINS youth be referred to a juvenile counselor who must assist the youth and his or her parents (or guardian or custodian) in accessing needed services. It would appear under the Sault Ste. Marie statute that the juvenile probation officer is not mandated to provide services to an allegedly status offending youth and his or her family short of direction from a court order. Consistent with the evidence-based trend for working with status offenders to divert them from juvenile court process to community-based services whenever possible, the model code provision is recommended as it provides an additional diversion point and mandate for a juvenile justice system officer to provide access to services.

## [24.4] Exercises

The following exercises are meant to guide you in writing the “referral to juvenile counselor” section of the tribal juvenile code.

- Find and examine your juvenile code’s provisions governing juvenile counselors and/or juvenile probation officers. Does your juvenile code set out a process for their intake and handling of youth? If you can, flow chart it.
- Make a list of the services juvenile counselors and/or juvenile probation officers are required to provide to, or refer for, youth.

Make a list of the services and programs you would like to develop or contract for and make subject to the juvenile counselor’s and/or juvenile probation officer’s intake/referral/supervision process.

## **Read and Discuss\***

Should you be lobbying your tribal councils and Congress to provide funding for comprehensive precourt services for youth and their families? And/or do you need to reform our existing service array?

### **Hillsborough County, Florida**

#### **Children in Need of Services/Families in Need of Services Program (CINS/FINS)**

##### **Goal . . .**

The goal of both the residential and nonresidential Children in Need of Services/Families in Need of Services (CINS/FINS) Program is to reduce juvenile crime while assisting, supporting, and strengthening the youth and families in Hillsborough County.

##### **Mission . . .**

The mission of CINS/FINS Program is to provide the highest quality care and treatment for the youth and families we serve every day.

##### **Program Components . . .**

The Hillsborough County CINS/FINS Program has two components: residential and nonresidential services, designed to help families whose youth exhibit risk factors that make them more susceptible to becoming involved with Juvenile Delinquency or Dependency system.

##### **Youth Served . . .**

The youth served in the CINS/FINS program are youth that have not been adjudicated delinquent and who have not been adjudicated dependent, but are at risk for adjudication without intervention services. These risk factors include school problems and truancy, family behavioral problems and ungovernability, runaway behaviors or homelessness, poor peer relations, and or the use of drugs and/or alcohol.

##### **(CINS/FINS) Residential Program**

- Youth that are experiencing significant issues within the home
- Youth that need a safe place to stay
- A short-term residential respite program which offers a youth an average length stay of 14 days for youth ages 10 to 17
- Youth receive . . .
  - individual, group and family counseling

- milieu services to help youth learn more appropriate behavior and participate in family life without resorting to ungovernable behavior
- a physical health screening and mental status exam
- educational support
- a variety of community overlay services
- behavioral incentives and recognition opportunities

**(CINS/FINS) Non-Residential Program**

- Youth and families may also receive help in a community setting
- Trained counselors provide individual and family therapy to youth ages 7 to 17 at sites throughout Hillsborough County with flexible daytime and evening hours
- A nationwide system of Safe Place sites where runaway youth may request services at designated sites throughout Hillsborough County and receive free transportation to the CINS/FINS shelter
- Case Staffing Committee where parents may file a Seven-Day Letter which is a formal document to request their child’s case be brought to the attention of a judge

Screening for services is available 24 hours a day for the CINS/FINS Residential Program and Monday through Friday, 8:00 am to 5:00 pm, for the CINS/FINS Non-Residential Program.

\*Taken from the Hillsborough County (Florida) Government website. Go to <http://www.hillsboroughcounty.org/index.aspx?NID=1046>.

# Chapter 25: Nondelinquency Proceedings—Family in Need of Services (FINS) Breakdown in Parent-Child Relationship

## [25.1] Overview

The 1989 BIA Tribal Juvenile Justice Code’s Family in Need of Services (FINS) provisions include youth conduct that would be labeled as “incorrigible,” “unmanageable,” “ungovernable,” or “unruly,” in other jurisdictions.<sup>36</sup> The preferred label, “ungovernable” is defined as being beyond the control of parents, guardians, or custodians or being disobedient of parental authority.

Ungovernability is a single unifying description for a broad number of delinquent acts. Some argue that the state governments have left the definition intentionally vague in order to have more power over “ungovernable youth.” However, it is generally accepted that it is not appropriate to charge every youth who fails to comply with the requests of his or her parent as “ungovernable.” Rather it is appropriate to do so when the continued disobedience may cause harm to the youth or another person. Common problems stemming from ungovernability include running away, truancy, or breaking curfew. The juvenile justice system may be able to help a parent whose child continuously exhibits:

- Serious and deliberate threats of physical harm to family members;
- Acts of intimidation toward household members;
- Deliberate injury to home structures, grounds, furnishings, or pets;
- Serious and repeated violations of curfew; and/or
- Refusing to go to school.

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<sup>36</sup> Characterizations of state juvenile justice system process are taken from *Ungovernable/Incorrigible Youth Literature Review* (Development Services Group, Inc., 2009).

Parental conduct demonstrating that a parent does not have the basic tools to deal with misbehavior in a healthy fashion may include:

- A lack of time,
- An authoritative parenting style,
- Abuse, and/or
- Alcohol or drug use within the home.

The 1989 BIA Tribal Juvenile Justice Code provisions reject the “incorrigible” or “ungovernable” language and opt instead to provide FINS jurisdiction over two categories: (1) a child that is “habitually and without justification absent from school,” and (2) where there is “a breakdown in the parent-child relationship.” The 1989 BIA Tribal Juvenile Justice Code at Section 1-1 C.14, defines “Family-in-Need-of-Services” to include, “a family wherein there is allegedly a breakdown in the parent-child relationship based upon the refusal of the parents, guardian, or custodian to permit a child to live with them or based upon the child’s refusal to live with his parents, guardian or custodian.” However, the code further requires that “the conduct . . . presents a clear and substantial danger to the child’s life or health . . . ; or the child and his family are in need of treatment, rehabilitation, or services. . . .” This appears to ensure that FINS petitions will not be filed against youth who are merely “acting like teenagers.”

It may be helpful to review [Section 3.2 \(M\) Support for Parents](#) in the overview.

## [25.2] Model Code Example

### [\(1989\) BIA Tribal Juvenile Justice Code](#)

#### [1-17 FAMILY IN NEED OF SERVICES—INITIATION OF PROCEEDINGS](#)

##### **1-17 A. Who May Submit Requests**

Requests stating that a family is “in need of services” may be submitted by the child; the child's parent, guardian, or custodian; an appropriate social services agency; and/or the juvenile counselor. A request stating that a child is habitually and without justification absent from school may also be submitted by an authorized representative of a local school board or governing authority of a private school but only if the request is accompanied by a declaration in which the authorized representative swears that the school has complied with each of the steps set forth in section 1-17G of this code.

(Certain Sections Omitted)

##### **1-17 F. Petition—Form and Contents**



A petition alleging that a family is “in need of services” shall be entitled, “In the Matter of the Family of \_\_\_\_, a child,” and shall set forth with specificity:

1. the name, birth date and residence address of the child and whether the child is the complainant or respondent in the proceedings;
2. the name and residence address of the parents, guardian or custodian of the child and whether the parents, guardian or custodian are the complainant or respondent in the proceedings;
3. that the family is a “family in need of services” as defined in section 1-1 C of this code;

#### **1-17 H. Petition—Additional Required Allegations for Breakdown in the Parent-Child Relationship**

In addition to the allegations required under section 1-17 F of this code, a petition alleging that there is a breakdown in the parent-child relationship shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

1. the child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;
2. the child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative;
3. the child has sought assistance at an appropriate juvenile shelter care facility for runaways or the child has refused assistance from such a facility; and
4. the child has been placed in a foster home or the child has refused placement in a foster home.

## **[25.3] Tribal Code Example**

### **Sault Ste. Marie Tribal Code**

#### **CHAPTER 36: JUVENILE CODE**

#### **SUBCHAPTER V: STATUS OFFENSES**

##### **36.501 Status Offenses.**

It is a violation of this Chapter for a child to runaway, be incorrigible or commit a violation of subchapters VI, VII, or VIII.

##### **36.502 Initiation of Proceedings.**

- (5) In addition to the allegations required under subsection (3) of this Chapter, a petition alleging that the child is incorrigible shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:
- (a) The child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;
  - (b) The child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative.

## [25.4] Tribal Code Commentary

The Sault Ste. Marie statute at Section 36.502 (5) reads:

“In addition to the allegations required under subsection (3) of this Chapter, a petition alleging *that the child is incorrigible* (emphasis added) shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

- (a) The child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;
- (b) The child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative.”

Compare 1989 BIA Tribal Juvenile Justice Code Section 1-17 H:

In addition to the allegations required under section 1-17 F of this code, a petition alleging that *there is a breakdown in the parent-child relationship* (emphasis added) shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

1. the child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;
2. the child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative;
3. *the child has sought assistance at an appropriate juvenile shelter care facility for runaways or the child has refused assistance from such a facility; and* (emphasis added)
4. *the child has been placed in a foster home or the child has refused placement in a foster home.* (emphasis added)

The Sault Ste. Marie statute replaces the 1989 BIA Tribal Juvenile Justice Code’s “breakdown in the parent-child relationship” with being “incorrigible,” which it defines at Section 36.301 to mean “a child who is repeatedly disobedient to the reasonable and lawful commands of his or her parents,

guardian, or custodian.” The 1989 BIA Tribal Juvenile Justice Code does not define a “breakdown in the parent-child relationship” but under its definition of “Family in Need of Services” at Section 1-1 C (14), the juvenile court, under its FINS process, has jurisdiction over:

a family wherein there is allegedly a breakdown in the parent-child relationship based on the refusal of the parents, guardian, or custodian to permit a child to live with them or based on the child’s refusal to live with his parents, guardian, or custodian . . .

Both provisions target conduct resulting in the difficulty of the youth and his or her parents, guardian, or custodian to live together. The 1989 BIA Tribal Juvenile Justice Code language redirects blame away from the youth and looks to the detrimental status—an inability to continue living together. This may be preferred where the targeted behaviors may range from a youth physically abusing his or her parent to refusing to consistently follow a parent imposed curfew, to prolonged verbal fighting between family members. There may not be an easy way to identify bad conduct where there are deeply strained underlying family dynamics.

1989 BIA Tribal Juvenile Justice Code Section 1-17 H also requires additional allegations in petitions that the Sault Ste. Marie statute omits when it comes to status offenders—a required additional allegation that the youth has sought or refused services at a shelter or has been placed or refused placement in a foster home. This “additional allegation” requirement puts the judge on notice of what has been attempted and where the youth is currently placed (or not). It is likely that Sault Ste. Marie, at the time their statute was drafted, lacked a shelter or foster home system.

## [25.5] Exercises

The following exercises are meant to guide you in writing the FINS “breakdown in the parent-child relationship” section of the tribal juvenile code.

- Find and examine your juvenile code’s provisions defining “incorrigible,” “ungovernable,” or any conduct, misconduct, or circumstances where youth and their parents/guardians are not getting along. What conduct/misconduct/circumstances are targeted?
- Find and examine your juvenile code’s provisions defining truancy, curfew violation, running away, possession/use of tobacco and/or inhalants. What conduct/misconduct/circumstances are targeted?
- Make a list of the services that you have that will support youth and families with these problems.
- What ideal list of conduct/misconduct/circumstances should be targeted and what services will you need that you do not have?

## Read and Discuss\*

### How do we fix “ungovernable” youth?

Research on the contributing factors of ungovernable behavior often focuses on . . .

- the relationship dynamics between a youth and his or her family
  - family is the key factor in the prosocial development of youth
  - family dysfunction is an important influence on future delinquent and antisocial behavior
  - interventions improving family functioning to reduce problem behaviors include . . .
    - family skills training
    - family education
    - family therapy
    - family services
    - family preservation programs
- parental behaviors and practices
  - parents are the most critical factor in the social development of children—the following buffer youth against problem behaviors . . .
    - supportive parent-child relationships
    - positive discipline methods
    - close monitoring and supervision
    - parental advocacy for their children
    - parental pursuit of needed information and support
  - interventions to improve fundamental parenting practices include . . .
    - behavioral parent training
    - parent education
    - parent support groups
    - in-home parent education or parent aid
    - parent involvement in youth groups
- presence of caring, supportive adults in the youth’s life provide youth with someone to relate to and the ability to be in a relationship . . .
  - at risk youth who are involved with at least one caring adult are more likely to withstand the range of negative influences . . .
    - poverty

- parental addiction
- family mental illness
- family discord
- Mentoring programs reduce risk factors and enhance protective factors that buffer children from risk
  - They provide positive adult contact
  - They enhance healthy beliefs
  - They enhance opportunities for involvement
  - They reinforce appropriate behavior
  - They provide personal connectedness, supervision and guidance, skills training, career or cultural enrichment opportunities, a knowledge of spirituality and values, a sense of self-worth, and goals and hope for the future

\*Taken from *Ungovernable/Incorrigible Youth Literature Review*, Development Services Group, Inc., (2009).



# Chapter 26: Nondelinquency Proceedings—Family in Need of Services (FINS) Consent Decrees

## [26.1] Overview

The 1989 BIA Tribal Juvenile Justice Code separates the court process for youth who are alleged to have committed juvenile acts from youth and families who are “in need of services.” Youth in the latter category are handled under the Family in Need of Services (FINS) court process. This process, like the juvenile offense process, includes a consent decree possibility. That is, youth may be diverted from the full court process if they enter into a written agreement, a “consent decree,” which is approved by the judge.

Under the 1989 BIA Tribal Juvenile Justice Code FINS Consent Decree process, once a petition alleging that a youth and his or her family is a FINS has been filed, and before the judge has ruled, someone may file a motion to undertake a consent decree. If the judge grants it, it may remain in effect for six months with a possible extension of an additional six months. If the youth and his or her family meet the terms and conditions of the consent decree, the original FINS petition will be dismissed. If the youth and his or her family fail to fulfill the express terms of the consent decree, the FINS petition may be reinstated and proceed through the FINS court process.

## [26.2] Model Code Example

### (1989) BIA Tribal Juvenile Justice Code

#### 1-18 FAMILY IN NEED OF SERVICES—CONSENT DECREE

##### **1-18 A. Availability of Consent Decree**

At any time after the filing of a petition alleging that a family is “in need of services,” and before the entry of a judgment, the court may, on motion of the juvenile presenter or that of the child, his parents, guardian, or custodian, or their counsel, suspend the proceedings and continue the family under supervision under terms and conditions negotiated with juvenile counselor and agreed to by all the parties affected. The court’s order continuing the family under supervision under this section shall be known as a “consent decree.”

##### **1-18 B. Objection to Consent Decree**

If the child or his parents, guardian, or custodian object to a consent decree, the court shall proceed to findings, adjudication, and disposition of the case.

#### **1-18 C. Court Determination of Appropriateness**

If the child or his parents, guardian, or custodian do not object, the court shall proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

#### **1-18 D. Duration of Consent Decree**

A consent decree shall remain in force for six months unless the family is discharged sooner by the juvenile counselor. Prior to the expiration of the six months period, and upon the application of the juvenile counselor or any other agency supervising the family under a consent decree, the court may extend the decree for an additional six months in the absence of objection to extension by the child or his parents, guardian, or custodian. If the child or his parents, guardian, or custodian object to the extension the court shall hold a hearing and make a determination on the issue of extension.

#### **1-18 E. Failure to Fulfill Terms and Conditions**

If, either prior to discharge by the juvenile counselor or expiration of the consent decree, the child or his parents, guardian, or custodian fail to fulfill the express terms and conditions of the consent decree, the petition under which the family was continued under supervision may be reinstated in the discretion of the juvenile presenter in consultation with the juvenile counselor. In this event, the proceeding on the petition shall be continued to conclusion as if the consent decree had never been entered.

#### **1-18 F. Dismissal of Petition**

After a family is discharged by the juvenile counselor or completes a period under supervision without reinstatement of the petition alleging that the family is in need of services, the petition shall be dismissed with prejudice.



## [26.3] Tribal Code Commentary

None of the tribal juvenile codes reviewed contained a consent decree process.

Consent decrees—The Sault Ste. Marie juvenile code, reviewed extensively throughout this resource as an example, omits the consent decree process of the 1989 BIA Tribal Juvenile Justice Code found at Subchapter 1-8. Given current research and policy trends, it is best to provide as many diversion points as possible within both the “juvenile offender” and “status offender”/”FINS” processes. The thinking is that allegedly status-offending or FINS youth may not be as culpable and/or are not necessarily on a track to criminal offending and thus should not be mixed either with the juvenile offender population or the adult criminal population in order to protect them from harm and to preserve their potential good prospects.

## [26.4] Exercises

The following exercises are meant to guide you in developing the FINS consent decree sections of the tribal juvenile code.

- Find and examine your juvenile code’s provisions governing FINS. Does it contain a consent decree provision?
  - If yes, what services or programs are required/available using a consent decree?
  - If no, what services or programs would you want to be available to youth before a formal hearing or adjudication using a consent decree?
- Make a list of the pros and cons of using consent decrees for status offenders and FINS youth to avoid formal hearings or adjudication.

## Read and Discuss\*

**What does a judge oversee when a youth agrees to be a party to a consent decree? What should happen when the youth violates it? Who can best advise the judge on what decision the judge should make in your system?**

Consent decree review orders contain the following information . . .

- **Court Findings**
  - Youth is making satisfactory progress in meeting the terms and conditions of the consent decree;
  - Youth is making unsatisfactory progress;
  - Youth is in violation of the consent decree; and/or

- Youth has satisfied the terms and conditions of the consent decree.
- **Order(s) to the Youth/Family**
  - Youth to remain on the consent decree;
  - Consent decree should be extended;
  - Consent decree should be modified;
  - Youth to be released due to program completion and case closed; and/or
  - Consent decree to be revoked and a petition alleging that the youth has committed a juvenile offense reinstated.
- **Additional Programs and Conditions**
  - No change;
  - New programs and conditions; or
  - Vacate programs and conditions.
- **Education, Health Care, and Disability**
  - \_\_\_\_\_ is appointed as the youth's educational decision maker to ensure the stability and appropriateness of his or her education.
  - Youth shall undergo the following evaluations, tests, counseling, and treatment:  
\_\_\_\_\_.
- **Shared Responsibility**
  - Case management responsibility is to be shared by the following agencies:  
\_\_\_\_\_.
  - The lead officer and agency are: \_\_\_\_\_.
- **Order(s) to the Juvenile Probation Officer**
  - The juvenile probation officer is directed to complete the following evaluations and report: \_\_\_\_\_.
- **The next scheduled court hearing is:** \_\_\_\_\_.

# Chapter 27: Nondelinquency Proceedings—Family in Need of Services (FINS) Dispositions

## [27.1] Overview

Under the 1989 BIA Tribal Juvenile Justice Code FINS parties (status offenders and their families) are subject to more limited disposition alternatives than would be juvenile offenders.<sup>37</sup> For example, they are not found to be offenders of any type, they are not subject to secure detention, they are not subject to “probation,” and the court orders are of a more limited duration (e.g., six months maximum). The goal of the FINS process is to identify risky behaviors and/or need areas and to use the tribal court process to intervene to provide services to the youth and his or her family members. The goal is not to adjudicate the guilt of an offender or to punish for an offense. FINS youth (a.k.a. “status offenders”) have not committed any juvenile offenses or crimes and should not be stigmatized as offenders.

## [27.2] Model Code Example

### (1989) BIA Tribal Juvenile Justice Code

#### 1-19 FAMILY IN NEED OF SERVICES—HEARINGS AND DISPOSITION

##### **1-19 A. Conduct of Hearings**

“Family in need of services” hearings shall be conducted by the juvenile court separate from other proceedings. At all hearings, the child and the child’s family, guardian, or custodian shall have the applicable rights listed in chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.

##### **1-19 B. Notice of Hearings**

Notice of all “family in need of services” hearings shall be given to the child, the child’s parent, guardian, or custodian, their counsel, and any other person the court deems necessary

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<sup>37</sup> Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10 F and 1-10 G of this code.

### **1-19 C. Adjudicatory Hearing**

The court, after hearing all of the evidence bearing on the allegations contained in the petition, shall make and record its findings as to whether the family is a “family in need of services.” If the court finds on the basis of clear and convincing evidence that the family is a “family in need of services,” the court may proceed immediately or at a postponed hearing to make disposition of the case. If the court does not find that the family is a “family in need of services” it shall dismiss the petition.

### **1-19 E. Disposition Hearing**

In that part of the hearing on dispositional issues all relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value even though not competent had it been offered during the part of the hearings on adjudicatory issues. The court shall consider any predisposition report, physician’s report or social study it may have ordered and afford the child, the child’s parent, guardian or custodian and the child’s counsel an opportunity to controvert the factual contents and conclusions of the report(s). The court shall also consider the alternative predisposition report or recommendations prepared by the child or the child’s counsel if any.

### **1-19 F. Disposition Alternatives**

If the court finds that a family is a “family in need of services,” the court may make and record any of the following orders of disposition, giving due weight to the need to preserve the unity of the family whenever possible:

1. permit the child to remain with his parents, guardian or custodian subject to those conditions and limitations the court may prescribe, including the protective supervision (as defined in section 1-1 C of this code) of the child by a local social services agency;
2. referral of the child and his parents, guardian, or custodian to an appropriate social services agency for participation in counseling or other treatment program as ordered by the court;
3. transfer legal custody of the child to any of the following if the family is found to be a “family in need of services” due to a breakdown in the parent-child relationship:
  - (a) a relative or other individual who, after study by the juvenile counselor

- (b) or other agency designated by the court, is found by the court to be qualified to receive and care for the child, or;
- (c) an appropriate agency for placement of the child in an appropriate juvenile shelter care facility (as defined in section 1-1 C of this code) for a period not to exceed thirty (30) days; with simultaneous directed referral of the family to a social services agency for counseling and/or other social assistance. A child may be placed under this section for an additional period not to exceed ninety (90) days after a hearing to determine the necessity of an additional placement.

#### **1-19 G. Restriction on Dispositional Placements**

The child shall not be confined in an institution established for the care and rehabilitation of “juvenile offenders” unless a child whose family is found to be “in need of services” is also found to be a “juvenile offender.” Under no circumstances shall a child whose family is found to be “in need of services” be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crimes.

#### **1-19 I. Termination of Disposition Order**

Any disposition order concerning a “family in need of services” shall remain in force for a period not to exceed six (6) months. The disposition order concerning a child whose family is found to be “in need of services” shall also automatically terminate when the child reaches his eighteenth (18th) birthday or is legally emancipated by the court.

## **[27.3] Tribal Code Example**

### **The Cherokee Code of the Eastern Band of the Cherokee Nation**

#### **Chapter 7A - JUVENILE CODE**

#### **ARTICLE V. LAW ENFORCEMENT PROCEDURES IN DELINQUENCY PROCEEDINGS**

##### **Sec. 7A-53A. Dispositional alternatives for undisciplined juveniles.**

The following alternatives for disposition shall be available to the court exercising jurisdiction over a juvenile who has been adjudicated undisciplined. The court may combine any of the applicable alternatives when the court finds it to be in the best interests of the juvenile:

- (1) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

- a. Require that the juvenile be supervised in the juvenile’s own home by a court counselor, or other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, or custodian or the juvenile as the judge may specify; or
  - b. Place the juvenile in the custody of a parent, guardian, custodian, relative, residential agency offering placement services, or some other suitable person; or
  - c. Place the juvenile in the custody of the Cherokee Children’s Home, or other similar type facility.
- (2) Place the juvenile under the protective supervision of a court counselor so that the counselor may:
- i. Assist the juvenile in securing social, medical, and educational services; and
  - ii. Visit and work with the family as a unit to ensure the juvenile is provided proper supervision and care. This supervision may be issued for a period of up to three months, with an extension of an additional three months in the discretion of the court. In addition, the court may impose any combination of the following conditions which may relate to the needs of the juvenile, including:
    - a. That the juvenile remain on good behavior and not violate any laws;
    - b. That the juvenile attend school regularly;
    - c. That the juvenile maintain passing grades in up to four courses during each grading period and meet with the court counselor and a representative of the school to make a plan for how to maintain those passing grades;
    - d. That the juvenile not associate with specified persons or be in specified places;
    - e. That the juvenile abide by a prescribed curfew;
    - f. That the juvenile report to a court counselor as often as required by the court counselor;
    - g. That the juvenile be employed regularly if not attending school; and
    - h. That the juvenile satisfy any other conditions determined appropriate by the court.

- (2) Excuse the juvenile from compliance with the compulsory school attendance law when the court finds that suitable alternative plans can be arranged by the family through other community resources for one of the following:
  - a. An education related to the needs or abilities of the juvenile including vocational education or special education;
  - b. A suitable plan of supervision or placement; or
  - c. Some other plan that the court finds to be in the best interests of the juvenile.

## [27.4] Tribal Code Commentary

The 1989 BIA Tribal Juvenile Justice Code at Section 1-19 F sets out the disposition alternatives for Family in Need of Services (FINS) youth and their families. Specifically, the provision focuses on placing the youth; on the provision of social, counseling, and treatment services; and “those conditions and limitations the court may prescribe.” The FINS court orders are only effective for up to six months and placement orders “in an appropriate juvenile shelter care facility” are limited to a maximum of 120 days. All FINS orders terminate automatically when the youth reaches the age of eighteen.

Contrast the 1989 BIA Tribal Juvenile Justice Code provisions with the dispositional alternatives of the Eastern Band of Cherokee, which defines its status offenders as “a juvenile adjudicated undisciplined.” Similar to the FINS process, it includes placement provisions (supervision in own home, in custody of parent, guardian, custodian, relative, “other suitable person,” residential agency, and facilities including the option of placing youth in the Cherokee Children’s Home). The Eastern Band of Cherokee code also includes a provision whereby a youth is placed under the protective supervision of a “court counselor” who assists the youth and family with social, medical, and educational services and who visits the family to assist the family in providing proper supervision and care. The maximum duration for such supervision is six months. Finally, the court may set conditions for the youth and his or her family members. These may include:

- Good behavior,
- School attendance,
- Maintaining passing grades,
- Not associating with specified persons/places,
- Curfew,
- Employment if not attending school, and
- Any other conditions.

The Eastern Band of Cherokee Code modifies the FINS process to hardwire in existing tribal services and positions, such as the Cherokee Children’s Home and the court counselor. Having such tribal services/positions targeted to assisting tribal youth who are involved with the tribal court is ideal.

## [27.5] Exercises

The following exercises are meant to guide you in developing the FINS dispositions sections of the tribal juvenile code.

- Find and examine your juvenile code’s provisions governing FINS/status offenders. Does your juvenile code have separate disposition provisions for FINS youth or status offenders than it does for juvenile delinquents/offenders?
  - Are FINS youth/status offenders subject to being put in secure juvenile detention facilities?
- Make a list of the pros and cons of mixing FINS youth/status offenders with juvenile delinquents/offenders in a juvenile facility (whether a secure detention facility or just a group home).
- Make a list of the placement/detention options for FINS youth/status offenders that you would like to develop or contract for in your community.

### **Read and Discuss\***

#### **Should status offenders be put in secure detention facilities?**

“Status offenders do not require secure detention to ensure their compliance with court orders or to protect public safety. However, recent data indicate that one-third of all youth held in juvenile detention centers are detained for status offenses and technical violations of probation (Arthur, 2001). Detaining youth in facilities prior to adjudication should be an option of last resort only for serious, violent, and chronic offenders and for those who repeatedly fail to appear for scheduled court dates. Secure detention and confinement are almost never appropriate for status offenders and certain other small groups of offenders—those who are very young, vulnerable, first-time offenders; those charged with non-serious offenses; and those with active, involved parents or strong community-based support systems. . . . The public’s heightened concern about crime and the increased emphasis on juvenile accountability in the past two decades may have further contributed to the juvenile justice system’s reliance on secure detention and confinement for most juvenile offenders. Clearly, quality and accessible community-based alternatives must exist to enable the judicious use of expensive detention and confinement programs to meet the needs of both the juvenile offender and the community.”



\*Taken from James Austin, Kelly Dedel Johnson, and Ronald Weitzer, *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, OJJDP Juvenile Justice Bulletin (September 2005) p. 1.



# Chapter 28: Nondelinquency Proceedings—Truancy Provisions

## [28.1] Overview

In the state systems the juvenile courts have been handling truancy since the 1960s<sup>38</sup>. Today, truancy has become a substantial driver of status offense cases: “In 2010, truancy cases constituted 36 percent (nearly 50,000) of the estimated 137,000 petitioned status offense cases across the country.”<sup>39</sup> Truancy stems from a student’s absence from school, as opposed to misconduct. The trigger for a finding of truancy is some set number of unexcused absences that vary state by state (can be anywhere from three to fifteen absences).

However, there is now a movement to use alternatives for arrest, court processing, and detention. State policy makers are seeing an unacceptable number of youth locked up for nonviolent, minor offenses. These include the “status offenses”—acts that are only considered criminal if committed by a juvenile (e.g., running away, truancy, curfew law violations, ungovernability or incorrigibility, and underage drinking violations). Research has shown a significant link between juvenile incarceration and negative outcomes for youth including increased risk of academic failure, dropping out of school, and future involvement in the juvenile and adult criminal justice systems.

Currently, juvenile justice leaders and practitioners are working with school administrators to shift the responsibility for addressing minor student misconduct away from the juvenile justice system and back to the school’s disciplinary systems. This includes launching school-justice partnerships to convene discussions about collaborative solutions to over referrals of cases involving minor student offenses to the courts.

Some state and local governments have established guidelines to help distinguish between offenses that do and do not merit referral to juvenile court. In cases in which school administrators must determine whether a student poses a serious safety threat to others, they may carry out a threat assessment.<sup>40</sup> Some court officials have developed written agreements describing steps that must

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<sup>38</sup> Characterizations of state truancy policy and laws are taken from *The School Discipline Consensus Report: Strategies in the Field to Keep Students Engaged in School and Out of the Juvenile Justice System*, Justice Center, The Council of State Governments, Washington, DC (2014).

<sup>39</sup> *Id.* at p. 271.

<sup>40</sup> E.g., Virginia Model for Student Threat Assessment (MSTA).

precede a school-based referral to the juvenile court.<sup>41</sup> In some states policy makers have changed the laws to restrict school-based referrals by limiting youth's eligibility criteria (e.g., raising the age limit for youth who may be subject to court jurisdiction for particular conduct).<sup>42</sup> Others have created more stringent statutory thresholds for invoking juvenile justice action for first offenders—for example, the law dictates that to refer a youth to juvenile court for a truancy offense, it must be his or her third charge of misconduct, and there must be evidence that each prior instance was met with a graduated school response.<sup>43</sup>

A large portion of school-based cases that come to juvenile courts involve truancy. Research suggests that sanction-based interventions are not effective, such as locating youth and getting them back to school with law enforcement, formal court processing, or school disciplinary measures. Instead a more effective intervention is to address the source of truant behavior with a multiagency response targeting the underlying unmet student and family needs (e.g., academic difficulty, family stress, and substance abuse). These interventions would include parent/guardian involvement, a continuum of supports and services, collaboration with community resources (including law enforcement, mental health services, mentoring, and social services), school administrative support, a commitment to keeping youth in the mainstream classroom, and ongoing evaluation. See, for example, the Stark County (OH) Truancy Mediation Program<sup>44</sup> and the Jefferson County (KY) Truancy Diversion Program.<sup>45</sup>

Juvenile courts and justice agencies should create alternative pathways and programs for students referred to the courts by establishing policies and partnerships. These alternatives should include rehabilitative supports and intervention without formal court involvement or confinement whenever possible. There are multiple points at which a student may be diverted from juvenile justice system processing, for example, from the point of referral (contact with school administrator) or point of arrest (contact with police). At these points the administrator or police office should have discretion to offer alternatives to arrest such as diversion to an alternative court (e.g., teen court, wellness court) or to a school, court, or community-based treatment or other program. See, for example, Florida's "civil citation" alternative<sup>46</sup>, Tennessee's SHAPE program (a multisystem approach that offers mentoring, tutoring, counseling, community service, victim restitution support, and other

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<sup>41</sup> Clayton County Juvenile Justice Collaborative Cooperative Agreement, Clayton County, GA, available at <http://thecollaborative.uncc.edu/sites/thecollaborative.uncc.edu/files/media/files/Clayton%20County%20GA%20School%20Referral%20Cooperative%20Agreement%20copy.pdf>, visited 11 August 2014.

<sup>42</sup> See Texas Senator Whitmire's bill, S.B. 1114, 83d Legi. Sess. (Tx 1114).

<sup>43</sup> South Carolina's Truancy Law, State Board Regulation 43-274.

<sup>44</sup> Stark County, Ohio Diversion Program, [www.starkcountyohio.gov](http://www.starkcountyohio.gov).

<sup>45</sup> J. L. Byer & J. Kuhn, *A Model Response to Truancy Prevention: The Louisville Truancy Court Diversion Project*, 54 *Juvenile and Family Court Journal* 1, p. 59–67 (2003).

<sup>46</sup> FLA. STAT. §1006.13 and FLA. STAT. §985.12.

individualized services),<sup>47</sup> Montgomery County Teen Court (eligible participants agree to have their case heard by a volunteer judge and a jury of their peers—a jury made up of high school student volunteers).<sup>48</sup>

Some of the tribal juvenile laws reviewed included the now disfavored sanction-based approach—using the juvenile court system to process truant youth. Others did not address truancy at all. See the tribal example in the following text.

## [28.2] Tribal and State Code/MOU Examples

### Sault Ste. Marie Tribal Code

#### CHAPTER 36: JUVENILE CODE

#### SUBCHAPTER VI: COMPULSORY SCHOOL ATTENDANCE

##### **36.601 School Enrollment Requirement.**

Except as excused under the state compulsory attendance law, any person having control [of] a tribal child living on the tribal lands shall enroll the child in school.

##### **36.602 Requirement to Attend School.**

Except as excused under the state compulsory attendance law, or under a school policy governing school attendance, any person having control of a tribal child living on the tribal lands age six (6) or older shall cause the child to attend the school in which the child is or should be enrolled.

##### **36.603 Truancy Prohibited.**

Truancy by a tribal child living on the tribal lands is prohibited.

##### **36.604 Enforcement Officers.**

- (1) Any Tribal Law Enforcement Officer or school attendance officer may enforce the provisions of this subchapter.
- (2) Any person authorized to enforce the provisions of this subchapter may stop and question any person upon reasonable belief that the person has violated this subchapter.

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<sup>47</sup> Shelby County Schools SHAPE MOU at [http://www.neglected-delinquent.org/sites/default/files/20101122\\_SHAPEMOU.pdf](http://www.neglected-delinquent.org/sites/default/files/20101122_SHAPEMOU.pdf).

<sup>48</sup> Montgomery County (MD) Teen Court available at [www.montgomerycountymd.gov/sao/other/TeenCourt.html](http://www.montgomerycountymd.gov/sao/other/TeenCourt.html) and [www.mdcca.org/mdcca-members/Montgomery-county-teen-court/](http://www.mdcca.org/mdcca-members/Montgomery-county-teen-court/), visited 22 September 2014.

- (3) If, during school hours, a person authorized to enforce this subchapter has probable cause to believe that a tribal child is truant, the person shall take the child into custody and transport the child to school and deliver the child to school authorities.

### **36.605 Cooperation with School.**

Each school is encouraged and authorized to contact the Tribal Law Enforcement Department on a daily basis and provide the names, ages and custodial information regarding truant tribal children for that day.

### **36.606 Enforcement Procedure.**

The Juvenile Division shall have jurisdiction over cases brought to enforce this subchapter. Proceedings shall be conducted in accordance with the provisions of subchapter V.

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### **Texas Senate Bill 1114 2013–2014 83rd Legislature**

SECTION 1. Article 45.058, Code of Criminal Procedure, is amended by adding Subsections (i) and (j) to read as follows:

- (i) If a law enforcement officer issues a citation or files a complaint in the manner provided by Article 45.018 for conduct by a child 12 years of age or older that is alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district, the officer shall submit to the court the offense report, a statement by a witness to the alleged conduct, and a statement by a victim of the alleged conduct, if any. An attorney representing the state may not proceed in a trial of an offense unless the law enforcement officer complied with the requirements of this subsection.
- (ii) Notwithstanding Subsection (g) or (g-1), a law enforcement officer may not issue a citation or file a complaint in the manner provided by Article 45.018 for conduct by a child younger than 12 years of age that is alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district.

SECTION 2. Section 25.0915, Education Code, is amended by adding Subsection (c) to read as follows:

- (c) A court shall dismiss a complaint or referral made by a school district under this section that is not made in compliance with Subsection (b).

**Florida Statutes 2014**

**Title XLVIII K-20 EDUCATION CODE**

**Chapter 1006 SUPPORT FOR LEARNING**

**1006.13 Policy of zero tolerance for crime and victimization.—**

- (1) It is the intent of the Legislature to promote a safe and supportive learning environment in schools, to protect students and staff from conduct that poses a serious threat to school safety, and to encourage schools to use alternatives to expulsion or referral to law enforcement agencies by addressing disruptive behavior through restitution, civil citation, teen court, neighborhood restorative justice, or similar programs. The Legislature finds that zero-tolerance policies are not intended to be rigorously applied to petty acts of misconduct and misdemeanors, including, but not limited to, minor fights or disturbances. The Legislature finds that zero-tolerance policies must apply equally to all students regardless of their economic status, race, or disability.

(Sections Omitted)

- (4)
  - (a) Each district school board shall enter into agreements with the county sheriff's office and local police department specifying guidelines for ensuring that acts that pose a serious threat to school safety, whether committed by a student or adult, are reported to a law enforcement agency.
  - (b) The agreements must include the role of school resource officers, if applicable, in handling reported incidents, circumstances in which school officials may handle incidents without filing a report with a law enforcement agency, and a procedure for ensuring that school personnel properly report appropriate delinquent acts and crimes.
  - (c) Zero-tolerance policies do not require the reporting of petty acts of misconduct and misdemeanors to a law enforcement agency, including, but not limited to, disorderly conduct, disrupting a school function, simple assault or battery, affray, theft of less than \$300, trespassing, and vandalism of less than \$1,000.
- (8) School districts are encouraged to use alternatives to expulsion or referral to law enforcement agencies unless the use of such alternatives will pose a threat to school safety.

**Title XLVII CRIMINAL PROCEDURE AND CORRECTIONS**

**Chapter 985 JUVENILE JUSTICE; INTERSTATE COMPACT ON JUVENILES**

**985.12 Civil citation.—**

- (1) There is established a juvenile civil citation process for the purpose of providing an efficient and innovative alternative to custody by the Department of Juvenile Justice for children who commit nonserious delinquent acts and to ensure swift and appropriate consequences. The department shall encourage and assist in the implementation and improvement of civil citation programs or other similar diversion programs around the state. The civil citation or similar diversion program shall be established at the local level with the concurrence of the chief judge of the circuit, state attorney, public defender, and the head of each local law enforcement agency involved. The program may be operated by an entity such as a law enforcement agency, the department, a juvenile assessment center, the county or municipality, or some other entity selected by the county or municipality. An entity operating the civil citation or similar diversion program must do so in consultation and agreement with the state attorney and local law enforcement agencies. Under such a juvenile civil citation or similar diversion program, any law enforcement officer, upon making contact with a juvenile who admits having committed a misdemeanor, may issue a civil citation and assess not more than 50 community service hours, and require participation in intervention services as indicated by an assessment of the needs of the juvenile, including family counseling, urinalysis monitoring, and substance abuse and mental health treatment services. A copy of each citation issued under this section shall be provided to the department, and the department shall enter appropriate information into the juvenile offender information system. Only first-time misdemeanor offenders are eligible for the civil citation or similar diversion program. At the conclusion of a juvenile's civil citation or similar diversion program, the agency operating the program shall report the outcome to the department. The issuance of a civil citation is not considered a referral to the department.
- (2) The department shall develop guidelines for the civil citation program which include intervention services that are based upon proven civil citation or similar diversion programs within the state.
- (3) Upon issuing such citation, the law enforcement officer shall send a copy to the county sheriff, state attorney, the appropriate intake office of the department, or the community service performance monitor designated by the department, the parent or guardian of the child, and the victim.
- (4) The child shall report to the community service performance monitor within 7 working days after the date of issuance of the citation. The work assignment shall be accomplished at a rate of not less than 5 hours per week. The monitor shall advise the intake office immediately upon reporting by the child to the monitor, that the child has in fact



reported and the expected date upon which completion of the work assignment will be accomplished.

- (5) If the child fails to report timely for a work assignment, complete a work assignment, or comply with assigned intervention services within the prescribed time, or if the juvenile commits a subsequent misdemeanor, the law enforcement officer shall issue a report alleging the child has committed a delinquent act, at which point a juvenile probation officer shall process the original delinquent act as a referral to the department and refer the report to the state attorney for review.
- (6) At the time of issuance of the citation by the law enforcement officer, such officer shall advise the child that the child has the option to refuse the citation and to be referred to the intake office of the department. That option may be exercised at any time before completion of the work assignment.

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### Clayton County Juvenile Justice Collaborative Cooperative Agreement <sup>49</sup>

#### **I. Purpose of Agreement**

This agreement is entered into between the [Juvenile Court], [Public School System], [Police Departments], [Department of Family and Children Services], [District Attorney], [Behavioral Health Services], and the [Department of Juvenile Justice] for the purpose of establishing a cooperative relationship between community agencies (hereinafter referred to as the Parties) involved in the handling of juveniles who are alleged to have committed a delinquent act on school premises. The Parties acknowledge that certain misdemeanor delinquent acts defined herein as the focused acts can be handled by the School System in conjunction with other Parties without the filing of a complaint in the Court. The Parties acknowledge that the commission of these focused acts does not require the finding that a student is a delinquent child and therefore not in need of treatment or supervision. The parties acknowledge that the law requires the Court to make a preliminary determination that a petition be certified in the best interest of the child and the community before it can be filed with the Court. The Parties acknowledge that the Court has the authority to give counsel and advice to a juvenile without the filing of a petition and to delegate such authority to public or private agencies.

The Parties acknowledge that the law expressly prohibits the detention of a student for punishment, treatment, [to] satisfy the demands of the victim, police or the community, [to] allow parents to avoid their legal responsibility, [to] provide more convenient administrative access to the child, and to facilitate further interrogation or investigation. The law allows for

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<sup>49</sup> Internal citations to state statutes omitted.

the detention of a student who is a flight risk, presents a risk of serious bodily injury, or requests detention for protection from imminent harm.

The Parties acknowledge and agree that decisions affecting the filing of a complaint against a student and whether to place restraints on a student and place a student in secure detention should not be taken lightly, and that a cooperative agreement delineating the responsibilities of each party when involved in making a decision to place restraints on a student and to file a complaint alleging the child is a delinquent child would promote the best interest of the student and the community.

The Parties acknowledge and agree that this Agreement is a cooperative effort among the public agencies named herein to establish guidelines for the handling of school related delinquent acts against public order which are defined herein as the focused acts. The Parties further acknowledge and agree that the guidelines contained herein are intended to establish uniformity in the handling of [a] student who has committed one of the focused acts as defined herein while simultaneously ensuring that each case is addressed on a case-by-case basis to promote a response proportional to the various and differing factors affecting each student's case. The parties acknowledge and agree that the manner in which each case or incident is handled by [School Resource Officers (SRO)], school administrator, and/or the Juvenile Court is dependent upon the many factors unique to each child that includes, but is not limited to, the child's background, present circumstances, disciplinary record, academic record, general demeanor and disposition toward others, mental health status, and other factors. Therefore, the parties acknowledge that students involved in the same incident or similar incidents may receive different and varying responses depending on the factors and needs of each student.

Finally, the Parties acknowledge that a Cooperative Agreement has previously been entered into by the [Juvenile Court], [Department of Juvenile Justice], [Department of Family and Children Services], and [Behavioral Health Services] to coordinate intake services to ensure that children who do not present a high risk to re-offend are not detained using a Detention Screening Instrument (DSI) and that children presenting a low to medium risk are returned home or appropriately placed in a non-secured or staff-secured setting. The Parties acknowledge that the prior Agreement remains in full force and effect and is interrelated to this Agreement as part of the Juvenile Detention Alternative Initiative and Collaborative of Clayton, County, Georgia.

## **II. Definitions**

As used in this Agreement, the term:

A. "Student" means a child under the age of 17 years.

- B. “Juvenile” means a child under the age of 17 years, which term is used interchangeably with “Student.”
- C. Omitted
- D. “Intake” means the division of the Juvenile Court responsible for making [and] reviewing complaints to determine which complaints may be handled informally and by diversion, which complaints may be forwarded to the District Attorney’s Office for a petition to be drawn, and which juveniles should be detained in the [Regional Youth Detention Center], or placed at another location, or returned home.
- E. “Detention Screening Instrument” or known also as “DSI” means a risk assessment instrument used by Intake to determine if the juvenile should be detained or released. The DSI measures risk according to the juvenile’s present offense, prior offenses, prior runaways or escapes, and the juvenile’s current legal status such as probation, commitment, etc.
- F. “Detention Assessment Questionnaire” or known also as “DAQ” means a document use[d] to determine if the juvenile presents any mental health disorders, aggravating circumstances, or mitigating circumstances. The DAQ assists Intake in making a final decision regarding detention or release.
- (H. and I. Omitted)
- J. “Bully” is a student who has three (3) times in a school year willfully attempted or threatened to inflict injury on another person, when accompanied by an apparent present ability to do so or has intentionally displayed force such as would give the victim reason to fear or expect immediate bodily harm.
- K. “Focused Acts” are misdemeanor type delinquent acts involving offenses against public order including affray [a noisy fight between two or more people in a public place], disrupting public school, disorderly conduct, obstruction of police (limited to acts of truancy where a student fails to obey and officer’s command to stop or not leave campus), and criminal trespass (not involving damage to property).

### **III. Terms of Agreement**

#### **A. Warning Notice and Referral Prerequisite to Complaint in Cases Where a Student has Committed a Focused Act**

Misdemeanor type delinquent acts involving offenses against public order including affray, disrupting public school, disorderly conduct, obstruction of police (limited to acts of truancy where a student fails to obey an officer’s command to stop or not leave campus), and criminal trespass (not involving damage to property) shall not result in the filing of a

complaint alleging delinquency unless the student has committed his or her third or subsequent similar offense during the school year and the Principal or designee has reviewed the behavior plan with the appropriate school and/or system personnel to determine appropriate action. In accordance with O.C.G.A. §20-2-735, the school system's Student Codes of Conduct will be the reference documents of record. The Parties agree that the response to the commission of a focused act by a student should be determined using a system of graduated sanctions, disciplinary methods, and/or educational programming before a complaint is filed with the Juvenile Court. The parties agree that a student who commits one of the focused acts must receive a Warning Notice and a subsequent referral to the School Conflict Diversion Program before a complaint may be filed in the Juvenile Court. An SRO shall not serve a Warning Notice or make a referral to the School Conflict Diversion Program without first consulting with his or her supervisor if the standard operating procedures of the SRO Program of which the SRO belongs requires consultation.

1. **First Offense.** A student who commits one of the focused acts may receive a Warning Notice that his or her behavior is a violation of the criminal code and school policy, and that further similar conduct will result in a referral to the Juvenile Court to attend a diversion program. The SRO shall have the discretion not to issue a Warning Notice and in the alternative may admonish and counsel or take no action.
2. **Referral to School Conflict Diversion Program.** Upon the commission of a second or subsequent focused act in that or a subsequent school year, the student may be referred to Intake to require the student and parent to attend the School Conflict Diversion Program, Mediation Program, or other program sponsored by the Court. However, a student who has committed a second "bullying" act shall be referred to the School Conflict Diversion Program to receive law related education and conflict resolution programming, and may also be required to participate in the mediation program sponsored by the Court for the purpose of resolving the issues giving rise to the acts of aggression and to hold the student accountable to the victim(s). Intake shall make contact with the parent of the child within ten (10) business days of receipt of the notice from the [SRO] or the school to schedule the parent and child to attend the School Conflict Diversion Program, or other program of the Court appropriate to address the student's conduct. Intake shall forward to the school where the child attends a confirmation of the child's successful participation in the diversion program. A child's failure to attend shall be reported to the [SRO] to determine if a complaint should be filed or other disciplinary action taken against the child.
3. **Complaint.** A student receiving his or her third or subsequent delinquent offense against public order may be referred to the Court by the filing of a complaint. If the student has attended a diversion program sponsored by the Court in that year or any previous school year and the student has committed a similar focused act, the student may receive a

Warning Notice warning that the next similar act against the public order may result in a complaint filed with the juvenile court. A student having committed his or her third “bullying” act shall be referred to the Juvenile Court on a juvenile complaint and the Court shall certify said petition provided probable cause exists and if adjudicated shall proceed to determine if said student is delinquent and in need of supervision. The school system shall proceed to bring the student before a tribunal hearing and if found to have committed acts of bullying shall in the least, with consideration given to special education laws expel said child from the school and place in an alternative educational setting, unless expulsion from the school system is warranted. All acts of bullying shall be reported by school personnel and addressed immediately to protect the victims of said acts of bullying.

(B. Omitted)

### **C. Treatment of Elementary Age Students**

Any situation involving violence to the extent that others are placed at risk of serious bodily injury shall constitute an emergency and warrant immediate action by police to protect others and maintain school safety. O.C.G.A. §15-11-150 et seq. sets forth procedures for determining if a juvenile is incompetent [and] also provides for a mechanism for the development and implementation of a competency plan for treatment, habilitation, support, [and] supervision for any juvenile who is determined not to be mentally competent to participate in an adjudication or disposition hearing. Generally, juveniles of elementary age do not possess the requisite knowledge of the nature of court proceedings and the role of the various players in the courtroom to assist his or her defense attorney and/or grasp the seriousness of juvenile proceedings, including what may happen to them at the disposition of the case.

The parties acknowledge that the Court will make diligent efforts to avoid the detention of juveniles who may be mentally incompetent upon reasonable suspicion, unless they pose a high risk of serious bodily injury to others. Furthermore, it is a fundamental best practice of detention decision making to prohibit the intermingling of elementary age juveniles from adolescent youth and to treat elementary age students according to their age and level of development. Furthermore, the parties acknowledge that the commission of a delinquent act does not necessitate the treatment of the child as a delinquent, especially elementary age juveniles in whom other interventions may be made available within the school and/or other agencies to adequately respond to and address the delinquent act allegedly committed by the juvenile.

The Court shall make its diversion, intervention, and prevention programs available to the juvenile without the filing of a complaint upon a referral from the school social worker. Intake shall respond to any and all referrals made by elementary school staff within 24 hours of receipt of the referral. Any delay shall be communicated to the official making the referral

within 24 hours with an explanation for the delay. Intake shall respond no later than 72 hours or the matter shall be referred to the Intake Supervisor or the Chief Probation Officer. In the event an elementary age student is taken into custody and removed from the school environment for the safety of others, the decision to detain said child shall be made by the Intake Officer pursuant to law.

The parties acknowledge that taking a child into protective custody is not a detention decision, which is a decision solely reserved for a juvenile judge or his or her intake officer and therefore requiring law enforcement to immediately contact the Court to determine if the child should be detained or released and under what conditions, if any, if so released.

## 28.3] Tribal and State Code/MOU Commentary

Truants Processed in Tribal Juvenile Court Family in Need of Services (FINS-type Process). The Sault Ste. Marie statute contains a subchapter making school attendance compulsory and prohibiting truancy. Under the Sault Ste. Marie statute at Section 36.501 it is “a violation of this Chapter for a child to . . . commit a violation of subchapter . . . VI.” Subchapter VI at Section 36.603 prohibits truancy: “Truancy by a tribal child living on the tribal lands is prohibited.” The Sault Ste. Marie statute at Section 36.502 (1) further adopts the 1989 BIA Tribal Juvenile Justice Code requirements for making a request or filing a petition with the Juvenile Court:

“Requests stating that a *juvenile has committed a status offense* (emphasis added) pursuant to this subchapter may be submitted. . . . A request stating that a child is habitually and without justification absent from school may also be submitted by an authorized representative of a local school board or governing authority of a private school.”

Section 36.606 brings truancy within the status offense jurisdiction of the Juvenile Court (as opposed to the “juvenile offender” jurisdiction): “The Juvenile Division shall have jurisdiction over cases brought to enforce this subchapter. Proceedings shall be conducted in accordance with the provisions of subchapter V.” Subchapter V, entitled “Status Offenses,” sets out the court process of youth alleged to be status offenders.

**Children under 12/Conduct on School Property—Complaints Barred from Processing in Juvenile Court.** The state of Texas, under its amended Code of Criminal Procedure and Education Code, has prohibited the juvenile court processing of complaints filed against youth under twelve where the conduct is alleged to have occurred on school property:

“. . . a law enforcement officer may not issue a citation or file a complaint . . . for conduct by a child younger than 12 years of age that is alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district.”

“A court shall dismiss a complaint or referral made by a school district . . . that is not made in compliance with [this section].”

**School Zero-Tolerance Policies Do Not Include “Petty Acts of Misconduct.”** The State of Florida has amended its zero tolerance for crime policy to not require the reporting of petty acts of misconduct and misdemeanors to law enforcement agencies, and to encourage schools to use alternatives to address disruptive behavior such as restitution, civil citation, teen court, and restorative justice programs. See Section 1006.13 in the preceding text.

**Use of “Juvenile Civil Citation Process.”** The state of Florida has also established a “civil citation process” that functions somewhat like a traffic ticket for youth. The program may be operated by a selected agency in coordination with the state attorney and local law enforcement agencies. Under this process law enforcement officers are empowered to issue citations to first-time misdemeanor offenders. The youth must admit to committing the misdemeanor and will be assessed up to fifty community service hours and be required to participate in intervention services as indicated by an assessment (including family counseling, urinalysis monitoring, and substance abuse and mental health treatment services). Copies of the citation are forwarded to the Juvenile Department. If the youth fails to report for an assignment, complete an assignment, or comply with intervention services, or if he or she commits a subsequent misdemeanor, the law enforcement officer will issue a report that the youth has committed a delinquent act. This report will be forwarded to the state attorney for the possible filing of a juvenile delinquency petition with the juvenile court. See Section 985.12 in the preceding text.

**Use of “Juvenile Justice Collaborative Agreement.”** The Clayton County Juvenile Justice Collaborative Cooperative Agreement is an agreement among that county’s juvenile court, public school system, police departments, department of family and children services, district attorney, behavioral health services, and department of juvenile justice. The agreement governs how youth who are alleged to have committed delinquent acts on school premises are handled. The targeted conduct includes what are called “focused acts” including affray (noisy public fights), disrupting public school, disorderly conduct, obstruction of police (truancy and failure to obey law enforcement officer), and criminal trespass (with no property damage). The agreement sets up a warning and referral process for first- and second-time offenders. Students experience a system of graduated sanctions, disciplinary methods, and/or educational programming before a complaint is filed with the juvenile court. This includes possible referral to a school conflict diversion program. See excerpts from the Clayton County Juvenile Justice Collaborative Cooperative Agreement in the preceding text.

## [28.4] Exercises

The following exercises are meant to guide you in developing the truancy sections of the tribal juvenile code and any interagency or intergovernmental agreements.

- Find and examine your juvenile code’s provisions governing truancy.
  - How is truancy defined?
  - What school, law enforcement, and/or court process is the youth subject to?
  - If the youth is processed in juvenile court which disposition alternatives is he or she subject to?
  - Are truants prohibited from being processed in juvenile court altogether?
- Make a list of the pros and cons of working with the school to exhaust its disciplinary and intervention process before cases might be allowed to come to the juvenile court.
- Make a list of the pros and cons of establishing a law enforcement civil citation process that diverts youth to a precourt diversion program (e.g., teen court).
- Make a list of the services and diversion programs that should be developed and/or contracted for in cooperation with the school and/or the juvenile court for truant youth and their families.

### Read and Discuss\*

**What is “truancy”? Who is at fault? How can you stop it?**

Truancy is a symptom of a range of underlying issues. These issues often relate to academic achievement:

- A teenager held back in middle school who sees no point in attending;
- An undiagnosed or mishandled special education need;
- A child who is failing and sees no hope;
- A child who is bullied or sees no social value in attending school.

Or, external barriers may block a child from attending:

- A lack of safe transportation to school or safety at school;
- The need to care for younger children or older relatives;
- Asthma or other medical conditions that have resulted in an extended absence; or



- A school that has not effectively communicated attendance policies and requirements with non-English-speaking parents.

Finally, truancy may be a symptom of larger breakdowns in the youth's family life such as substance abuse, mental illness, or domestic violence.

\*Taken from the ABA article by Claire Shubick, *What Social Science Tells Us about Youth Who Commit Status Offenses: Practice Tips for Attorneys*.



# Chapter 29: Trauma-Sensitive Statutory Provisions

## [29.1] Overview

In 2013 the [Indian Law and Order Commission](#) (ILOC) issued the report,<sup>50</sup> [A Roadmap For Making Native America Safer](#), based upon its own hearings, and based in part upon hearings before the Attorney General's National Task Force on Children Exposed to Violence.<sup>51</sup> The ILOC Report found that nationally, Indian youth are vulnerable and traumatized. They experience poverty, low graduation rates, a shorter life expectancy, and higher rates of cigarette use, binge drinking, and illegal drug use. They experience high rates of abuse and neglect and are also more likely to be subject to violent victimization. They are more likely to be placed in foster care. They have high rates of early, unexpected, and traumatic death. They have greater exposure to violence and loss and are at greater risk for experiencing trauma. Native women, including young women, experience high rates of sexual assault and domestic violence. Finally, Indian youth are overrepresented in the federal and state juvenile justice systems and receive the most severe dispositions.

The ILOC Report concluded that federal and state justice systems are making matters worse by subjecting Indian country youth to complex and inadequate regimes. The federal system, for example, has no specialized juvenile division tailored to handling juveniles. Very high percentages of tribal youth end up in federal detention, but these facilities lack any secondary education services. States also have significant and often disproportionate numbers of Indian country youth with no clear way of tracking them. Finally, at the tribal level, the U.S. attorneys often decline to prosecute juvenile cases leaving tribes with little infrastructure and funding to handle juveniles (e.g., housing, mental health services).

Given a review of publicly available tribal codes, it appears that when tribal courts do handle juvenile matters they lack an array of trauma-sensitive policy and legal approaches, trauma training for juvenile justice system actors, and access to professional services, including psychologists, psychiatrists, and others who are trained in providing the necessary assessments and treatment services.

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<sup>50</sup> *A Roadmap for Making Native America Safer, Report to the President and Congress of the United States*, Indian Law and Order Commission (November 2013), available at <http://www.aisc.ucla.edu/iloc/> and <http://www.indian.senate.gov/hearing/oversight-hearing-receive-testimony-indian-law-and-order-commission-report-roadmap-making>, visited 29 August 2014.

<sup>51</sup> Attorney General's National Task Force on Children Exposed to Violence, available at <http://www.justice.gov/defendingchildhood/aian.html> and <http://www.justice.gov/defendingchildhood/aian-hearings.html>, visited 20 November 2014.

Symptoms of trauma often include smoking, use of alcohol and/or drugs, and/or running away. Tribal juvenile court judges and justice system personnel may see juvenile offenses or even crimes in this conduct. Parents, teachers, and community members may perceive that youth who have trouble concentrating and learning, who are inactive, overweight, sexually promiscuous, or who are anxious, depressed, or suicidal are the “troubled or bad kids.” What no one may see is that traumatized youth are experiencing numbing and avoidance, have increased anxiety or emotional arousal, have mood and memory problems, are reexperiencing intrusive memories, and may overreact to perceived threats and have trouble discriminating between safe and dangerous situations.<sup>52</sup>

Tribal youth advocates and juvenile justice system reformers make a number of recommendations for protecting and healing traumatized youth. These include the following:

- Provide training for tribal leaders, judges, justice system personnel, and service providers on youth and trauma;
- Mandate tribal court/judicial leadership in developing and coordinating trauma-focused programs;
- Take a hard look at the local provision of mental health services;
- Take a hard look at the local provision of respite care/housing (planned, short-term and time-limited breaks) for youth;
- Be careful not to overlook and foster existing community activities and programs that enhance resilience such as ceremonies, recreation programs, arts, mentorships, and vocational programs;
- Consider developing formal diversion programs such as family conferencing, mediation, wellness court, peacemaking court, teen court, etc.;
- Consider the establishment of special units and specialists in social services and/or behavioral health departments such as “family advocates” and “family system navigators” who focus on a justice system involving youth with mental health issues;
- Ensure effective treatments for youth, including violent youth, with significant trauma histories;
- Provide training for judges and attorneys to improve justice system interactions with youth and their families who have experienced trauma;
- Review existing court process and practice to reduce potential traumatization or retraumatization (reduce trauma triggers);

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<sup>52</sup> Characterizations of state policies and laws are taken from Jessica Feierman & Lauren Fine, *Trauma and Resilience, a New Look at Legal Advocacy for Youth in the Juvenile Justice and Child Welfare Systems*, Philadelphia, Pennsylvania Juvenile Center (2014).

- Require that trauma information be used appropriately at various stages in the juvenile and criminal justice systems to support diversion, the use self-defense claims, and as mitigating evidence in transfer, disposition, and sentencing;
- Mandate that tribal judges consider trauma when considering the often-conflicting duties to public safety and the best interests of youth;
- Ensure that trauma is accounted for in competency determinations and assessments regarding the voluntariness of confessions;
- Prohibit transfer of traumatized youth to adult criminal court; if allowed, amend criminal laws/procedures to mitigate sentencing due to trauma;
- Ensure that juvenile court dispositions provide treatment and do not inflict further harm to youth;
- Prohibit the use of “probation conditions” and “contempt orders” for traumatized youth who would likely violate conditions and where such violations would result in secure detention and retraumatization; and
- If traumatized youth are to be placed in secure detention, mandate that the judge consider the availability of mental health treatment in determining placement.

## [29.2] State and Tribal Code Examples—Purposes

### 2013 Wyoming Statutes

#### TITLE 14—CHILDREN

#### CHAPTER 6—JUVENILES

#### ARTICLE 2—JUVENILE JUSTICE ACT

#### 14-6-201. Definitions; short title; statement of purpose and interpretation.

- (c) This act shall be construed to effectuate the following public purposes:
- (ii) Consistent with the best interests of the child and the protection of the public and public safety:
    - (a) To promote the concept of punishment for criminal acts *while recognizing and distinguishing the behavior of children who have been victimized or have disabilities, such as serious mental illness that requires treatment or children with a cognitive impairment that requires services;*

**The Cherokee Code of the Eastern Band of the Cherokee Nation**

**Chapter 7A - JUVENILE CODE**

**ARTICLE I. - IN GENERAL**

**Sec. 7A-1. Purpose.**

This chapter shall be interpreted and construed so as to implement the following purposes and policies:

- (a) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that *juveniles* may remain in their own homes and *may be treated through community-based services* when this approach is consistent with the protection of the public safety;
- (b) Omitted
- (c) To develop a disposition in each juvenile case that reflects *consideration of the facts, the needs and limitations of the child*, the strengths and weaknesses of the family, and the protection of the public safety.

**THE HOPI CHILDREN'S CODE**

**Chapter II General**

**A. Purpose**

It is the purpose of the Hopi Children's Code to:

(Note: Certain definitions omitted)

- 3. *provide for the care, protection, mental and physical development of the children* of the Hopi Tribe;
- 4. *ensure that a program of supervision, care, and rehabilitation will be available to those children* who come within the provisions of the code;
- 5. achieve the forgoing purposes in a family environment whenever possible separating the minor from his parents only when no alternative disposition is suitable to the child's welfare or in the tribal interest of public safety;

## Leech Lake Band of Ojibwe Judicial Code

### Title 4: Juvenile Justice Code

#### 4-1 Short Title, Purpose and Definitions

##### 4-1 B. Purpose

The Juvenile Justice Code shall be liberally interpreted and construed to fulfill the following expressed purposes:

1. To preserve and retain the unity of the family whenever possible and *to provide for the care, protection, and wholesome mental and physical development of children* coming within the provisions of this code;
2. To remove children committing juvenile offenses, the legal consequences of criminal behavior and to *substitute* therefore *a program of supervision, care, and rehabilitation* consistent with the protection of the Leech Lake community;

(Note: Certain definitions were omitted)

5. To *provide a continuum of services for children and their families* from prevention to residential treatment, with *emphasis* whenever possible *on* prevention, early intervention and *community-based alternatives*.

## [29.3] State and Tribal Code Examples—Determining Competence

### VERMONT JUVENILE PROCEEDINGS STATUTE & RULES

#### VERMONT RULES FOR FAMILY PROCEEDINGS

##### Rule 1. Procedure for Juvenile Delinquency Proceedings 8/12/13

- (i) Determination of Competence to Be Subject to Delinquency Proceedings
  - (1) **In general.** —The issue of a child’s competence to be subject to delinquency proceedings may be raised by motion of any party, or upon the court’s own motion, at any stage of the proceedings.
  - (2) **Mental Examination.**—*Competence shall be determined through a mental examination* conducted by a psychologist or psychiatrist selected by the court. In addition to the factors ordinarily considered in determining competence in criminal proceedings, the examiner shall consider the following appropriate circumstances of the child:
    - (A) The age and developmental maturity of the child;

- (B) *whether the child suffers from mental illness* or a developmental disorder including mental retardation;
  - (C) whether the child has any other disability that affects the child's competence; and
  - (D) any other factor that affects the child's competence.
- (a) The child, or the state shall have the right to obtain an independent examination by an expert.
- (3) **Report.**—The *report of an examination* ordered by the court or obtained by the child or the state is to be *sealed and filed in the juvenile court*, with copies transmitted to counsel and available to the parties for review.
  - (4) **Statements Made in the Course of Examination.**—*No statement made in the course of an examination by the child examined*, whether or not the child has consented to, or obtained, the examination, *shall be admitted as evidence* in the delinquency proceedings for the purpose of proving the delinquency alleged *or for the purpose of impeaching the testimony of the child* examined.
  - (5) **Hearing.**—The *issue of competence shall be determined by the court after a hearing* at which all parties are entitled to present evidence. The hearing shall be held as soon as practicable after the reports of the examination or examinations are filed.
  - (6) **Determination of Competence.**—If the court determines that the child is competent to be subject to delinquency proceedings, the proceeding shall continue without delay.
  - (7) **Determination of Incompetence.**—*If the court determines that the child is not competent to be subject to delinquency proceedings, the court shall dismiss the petition without prejudice*; provided that if the child is found incompetent by reason of developmental disabilities or mental retardation; the dismissal may be with prejudice.



## [29.4] State and Tribal Code Examples—Judicial Branch Leadership

2012 Connecticut General Statutes

[Title 46b - Family Law](#)

Chapter 815t—Juvenile Matters

**Section 46b-121k—Programs, services and facilities for juvenile offenders.**

- (a)
- (1) The Judicial Branch shall develop constructive programs for the prevention and reduction of delinquency and crime among juvenile offenders. To develop such programs, the executive director of the Court Support Services Division within the Judicial Branch shall cooperate with other agencies to encourage the establishment of new programs and to provide a continuum of services for juvenile offenders who do not require secure placement, including, but not limited to, juveniles classified pursuant to the risk assessment instrument described in section 46b-121i, as those who may be released with structured supervision and those who may be released without supervision. When appropriate, the Judicial Branch shall coordinate such programs with the Department of Children and Families and the Department of Mental Health and Addiction Services.
  - (2) The programs shall be tailored to the type of juvenile, including the juvenile's offense history, age, maturity and social development, gender, mental health, alcohol dependency or drug dependency, need for structured supervision and other characteristics, and shall be culturally appropriate, trauma-informed and provided in the least restrictive environment possible in a manner consistent with public safety. The Judicial Branch shall develop programs that provide: (A) Intensive general education, with an individualized remediation plan for each juvenile; (B) appropriate job training and employment opportunities; (C) counseling sessions in anger management and nonviolent conflict resolution; (D) treatment and prevention programs for alcohol dependency and drug dependency; (E) mental health screening, assessment and treatment; (F) sexual offender treatment; and (G) services for families of juveniles.
- (b) The Judicial Branch may contract to establish regional secure residential facilities and regional highly supervised residential and nonresidential facilities for juveniles referred by the court. Such facilities shall operate within contracted-for capacity limits. Such facilities shall be exempt from the licensing requirements of section 17a-145.

- (c) The Judicial Branch shall collaborate with private residential facilities providing residential programs and with community-based nonresidential postrelease programs.
- (d) The Judicial Branch, as part of a publicly bid contract for an alternative incarceration program, may include a requirement that the contractor provide for space necessary for juvenile probation offices and other staff of the Court Support Services Division to perform their duties.
- (e) Any program developed by the Judicial Branch that is designed to prevent or reduce delinquency and crime among juvenile offenders shall be gender specific, as necessary, and shall comprehensively address the unique needs of a targeted gender group.
- (f) The Judicial Branch shall consult with the Commission on Racial and Ethnic Disparity in the Criminal Justice System established pursuant to section 51-10c to address the needs of minorities in the juvenile justice system.

**(1989) BIA Tribal Juvenile Justice Code**  
**1-5 RELATIONS WITH OTHER AGENCIES**

**1-5 A. Cooperation and Grants**

The juvenile court is authorized to cooperate fully with any federal, state, tribal, public, or private agency in order to participate in any diversion, rehabilitation, or training program(s) and to receive grants-in-aid to carry out the purposes of this code. This authority is subject to the approval of the tribal council if it involves an expenditure of tribal funds.

(1-5 B. Omitted)

**1-5 C. Contracts**

The juvenile court may negotiate contracts with tribal, federal, or state agencies and/or departments on behalf of the tribal council for the care and placement of children whose status is adjudicated by the juvenile court subject to the approval of the tribal council before the expenditure of tribal funds;

**1-5 D. Transfers from Other Courts**

The juvenile court may accept or decline transfers from other states or tribal courts involving alleged delinquent children or alleged status offenders for the purposes of adjudication and/or disposition.

## [29.5] State and Tribal Code Examples—Special Unit; Advocates and Navigators

### Colorado Revised Statutes

#### TITLE 27. BEHAVIORAL HEALTH—MENTAL HEALTH

#### ARTICLE 69. FAMILY ADVOCACY—MENTAL HEALTH—JUVENILE JUSTICE PROGRAMS

##### 27-69-101 Legislative declaration

- (1) The general assembly hereby finds and declares that:
  - (a) Colorado families and youth have difficulties navigating the mental health, physical health, substance abuse, developmental disabilities, education, juvenile justice, child welfare, and other state and local systems that are compounded when the youth has a mental illness or co-occurring disorder;
  - (b) Preliminary research demonstrates that family advocates increase family and youth satisfaction, improve family participation, and improve services to help youth and families succeed and achieve positive outcomes. One preliminary study in Colorado found that the wide array of useful characteristics and valued roles performed by family advocates, regardless of where they are located institutionally, provided evidence for continuing and expanding the use of family advocates in systems of care.
  - (c) Input from families, youth, and state and local community agency representatives in Colorado demonstrates that family advocates help families get the services and support they need and want, help families to better navigate complex state and local systems, improve family and youth outcomes, and help disengaged families and youth to become engaged families and youth;
  - (d) State and local agencies and systems need to develop more strengths-based, family-centered, individualized, culturally competent, and collaborative approaches that better meet the needs of families and youth;
  - (e) A family advocate helps state and local agencies and systems adopt more strengths-based-targeted programs, policies, and services to better meet the needs of families and their youth with mental illness or co-occurring disorders and improve outcomes for all, including families, youth, and the agencies they utilize;

- (f) There is a need to demonstrate the success of family advocates in helping agencies and systems in Colorado to better meet the needs of families and youth and help state and local agencies strengthen programs.
- (2) It is therefore in the state's best interest to establish demonstration programs for system of care family advocates for mental health juvenile justice populations who navigate across mental health, physical health, substance abuse, developmental disabilities, juvenile justice, education, child welfare, and other state and local systems to ensure sustained and thoughtful family participation in the planning processes of the care for their children and youth.

### **27-69-102 Definitions**

As used in this article, unless the context otherwise requires:

- (1) "Co-occurring disorders" means disorders that commonly coincide with mental illness and may include, but are not limited to, substance abuse, developmental disabilities, fetal alcohol syndrome, and traumatic brain injury.
- (2) "Demonstration programs" means programs that are intended to exemplify and demonstrate evidence of the successful use of family advocates in assisting families and youth with mental illness or co-occurring disorders.
- (3) "Division of criminal justice" means the division of criminal justice created in section 24-33.5-502, C.R.S., in the department of public safety.
- (4) "Family advocacy coalition" means a coalition of family advocates or family advocacy organizations working to help families and youth with mental health problems, substance abuse, developmental disabilities, and other co-occurring disorders to improve services and outcomes for youth and families and to work with and enhance state and local systems.
- (5) "Family advocate" means an individual who has been trained to assist families in accessing and receiving services and support. Family advocates are usually individuals who have raised or cared for children and youth with mental health or co-occurring disorders and have worked with multiple agencies and providers, including mental health, physical health, substance abuse, juvenile justice, developmental disabilities, and other state and local systems of care.
- (6) "Legislative oversight committee" means the legislative oversight committee for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems, created in section 18-1.9-103, C.R.S.

- (7) “Partnership” means a relationship between a family advocacy organization and another entity whereby the family advocacy organization works directly with another entity for oversight and management of the family advocate and family advocacy demonstration program, and the family advocacy organization employs, supervises, mentors, and provides training to the family advocate.
- (8) “System of care” means an integrated network of community-based services and support that is organized to meet the challenges of youth with complex needs, including, but not limited to, the need for substantial services to address areas of developmental, physical, and mental health, substance abuse, child welfare, and education and involvement in or being at risk of involvement with the juvenile justice system. In a system of care, families and youth work in partnership with public and private organizations to build on the strengths of individuals and to address each person’s cultural and linguistic needs so services and support are effective.
- (9) “Task force” means the task force for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems in Colorado, created in section 18-1.9-104, C.R.S.
- (10) “Unit” means the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse.

**27-69-103. Demonstration programs established**

There are hereby established demonstration programs for system of care family advocates for mental health juvenile justice populations that shall be implemented and monitored by the division of mental health unit, with input, cooperation, and support from the division of criminal justice, the task force, and family advocacy coalitions.

**27-69-104. Program scope—rules**

- (1) The unit shall promulgate rules and standards, after consultation with family advocacy coalitions and other stakeholders, for family advocacy mental health juvenile justice programs for system-of-care family advocates and family systems navigators for mental health juvenile justice populations. The programs shall:
  - (a) Focus on youth with mental illness or co-occurring disorders who are involved in or at risk of involvement with the juvenile justice system and be based upon the families’ and youths’ strengths; and

- (b) Provide navigation, crisis response, integrated planning, transition services, and diversion from the juvenile justice system for youth with mental illness or co-occurring disorders.
- (2) The unit shall provide technical assistance and coordination of family advocacy mental health juvenile justice programs throughout the state that provide system-of-care family advocates and family systems navigators for mental health juvenile justice populations with support to implement and sustain programs that best meet the needs of youth, families, and communities.
- (3) Key components of the family advocacy mental health juvenile justice programs for system-of-care family advocates and family systems navigators for mental health juvenile justice populations shall include:
- (a) Coordination with the key stakeholders involved in the local community to ensure consistent and effective collaboration. This collaboration may include, but need not be limited to, a family advocacy organization, representatives of the juvenile court, the probation department, the district attorney's office, the public defender's office, a school district, the division of youth corrections within the department of human services, a county department of social or human services, a local community mental health center, and a regional behavioral health organization and may include representatives of a local law enforcement agency, a county public health department, a substance abuse program, a community centered board, a local juvenile services planning committee, and other community partners;
  - (b) Services to youth with mental illness or co-occurring disorders who are involved in or at risk of involvement with the juvenile justice system and other state and local systems;
  - (c) Policies concerning the work of family advocates or family systems navigators that include:
    - I. Experience and hiring requirements;
    - II. The provision of appropriate training; and
    - III. A definition of roles and responsibilities; and
  - (d) Services provided by system-of-care family advocates or family systems navigators for mental health juvenile justice populations, which services shall include:
    - I. Strengths, needs, and cultural assessment;

- II. Navigation and support services;
- III. Education programs related to mental illness, co-occurring disorders, youth and family involvement in the system of care, the juvenile justice system, and other relevant systems;
- IV. Cooperative training programs for family advocates or family systems navigators and for staff, where applicable, of mental health, physical health, substance abuse, developmental disabilities, education, child welfare, juvenile justice, and other state and local systems related to the role and partnership between the family advocates or family systems navigators and the systems that affect youth and their family;
- V. Integrated crisis response services and crisis and transition planning;
- VI. Access to diversion and other services to improve outcomes for youth and their families;
- VII. Other services as determined by the local community; and
- VIII. Coordination with the local community mental health center.

**27-69-105. Evaluation and reporting**

- (a) As determined by the unit, in consultation with family advocacy programs, each integrated system-of-care family advocacy program for mental health juvenile justice populations shall forward data to the unit, including:
  - (a) System utilization outcomes, including, but not limited to, available data on services provided related to mental health, physical health, juvenile justice, developmental disabilities, substance abuse, child welfare, traumatic brain injuries, school services, and co-occurring disorders;
  - (b) Youth and family outcomes, related to, but not limited to, mental health, substance abuse, developmental disabilities, juvenile justice, and traumatic brain injury issues;
  - (c) Family and youth satisfaction and assessment of family advocates or family systems navigators;
  - (d) Process and leadership outcomes, including, but not limited to, measures of partnerships, service processes and practices among partnering agencies, leadership indicators, and shared responses to resources and outcomes; and
  - (e) Other outcomes, including, but not limited to, identification of the cost avoidance or cost savings, if any, achieved by the demonstration program, the applicable

outcomes achieved, the transition services provided, and the service utilization time frames.

**(1989) BIA Tribal Juvenile Justice Code**  
**1-6 JUVENILE COURT PERSONNEL**

**1-6 B. Juvenile Counselor/Juvenile Probation Officer**

**1. Appointment**

The court shall appoint juvenile counselor(s) or juvenile probation officer(s) to carry out the duties and responsibilities set forth in this code. The chief judge of the tribal court shall certify annually to the tribal council the number of qualified juvenile counselor(s) or juvenile probation officer(s) needed to carry out the purpose of this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled “juvenile counselors” or “juvenile probation officers” or any other title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

**2. Qualifications**

The juvenile counselor must have an educational background and/or prior experience in the field of delivering social services to youth.

**3. Resource Development**

The juvenile court counselor shall identify and develop resources on the reservation, in conjunction with the juvenile court and the tribal council, to enhance each tribal child’s potential as a viable member of the tribal community.

**4. Duties:**

- a. Make investigations as provided in this code or as directed by the court;
- b. Make reports to the court as provided in this code or as directed by the juvenile court;
- c. Conduct informal adjustments;
- d. Provide counseling services;
- e. Perform such other duties in connection with the care, custody, or transportation of children as the court may require.

**5. Prohibited Duties**



The juvenile counselor shall not be employed as or be required to perform the duties of a prosecutor, juvenile presenter, or law enforcement official.

(Sections Omitted)

#### **1-6 D. Additional Court Personnel**

The court may set qualifications and appoint additional juvenile court personnel such as guardians ad litem, court appointed special advocates (CASAs), juvenile advocates, and/or referees whenever the court decides that it is appropriate to do so.

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### **Leech Lake Band of Ojibwe Judicial Code**

#### **[Title 4: Juvenile Justice Code](#)**

#### **4-5 Juvenile Court Personnel**

#### **4-5 B. Juvenile Service Coordinator**

##### **1. Appointment**

The court may appoint Juvenile Service Coordinator(s) to carry out the duties and responsibilities set forth in this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled “juvenile counselors,” “juvenile truancy specialists,” “juvenile caseworkers,” or “juvenile probation officers,” or any other title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

##### **2. Duties**

- (a) Make investigations as provided in this code or as directed by the court;
- (b) Make reports to the court as provided in this code or as directed by the juvenile court;
- (c) Conduct informal adjustments;
- (d) Provide referrals for counseling services;
- (e) Perform such other duties in connection with the care, custody or transportation of children as the court may require.

##### **3. Prohibited Duties**

The Juvenile Service Coordinator shall not be employed as or be required to perform the duties of a prosecutor, juvenile prosecutor, or law enforcement official.

(Sections Omitted)

#### 4-5 C. Additional Court Personnel

The court may set qualifications and appoint additional juvenile court personnel such as guardian ad litem, court appointed special advocates (CASAs), juvenile advocates, and/or referees whenever the court decides that it is appropriate to do so.

## [29.6] State and Tribal Code Examples—Mitigation in Sentencing

### 2009 Kansas Code

#### Chapter 21 CRIMES AND PUNISHMENTS

#### [Article 46 SENTENCING](#)

#### 21-4626: Same; mitigating circumstances.

Mitigating circumstances shall include, but are not limited to, the following:

- (8) At the time of the crime, the defendant was suffering from posttraumatic stress syndrome caused by violence or abuse by the victim.

## [29.7] State and Tribal Code Examples—Secure Detention

### Colorado Statutes

#### Title 19. CHILDREN'S CODE

#### Article 2. The Colorado Juvenile Justice System

#### [Part 5. ENTRY INTO SYSTEM](#)

#### 19-2-508. Detention and Shelter—Hearing—Time Limits—Findings—Review—Confinement with Adult Offenders—Restrictions

In determining whether an adult jail is the appropriate place of confinement for the juvenile, the district court shall consider the following factors:

(Sections Omitted)

- (F) The relative ability of the available adult and juvenile detention facilities to meet the needs of the juvenile, including the juvenile's need for mental health and educational services;

## THE HOPI CHILDREN'S CODE

### Chapter I - Definitions

(Definitions Omitted)

15. Detention: Temporary care in physically restricting facilities.

30. Shelter Care: Temporary care in physically unrestrictive facilities.

### Chapter VI - Juvenile Offender

(Sections Omitted)

#### D. Taking Custody

1. **Custody:** A minor may be taken into custody by a law enforcement officer . . .
2. Omitted
3. **Arresting Officer's Options:** The arresting officer [may] present the minor to the juvenile intake officer.

#### E. Intake Custody Decision

When a minor is presented to the juvenile intake officer by the arresting officer, the intake officer may, after an evaluation of the circumstances, place a minor in detention or shelter care . . .

#### F. Custody Retained

If the minor is not released the following provisions shall apply:

1. **Detention Pending Court Hearing:** A minor alleged to be a juvenile offender may be detained pending a court hearing, in the following places:
  - a. a shelter care facility on the Reservation approved by the Tribe and/or Bureau of Indian Affairs;
  - b. a detention facility on the Reservation approved by the Court and/or the Bureau of Indian Affairs;
  - c. a foster home on the Reservation approved by the Court and/or the Bureau of Indian Affairs.

A minor who is sixteen (16) years of age or older may be detained in a jail or facility used for the detention of adults only if:

- a. a facility as noted above is not available or would not assure adequate supervision of the minor;
- b. detention is in a cell separate and removed from sight and sound of adults;

- c. adequate supervision is provided twenty-four (24) hours a day.
- 2. **Detention Criteria:** A minor taken into custody shall not be placed in detention prior to a court's disposition unless:
  - a. the act is serious enough to warrant continued detention or shelter care;
  - b. there is reasonable cause to believe that the minor will run away and that he will be unavailable for further proceedings and/or commit a serious act causing damage to persons or property;
  - c. there is reasonable cause to believe that the minor will commit injury to persons or property of others or commit injury to himself or be subject to injury by others; or
  - d. there is reasonable cause to believe the minor has no parent(s), guardian or custodian able or willing to provide adequate supervision and care for him.

## [29.8] Tribal Code Commentary

**Purposes**—Many purpose statements in juvenile statutes mandate that judges weigh the often-competing goals of “the best interests of the child” and “protection of the public safety” in determining how to handle and dispose of juvenile cases, for example, whether to return a youth home with treatment or to send a youth to a secure juvenile detention facility. The Wyoming Statute (WY Stat § 14-6-201(c)(ii)(a)) inserts a third required consideration—judges must recognize any distinctive behavior indicating that a youth has been victimized and whether he or she has a serious mental illness (e.g., depression or posttraumatic stress disorder [PTSD]) that requires treatment. Advocates for traumatized youth argue that traumatized youth require high-quality mental health interventions in a family and/or community setting and warn that secure detention must be avoided to prevent retraumatizing them. The sample tribal statutory language references “the provision of mental development” (Hopi and Leech Lake). The Eastern Band of Cherokee statute allows that “juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety.” Similarly, Leech Lake states that its juvenile system and law is “to provide a continuum of services for children and their families from prevention to residential treatment, with emphasis whenever possible on prevention, early intervention and community-based alternatives.” The Wyoming statutory language is preferable to the tribal statutory language here as it targets trauma victims and requires judges to distinguish and recognize “children who have been victimized or have disabilities, such as serious mental illness that requires treatment.”

**Determining Competence**—We include the competency provisions of the Vermont Rule of Family Practice (V.R.F.P. 1(i)) here, although, none of the tribal juvenile statutes reviewed included or required a competency determination. The question of competency arises in determining whether a child or youth is competent to proceed in a juvenile delinquency proceeding. For example, a small

child of four years old who bites his playmate would be incompetent to proceed in a juvenile delinquency proceeding as he would not be culpable for a bad act or capable of understanding or responding to the proceedings. Likewise, advocates for traumatized youth argue, some youth are too mentally ill to be culpable for the bad act for which they are charged (e.g., they were reacting to a perceived but not actual threat because they had PTSD) and/or they are not capable of understanding or responding to the juvenile justice proceedings (which may be targeted at accountability, restitution, and/or punishment). A tribal juvenile court should have a process and criteria for identifying these youth, dismissing these cases, and redirecting them to the dependency or other appropriate tribal court dockets. The Vermont rule provides that mental examinations be undertaken by court-selected psychologists or psychiatrists and requires the examiner to consider whether the youth suffers from a serious mental illness, among other factors. The rule requires that the report be sealed and filed with the juvenile court and disallows the use of any statements made by the youth as proof of his or her delinquency or for impeachment purposes. The rule further requires a competency hearing and dismissal of petitions before the juvenile court where a youth is found to be incompetent. The implications for tribal juvenile statutes are that some youth do not belong in juvenile court as they do not understand right and wrong in the given situation and will not respond to the accountability, reparations, and/or punishment mechanisms of the system given a current serious mental illness. Tribes adopting a competency screening provision for their delinquency systems should be careful to amend their dependency laws to assume jurisdiction over these youths and their families to provide needed protections, monitoring, services, and treatment.

**Judicial Branch/Leadership**—The Connecticut statute mandates that the judicial branch, in cooperation with the Department of Children and Families and the Department of Mental Health and Addiction Services, develop prevention and crime-reduction programs for juvenile offenders, including new programs providing a continuum of services. The programs are to be tailored to the juvenile, culturally appropriate, and trauma informed. They must also provide intensive general education with an individualized remediation plan for each juvenile, appropriate job training and employment opportunities, counseling sessions in anger management and nonviolent conflict resolution, treatment and prevention programs for alcohol and drug dependency, mental health screening, assessment and treatment, sex offender treatment, and services for families and juveniles. The judicial branch is also authorized to contract with secure residential facilities and highly supervised residential and nonresidential facilities for juveniles. The judicial branch is also mandated to collaborate with private residential facilities and community-based nonresidential postrelease programs. See the Section 46b-121k of the Connecticut statute in the preceding text.

Contrast the Connecticut statute with the requirements of the 1989 BIA Tribal Juvenile Justice Code that authorizes the tribal juvenile court to cooperate with any federal, tribal, state, public, or private agency to participate in any diversion, rehabilitation, or training programs and to receive grants. The 1989 BIA Tribal Juvenile Justice Code provisions also empower the tribal juvenile court to negotiate contracts for the care and placement of children “whose status is adjudicated by the juvenile court.” The Leech Lake provisions are based upon the 1989 BIA Tribal Juvenile Justice Code. The

Connecticut approach is preferable in that it designates a “lead agency,” the judicial branch, to develop the necessary programs in coordination with other key agencies.

**Special Unit; Advocates and Navigators.** The purpose of the Colorado statute at Section 27-69-101 et seq. is to assist youth and families specifically where the youth has a mental illness or co-occurring disorder. The law establishes a mental health unit that will promulgate rules and standards after consultation with a family advocacy coalition and stakeholders, and provide navigation, crisis response, integrated planning, transition services, and diversion from the juvenile justice system for youth with mental illness or co-occurring disorders. The law uses “family advocates” and “family systems navigators” to help youth and their families access and participate in services—to navigate across mental health, physical health, substance abuse, developmental disabilities, juvenile justice, education, child welfare, and other state and local systems.

Contrast the Colorado statute with the 1989 BIA Tribal Juvenile Justice Code Section 1-6 describing tribal juvenile court personnel including a court-appointed juvenile counselor or probation officer, guardians ad litem, CASAs, juvenile advocates, and/or referees. The Leech Lake provisions are based upon the 1989 BIA Tribal Juvenile Justice Code provisions. The 1989 BIA Tribal Juvenile Justice Code and Leech Lake provisions contemplate primarily justice system personnel (e.g., intake, monitoring, legal representation, judges) while the Colorado statute adds additional advocates and navigators with specific backgrounds and training in working with mental health problems and co-occurring disorders.

**Mitigation in Sentencing.** The Kansas statute at Section 21-4626 provides for mitigation in sentencing where there is evidence that a criminal defendant was suffering from PTSD caused by violence or abuse by the victim of the crime. This scheme assumes that a juvenile offender was transferred to adult criminal court, was found guilty, and was sentenced. Youth advocates and juvenile justice system reformers argue that traumatized youth should not be transferred to an adult criminal court for processing, but if they are, their sentences should be mitigated where there is proof of trauma. They argue that such mitigation should be extended to other stress-related disorders as well (beyond PTSD) and that it should not depend on whether the victim of the crime was also the abuser of the youth.

**Secure Detention.** The Colorado statute at Section 19-2-508 requires a juvenile court judge to consider the juvenile’s need for mental health and educational services when determining what detention facility to confine a juvenile in. Youth advocates and juvenile justice system reformers argue that traumatized youth should never be put in either a juvenile or adult secure detention facility (jail). However, should this be necessary, the judge should be required to consider the youth’s trauma and mental health needs in selecting a facility.

Note that many tribes, similar to the Hopi Children’s code provisions, authorize the tribal juvenile intake officers and judges to place juveniles in secure detention, and even adult jail (for certain age ranges), pending adjudication and as a disposition alternative. This raises serious due process and

potential traumatization and retraumatization concerns where youth are detained under dangerous conditions and for long periods of time awaiting adjudication or postdisposition. Out of the tribal juvenile codes reviewed, none made the choice of a secure detention facility conditional on the availability of mental health or trauma-sensitive services.

## [29.9] Exercises

The following exercises are meant to guide you in developing the trauma-sensitive sections of the tribal juvenile code.

- Find and examine your juvenile code’s provisions governing mental health screening, assessment, and treatment. What agencies or entities are responsible for undertaking these activities? What are the timing requirements?
- Make a list of what is working well and what is not.
- If you were to reform your juvenile justice system, what tribal entity or agency should be empowered and mandated to be the lead agency to establish coordinated programs for traumatized, potentially court-involved youth and their families?
- Are you interested in adopting any of the following policy/law approaches?
  - Does your tribal system designate a lead agency for working with court-involved youth with mental health problems and their families?
  - Do your laws and policies provide for special units, family advocates, and/or navigators to assist traumatized youth and their families?
  - Does your juvenile code require your juvenile judge to consider trauma as well as the protection of the child and public safety in exercising juvenile court jurisdiction over youth?
  - Does your juvenile code require your juvenile judge to determine whether a traumatized youth is competent to proceed within the juvenile justice system?
  - Does your juvenile code require that information about a youth’s trauma be used appropriately (not for findings of guilt or to order secure detention) and to support diversion, the use of self-defense claims, and as mitigating evidence in transfer, disposition, and sentencing?
  - Does your juvenile code avoid the use of probation conditions and contempt orders that in effect funnel traumatized youth into secure detention facilities?

- Does your juvenile code require your juvenile judge to consider trauma and the availability of mental health services in ordering youth to secure detention facilities?
- Does your juvenile code prohibit the transfer of traumatized youth to adult criminal court?
- If not, does your criminal code require the sentencing judge to factor in the existence of trauma in determining criminal sentences?

## **Read and Discuss\***

**Can evidence-based mental health and therapeutic services be culturally adapted to provide effective and appropriate treatment for American Indian (AI) and Alaska Native (AN) youth and their families?**

### **Needs of Youth**

- The AI/AN population is especially susceptible to mental health difficulties

Average annual violent crime rate among AI/AN people over 12 years of age is approximately 2.5 times the national rate

- There is approximately one substantiated report of violent crime per year for every 30 Native children
- Average life expectancy among AI/AN people is lower than the non-Indian population
- Nearly half the AI/AN population is comprised of minors who need care, guidance, and support
- The prevalence of posttraumatic stress disorder (PTSD) is substantially higher among AI/AN persons than in the general community (22% vs. 8%)
- AI/AN persons are more vulnerable to PTSD given exposure to traumatic events coupled with the overarching cultural, historical, and intergenerational traumas
- People who have traumatic experiences and develop PTSD are at risk for other negative mental health outcomes
- Rates of substance abuse disorders, mental health disorders, particularly depression, are elevated among AI/AN peoples

### **Culturally Adapting Evidence-Based Treatments**

- Many AI/AN individuals, to survive, have developed coping strategies that leave them ill-equipped to deal with ongoing trauma, stress, and hardship



- Many AI/AN people are distrustful and reluctant to consider professional mental health services
- Therapeutic services offered in the past have often proven ineffective and inappropriate for AI/AN populations

#### **There is a need to . . .**

- Develop, refine, disseminate, and evaluate culturally relevant trauma intervention models for use with children in Indian country
- Culturally adapt interventions from existing evidence-based treatments
- Identify traditional healing practices, activities, and ceremonies that are used therapeutically to provide instructions about relationships and parenting

#### **The process of adaptation includes . . .**

- Identifying the core concepts within existing evidence-based treatments
- Identifying Native traditional teachings and concepts relevant to trauma therapy—parenting, nurturing, therapeutic practice, ways of teaching and learning, cultural worldviews used to explain individual behavior
- Using a process of ongoing and open dialogue
- Working with diverse group of Native cultural consultants
- Creating intervention and training materials and implementation support strategies and protocols

#### **Culturally Adapted Evidence-Based Treatments**

- The following interventions have been developed by the Indian Country Child Trauma Center at the University of Oklahoma Health Sciences Center and build upon common and tribal-specific cultural elements to provide culturally relevant therapeutic approaches that also respect the substantial individual variability in cultural identity among AI/AN people:
- **Honor Children, Making Relatives**—based upon Parent Child Interaction Therapy, clinical application of parenting techniques in a traditional framework, emphasizing honor, respect, extended family, instruction, modeling, and teachings
- **Honoring Children, Respectful Ways**—congruent with evidence-based group treatment for children with sexual behavioral problems, designed to honor children and promote their self-respect while also promoting respect for others, elders, and all living things

- **Honoring Children, Honoring the Future**—based on the American Indian Life Skills Development Curriculum, an evidence-based suicide prevention program, uses risk and protective factors specific to AI/AN youth as the basis for its prevention strategies, the curriculum is designed for middle and high school students and teaches communication, problem solving, depression and stress management, anger regulation, and goal setting, special attention is paid to AI/AN worldviews, communication styles and forms of recognition
- **Honoring Children, Mending the Circle**—based upon Trauma-Focused Cognitive-Behavioral Therapy, applies cognitive behavioral techniques to support the healing process of trauma in children, grounded in a traditional framework that supports the AI/AN belief in spiritual renewal leading to healing and recovery, practices about behavior, health, healing, humor, and children

\*Taken from Delores Subia Bigfoot & Janie Braden, “Adapting Evidence-Based Treatments for Use with American Indian and Native Alaskan Children and Youth,” *Focal Point* 21, no. 1 (Winter 2007): 19–22. Research, Policy, and Practice in Children’s Mental Health. Research and Training Center on Family Support and Children’s Mental Health.

# Chapter 30: Integrating Culture, Customs, Traditions, and Generally Accepted Practices

## [30.1] Overview

Tribal leaders, legislators, and judges today repeatedly face the task of identifying custom and factoring it into their policymaking. They must also consider when and how to incorporate custom into tribal legislation and into the written decisions of the tribal court. There are important questions concerning the transparency of the respective processes (the decision-making processes of the executive, legislative, or adjudicative branches), the reliability of the sources and characterizations of custom, and the relevancy and applicability of custom to the problems or disputes being addressed.<sup>53</sup>

Working with culture, customs, traditions, and generally accepted practices (CCTGAPs) in both the drafting of tribal laws and in the application of those laws by the tribal courts and justice system personnel can be challenging. Some critics argue that such undertakings romanticize tribal governance and law and/or that they will result in the application of old, out-of-date, or simply wrong principles. Others argue that custom and tradition are too hard to work with or that they are inefficient or lack the status of being “legal.” However, these criticisms are based in a misunderstanding of both the purpose of these undertakings and the nature of custom and tradition.

Many tribal governments today are under a legal duty under their own written laws to identify, respect, and at least to consider the incorporation of persisting legal norms (also known as CCTGAPs) arising from local (often traditional) groups within their communities. These “legal norms” are original, naturally arising law—the glue that has kept and continues to keep people in Native communities together. Tribal governments are also under a duty to ensure that their legal institutions and laws reflect principles that seem just or fair to their people in the given tribal culture. This includes a duty to reform to keep in step with the changing values and expectations of Native community members.

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<sup>53</sup> Pat Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking,” 32 *AM. INDIAN L. REV.*, 319, 329 (2007-2008).

Unfortunately, many, if not most tribes today have inherited “boilerplate law” drafted by non-Natives, usually U.S. government officials, based on Western models but then often modified in curious ways by bureaucratic fiat. Recognition of this fact by Native legal scholars has resulted in cries for the reform of tribal constitutions, codes, rules, and in the tribal common law. As one Native scholar has put it:

[W]e are at an opportune moment to critically appraise our systems and evaluate them using native ideals and taking into consideration the native world view. It is the particular responsibility of native lawyers, practitioners, professionals, and advocates working with tribal justice systems to assess the current situation of tribal courts and to determine the future course. . . .<sup>54</sup>

This chapter seeks to inform a critical appraisal of existing tribal children’s and juvenile law (a.k.a. “codes”), to spur an evaluation of Western-influenced statutory provisions, and to prompt Native communities to explore their local values and ways in the reconceptualization and reform of their children’s and juvenile law(s).

There are three important considerations to keep in mind in making written custom law: (1) many Native people are horrified at the prospects of having their customs and traditions put into writing so it will be critical to explain why this is needed, how it will work, and to include them in crafting the laws. This can be accomplished by establishing a custom documenting committee working parallel to your law drafting committee; (2) in considering custom law, both committees and judges must consider the reliability of the sources and characterizations of custom, and the relevancy and applicability of the defined custom to the problems or disputes being addressed; and (3) most tribal legal scholars argue that the choice of enforcement of customs should be left up to tribal judges, who deal with real parties in real time with live issues, rather than to law makers, as legislation tends to freeze custom in time and lawmakers cannot predict or provide rules for all future variations of an issue or problem. Nevertheless, there are some procedural and substantive matters that are well suited and necessary to be legislated (see the list in following text).

Key statutory provisions for working with CCTGAP in a juvenile justice context include:

- setting out the values and purposes of the law;
- defining youth and family bills of rights, duties, and obligations;
- mandating the choice of law to be applied by the juvenile court;
- creating a process for finding CCTGAP;
- creating requirements for juvenile judges applying CCTGAP in court;

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<sup>54</sup> Christine Zuni, “Strengthening What Remains,” 7 *Kan. J.L. and Pub. Pol’y* 17 (Winter 1997).

- providing notice and participation rights in juvenile court for extended family members;
- mandating cultural education for justice and treatment system personnel;
- defining and authorizing traditional placements, guardianships, and adoptions;
- creating a diversion process to traditional authorities/entities, healers, mentors, and activities; and
- defining CCTGAP restitution and reconciliation.

Reviewing CCTGAP while working through [Chapter 2: Preliminary Choices to Guide Code Development](#) may be helpful.

## [30.2] Tribal Code Examples—Values and Purpose

### THE HOPI CHILDREN'S CODE

#### CHAPTER II - GENERAL

##### A. Purpose

It is the purpose of the Hopi Children’s Code to:

1. preserve the unity of the family;
2. provide for the full consideration of religious and traditional preferences and practices of families during the disposition of a matter;
3. provide for the care, protection, mental and physical development of the children of the Hopi Tribe ...

### **Native Village of Barrow Iñupiat Traditional Government Tribal Children’s Code \***

#### **4-1 GENERAL PROVISIONS**

##### **4-1-1 B. Purpose and Construction**

The Native Village of Barrow Iñupiat Traditional Government (“NVB Tribe” or “Tribe”) hereby establishes the following procedures to protect the best interests of children, and the future of the Tribe and its customs and culture, as authorized by the Constitution of the NVB Tribe. All provisions of this Code shall be liberally construed in order to give effect to the following purposes with regard to child welfare:

1. Protect the best interests of children, prevent the unwarranted breakup of families, maintain the connection of children to their families, their community and the Tribe, and promote the stability and security of the Tribe by establishing tribal standards for the conduct of legal proceedings involving children;
2. Omitted
3. Provide child welfare services to children and families that are in accord with the laws, traditions, and cultural values of the Tribe; and
4. Preserve the opportunity for children to learn about their culture and heritage, and to become productive adult members of the NVB Tribe community, by experiencing their culture on an ongoing basis.

\* Not available online, as of April 2015.

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## **OGLALA SIOUX TRIBE**

### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE) \* PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 401.4—PURPOSE AND CONSTRUCTION**

The Child and Family Code shall be liberally interpreted and construed to fulfill the following expressed purposes:

- (1) To provide for the welfare, care, and protection of the children and families within the jurisdiction of the Oglala Sioux Tribe;
- (2) To preserve the unity of the tiwahe and tiospaye, separating the child from his or her parents, tiwahe and/or tiospaye, only when necessary;
- (3) To take such actions that will best serve the spiritual, emotional, mental, and physical welfare of the child;
- (4) Omitted
- (5) To secure the rights and ensure fairness to the children, parents, guardians, custodians, and other parties who come before the OST Children and Family Court under the provisions of this Code;
- (6) Omitted

- (7) To recognize and reinforce the tribal customs and traditions of the Oglala Lakota Oyate regarding child-rearing;
- (8) To preserve and strengthen children’s cultural and ethnic identities; and
- (9) To provide services and cultural support to children and families to strengthen and rebuild the Oglala Lakota Nation.

**SECTION 402.2—LENA TUWEPI HE/HWO (TRADITIONAL LAKOTA DEFINITIONS)**

- (1) Oyate (“people”): The Lakota People.
- (2) Tiospaye (“extended family”): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.
- (3) Tiwahe (“family”): A family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.
- (4) Wakanyeja (“child”): A sacred gift from Tunkasila, or Wakan Tanka (the Great Spirit) conceived by the union of a man and a woman. Spirits conduct ceremonies in Nagiyata (the spirit world) to prepare for the child’s entry into earth. Children are given a vision or role for their life on earth. Children are pure and have special powers until around the age of puberty.

**SECTION 402.3—WASICU WOIWANKE (GENERAL DEFINITIONS)**

- (33) **Extended Family Member:** An adult relative of a child who has not been deemed by a court of competent jurisdiction to be a danger to the child, including:
  - (A) The paternal and maternal grandfather and grandmother;
  - (B) Siblings of the grandparents;
  - (C) Father and mother;
  - (D) Paternal and maternal uncle and aunt;
  - (E) Brother and sister;
  - (F) The spouses of persons listed in (A) through (E);
  - (G) Any adult person legally adopted in (A) through (E); and

- (H) Any adult member of the child’s tiospaye, or other adult person adopted by the child’s tiospaye as a relative through a formal ceremony.

## **SECTION 402.1—WOTAKUYE (DEFINITIONS OF LAKOTA KINSHIP)**

### **(a) Background, Tiospaye, and Tiwahe**

- (1) The root of Lakota social structure is the tiospaye—extended family. Tiospaye are comprised of tiwahe, immediate families, as well as individuals adopted through formal ceremony. Equality is a prevailing principle of tiospaye life. Responsibilities are dispersed throughout the tiospaye and no one is above the laws. Social classes do not exist and leaders maintain prominence only insofar as they carry out the wishes of the people. Historically, tiospaye were self sufficient and life revolved around them. However, Federal policies and initiatives that accompanied reservation life promoted the assimilation of the Lakota into mainstream Anglo-American culture and have led to a loss of some of the strengths of the tiospaye lifestyle.
- (2) Among the strengths of traditional tiospaye life and the strong emphasis on kinship was that children never really became orphans. Upon birth, they had many mothers, fathers, brothers, and sisters. Thus, even though children might lose their natural parents, relatives stepped forward and assumed parental responsibilities. Furthermore, kinship customs minimized violence, conflicts, and disputes within the tiospaye. Few individuals would consider causing trouble among the people, knowing of the consequences they would face from disrespecting relatives. Kinship customs in the historical tiospaye, with few exceptions, promoted a peaceful and harmonious life.

(b) Omitted

### **(c) Elders**

- (1) The first important consideration in traditional kinship is age. We often hear of, “respect your elders.” Elders hold a special place and status in traditional Lakota society. They are revered for their knowledge and wisdom, which they have acquired through lifelong experiences and learning. They are looked upon as the foundation of tiospaye life because they provide the guidance and direction needed by the people to endure from generation to generation.
- (2) Children are taught at an early age to respect their elders. They are also taught to know and to help their relatives. These teachings have a practical application of precluding intermarriages, but are mainly in keeping with the natural laws of respect and generosity. Elders are teachers and counselors in traditional Lakota life. Children



are often sent to them for Wowahokunkiye, lecturing or teaching. This is done particularly when children misbehave or need help. Elders are also called upon to mediate disputes and to help keep peace and harmony within the tiospaye.

- (3) In interactions among tiospaye members, preference is always given to elders. For example, in asking for assistance from a tiwahe or tiospaye, we ordinarily work through the eldest members. We may ask the younger people, but, in most cases, they would need to confer with the elders anyway before our request is either granted or denied. Furthermore, in gatherings, such as meetings, preference is always given to the eldest individuals present.
- (4) They are called upon for the wocekiye (prayer) and woiyaksape (words of wisdom) which always come first in a meeting. Elders always speak first, eat before others, and are made to feel comfortable until the gathering is concluded. If younger people are going to precede elders in any way, such as in speaking, it must be done with the permission or acknowledgment of the elders. In traditional Lakota society, we always give preference to individuals who are older than we are regardless of our relationship to them.

**(d) Addressing Relatives**

Males and females use different terms in some cases to refer to the same relative. For example, a male and female have a cousin named Jake. The male would refer to him as Tahansi or Tahansi Jake. The female would refer to him as Sicesi or Sicesi Jake. We must distinguish between male and female kinship terms in referring to our relatives. Otherwise, we might embarrass ourselves and our relatives by using a term reserved for the opposite gender. This is one of the reasons we are taught at an early age to know our relatives. We need to know them in order to refer to them and to address them in the proper way. By using the proper kinship terms in addressing our relatives, we command a great deal of respect from them. Children and young people who address their relatives by the appropriate kinship terms are admired because they reflect a proper upbringing.

**(e) Making Relatives**

- (1) Tiospaye kinship also goes beyond bloodlines. Individuals are adopted into tiospaye through formal ceremony. Waliyacin means the prelude to the making of relatives; it means that individuals and their families make a commitment to being related which begins the necessary preparations for formal ceremony. The ceremony for making relatives is Hunkapi; individuals may also choose, however, to make relatives through a pipe ceremony and/or gift giving. Women who make relatives, such as taking on a sister, call the ceremony SaWicayapi. Ceremonies for making relatives are purposeful and elaborate. Spirituality is at the root of making relatives; individuals commit

themselves before their tiwahe and tiospaye, and before Wakan Tanka, to be related from that time on.

- (2) In the case of children, the making of relatives is a way for adults to provide a home for orphans, or children who have been abandoned. A father takes on a new son, or a mother a new daughter through formal ceremony. Once parents adopt children in this way, they treat them as they do their own children. Moreover, they acquire all the rights of kinship afforded other children in the tiospaye.

\* Not available online, as of April 2015.

## [30.3] Tribal Code Examples—Rights, Duties, and Obligations

### Native Village of Barrow Iñupiat Traditional Government Tribal Children’s Code \*

#### 4-3 RESPONSIBILITIES AND RIGHTS REGARDING CHILDREN

##### 4-3-1 RIGHTS OF CHILDREN

##### 4-3-1 A. Right to Life

A child has an inherent right to life, survival, and development, and the right to a standard of living adequate to the child’s physical, mental, spiritual, moral, and social development and reflective of the traditions and cultural values of that child’s people. This right includes the right to nutrition, clothing, shelter, nurturing, and appropriate discipline.

##### 4-3-1 B. Right to Identity

A child has the right from birth to acquire and form an identity, including name, tribal affiliation, language, and cultural heritage. A child has the right to learn about and preserve his identity throughout his life, including the right to maintain ties to his birth parents, his extended family, and his village. A child has the right to learn about and benefit from tribal history, culture, language, spiritual traditions, and philosophy.

##### 4-3-1 C. Right to Protection

A child has the right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, extended family members, or any other custodian. A child has the right to be free from torture or other cruel, inhuman, or degrading treatment or punishment. A child has the right not to face capital punishment or life imprisonment without possibility of release.

#### **4-3-1 D. Right to Health**

A child has the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Mentally or physically disabled children have the right to enjoy a full and decent life in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community. All children have the right to periodic review of any medical or mental health treatment.

#### **4-3-1 E. Right to Family**

A child has the right not to be separated from his parents forcibly or against his will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interest of the child. In case such separation is necessary, a child shall have the right wherever possible not to be separated from other members of his immediate and extended family.

A child temporarily or permanently deprived of his family environment shall be entitled to special protection and assistance provided by the Tribe, which shall strive to ensure continuity in the child's upbringing and the maintenance of ethnic, cultural, religious, and linguistic heritage.

#### **4-3-1 F. Right to Education**

A child has the right to education, including academic, physical, and cultural teachings, and training on how to safely undertake subsistence activities and other potentially dangerous work.

#### **4-3-1 G. Right to be Heard**

A child who is capable of forming his own views has the right to express those views freely in all matters, including judicial proceedings, affecting that child and those views shall be given due weight in accordance with the age and maturity of the child.

#### **4-3-1 H. Right to Due Process**

A child has the right not to be deprived of his liberty unlawfully or arbitrarily. Every child deprived of liberty shall have the right to challenge the deprivation of liberty and the right to appropriate judicial review. A child shall at all times be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of a person of his age.

### **4-3-3 RESPONSIBILITIES AND RIGHTS OF EXTENDED FAMILY MEMBERS**

#### **4-3-3 A. Common Responsibility for Children**

Extended family members have secondary, common responsibility for the upbringing and development of children in their family. This includes ensuring each child's inherent right to life, survival, and development and to a standard of living adequate to the child's healthy physical, mental, spiritual, moral, and social development and reflective of the traditions and cultural values of that child's people. The best interests of the child shall be their basic concern.

#### **4-3-3 B. Responsibility to Foster Identity**

Extended family members are responsible for helping children acquire and form identities, including name, tribal affiliation, language, and cultural heritage.

#### **4-3-3 C. Responsibility to Nurture and Discipline**

Extended family members are secondarily responsible for nurturing children and for administering appropriate discipline to children.

#### **4-3-3 D. Responsibility for Protection**

Extended family members are responsible for helping to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, torture, or other cruel, inhuman, or degrading treatment or punishment.

#### **4-3-3 E. Responsibility to Assist**

Extended family members have a responsibility to intervene or assist when necessary to protect a child's rights and well-being, and to ensure the continuity of the child's upbringing and the maintenance of the child's ethnic, cultural, religious, and linguistic heritage.

\* Not available online, as of April 2015.

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## **OGLALA SIOUX TRIBE**

### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE) \***

#### **PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 403—CHILDREN'S AND FAMILY RIGHTS**

##### **§403.1 WAKANYEJA TA WOWASAKE (TRADITIONAL CHILDREN'S RIGHTS)**

- (a) All children have the rights set out in subsection (b), and all decisions concerning children shall be made in consideration and furtherance of these rights. By definition, these rights are in the best interests of the children.

- (b) All children have a right to:
- (1) a mother (Ina);
  - (2) a father (Ate);
  - (3) identify with the traditional way of life (Lakolwicoh'an);
  - (4) learn and speak his or her language (Lakolliyapi);
  - (5) a family (Tiwahlenatiospaye);
  - (6) know their relatives (Wotakuye);
  - (7) know the traditional laws, customs, and ceremonies of the people; and
  - (8) live according to and to practice the traditional laws, customs, and ceremonies that govern the people.

**§403.2 TIWAHE NA TIOSPAYE TA WOWASAKE (TRADITIONAL FAMILY RIGHTS)**

- (a) Largely because of their primary role in taking care of the children, tiwahe and tiospaye groups also have certain rights as set out in subsection (b). By definition, these rights are in the best interests of the tiwahe and tiospaye, and in turn they are therefore in the best interests of the children for whom the groups care.
- (b) Tiwahe and tiospaye have a right, and corresponding responsibilities, to:
- (1) Wicozani—to make choices and decisions to live a healthy and prosperous life according to the traditional laws, customs, and ceremonies;
  - (2) Igluhapi—to make choices and decisions to establish economic, political, educational and cultural self sufficiency, and to maintain privacy according to the traditional laws, customs, and ceremonies;
  - (3) Woose Gluhapi—to live and function according to the traditional laws, customs, and ceremonies; and to protect and nurture such laws, customs and ceremonies;
  - (4) Woitanca—to select and designate leaders to serve the people and to promote the common good according to the traditional laws, customs, and ceremonies; and

- (5) Woilake—to select and designate such official officers and workers as the tiospaye deem necessary to serve the people and to promote the common good according to the traditional laws, customs, and ceremonies.

#### **SECTION 401.5—OYATE TA WOOPE-TRADITIONAL LAWS TO GOVERN DECISIONS EFFECTING CHILDREN**

- (a) This Code reincorporates familial practices retained, sometimes even unknowingly, by our people. We have retained many traditional practices in spite of a history of attempts to outlaw or prevent the practice of our culture. These practices are rooted in our history and our language, and they arose naturally over a long period of time or as gifts from Wakan Tanka to aid in harmonious living with each other and our natural world.
- (b) The following traditional laws shall be considered and reinforced where the future of a child is decided or influenced, including in processes governed by this Code. Approximate English translations are provided, but the Lakota terms shall govern:
- (1) Wocekiye (“faithfulness”)—To believe in and pray to Tunkasila, or Wakan Tanka—the Great Spirit—as the supreme being and power, and as the creator of all that is. Wakan Tanka gave the people seven sacred ceremonies as means of cleansing themselves and seeking guidance and direction from the Great Spirit. The ceremonies, in the order they were given to the people, are: (i) Inipi (purification); (ii) Hanbleceyapi (seeking a vision); (iii) Wiwangwacipi (Sun dance); (iv) Hunkapi (making of relatives); (v) Nagi Gluhapi (keeping of the spirit); (vi) Isnati Awicalowanpi (womanhood ceremony); (vii) Tapa Wankayeyapi (throwing of the ball).
  - (2) Wowacinksape (“wisdom”)—To be sound in mind and to acquire the knowledge necessary to make proper and effective decisions for the well-being of the people.
  - (3) Wonagiksape (“spirituality”)—To be sound in spirit and to live according to the laws, direction, and guidance of Tunkasila.
  - (4) Wowacintanka (“fortitude”)—To exercise self control and discipline and to have the strength of mind to endure pain and adversity.
  - (5) Wowaunsila (“generosity”)—To look after the well-being of others, and to share one’s knowledge and materials so that others may prosper.
  - (6) Wawoyuonihan (“respect”)—To respect oneself and the rights, beliefs, and decisions of others.

- (7) Wowahokunkiye (“guidance and counseling”)—To advise, counsel, and guide others in the proper ways and beliefs of the people, especially the youth.

\* Not available online, as of April 2015.

## [30.4] Tribal Code Examples—Choice of Law

### RESOLUTIONS OF HOPI TRIBE

#### Hopi Resolution H-12-76

##### Section 2. Precedential Authority for Trial Courts

- (a) The Courts of the Hopi Tribe, in deciding matters of both substance and procedure, in cases otherwise properly before the Courts of the Hopi Tribe, shall look to and give weight as precedent to, the following:
  - (1) The Hopi Constitution and Bylaws;
  - (2) Ordinances of the Hopi Tribal Council;
  - (3) Resolutions of the Hopi Tribal Council;
  - (4) Customs, traditions and culture of the Hopi Tribe;
  - (5) Laws, rules and regulations of the Federal Government and cases interpreting such. Such laws, rules and regulations may, in circumstances dictated by the Supremacy Clause of the U.S. Constitution, be required to take a higher order or precedence.
  - (6) The laws and rules, and cases interpreting such laws and rules, of the State of Arizona. This provision shall not be deemed to be an adoption of such laws or rules as the law of the Hopi Tribe nor as a grant or cession of any right, power or authority by the Hopi Tribe to the State of Arizona.
  - (7) The Common law
- (b) The Courts of the Hopi Tribe shall not recognize nor apply any federal, state, or common law rule or procedure which is inconsistent with either the spirit or the letter of either the Hopi custom, traditions, or culture of the Hopi Tribe, unless otherwise required, in the case of federal law, by the Supremacy Clause of the U.S. Constitution.

**Stockbridge-Munsee Tribe**

**[Chapter 1 Tribal Court Code](#)**

**Section 1.3 Purpose and Construction**

**B. Construction.**

This code is exempted from the rule of strict construction. It shall be read and understood in a manner that gives full effect to the purposes for which it is enacted. Whenever there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling and where appropriate may be used based on the written or oral testimony of a qualified tribal elder, historian, or other representative.

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**Native Village of Barrow Iñupiat Traditional Government**

**Tribal Judicial Code \***

**3-11 ORDER OF AUTHORITY**

**3-11 A. Mandatory Authorities**

The Tribal Court, in deciding matters of both substance and procedure, in cases otherwise properly before the Tribal Court, shall look to and give weight as precedent to the following mandatory authorities in the following order:

1. The Constitution and Bylaws of the NVB Tribe;
2. Agreements with other tribes entered into by the NVB Tribal Council;
3. Statutes of the NVB Tribe;
4. Resolutions of the NVB Tribe;
5. Common law of the NVB Tribal Court; and
6. Customs and traditions of the NVB Tribe.

**3-11 B. Persuasive Authorities**

If an issue cannot be resolved by reliance on the above authorities, the Tribal Court may look to the following foreign sources of law as persuasive authority only (in no particular order:

1. Federal laws and regulations applicable to or affecting Iñupiat people;
2. Federal common law;



3. Statutory and common law of other tribes;
4. International law;
5. Common law of the State of Alaska;
6. Common law of other states.

### **3-8 E. Conflict of Law Notices**

Any time a Tribal Court judge finds that an inter-tribal agreement, statute, or resolution of the NVB Tribe contravenes the customs or traditions of the NVB Tribe, that judge shall issue a written notice of the conflict to the Tribal Council and shall ensure that a copy of the relevant opinion accompanies such notice.

\* Not available online, as of April 2015.

## **[30.5] Tribal Code Examples—Process for Finding Culture, Customs, Traditions, and Generally Accepted Practices**

### **Native Village of Barrow Iñupiat Traditional Government Tribal Judicial Code \***

#### **3-5 TRIAL COURT**

(3-5 A. and 3-5 B. Omitted)

#### **3-5 C. Judicial Notice of Custom**

The court may take judicial notice of Iñupiat custom or tradition only if the court finds the custom or tradition to be generally known and accepted within the NVB Tribal community. Parties need not plead and prove the existence of a custom when the court has taken judicial notice of it. The taking of judicial notice shall not dispense with a required showing of relevancy.

#### **3-5 D. Notice and Pleading of Custom**

A party who intends to raise an issue of Iñupiat custom or tradition shall give notice to the other party and the court through its pleading or other reasonable written notice as soon as its relevance becomes apparent. The proponent of custom or tradition must then plead it to the court with sufficient proof to establish by a preponderance of the evidence that the custom or tradition exists and that it is relevant to the issue before the court. The relevancy of Iñupiat custom or tradition as to any legal matter shall not be presumed.

### **3-5 E. Certification of Custom Questions**

If the judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the court shall certify that question to the Elders Council.

### **3-5 F. Right of Parties to Petition for Recertification**

Where a question of custom or tradition law has been decided in a previous case, any party may petition the court to recertify that question to the Elders Council under the facts of the new case.

## **3-7 ELDERS COUNCIL**

### **3-7 A. Establishment of Elders Council**

An Elders Council is hereby established to resolve questions or disputes about the customs and traditions of the Iñupiat. The Elders Council shall decide such questions only when certified to them by a Tribal Court judge pursuant to Section 3-5 E or 3-5 F of this Code. Questions about customs or traditions shall be reviewed by the Elders Council de novo. The Elders Council shall not decide questions of fact or relevancy.

### **3-7 B. Composition**

The Elders Council shall be comprised of three (3) elders appointed by the Tribal Council.

### **3-7 C. Written Findings**

The Elders Council shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Tribal Court and a second copy shall be maintained in a file for future reference by the Elders Council.

### **3-7 D. Effect of Decision**

A decision of the Elders Council shall not be binding as precedent until it is incorporated into an opinion of the Tribal Court.

### **3-7 E. Custom Law Treatises**

The Elders Council shall engage in ongoing documentation of custom and tradition in the following areas and in any other areas deemed necessary and funded by Tribal Council:

1. How boys and girls are raised;
2. How property is distributed, transferred, and inherited; and

3. Roles and duties in marriage.

This documentation shall be preserved in a searchable video archive, where possible and funded by Tribal Council, or on audio tapes and video tapes, and in written transcripts.

\* Not available online, as of April 2015.

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**OGLALA SIOUX TRIBE**

**CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE) \***

**PART A GENERAL AND DEPENDENCY PROVISIONS**

**SECTION 412.1—BACKGROUND, NAME, PURPOSE**

(a) Background

(1) Omitted

(2) The Tiospaye Navicakicijinpi, Tiospaye Advisory Council, is hereby established to ensure that these concepts, protocols, and definitions are properly understood, enforced, and interpreted. The Advisory Council shall consist of Oglala tribal members who have demonstrated knowledge of all aspects of traditional Lakota life—language, history, culture, philosophy, and spirituality.

(b) Omitted

(c) Purposes

(1) Omitted

(2) The Advisory Council also shall be empowered to issue official opinions on decisions of the Children and Family Court if the Council feels that such decisions are inconsistent with the provisions of the Child and Family Code. Such opinions shall be submitted to the Chief Judge of the Tribal Court, the Supreme Court, and to the members of the Judiciary Committee. The following purposes delineate the work of the Advisory Council:

(A) To promote, sustain, and support the Child and Family Code, Wakanyejana Tiwahe Ta Woope, and all provisions thereof;

(B) To answer certified questions from the Children and Family Court judge;

- (C) To promote, sustain, and support a Lakota perspective in all aspects of enforcing and interpreting the Child and Family Code, Wakanyeja Na Tiwahe Ta Woose, and all provisions thereof;
- (D) To advise and counsel judges, attorneys, and other advocates involved in child and family issues on matters pertaining to the enforcement and interpretation of the Child and Family Code, particularly with respect to the Lakota concepts, protocols, and definitions contained in the Code;
- (E) Omitted
- (F) To serve as intermediaries and/or interpreters in any and all matters arising of the enforcement and interpretation of the Child and Family Code, upon the request of court personnel, other program personnel involved in child and family issues, tiwahe, or tiospaye;

#### **§412.2 QUESTIONS CERTIFIED FROM CHILDREN AND FAMILY COURT**

- (a) If the Children and Family Court judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the judge shall certify that question to the Tiospaye Nawicakicijinpi, Tiospaye Advisory Council.
- (b) The Tiospaye Advisory Council shall resolve questions or disputes about the customs and traditions certified to them by a Children and Family Court judge. Questions about customs or traditions shall be reviewed by the Tiospaye Advisory Council de novo. The Council shall not decide questions of fact or relevancy.
- (c) The Tiospaye Advisory Council shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Children and Family Court for use in its proceedings and a second copy shall be maintained in a file for future reference by the Council.
- (d) A decision of the Tiospaye Advisory Council shall not be binding as precedent until it is incorporated into an order of the Children and Family Court.

#### **§412.3 ONGOING COMPILATION OF CUSTOM LAW TREATISES**

The Tiospaye Advisory Council shall engage in ongoing documentation of custom and tradition in the following areas and in any other areas deemed necessary and funded by Tribal Council:

- (1) How boys and girls are raised;

- (2) How property is distributed, transferred, and inherited; and
- (3) Roles and duties in marriage.

This documentation shall be preserved in a searchable archive, where possible and funded by Tribal Council, or on audio or video tapes or in some other digital form, and in written transcripts.

\* Not available online, as of April 2015.

## [30.6] Tribal Code Examples—Notice and Participation Rights for Extended Family

### **OGLALA SIOUX TRIBE**

#### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPÉ (CHILD AND FAMILY CODE) \***

##### **PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 408.8—RIGHTS OF THE PARTIES TO PROCEEDINGS—CHILDREN’S RIGHTS**

In addition to rights defined in Section 403.1, explaining Wakanyeja Ta Wowasake, a child involved in [a] Child in Need of Care case shall have a right to each of the following:

- (1. and 2. Omitted)
- (3) To have tiwahe and tiospaye members present at all stages of the proceedings;
- (4) To have tiwahe and tiospaye members speak on the child’s behalf if the child so requests;

#### **SECTION 402.2—LENA TUWEPI HE/HWO (TRADITIONAL LAKOTA DEFINITIONS)**

- (1) Omitted
- (2) Tiospaye (“extended family”): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.
- (3) Tiwahe (“family”): A family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.

### **SECTION 402.3—WASICU WOIWANKE (GENERAL DEFINITIONS)**

- (33) Extended Family Member: An adult relative of a child who has not been deemed by a court of competent jurisdiction to be a danger to the child, including:
- (a) The paternal and maternal grandfather and grandmother;
  - (b) Siblings of the grandparents;
  - (c) Father and mother;
  - (d) Paternal and maternal uncle and aunt;
  - (e) Brother and sister;
  - (f) The spouses of persons listed in (A) through (E);
  - (g) Any adult person legally adopted in (A) through (E); and
  - (h) Any adult member of the child's tiospaye, or other adult person adopted by the child's tiospaye as a relative through a formal ceremony.

(Sections Omitted)

### **SECTION 406.8—EMERGENCY REMOVAL OF CHILD—NOTICE TO PARENT, GUARDIAN OR CUSTODIAN, AND TIOSPAYE**

The LOWO Division of Child Protective Services shall make all reasonable efforts to notify the parents, guardian or custodian, as soon as possible and not later than twelve (12) hours after the removal of the child from the home. Reasonable efforts shall include personal, telephone, and written contacts at the residence, place of employment, or other location where the parents, guardian or custodian are known to frequent with regularity. Notice shall also be given to the child's Tiospaye Interpreter(s).

### **SECTION 408.1—STATEMENT OF PURPOSE OF SECTION [ADJUDICATION AND DISPOSITION]**

- (c) The Children and Family Court shall direct the Clerk of the Tribal Court to provide notice of all hearings under Section 408 to the appropriate Tiospaye Interpreter(s) who in turn shall be responsible for notifying the appropriate members of a child's and the child's parent(s)' guardian's, or custodian's Tiospaye. Notice under this paragraph does not relieve the LOWO Division of Child Protective Services from its own notice or collaboration requirements with Tiospaye Interpreters under other provisions of this Code.

\* Not available online, as of April 2015.

**Native Village of Barrow Iñupiat Traditional Government  
Tribal Children’s Code \***

**4-3-3 RESPONSIBILITIES AND RIGHTS OF EXTENDED FAMILY MEMBERS**

(Sections Omitted)

**4-3-3 F. Right to Notice**

Any member of a child’s extended family currently residing in the Native Village of Barrow has the right to be timely noticed by the court of any judicial or other proceeding involving that child.

**4-3-3 G. Right to be Heard**

Any member of a child’s extended family who comes forward in a timely manner has the right to be heard in any judicial or other proceeding involving that child ...

**4-3-3 I. Right to Request a Family Conference**

Any member of a child’s extended family has the right to request a family conference pursuant to Subchapter 4-5-2 of this Code.

**Section 4-2 Definitions**

15. Extended Family Member: Any adult sibling, grandparent, aunt, uncle, great aunt, great uncle, or cousin of the child, including adoptive adult siblings, grandparents, aunts, uncles, great aunts, great uncles, and cousins. Extended family members have certain rights and responsibilities with respect to children.

\* Not available online, as of April 2015.

# [30.7] Tribal Code Examples—Cultural Education for Personnel

## **OGLALA SIOUX TRIBE**

### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE) \***

#### **PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 416—COMPLIANCE OF LOWO OFFICE, DIVISIONS AND COLLABORATING ORGANIZATIONS**

##### **§416.1 BACKGROUND AND PURPOSE**

- (a) It is common knowledge that service providers for children and families on the Pine Ridge Reservation operate for the most part on Western European methods and concepts. This is happening despite the fact that many of the Oglala Lakota tiospaye have been reviving their traditions and customs, and have called for culturally based programs and services. The passage of the Child and Family Code, Wakanyeja Na Tiwahe Ta Woope, which is based on traditional Lakota knowledge, necessitates that service providers now honor the vision of the tiospaye. It is imperative that service providers and their employees and representatives have a sufficient understanding of the traditional Lakota concepts, protocols, and definitions that are contained in this Code.
- (b) Requirements for compliance are hereby established in this Code to ensure that these concepts, protocols, and definitions are properly understood, enforced, interpreted, and followed in the delivery of services to children and families.

##### **§416.2 APPLICABILITY**

The requirements for compliance as defined in this section shall apply to any program, office, agency, association, or entity operating on the Pine Ridge Reservation whose business is to enforce, interpret, apply, or comply with the provisions of this Code. The requirements also apply to any program, office, agency, association, or entity operating on the Pine Ridge Reservation that, by the nature of the services they provide, could cause children and families to be subjected to the provisions of this Code. Programs, offices, agencies, associations, or entities shall be held accountable for the requirements of this section if their mission, purposes, services, or identities can be tied to any of the following areas:

- (1) Law Enforcement;
- (2) Social/Human Services;
- (3) Child Protection;
- (4) Child Advocacy;



- (5) Child Neglect/Abuse;
- (6) Domestic Violence;
- (7) Education;
- (8) Foster Care;
- (9) Medical Care;
- (10) Mental Health Care;
- (11) Adjudication; or
- (12) Religion/Culture/Spirituality.

### **§416.3 MEANS OF COMPLIANCE**

- (a) Programs, offices, agencies, associations, or entities shall be expected to comply with the provisions of this Code as defined in this section by initiating the necessary organizational changes and plans using their own resources and at their own expense. Changes and plans shall be directed at adapting the delivery of services to the Lakota concepts, protocols, and definitions contained in this Code. Changes and plans shall be directed also at providing opportunities for staff, board members, volunteers, consultants, and other institutional representatives to develop sufficient knowledge and understanding of the Lakota concepts, protocols, and definitions contained in this Code.
- (b) Among the means by which entities shall be expected to comply are, but not limited to the following:
  - (1) Staff training and orientation;
  - (2) Board training and orientation;
  - (3) Training and orientation for volunteers, consultants, and other representatives of the entities;
  - (4) Restructuring;
  - (5) Revision of policies and procedures; and
  - (6) Revision of statements of mission, philosophy, vision, or purposes.

\* Not available online, as of April 2015.

# [30.8] Tribal Code Examples—Traditional Placements, Guardianships, and Adoptions

## LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE

### **TITLE TWO - DOMESTIC RELATIONS**

#### **CHAPTER TWO ADOPTION**

##### **§ 2-2-7 Ecagwaya or Traditional Adoption**

**2-2-7 ECAGWAYA or TRADITIONAL ADOPTION**—means according to Tribal custom, the placement of a child by his natural parent(s) with another family but without any Court involvement. After a period of two years in the care of another family, the Court upon petition of the adoptive parents will recognize that the adoptive parents in a custom or traditional adoption have certain rights over a child even though parental rights of the natural parents have never been terminated. Traditional adoption must be attested to by two reliable witnesses. The Court, in its discretion, on a case-by-case basis, shall resolve any questions that arise over the respective rights of the natural parent(s) and the adoptive parent(s) in a custom adoption. The decision of the Court shall be based on the best interests of the child and on recognition of where the child's sense of family is. Ecagwaya is to raise or to take in as if the child is a biological child.

## **Native Village of Barrow Iñupiat Traditional Government**

### **Tribal Children's Code \***

#### **4-5-5 IÑUGUUQ [TRADITIONAL ADOPTION]**

##### **4-5-5 A. Definition**

Iñuguuq, meaning “to raise,” refers to a traditional Iñupiat adoption process in which a child gains, but does not lose, a parent. This procedure shall not terminate the rights of the birth parent.

##### **4-5-5 B. Who May Adopt**

Any adult at least ten (10) years older than the child in question may file a petition for Iñuguuq adoption. Where the petitioner has made an agreement with the birth parent, the birth parent shall be made a party to the petition. In the case of married persons maintaining a home together, both spouses shall be petitioners except that, if one of the spouses is the birth parent of the child to be adopted, the birth parent shall not be a party to the petition. A married person legally separated may adopt without the participation of her spouse.

The court shall order the Social Services Department to perform a background check on all prospective adoptive parents in order to ensure the safety of the child, and no person shall be approved as an adoptive parent under this Code if a background check reveals any of the following:

1. Felony conviction for child abuse or neglect;
2. Felony conviction for spousal abuse;
3. Felony conviction for crimes against children, including child pornography;
4. Felony conviction for a crime involving violence, including rape, sexual abuse, or homicide; or
5. Felony conviction of assault, battery, or a drug-related offenses within the last five (5) years.

#### **4-5-5 C. Petition**

Proceedings under this Subchapter shall commence when a petition for adoption is filed with the court. A petition for adoption shall contain:

1. A citation to the specific Section of this Code giving the court jurisdiction over the proceedings;
2. The full name, residence, place of birth, date of birth, and sex of the child, with attached documentary proof of the date and place of birth;
3. Documentary proof of the child's membership status in the Tribe, if such proof exists;
4. A written statement by the prospective adoptive parent stating her full name, residence, date and place of birth, occupation, and relationship to the child, with attached documentary proof of marital status, provided this not be interpreted to prohibit single parent adoptions, and tribal membership status;
5. Written statement of consent from all persons whose consent is required by Section 4-5-5 D;
6. A written statement by the birth parent specifying the reasons why the birth parent cannot or does not want to raise the child;
7. An agreement by the prospective adoptive parent of the desire that a relationship of parent and child be established;

8. A full description and statement of value of all property owned, possessed, or held in trust by and for the child;
9. A report by the Social Services Department indicating the results of the home study conducted pursuant to Section 4-5-5 I; and
10. A brief and concise statement of the facts which may aid the court in its determination.

#### **4-5-5 D. Valid Consent Required**

In order to be valid, consent must be written and voluntary. Valid consent to Inūguuq adoption is required of:

1. Each birth or prospective adoptive parent whose parental rights have not been involuntarily terminated, who has not voluntarily relinquished her parental rights, or who has not been declared incompetent;
2. The guardian or custodian, if empowered to consent;
3. The court, if the guardian or custodian is not empowered to consent; and
4. The child, if he or she is over fourteen (14) years of age.

Written consents shall be attached to the petition for adoption. Written consent to an adoption shall be signed and acknowledged before a Notary Public. An interpreter shall be provided if required by the court. The court shall have authority to inquire as to the circumstances behind the signing of a consent under this Section.

#### **4-5-5 E. Purpose of Hearing**

The purpose of an Inūguuq hearing shall be to determine, by examining all persons appearing before the court and all evidence presented, whether the child is suitable for adoption, whether the consent of all parties is valid, whether the adoptive parent is financially, morally, and physically fit to adopt, whether the best interests of the child will be promoted by the adoption, and how best to allocate parental rights and responsibilities between the parents. If the parties have already come to an agreement regarding allocation of parental rights, the court shall review their agreement at the hearing.

(Sections Omitted)

#### **4-5-5 M. Granting Petition**

If the court is satisfied that it is in the best interest of the child to grant the petition, the court may enter a final decree of adoption as follows:

1. In the case of a child who has lived with the adoptive parent for more than one year before the adoption petition was filed, the final decree of adoption shall be entered immediately; and
2. In all other cases, the court shall appoint the potential adoptive parent to be the child's guardian pursuant to Subchapter 4-5-3 and shall allow the child to live with the potential adoptive parent for at least one year; at that time, the court shall request a supplemental report and, if the court determines that the best interest of the child is served, shall enter the final decree of adoption immediately.

(Sections Omitted)

#### **4-5-5 P. Name and Legal Status of Child**

Children adopted under this Subchapter may assume the surname of the persons by whom they are adopted. They shall be entitled to the same rights as natural children of the persons adopting them. However, Iñuguuq adoption does not confer tribal membership status on adopted children who would not be otherwise eligible. Iñuguuq adoption does not terminate the rights of natural extended family members of the child, unless those rights are specifically terminated by the court.

#### **4-5-5 Q. No Effect on Enrollment, Inheritance, or Shareholder Rights**

Iñuguuq adoption shall not affect a child's enrollment status as a member of the Tribe, a child's degree of blood quantum, a child's right to inherit from his or her birth parents, or a child's rights as a shareholder in a Native corporation.

#### **4-5-5 R. Transfer and Reversion of Parental Rights**

If the birth parents dies or is otherwise incapacitated, all parental rights shall be transferred to the adoptive parent. If the adoptive parent dies or is otherwise incapacitated, all parental rights shall revert to the birth parent.

#### **4-5-5 S. Denying Petition**

If satisfied that the Iñuguuq adoption requested will not be in the best interests of the child, the court shall deny the petition. If necessary, the court may request that the Social Services Department assist in the placement and care of the child.

#### **4-5-5 T. Challenging an Iñuguuq Adoption**

Any party whose parental, custodial, or extended family rights are limited or terminated by an Iñuguuq adoption may file a motion for rehearing. A motion for rehearing must be filed within ninety (90) days from when the adoption was granted. Where a motion for rehearing alleges a defect in notice which may affect the validity of the proceedings or questions the

validity of consent, and the allegation is supported by evidence, the court shall grant the motion.

#### **4-5-5 U. Withdrawal of Consent**

Valid consent cannot be withdrawn after the entry of a final order of adoption. Valid consent may be withdrawn prior to the final order of adoption upon a showing by a preponderance of the evidence that the best interests of the child require the consent to adoption be voided.

\* Not available online, as of April 2015.

## **[30.9] Tribal Code Examples—Diversion to Traditional Authorities, Entities, Healers, Mentors, and Activities**

### **OGLALA SIOUX TRIBE**

#### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPÉ (CHILD AND FAMILY CODE) \***

#### **PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 408.13—INFORMAL RESOLUTION**

- (a) At any time . . . the Children and Family Court may allow, or may require on its own initiative, referral to an informal resolution process.
- (b) This process should be considered by the Office of the Attorney General and the LOWO Division of Child Protective Services in those cases where a parent has voluntarily placed a child with the LOWO Division of Child Protective Services because of an expressed inability to provide for the child, not due to the faults or omissions of the parent(s), . . . but there has been a breakdown in the family relationship and intervention is needed.
- (c) Upon referral to the informal resolution process, the child and family will be summoned into Children and Family Court to meet informally with the judge, the LOWO Division of Child Protective Services, the Tiospaye Interpreter, appropriate members of the child's extended family and tiospaye, and any other person whose presence is necessary for a full and open discussion of the problems facing child and his or her family. At that meeting the group will attempt to achieve a plan to assure that appropriate intervention is made to prevent future court involvement in the family. The parent(s), guardian, custodian, appropriate extended family and tiospaye members, the child, and the LOWO Division

of Child Protective Services, shall sign a plan stipulating what each will do to address the problem or crisis facing the family.

- (d) Review hearings shall be held every 90 days and the Children and Family Court will review the plan in an informal manner to assure that progress is being made.
- (e) Participation in a plan under this section shall not prevent the Office of the Attorney General from filing a neglect or abuse petition or other legal action.

**SECTION 402.2—LENA TUWEPI HE/HWO (TRADITIONAL LAKOTA DEFINITIONS)**

- (a) Omitted
- (b) Tiospaye (“extended family”): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.

(Sections Omitted)

**SECTION 405.2—DESCRIPTION OF TRADITIONAL RESOLUTION OF CHILD AND FAMILY ISSUES**

- (a) In traditional tiospaye life, children are under constant supervision. Lakota customary law gives adult relatives the right to correct and discipline children, in the absence of the parents. Children are corrected on the spot when they misbehave or commit wrongdoings. Wowahokunkiye is the proper method for correcting and disciplining children. Wowahokunkiye means to advise, counsel, teach, or lecture. When children misbehave or commit a wrongdoing, adults explain to the children what they did wrong, why is it wrong, what they need to do to correct their behavior, and the consequences for continued misbehavior or wrongdoings. Incidences are reported immediately or as soon as possible to the affected parents.
- (b) In correcting children through wowahokunkiye, adults evoke all the traditional laws, customs, and ceremonies to remind children and adults about the proper way to live. Verbal abuse, the use of strong or bad language, labeling, or any form of threatening physical contact is prohibited in correcting children through wowahokunkiye. Physical contact is proper only if it is to encourage or nurture (wokigna) such as through hugs or handshakes. Physical contact is also allowed if it is necessary to restrain children who are fighting or who physically attack others. In such cases, restrain means only to hold back or separate and not physical force such as hitting or choking.

- (c) Constant supervision and discipline precludes issues from reaching crisis proportions. Issues between children and parents are addressed by the parents' parents (grandparents of the children) or other elders, again through wowahokunkiye. In the absence of the grandparents, the parents' aunts and uncles have the responsibility to mediate the issues. In addressing family issues, individuals directly responsible for mediating the issues have the right to ask for assistance from other individuals in the tiospaye or from individuals from other tiospaye. Given the existence of service agencies today, it would also be proper to ask for assistance from these programs, such as from social workers, legal experts, or guidance counselors. In cases where incidences are reported to service agencies, employees of the services agencies are obligated to follow and exhaust the chain of command and protocols defined in this subsection. Service agencies cannot take arbitrary actions as tiospaye have the right and responsibility to initially attempt to resolve each and every case or situation. If written notification is to be given concerning a child/family issue, all the relatives in the chain of command have to be notified, not just the parents.
- (d) Omitted
- (e) Spiritual ceremonies and rituals play a significant role in the proper upbringing of children. Adults have the right and responsibility to ensure that young men and women undergo the appropriate ceremonies and rituals at the appropriate times to make sure they grow up in the proper way and to be well—mentally, physically, and spiritually. Rites of passage for young men and women are good preventive medicine for misconduct and inappropriate behavior. Ceremonies also play a significant role in addressing child and family issues, especially in instances where there are mental or physical anguish or abuse. Adults have the right and responsibility to arrange for the appropriate ceremonies for the affected parties to provide for healing, reconciliation, and correction.
- (f) Given the realities of modern-day reservation life, there might be children in crises for whom relatives cannot be immediately identified. If these types of situations arise, an extensive relative search shall be conducted in an attempt to find a relative who will take responsibility for such children. The assumption is that every child has a relative somewhere that cares for them and who would take responsibility for them. Modern-day technologies, such as ancestral projects on the internet, provide excellent means for conducting relative searches. If relatives are found, they will be properly notified about the issue or issues and given the opportunity to take responsibility for the children. If searches for relatives are unsuccessful or that reveal uncaring relatives, other tiospaye will be given notice and opportunity to take responsibility for the children. Tiospaye have adoption ceremonies through which they can adopt children who are abandoned.

\* Not available online, as of April 2015.



## [30.10] Tribal Case and Code Examples—Traditional Restitution and Reconciliation

**District Court of the Navajo Nation (Crownpoint District)**  
**In the Matter of the Interest of D.P., a Minor, 3 Nav. R. 255 (1982)**

### **Situation before the Court**

On February 28, 1982 this minor was found to have violated criminal law as a juvenile and to have committed what would otherwise have been the offenses of armed robbery, unlawful use of a deadly weapon, and unauthorized use of an automobile had he been an adult. The order of the same date ordered that the juvenile “make restitution to the victim in the amount of One Thousand Dollars (\$1,000.00) and no/100.” That order was appealed, and on August 6, 1982 the Court of Appeals dismissed the appeal for failure to comply with the Rules of Appellate Procedure.

When the case was returned to this court the child asked that the amount of restitution be reduced due to his unemployment and the failure of the victim to prove the amount of damage. On October 29, 1982 the deputy prosecutor moved the court to leave the victim to collect his damages through a separate civil action. Finally, on November 22, 1982 both the counsel for the child and the Navajo Nation entered into a stipulation asking that this action be dismissed because of unknown damage amounts, the fact restitution was not requested by the prosecution, that the amount of restitution is unreasonable and unsubstantiated, and that the rules of court and the law of the Navajo Nation do not allow for restitution in juvenile cases.

### **Whether Restitution in Juvenile Cases is Permitted by Law**

The question of whether restitution is permitted in juvenile cases is easily answered, and counsel should be ashamed to execute a stipulation agreeing there is no such law. 9 NTC Sec. 1191(6) clearly authorized the court to “order that the child be required to make restitution for damage or loss caused by his wrongful acts.” While the statute does say that the obligation to make restitution is only that of the child, it is clear that the court has the power to order it.

It is of no consequence whatsoever that the prosecutor did not ask for restitution to the victim in this case. The court has the independent right and duty to justice to order whatever relief is appropriate and fits under the circumstances. 9 NTC Sec. 1191. As is noted below, restitution in criminal and quasi-criminal cases is also a matter of Navajo custom, and this court will require it whenever and wherever it is appropriate to the circumstances.

### **Restitution under Navajo Common (Custom) Law**

In general Anglo-European history, the victims of crime lost their right to be paid back for a crime by the offender. Some Anglo historians argue that this was because of the need of

European governments to build social unity and stop revenge, the desire of kings to take all powers to themselves, and the practice of kings taking money in the form of fines as payment to protect the wrongdoers from the vengeance of the victim. This ridiculous trend, which thankfully is being slowly replaced by concern for the victim of crime, is totally the opposite from the traditional Navajo way.

Under Navajo tradition, all offenses (with the exception of witchcraft) were punished by payments to the victim or the victim's immediate family and clan. In this case, robbery with injury would be punished by a payment of "blood money" to the immediate family, plus a multiple payment for any property taken. Theft would be punished by a multiple payment to the victim of the immediate family group.

The Navajo tradition recognized that the central ideas of punishment were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way by requiring extra payments to the victim or the victim's family (rather than to the kind or state), and give a visible sign to the community that wrong was punished. The offender was given the means to return to the community by making good his or her wrong. Surely this is a far better concept of justice than to leave the victim out of the process of justice and leaving the victim with no means of healing the injury done.

Therefore, this court finds that not only is restitution permitted under Navajo custom law, but indeed it was so central to the Navajo tradition in offenses that it should be presumed to be required in any juvenile disposition.

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## **The Cherokee Code of the Eastern Band of the Cherokee Nation**

### **Chapter 7A—JUVENILE CODE**

#### **ARTICLE V. LAW ENFORCEMENT PROCEDURES IN DELINQUENCY PROCEEDINGS**

##### **Sec. 7A-53. Dispositional alternatives for delinquent juvenile.**

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives:

- (4) Require restitution, full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The court may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the court shall not require the juvenile to make immediate restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.

## [30.11] Tribal Code Commentary

**Values and Purpose**—The Culture, Customs, Traditions, and Generally Accepted Practices (CCTGAP)-informed provisions setting out the values and purposes of tribal children’s or juvenile codes focus on generally protecting customs and culture, protecting the rights of families to their religious and traditional preferences, preserving the nuclear and extended family units, preserving opportunities for children to learn about their culture and heritage or to preserve their ethnic identity, and ensuring that services include cultural support. The Oglala Sioux Tribe’s Children’s code stands out in explicitly protecting the unity of the extended family unit (“tiospaye”) and in its substantial provisions defining Lakota kinship and the roles and duties associated with it. See discussion in the following text.

The Hopi Children’s code states that it is the purpose of the code to “preserve the unity of the family [and] provide for the full consideration of religious and traditional preferences and practices of families during the disposition of the matter.”

The Native Village of Barrow in Section 4-1-1 B. of its Children’s Code, states that it “establishes the following procedures to protect the best interests of children, and the future of the Tribe and its customs and culture. . . .” Further it provides that [a]ll provisions of this Code shall be liberally construed in order to give effect to the following purposes with regard to child welfare: “. . . [p]rotect the best interests of children [and] prevent the unwarranted breakup of families, maintain the connection of children to their families, their community and the Tribe . . . [p]rovide child welfare services to children and families that are in accord with the laws, traditions, and cultural values of the Tribe . . . and [p]reserve the opportunity for children to learn about their culture and heritage, and to become productive adult members of the NVB Tribe community, by experiencing culture on an ongoing basis.”

The Oglala Sioux Tribe in its Child and Family Code at Section 401.4, states that the code “shall be liberally interpreted and construed to fulfill the . . . purposes [including] . . . [t]o preserve the unity of the tiwahe and tiospaye, separating the child from his or her parents, tiwahe and/or tiospaye, only when necessary; . . . [t]o recognize and reinforce the tribal customs and traditions of the Oglala Lakota Oyate regarding child-rearing; . . . [t]o preserve and strengthen children’s cultural and ethnic identities; and . . . [t]o provide services and cultural support to children and families to strengthen and rebuild the Oglala Lakota Nation.” The code at Section 402.2(3) defines “tiwahe” as “[a] family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.” At Section 402.2(2) it defines “tiospaye” as “[t]he root of Lakota social structure . . . comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.” At Section 402.2(1) the code defines “oyate” as “[t]he Lakota People.”

The Oglala Sioux Tribe’s code, in Section 402.1 et seq., also includes more substantial provisions defining Lakota kinship with a more detailed background on the tiospaye and tiwahe; the connection

between kinship and essentially caretaking and guardianship of children by the tiwahe; how kin traditionally talk to one another and interact; respect for and the place and role of elders as wisdom keepers, teachers and mediators; the proper ways to know and address relatives; and the making of ceremonial relatives, including traditional adoption.

**Rights, Duties, and Obligations**—A number of tribes have set out lists of “positive” rights in addition to various “negative rights” that we are more familiar with. Positive rights are things that the tribe or government must provide, as opposed to those things that a tribe or government can’t do to you (e.g., seizing you and your car and throwing you in jail without fair process). The Native Village of Barrow Children’s Code at Section 4-3-1, lists the following positive rights relevant to CCTGAP including:

A child has a right to . . .

- Life, survival, development, and a standard of living . . . reflective of the traditions and cultural values of that child’s people;
- Acquire and form an identity from birth, including name, tribal affiliation, language, and cultural heritage;
- Learn about and preserve his or her identity throughout his life, including the right to maintain ties to his or her birth parents, extended family, and village;
- Learn about and benefit from tribal history, culture, language, spiritual traditions, and philosophy;
- If separated from his parents for the child’s best interests, wherever possible not to be separated from other members of his immediate and extended family;
- If separated from his parents for the child’s best interests, special protection and assistance to ensure the maintenance of ethnic, cultural, religious, and linguistic heritage; and
- Education, including cultural teachings and training on how to safely undertake subsistence activities and other potentially dangerous work.

Contrast this with the shorter Oglala Lakota Tribe’s list at Section 403.1:

All children have a right to . . .

- A mother;
- A father;
- Identify with the traditional way of life;
- Learn to speak his or her language;
- A family;

- Know their relatives;
- Know the traditional laws, customs, and ceremonies of the people; and
- Live according to and to practice the traditional laws, customs, and ceremonies that govern the people.

There is debate about the legal implications of positive rights. Lawyers argue that they are either aspirational and thus unenforceable, or they are enforceable and the tribe may be forced to pay to make such a right real if successfully sued by a child and his family. Note, sadly, that some positive rights might never be enforceable like the right of a child to have a mother or father. Aspirational language may still influence a judge in his or her interpretation of other provisions of a statute. Tribal law drafting committees will need to discuss what their intent might be and memorialize this in the statutory language.

The Native Village of Barrow Code at Section 4-3-3 also sets out the responsibilities and rights of extended family members. The section begins by recognizing that extended family members have a “secondary, common responsibility for the upbringing and development of children in their family.” The responsibilities and rights of extended family members include the responsibilities and rights to. . .

- Be responsible for helping children acquire and form identities, including name, tribal affiliation, language, and cultural heritage;
- Be responsible for intervening or assisting when necessary to ensure the continuity of the child’s upbringing and the maintenance of the child’s ethnic, cultural, religious, and linguistic heritage;
- Be timely noticed by the court of any judicial or other proceeding involving the child;
- Be heard in any judicial or other proceeding involving the child;
- Have reasonable visitation with the child; and
- Request a family conference.

Again, there is debate about the enforceability of the responsibilities (the rights are easier to effect). For example, would such statutory provisions create a right on the part of the tribe or the child and his family to sue extended family members for breach of responsibility? If yes, what would be the remedy (e.g., money damages)? Again, aspirational language may still influence a judge in his or her interpretation of other provisions of a statute. As stated previously, tribal law drafting committees will need to discuss what their intent might be and memorialize this in the statutory language.

Contrast the Native Village of Barrow language with the Oglala Lakota Tribe’s “traditional family rights” and “traditional laws governing the decisions affecting children” at Sections 403.2 and 401.5. These provisions are more like a code of ethics for family members in their dealings with one

another—to have “faithfulness,” “wisdom,” “spirituality,” “fortitude,” “generosity,” and “respect,” and to advise and counsel others. Such provisions, no doubt, will be difficult for an outsider judge to apply. However, assuming that the tribe appoints its own people as judges or those very familiar with its ways, such provisions could be a powerfully effective for interpreting other parts of the statute.

**Choice of Law**—Choice of law provisions are mandates from the tribal legislature to the tribal judiciary directing them in what laws to apply and in what order to resolve disputes that come before the courts. If your community is committed to integrating CCTGAP into your judge-made law, it is critical to include custom and tradition in your tribe’s “choice of law” provision. It is also important to consider where custom and tradition sits in the order of law to be applied. If it sits above tribal written law (the constitution, statutes, resolutions, etc.), then custom and tradition will trump the constitution, statutes, and codes. This may pose serious problems where the legislated rules represent the consensus (or majority consensus) on what customs should be reinforced and what safety measures should trump custom (e.g., if your statute/code says that extended family members have rights to notice and participation in children’s proceeding but only if they are not “dangerous relatives”). If custom and tradition sits below the tribe’s written law but before the importation of foreign law, it may be used by the judge as the default gap-filler where the tribal council has not legislated. Many tribes treat custom and tradition as mandatory law at this level.

The Hopi Tribe in its Resolution H-12-76 at Section 2(a) treats custom and tradition as a mandatory gap filler after the application of the tribe’s written law. This means that the tribal judge has to apply it where the tribe’s written law fails to address the issue before the court: “The Courts of the Hopi Tribe, in deciding matters of both substance and procedure . . . shall look to and give weight as precedent to . . . (1) The Hopi Constitution and Bylaws; (2) Ordinances of the Hopi Tribal Council; (3) Resolutions of the Hopi Tribal Council; (4) Customs, traditions and culture of the Hopi Tribe. . . .”

The Hopi Tribe’s choice of law provision at Section 2(b) also provides for importation of foreign law where neither the tribe’s written law nor its customs or traditions have an answer. However, it prohibits the recognition and application of foreign law where it is “inconsistent with either the spirit or the letter of either the Hopi custom, traditions, or culture of the Hopi Tribe.”

Contrast this with the Stockbridge-Munsee Tribe’s approach at Section 1.3, where instead of using a choice of law provision, it makes the consideration of custom part of how a judge must read only that particular statute (a.k.a. “rules of statutory construction”): “This code is exempted from the rule of strict construction. . . . Whenever there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling. . . .”

The Native Village of Barrow Code at Section 3-11 provides the clearest direction for judges by dividing “mandatory authorities” (judges have to apply it) from “persuasive” authorities (judges may apply it), and by making “customs and traditions” mandatory after the tribe’s written laws:

The Tribal Court, in deciding matters of both substance and procedure, shall look to and give weight as precedent to the following mandatory authorities in the following order: 1. The Constitution and Bylaws of the NVB Tribe; 2. Agreements with other tribes entered into by the NVB Tribal Council; 3. Statutes of the NVB Tribe; 4. Resolutions of the NVB Tribe; 5. Common law of the NVB Tribal Court; and 6. Customs and traditions of the NVB Tribe.

Notice that the Native Village of Barrow Tribe statute ranks agreements with other tribes and the “common law of the NVB Tribal Court” higher than its customs and traditions, which means that provisions in the agreement and prior written judicial opinions will influence or trump the interpretation or application of customs and traditions in future cases.

The Native Village of Barrow Tribe statute at Section 3-8 E also includes a requirement that where a tribal judge finds that an agreement, tribal statute, or resolution “contravenes the customs or traditions,” the judge must issue a “written notice of the conflict” to the tribal council, along with a copy of the judge’s written opinion in the case.

**Process for Finding CCTGAP**—Tribal judicial codes often contain processes describing how a tribal judge may identify culture, custom, and tradition. There are three popular methods. The judge may “take judicial notice of generally accepted and known custom.” This means that a judge may simply recognize and restate a custom that everyone in the tribal community is familiar with. The judge may also hold hearings with “traditional expert witnesses” testifying as to what the custom is and then the judge ultimately decides what parts of the custom are relevant to the dispute in front of him, how it is defined, and how the custom will be applied to the parties. Finally, a particular tribe may have established a culture-bearer or elders panel or a similar body to assist the judge in identifying and defining a particular custom. Some tribes have set up these bodies and set out a “certification process” where a tribal judge may certify a question to the body and where it can then send a written answer back to the judge who then applies the written custom to the facts in the case before him or her in tribal court. The judge’s final written “opinion and order” in the tribal court case would then describe the custom and how it was to be applied to the parties and their problem in the case. All such processes should be set out in tribal court statutes/codes to ensure the consistent application of custom and tradition in tribal court cases over time, and to ensure the orderly development of the tribe’s common law (judge-made law) incorporating custom and tradition.

The Native Village of Barrow Judicial Code at Section 3-5 provides for all three custom identification processes, including: (1) “judicial notice”—“The court may take judicial notice of Iñupiat custom or tradition only if the court finds the custom or tradition to be generally known and accepted within the NVB tribal community”; (2) custom-law-finding hearings—“A party who intends to raise an issue of Iñupiat custom or tradition shall give notice to the other party and the court through its pleading. . . . The proponent of custom or tradition must then plead it to the court with sufficient proof to establish by a preponderance of the evidence that the custom or tradition exists and that it is relevant to the issue before the court”; and (3) certification to a culture-bearers

panel—”If the judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the court shall certify the question to the Elders Council.”

Note that tribal judges will need at least two methods at all times, judicial notice and custom law finding hearings or judicial notice and a culture-bearer panel. This is due to the fact that not all tribal judges will know “custom or tradition generally known and accepted” as they may be a nontribal member or not from the same region or group within the tribal communities as the parties. Also, it may be prudent to include all three processes where there is uncertainty as to the consistent availability of funding and staffing of the culture-bearer panel.

The Oglala Sioux Tribe provisions are similar to those of the Native Village of Barrow at Sections 412.1 and 412.2 that establish a “Tiospaye Advisory Council” that “shall resolve questions or disputes about the customs and traditions certified to them by a Children and Family Court Judge.” The Council “shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Children and Family Court for use in its proceedings. . . . A decision of the Tiospaye Advisory Council shall not be binding as precedent until it is incorporated into an order of the Children and Family Court.”

However, the Oglala Sioux Tribe at Section 412.1(c)(2) further empowers its Tiospaye Advisory Council “to issue official opinions on the decisions of the Children and Family Court if the Council feels that such decisions are inconsistent with the provisions of the Child and Family Code.” Recall that their Children’s Code contains extensive cultural definitions, values, ethics, and responsibilities and rights for extended family members.

Both the Native Village of Barrow and the Oglala Sioux Tribe Codes include provisions authorizing their culture-bearer bodies to engage in the ongoing documentation of custom and tradition. See Section 3-7 E of the Native Village of Barrow Judicial Code and Section 412.3 of the Oglala Sioux Tribe Children’s Code.

**Notice and Participation Rights for Extended Family**—Once a tribal community has identified “who is family” with respect to a child, it will be important to define the terms *parent* or *extended family* (or the traditional terms and categories) in order to provide them with notice and participation rights when a child is detained, taken into custody, or involved in court proceedings. If your community desires to hold parents and extended family members responsible for their youth, they will need to have information and participation rights in the juvenile justice system process. Note that the Oglala Sioux Tribe’s definition of “extended family” at Section 402.3 includes “an adult relative of a child,” but not “[an adult relative] who has . . . been deemed by a court of competent jurisdiction to be a danger to the child.”

The Oglala Sioux Tribe’s Children’s Code at Section 408.8 provides “tiwahe” and “tiospaye” members with the “right to be present at all stages of the [court] proceedings,” and to “speak on the



child's behalf if the child so requests." Tiwahe is defined at Section 402.2(3), as "a family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people. Tiospaye (or "extended family") is defined at Section 402.2(2), as "[t]he root of the Lakota social structure . . . comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony." Section 402.3 further defines extended family to include:

- (A) The paternal and maternal grandfather and grandmother;
- (B) Siblings of the grandparents;
- (C) Father and mother;
- (D) Paternal and maternal uncle and aunt;
- (E) Brother and sister;
- (F) The spouses of persons listed in (A) through (E);
- (G) Any adult person legally adopted in (A) through (E); and
- (H) Any adult member of the child's tiospaye, or other adult person adopted by the child's tiospaye as a relative through a formal ceremony."

The Oglala Sioux Tribe definitions of family are expansive and appear to include biological parents, all adult biological relatives who have not been found to be a danger to the child, and ceremonial relatives. The burden of providing notice to family and "tiospaye interpreters" regarding hearings involving the child is put on the "clerk of the court" in Section 408.1. In other parts of the Oglala Sioux Tribe Children's Code, the burden of providing notice to parents and the child's "tiospaye interpreter" is put on the child protective services agency regarding notice of any removal of the child from the home (Section 406.8). The tiospaye interpreter is defined in another part of the code to be a representative of the tiospaye and a liaison with the children's court to speak for the children of the tiospaye who are court involved. A key consideration to make notice effective will be to locate responsibility for maintaining updated family trees, including ceremonial relatives, and contact information for family members with a responsible agency and/or official.

The Native Village of Barrow Children's Code at Section 4-3-3 F-I, establishes the rights of resident extended family members to "be timely noticed by the court of any judicial or other proceeding involving the child"; to be "heard in any judicial or other proceeding involving that child," should that person "come . . . forward in a timely manner"; and the right to "request a family conference." The Native Village of Barrow Children's Code defines extended family member at Section 4-2 15 to include: "Any adult sibling, grandparent, aunt, uncle, great aunt, great uncle, or cousin of the child, including adoptive adult siblings, grandparents, aunts, uncles, great aunts, great uncles, and cousins."

The Native Village of Barrow Children’s Code provisions notably differ from the Oglala Sioux Tribe provisions by providing family with the right to request family conferences.

**Cultural Education for Personnel**—Once a tribal community has drafted or amended its children’s laws to incorporate CCTGAP, it will be necessary to train justice system and service provision personnel and others on both the substance and process of the new law, and particularly with respect the CCTGAP provisions. The question is whether and how this should be set out in the statute/code and/or what should be part of a negotiated MOU or MOA with tribal agencies, private agencies, and/or other governments.

The Oglala Sioux Tribe’s Children’s Code in its Sections 416.1 to 416.3 mandates expansive compliance across tribal entities to comply with the new law. This includes its justice system, law enforcement and service provider agencies, educational and health care entities, and even its religious entities. All are mandated to revise their mission and vision statements, to adapt their policies and procedures and the delivery of services to the new law, and also to provide orientations and trainings about the new law.

Although all these agencies and entities are mandated to comply with the new children’s law including its CCTGAP provisions, the Oglala Sioux Tribe mandates may prove to be impossible to enforce where the entity is not tribally controlled and/or located within reservation boundaries (this would necessitate the negotiation and signing of MOUs or MOAs). Also, it is also unreasonable to expect that private entities governed by board of directors, for example, would be agreeable or feel obligated to revise their mission statements. A more workable approach would be to invite them to participate in early community discussions and/or to give them an opportunity to provide feedback on the draft law(s). Finally, even tribally controlled agencies and entities have their own distinct missions and legal parameters. A better approach would be to have the statute authorize the negotiation of interagency agreements including provisions for the development or reform of policies and procedures and the nature of required orientations and trainings.

**Traditional Placements, Guardianships, and Adoptions**—In juvenile court proceedings, from time to time, there will be a need to place a youth outside the home. Whether this is temporary (sometimes called “interim care,” “respite care,” or a temporary “guardianship”) or permanent (sometimes called “guardianship” or “adoption”), tribal communities will need to explore what traditional arrangements or present day generally accepted practices exist. The community should discuss the pros and cons of including these arrangements within the interim care (emergency) provisions and the disposition alternatives within their juvenile justice codes.

Here we provide examples from the tribal dependency court context (tribal children’s codes dealing with child abuse and neglect). The first example from the Rosebud Tribe, at Section 2-2-7, sets out a process for judicial recognition of an existing placement of a child with “another family”:

After a period of two years in the care of another family, the court upon petition of the adoptive parents, will recognize that the adoptive parents in a custom or tradition adoption have certain rights over a child even though parental rights of the natural parents have never been terminated.

The Rosebud code requires an attestation by two reliable witnesses.

The second example, from the Native Village of Barrow Children’s Code at Sections 4-5-5 A to 4-5-5 U, sets out a more elaborate process for legally effecting traditional adoptions—where new parents will be made and added to a child’s existing set of parents. While the Rosebud provisions are far simpler, the Native Village of Barrow provisions ensure greater protections for the child in that they: (1) ensure that the adoptive parent is old enough; (2) ensure that both spouses agree to the adoption; (3) ensure that the child will be safe by undertaking background checks on prospective adoptive parents; (4) ensure proof of a child’s membership status, proof of consent on the part of the birth parents, prospective adoptive parents, and children over fourteen years of age, protect the child’s tribal membership and property rights, and require a statement of the reasons for the adoption; and (5) require a hearing and findings from a tribal court judge that “the child is suitable for adoption,” that the consents are valid, that the adoptive parents are “financially, morally, and physically fit to adopt,” “how best to allocate parental rights and responsibilities between parents,” and “whether the best interests of the child will be promoted by the adoption,” before the adoption is legally recognized.

Neither the Rosebud provisions, nor the Native Village of Barrow provisions, terminate the biological parents’ parental rights. This means that the tribal court and/or some sort of family conferencing or mediation process will likely be necessary to handle parenting disputes where the multiple sets of parents cannot agree in the future and on an ongoing basis.

**Diversion to Traditional Authorities, Entities, Healers, Mentors, and Activities**—As can be gleaned from the model provisions highlighted in this resource for tribal juvenile justice codes, there is a preference for the diversion of youth from the juvenile justice system at multiple stages, some even prior to any justice system involvement. For truant youth or for families-in-need-of-care, ideally, there should be diversions at the school and/or law enforcement levels. For recurrent status offending youth, there should be statutory diversions before trial or disposition (a.k.a. “informal adjustment” using “consent decrees,” or similar terms). For juvenile offenders there should also be pretrial and predisposition diversions processes. For all status and juvenile offenders who find themselves adjudicated, the statute should provide yet one more opportunity for diversion through court-ordered participation in community-based programs and activities as part of the judges’ final dispositions. Basically, you want to create as many doors exiting the juvenile court process as you can to screen, assess, treat, and divert youth to therapeutic and cultural programming and activities. The reasons for having multiple doors include having multiple opportunities for youth and their families to seek assistance when they might be ready. Also different tribal officials are in charge of the different doors (e.g., school officials, law enforcement, juvenile intake officers, prosecutors and

presenting officers, and judges) and you may not want to hinge the fate of youth and their families on the discretion of just one official at a given time.

However, creating all of these “doors out of the juvenile justice system” assumes that youth and their families will have somewhere to go. One of the most important things your tribal community will want to consider is the type of cultural entities, authorities, healers, mentors, and/or activities you will want to divert youth and families to and/or what type of cultural programming you will wish to design and implement.

There is a universe of possibilities here but three common approaches are to divert youth and their families directly to existing traditional entities/activities (e.g., traditional authority figures, healers, and ceremonies), to design and implement cultural programming (e.g., history and language education programs, hunting, fishing, gathering, and/or subsistence activities), and/or to modify existing non-Indian justice, dispute resolution, and therapeutic processes to accommodate a tribe’s CCTGAP (e.g., wellness courts, family conferencing, mediation/peacemaking, and sentencing circles).

Here we provide examples from the Oglala Sioux Tribe that opted to provide two required doors or “diversions,” from their children’s court process. These include first, an initial referral to the tiospaye, or extended family, and then an informal resolution process (a quasifamily conferencing process) once a child becomes court involved.

See the Oglala Sioux Tribe’s Section 405.2(c) where it states “[i]n cases where incidences are reported to service agencies, employees of the service agencies . . . cannot take arbitrary actions as tiospaye have the right and responsibility to initially attempt to resolve each and every case or situation.” If this tiospaye involvement does not remedy the situation or if it does not happen and a child proceeds through the children’s court process, Section 408.13 provides that the child may be referred to an “informal resolution process.” This is an informal meeting with the child, his or her family, child protective services, the tiospaye interpreter, and members of the child’s tiospaye for the purpose of developing a plan of intervention.

**Traditional Restitution and Reconciliation**—Many tribes view restitution as a part of their CCTGAP. For example, the Navajo Tribe in *In the Matter of the Interest of D.P.*, found that restitution is a matter of custom and centers on the harm suffered by the victim. The Navajo court stated:

Under Navajo tradition, all offenses (with the exception of witchcraft) were punished by payments to the victim or the victim’s immediate family. . . . [T]he central ideas of punishment were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way by requiring extra payments, . . . and give a visible sign to the community that wrong was punished. The offender was given the means to return to the community by making good his or her wrong.

The Navajo formulation of restitution favors concepts of reparations to the victim, punishment, satisfying public calls for justice, and providing the offender with “making good his wrong.”

The Eastern Band of Cherokee Juvenile Code, at Section 7A-53, sets out a fairly standard provision in authorizing its juvenile court to order restitution as a disposition alternative:

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives: . . . [r]equire restitution, full or partial, payable within a 12 month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile.

Tribal communities should explore whether their CCTGAP includes the concept of restitution and what its parameters include. For example, what amount of restitution? Payable to whom? Should youth be excused from paying if they can’t pay it? Should their parents be required to pay? What happens if they can’t afford it?

## [30.12] Exercises

The following exercises are meant to guide you in identifying and integrating CCTGAP into various sections of the tribal juvenile code.

**Step 1:** Hold a discussion about CCTGAP with stakeholders (youth and their families, etc.), culture bearers, elders, and interested community members to refine views and definitions, and to find and document relevant CCTAGP. Begin with the following questions.

### How do we recognize and incorporate “custom”?

#### A. What terms and definitions should we use when working with “custom”?

- “Social Norm” and “Legal Norm”
- “Tradition” and “Current Practice”
- “Traditional Authority” and “Modern Secular Authority”
- “Traditional Legal Levels” and “Secular Legal Levels”
- “Policy Making”
- “Social Norm” and “Legal Norm”
- “Social Norm”—A felt standard of proper behavior
- “Legal Norm”—A felt standard of proper behavior backed by official recognition or sanction

1. Identify a social norm in your community. What is something that everyone says you should or shouldn't do?

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2. Identify an unwritten legal norm in your community. What is something that everyone says you should or shouldn't do? What happens to you if you do or forget to do this thing?

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“Tradition” and “Current Practice”

“Tradition”—Old values or ways of doing things

“Current Practice”—Current, generally accepted ways of doing things

3. Identify a tradition in your community. What is the old way of doing things? How have things changed? Is there a different current practice for this tradition now?

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“Traditional Authority” and “Modern Secular Authority”

“Traditional Authority”—The old offices or respected leaders

“Modern Secular Authority”—Constitutionally or statutorily recognized leaders or other leaders elected or appointed by the community

4. Identify several traditional authorities in your community:

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5. Identify several tribal secular leaders:

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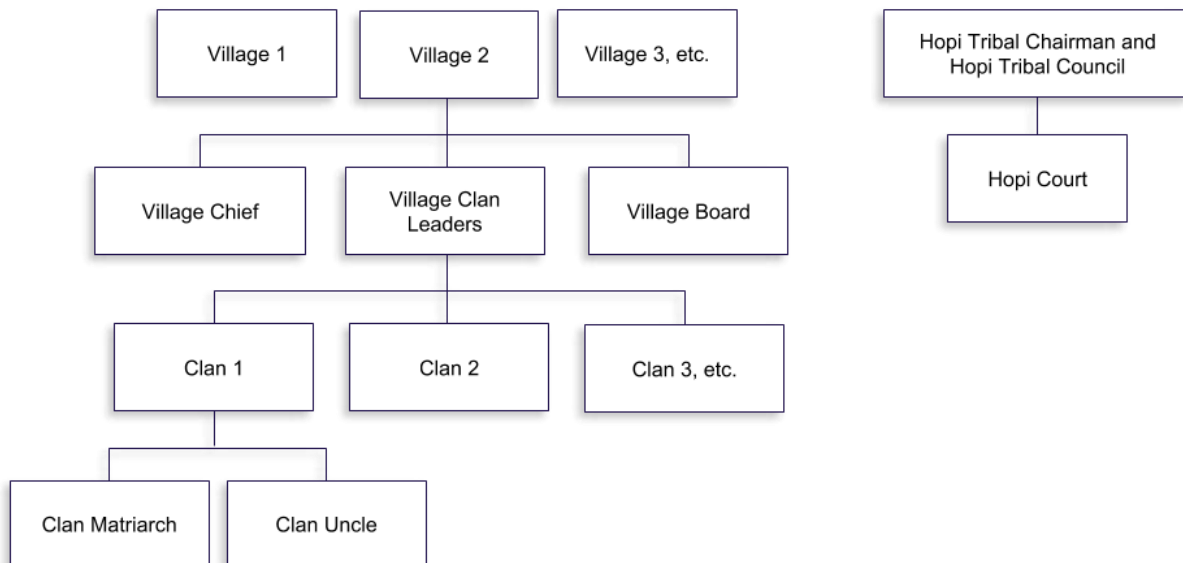
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“Traditional Legal Levels” and “Secular Legal Levels”

“Legal Levels”—Legal norms vary within different, traditional and secular legal levels, that is, the custom law may be different for different villages, clans, or bands within one tribe. The written tribal law (constitution, codes, resolutions, tribal court opinions, and orders) may also deal differently with people from different villages, clans, or bands. **Example: The Hopi Tribe**



6. Identify your community’s traditional and secular legal levels. Identify a norm that may be different from one place to the next. Is there written tribal law that recognizes different norms/rules for different groups?

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“Policy Making,” Custom, and Tradition

“Policy Making”—When you formalize custom in your written tribal law (constitution, code, or tribal court opinion), you are engaging in policy making—that is picking and choosing bits of custom and putting them in your modern written tribal law—for a good reason.

Custom or Tradition

Mother’s Sister = Mother

Tribal Policy

Mother’s Sister has a right to notice of involuntary dependency hearings regarding her sister’s children

7. Can you think of an example where your tribe has done this?

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8. Define who is family

- “**Natural Parent(s)**”—The mother and father who conceive the child.
- “**Nuclear Family**”—A kin group consisting only of parents and children. The prevalence of nuclear families in modern nations reflects the realities of industrialism, geographic mobility, a lack of ties to the land, and the sale of labor for cash.
- “**Extended Family**”—The term “extended family” is used in tribal communities to mean close kin outside the nuclear family, including “band relatives,” “clan relatives,” etc.
- “**Band Relatives**”—Comprised of nuclear families that join the husband’s or wife’s family on a seasonal basis—traditionally to hunt or gather.
- “**Clan Relatives**”—Comprised of a permanent social unit whose members say they have an ancestor(s) in common. Membership is determined at birth and is lifelong.
- “**Matrilineal Descent**”—A person is born into the mother’s group automatically at birth. That group is considered close family.
- “**Patrilineal Descent**”—A person is born into the father’s group automatically at birth. That group is considered close family.
- “**Ceremonial Relatives**”—People who are selected, or who come to be relatives for ceremonial or other purposes.



9. Who do you consider to be your child’s “relatives” in your community? Is it the same on both the mother’s and father’s side? Are there ceremonial or other important traditional relationships?

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10. Identify any “third parents.”

- “**Third Parent Status**”—Those kin, designated by specific kin terms, who are understood to have parent-like duties, obligations, and privileges (rights) with respect to a child(ren) they are kin to.
- “**Kin Types**”—Genealogical kin types such as biological father (F), mother (M), son (S), daughter (D), brother (B), sister (Z), child (C), and husband (H) and wife (W).
- “**Kin Terms**”—The words used for different relatives in the native language.

11. Are there certain relatives that equal natural parents (who are like “third parent[s]”) in duties and rights with respect to children?

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12. What is the word for “mother” in your language? Does the child call more than one person in his or her life by this term?

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13. What is the word for “father” in your language? Does the child call more than one person in his or her life by this term?

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14. Are there other important names or terms to a child to note here?

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15. Determine what duties and obligations are owed to youth.

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16. What traditional duties are owed to children? Which people are primarily responsible for the care, supervision, protection, and education of boys? Which people are primarily responsible for the care, supervision, protection, and education of girls?

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17. Figure out what your CCTGAP documenting committee should work on.

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18. Make a list of questions to be explored and documented by a custom-law finding body of culture bearers or elders<sup>55</sup> on the following topics relevant to the tribal juvenile justice system (add in your own topics as they arise):

- Values, such as “respect,” “honor,” “patience,” “teaching others,” “self-respect,” “honoring self,” “positive beliefs about self,” etc.
- Beliefs in spiritual renewal leading to healing and recovery
- Beliefs and practices about behavior, health, healing, humor, and children/youth
- How one should manage thoughts, emotions, and physical reactions
- Worldview about family
- Worldview about children and youth
- Duties and obligations owed between people (e.g., parent-child and child-parent, ceremonial aunt-child and child-aunt) who are related to each other in the nuclear, extended, and ceremonial family
- How boys should be raised
- How girls should be raised
- Good parenting skills
- Good communication skills
- Traditional placements, guardianships, and adoptions
- Traditional authorities, entities, healers, and mentors
- Traditional healing practices, activities, and ceremonies used to provide instruction about relationships and parenting
- Traditional restitution and reconciliation

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<sup>55</sup> This body or committee should work in tandem with a separate law or code drafting committee and should regularly share its “found CCTGAPs” to inform the law drafting process as it happens. The law/code drafting committee should provide a list of topics and questions to the custom law finding body/committee to have it explore topics and answer questions relevant to the juvenile code drafting process as an integral part of its law/code drafting process.

**Step 2: Examine the current situation.**

Review your tribal laws to determine whether you have any of the following provisions (note you will need to check your constitution, judicial or court establishment code, and children’s laws):

- Values and/or purpose statement
- Youth and family “Bill of Rights”
- Bill of Duties and Obligations to Youth
- Choice of law provision allowing or mandating use of CCTGAP
- Provisions authorizing judges to notice, find, and/or apply CCTGAP in tribal court
- Notice and participation rights for extended family members
- Mandating cultural education for justice system and treatment personnel
- Provisions defining and authorizing traditional temporary placements, guardianships, and/or adoptions
- Diversion provisions to traditional authorities, entities, healers, and/or mentors
- Provisions defining traditional restitution and reconciliation processes

What is working well under your current laws? What is not working?

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**Step 3: Capture the key provisions.**

- Which of your tribal constitutional provisions, codes, or court rules will need to be amended?
- What new laws or codes will need to be drafted?
- Do you need to establish a law-finding/documenting committee of stakeholders/culture bearers/elders? If yes, who should be recruited to be on the committee?

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## Read and Discuss\*

What is custom, is it legal, where do we find it, who knows it best?

- “**Custom**” is law and it permeates every subject category within the written laws of a tribe;
- Custom law exists and operates underneath written tribal laws in many contemporary tribal societies. A functional definition of substantive custom is one that distinguishes . . .
  - “**custom as a kernel of law**” (what people feel/believe/do given certain values) (for example, women have certain mandatory duties to their families, clans and villages; including organizing and carrying out baby namings, weddings, their part in funerals, and ceremonially supporting their husbands and clansmen);
  - “**custom of a legal nature in its natural setting**” (legal norms vs. social norms where the traditional system somehow backs or recognizes the legal norm) (for example, where a clan uncle declares that a clanswoman has met her duties and recognizes her right to use a house or a field); and
  - “**custom that is enforceable under tribal law**” (custom that is incorporated into written tribal law in a policy-making process) (for example, a tribal statutory provision recognizing the property rights of caretakers of elders once the elder has passed and defining “caretaking” to include meeting both basic day-to-day needs of the elders and ceremonial support).
- Custom law varies among groups at the subtribal level (villages, clans, bands, etc.). Tribal societies are comprised of multiple legal levels with differences in their legal structure and their substantive bodies of custom;
- Tribal legislators, judges, and ad hoc elders may not be the most reliable sources to identify and define customary law elements. Some sources are more reliable than others for identifying and defining relevant legal norms (custom that is law in its natural setting). For example, traditional authorities from the same village or clan who have decided similar cases in the past would be more reliable;
- Custom law often naturally arises from kinship, ceremonial, and other relationships and looks like duties and obligations with rules about what happens in case of a breach of duty;
- All contemporary tribal societies arguably have “new custom laws” that are naturally arising and that are in the process of being internalized by members. Customs or generally accepted practices (and their underlying values) may change but may still be considered “custom that is law”; and

- Not all tribes “find” custom in the same way. Check the court establishment code, judicial code, court rules, or tribal common law to determine what custom knowing or finding process is used.

\*Taken and condensed from Pat Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking,” 32 *AM. INDIAN L. REV.*, 319, 329 (2007–8).

# Chapter 31: Tribal Healing to Wellness Courts

## [31.1] Overview

Since the late 1990s tribes have established and implemented what are now known as “Tribal Healing to Wellness Courts” (a.k.a. “wellness courts”). These therapeutic court dockets are modeled on the state drug court model but modified in important ways that are tailored to each tribal community. The three primary types of tribal wellness court are targeted at (1) adult criminals who have a substance abuse problem; (2) juveniles who have a substance use or abuse problem; and (3) parents with allegations of maltreatment against them who have a substance use or abuse problem. Youth would conceivably be eligible to participate in either a juvenile wellness court and/or a family wellness court focused on young parents. Note that a number of tribal juvenile wellness courts also label their juvenile wellness court (as opposed to their parent-focused docket) as a “family wellness court.” A few tribes are also experimenting with a DUI/DWI wellness court that targets individuals who drive while drunk/drinking.

Therapeutic “dockets” or courts have a dramatically different process than the standard trial court. The job of the judge is not to find facts or truth and to apply the law to the facts such as in an adversarial process. Rather, his or her job is to work with a team of service providers to individuals and their families to ensure that they are proceeding through an individualized treatment plan. The judge holds wellness community hearings where everyone in the wellness court program is required to attend. In these community hearings the judge checks on the progress of the individual and gives out incentives or sanctions for progress or noncompliance. Participants advance through “phases” of treatment, ranging from nine to eighteen months. Typically, a successful “participant” (note that they are not called “juveniles” or “defendants”) graduates from the wellness court program and his or her original charge or petition is thereafter dismissed in the regular tribal court. Participants are held accountable throughout the wellness court, such as to be on time, to attend required appointments and activities, to undergo random alcohol and drug tests, to undertake community services, etc. The judge and the “wellness team” are simultaneous parent figures, mentors, and a support system for participants, many of whom may have never had such people in their lives.

We include a chapter on wellness dockets/courts here as a preferred diversion model for working with tribal youth who are using and/or abusing substances. Typically, “violent offenders” are ineligible for wellness court participation. This exclusion may need to be reconsidered in tribal communities with significant numbers of traumatized youth who badly need the support and access to treatment (particularly mental health screening, assessment, and treatment services), but who also

tend to be in the violent offender category. In the following text we provide statutory/MOU examples from a juvenile, family, and adult wellness court process.

## [31.2] Tribal Code and MOU Examples

### **Muscogee (Creek) Nation of Oklahoma**

#### **CODIFICATION #26. JUDICIAL BRANCH/COURTS**

#### **Section 100. Be It Enacted By the Muscogee Nation in Council Assembled: Section 101.**

#### **Findings: The National Council Finds That:**

1. The Muscogee Nation currently has both a criminal code and a juvenile code governing criminal and juvenile actions arising within the jurisdictional boundaries of the Muscogee Nation.
2. Drug and/or alcohol abuse is a commonly recurring factor in a substantial number, if not the majority, of juvenile cases within the Nation's Children and Family Services Administration as well as in adult criminal cases.
3. The Nation's current programs and services designed to address family problems and conditions are often inadequate where such problems and conditions are the result, in whole or in part, of chronic drug and/or alcohol abuse.
4. There is a need to reduce the incidence of drug and alcohol abuse within the Muscogee Nation and to create and implement a program integrating alcohol and drug treatment and other rehabilitative services and resources within the Nation's judicial system.
5. With funding provided in 1996 from a grant funded in 1996 by the U.S. Department of Justice, the Nation formed a family drug court planning team whose members have been meeting since February 1997 to discuss and plan a family drug court program within the Muscogee (Creek) Nation judicial system. The members of the family drug court planning team have also participated in both national and state drug court training sessions to assist them in developing a drug court program.
6. The family drug court planning team members studied the problems of chronic alcohol and drug abuse and its effects on families and have recommended the establishment of a Family Drug Court Pilot Project as the initial substantive step in creating a program specifically designed to address the cycle of alcohol and drug abuse and the disintegration of families within Muscogee Nation caused by such abuse.



7. The Muscogee Nation was recently awarded a drug court implementation grant by the U.S. Department of Justice to assist with funding the implementation of a family drug court program within the Nation's criminal and juvenile justice system.
8. It is in the best interests of the Muscogee Nation and its Indian families to implement a Family Drug Court Pilot Project pursuant to the federal drug court grant awarded by the Department of Justice.

**Section 102. Purpose:**

The purpose of this Act is to provide for and establish a Family Drug Court Pilot Project within the Muscogee Nation's judicial system, to authorize the members of a family drug court implementation team to prepare policies, procedures, inter-agency departmental protocols and standards for the Family Drug Court Pilot Project, and to authorize the Administration to seek other funding sources to assist in the development of a Family Drug Court Pilot Project.

**Section 103. Family Drug Court Pilot Project: Court Authority and Rules: Family Drug Court Implementation Team:**

- A. There is hereby established a Family Drug Court Pilot Project within the Muscogee Nation's judicial system.
- B. The judge of the Muscogee (Creek) Nation District Court is hereby authorized to order and/or impose sanctions and incentives for participants who enter into the Family Drug Court Pilot Project program. The Court's powers and authority hereunder shall include, but are not limited to, the following:
  - (1) approving and enforcing treatment plans;
  - (2) holding participants in direct or indirect contempt of court for willful violations of the Court's orders, including Court-ordered treatment plans;
  - (3) imposing fines and/or costs;
  - (4) ordering the performance of community service;
  - (5) ordering participants to receive mandatory inpatient/outpatient drug or alcohol treatment or counseling;
  - (6) ordering random and/or periodic urinalysis testing;

- (7) placement of children in the legal and/or physical custody of Children and Family Services Administration and/or other persons;
- (8) authorizing increased or restricted contact with other family members or increased or restricted supervised visitation with children);
- (9) extending, accelerating, and/or terminating treatment plan(s) and/or ordering that non-compliant participants be discharged from the Family Drug Court program;
- (10) where a participant in the program has materially and/or repetitively violated the terms of his or her court-ordered treatment plan, ordering that the participant be placed in confinement for a period not to exceed 5 days for each violation, but only after the Court expressly finds that the participant's violation of the plan was willful and that other sanctions or incentives are inadequate; and
- (11) imposing any other condition, standard, requirement, treatment, service, training or activity which the Court deems appropriate under the facts and circumstances of the case in the exercise of the court's sound discretion.

The District Court may, in its discretion, adopt written rules and procedures for the conduct of hearings and proceedings within the Family Drug Court program and the administration of cases therein, provided that copies of such rules and procedures shall be public documents and made available to all persons participating in the Family Drug Court Program and, upon request to any citizen or attorneys admitted to the Muscogee (Creek) Nation Bar Association.

- C. There is hereby established the Family Drug Court Implementation Team, which shall consist of at least one representative from each of the following agencies or departments of Muscogee Nation: Office of the Attorney General, Children and Family Services Administration (hereinafter CFSA), Muscogee Nation Behavioral Health and/or Employee Health Department, Lighthorse Police, and such other person or persons as may be designated by the Principal Chief. The Speaker of the National Council may appoint one member of the National Council to attend Implementation Team meetings in an ex-officio capacity.
- D. The Family Drug Court Implementation Team is hereby authorized to develop policies, procedures, and inter-agency/departmental protocols and standards for use in the operation of the Family Drug Court Pilot Project, as well as standardized forms and other documents to be used in the program. In developing the foregoing, the Team shall consult with their respective agencies, the judicial branch, attorneys who provide indigent defense services, and other outside agencies.

- E. The CFSA shall be primarily responsible for managing and coordinating services and activities under the individual treatment plans, provided that in drafting and formulating individual treatment plans, CFSA shall consult with other agencies participating in the program in accordance with the inter-agency protocols and standards adopted pursuant to Subsection D of this Section.
- F. Muscogee Nation Behavioral Health shall be the primary service provider for alcohol and drug abuse assessments, testing, counseling, and treatment services to be provided under the individual treatment plans, provided that Muscogee Nation Behavioral Health shall coordinate its services with other agencies participating in the program in accordance with the inter-agency protocols and standards adopted pursuant to Subsection D of this Section.
- G. The Principal Chief or his designee is authorized to seek and apply to other funding or sources for the purpose of implementing a Family Drug Court program within the Muscogee (Creek) Nation justice system.

**Section 104. Cooperative Agreements:**

The Principal Chief, with the assistance of the Attorney General, is hereby authorized to negotiate and enter into on behalf of the Muscogee (Creek) Nation appropriate cooperative agreements with state and local governments for integrating and/or coordinating the Muscogee (Creek) Nation Family Drug Court Pilot Project with agencies of such other governments.

**Section 105. Expiration:**

The Family Drug Court Pilot Project shall expire twenty-four months after the date on which this ordinance is enacted, after which date no additional cases shall be taken into the Family Drug Court Pilot Project program without further legislation creating a permanent Family Drug Court or extending the Pilot Project authorized herein; provided, that any cases in the program still pending at the end of said 24-month period shall continue to be administered to completion in accordance with this ordinance.

**CODIFICATION \*27. JUDICIAL PROCEDURES—AN ORDINANCE OF THE MUSCOGEE (CREEK) NATION AMENDING NCA 98-77 TO ESTABLISH A PERMANENT FAMILY DRUG COURT PROGRAM**

**Section 100. Be It Enacted By the Muscogee (Creek) Nation in Council Assembled:**

**Section 101. Findings: The National Council Finds That:**

- A. On August 29, 1998, the National Council adopted NCA 98-77 that established a Family Drug Court Pilot Project, created a Family Drug Court Implementation Team, and authorized the adoption and implementation of Family Drug Court Rules, policies, and procedures.
- B. Section 105 of NCA 98-77 created an expiration date for the Family Drug Court Pilot Project which was to occur twenty-four months after the date on which said ordinance was enacted.
- C. In June 1999, the Family Drug Court Pilot Project began accepting participants and providing a specialized court docket in which to provide treatment, supervision, case management, and accountability for Family Drug Court participants.
- D. The Family Drug Court Implementation Team has executed a Memorandum of Understanding between the respective agencies involved, drafted policies and procedures to govern the Family Drug Court Program, and developed standardized forms and orders to be used by said Program. The Family Drug Court Implementation Team meets regularly and is encouraged by the operation of the Family Drug Court Program and the level of cooperation between the participating agencies.
- E. There is a need to continue the operation of the Family Drug Court Program beyond the expiration date of the Family Drug Court Pilot Project and to enhance the resources and services provided to Family Drug Court participants and their families.
- F. It is in the best interests of the Muscogee (Creek) Nation and its Indian families to establish a permanent Family Drug Court Program and to pursue funding sources to assist in the continuation of the Family Drug Court Program.

**Section 102. Purpose:**

The purpose of this Act is to provide for and establish a permanent Family Drug Court Program within the Muscogee (Creek) Nation’s judicial system by repealing the expiration date of the Family Drug Court Pilot Project program, by amending NCA 96-77 to rename the “Family Drug Court Pilot” program as the “Family Drug Court Program” and to otherwise carry out the authorities, functions, and responsibilities of said Program pursuant to NCA 98-77.

(Sections Omitted)

**Section 104. Amendment:**

**Section 104 of NCA 98-77 which is titled “Cooperative Agreements” shall be amended by adding the following language to the end of the existing Section 104:**

“In addition, the Principal Chief, with the assistance of the Attorney General, is hereby authorized to negotiate and enter into on behalf of the Muscogee (Creek) Nation appropriate cooperative agreements/contracts with substance abuse treatment facilities, local jails and/or detention facilities, and other agencies in order to provide mere comprehensive treatment and sanctions services for the Family Drug Court Program.”

## **The Cherokee Code of the Eastern Band of the Cherokee Nation**

### **Chapter 7C CHEROKEE TRIBAL DRUG COURT**

#### **Sec. 7C-1. Purpose.**

This chapter shall be interpreted and construed so as to implement the following purposes and policies:

- (a) To offer treatment to both juvenile and adult offenders who have committed a crime that is directly or indirectly related to a substance abuse or addiction issue;
- (b) To identify and recommend potential Cherokee Tribal Drug Court participants to the Cherokee Tribal Drug Court Team for legal and clinical screening as soon as possible during the sentencing or dispositional stage of the court process;
- (c) To strictly monitor and supervise each participant through regular and frequent drug and alcohol testing, court appearances and program requirements;
- (d) To impose immediate sanctions and offer immediate rewards or incentives when a participant’s behavior warrants such actions; and
- (e) To make the participant a valued intricate part of the Cherokee Tribal Drug Court and to encourage and support each participant in the goal of individual wellness and sobriety.

#### **Sec. 7C-2. Definitions.**

- (a) **Cherokee Tribal Drug Court.** The Cherokee Tribal Drug Court is a trial court of special jurisdiction within the provisions of Section 7-1(a), with jurisdiction to hear all cases referred to it pursuant to Cherokee law.
- (b) **Cherokee Tribal Drug Court Judge.** The Cherokee Tribal Drug Court Judge shall be appointed upon nomination by the Principal Chief, and confirmation by the Tribal Council for a term of four years. The Cherokee Tribal Drug Court Judge shall be an attorney licensed by the North Carolina State Bar and shall be subject to the other requirements of Section 7-8. In the case of a vacancy, the Chief Justice of the Cherokee Court may name a temporary replacement for a period not to exceed 120 days. The

Cherokee Tribal Drug Court Judge is an Associate Judge of the Trial Courts of Special Jurisdiction pursuant to Section 7-1(b).

- (c) **Tribal Drug Court Team.** The Drug Court Team shall consist of the Drug Court Judge, Case Coordinator, Case Manager and Treatment Specialist. The Drug Court Team may also include other members as set forth in the Policies and Procedures.

### **Sec. 7C-3. Jurisdiction.**

- (a) The Cherokee Tribal Drug Court shall have jurisdiction over any case that is transferred by the Cherokee Court. Upon successful completion of the Cherokee Tribal Drug Court program, or at such a time when a participant of the Cherokee Drug Court becomes ineligible to continue in the program as set out in the Cherokee Tribal Drug Court policies and procedures, the Cherokee Tribal Drug Court will transfer jurisdiction of each case back to the Cherokee Court for any final disposition. All sanctions imposed by the Cherokee Tribal Drug Court, including terms of incarceration, must be completed before the participant returns to Cherokee Trial Court.
- (b) Referrals to the Cherokee Tribal Drug Court may be made by the Cherokee Court once a criminal defendant has pled guilty of or has been convicted of at least one criminal charge where alcohol or drugs are involved. Cherokee Tribal Drug Court referrals may be made as a part of a conditional sentence or may be made as part of a split or suspended sentence.
- (c) Once a referral is made to the Cherokee Tribal Drug Court, the participant shall be assigned to a caseworker who shall begin the eligibility process as set out in the Policy and Procedures Manual. The Cherokee Drug Court Judge shall order any ineligible individuals back to the Cherokee Trial Court for final disposition of the defendant's case(s) pursuant to the Policies and Procedures Manual. Individuals who are determined to be eligible by the Cherokee Drug Court Team may enter the Cherokee Tribal Drug Court.

### **Sec. 7C-5. Rules of Evidence.**

The Rules of Evidence adopted by the Eastern Band of Cherokee Indians shall not apply in any Cherokee Tribal Drug Court proceedings. The Cherokee Tribal Drug Court shall not be a court of record. All information obtained from or disclosed by a participant under the jurisdiction of Cherokee Tribal Drug Court is privileged and confidential information. However, confidential information may always be disclosed after the participant has signed a proper consent form, even if it is protected by Federal confidentiality regulations. The regulations also permit disclosure without a participant's consent in several situations, including medical emergencies, program evaluations and communications among program staff. Offenders who refuse to sign consent forms permitting essential communications can

be excluded from treatment or be terminated from Cherokee Tribal Drug Court. Additionally, a judge may order disclosure as allowed by federal, tribal, and state law.

**Sec. 7C-6. Cherokee Tribal Drug Court procedures.**

**(a) Establishment of policies and procedures.**

- (1) Policies and procedures for the Cherokee Tribal Drug Court shall be established by the Cherokee Tribal Drug Court Team.
- (2) Thereafter, the Cherokee Tribal Drug Court Team shall amend and modify the policies and procedures as necessary to improve the Cherokee Tribal Drug Court process. Any such amendments or modifications shall be by a majority vote at a Cherokee Tribal Drug Court Team meeting with each member eligible to carry one vote and notice of the meeting must be given to each member of the Cherokee Tribal Drug Court Team at least seven days prior to the meeting.
- (3) In order for the policies and procedures to be amended or modified, there shall be present at the Cherokee Tribal Drug Court Team meeting the judge and at least four other members of the Cherokee Tribal Drug Court Team.

**(b) Sessions.**

- (1) All Cherokee Tribal Drug Court sessions shall be closed to the public except for invited guests as allowed by HIPAA (Health Insurance Portability and Accountability Act) regulations.
- (2) The Cherokee Tribal Drug Court is strictly a non-adversarial forum and there shall be no prosecuting or defense attorneys allowed to participate in any court proceedings.
- (3) The Cherokee Tribal Drug Court Judge shall make all findings of facts relevant to each participant's case pursuant to the policies and procedures adopted by the Cherokee Tribal Drug Court Team.
- (4) Cherokee Tribal Drug Court sessions shall proceed pursuant to the policies and procedures adopted by the Cherokee Tribal Drug Court Team.
- (5) Cherokee Tribal Drug Court sessions shall require a Judge, Case Manager, Case Coordinator, and one of the following team members: community elder, treatment specialist or law enforcement officer of the Cherokee Tribal Drug Court Team in order to proceed.

- (c) Sanctions.** If a participant is not compliant with the requirements of the Cherokee Tribal Drug Court, sanctions against the non-compliant individual may be issued by the

Cherokee Tribal Drug Court Judge. Sanctions include but are not limited to incarceration, community service work and increase in requirements issued by the Cherokee Tribal Drug Court Team.

- (d) **Treatment.** At any time the Drug Court deems it appropriate, the Team can require a participant to enter a Substance Abuse Intensive Outpatient Program or to an inpatient facility.

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## **Cass County/Leech Lake Band of Ojibwe Wellness Court**

### **MEMORANDUM OF UNDERSTANDING**

AGREEMENT between the Cass County Sheriff, Walker Police Department, Leech Lake Tribal Police Department, Minnesota State Patrol, Cass County Attorney, Walker City Attorney, Ninth Judicial District Public Defender, Cass County Health, Human and Veterans Services, Pine Manors Treatment Center, Ninth Judicial District Administration, Cass County District Court Judge, Leech Lake Tribal Council, and Leech Lake Tribal Court.

The parties to this Agreement endorse the mission and goals of the Cass County Wellness Court (wellness court) so that participants may eliminate future criminal behavior and improve the quality of their lives. The parties recognize that for the wellness court mission to be successful, cooperation and collaboration must occur within a network of agencies.

The parties to this Agreement support the following mission statement:

The purpose of the Cass County Leech Lake Band of Ojibwe Wellness Court is to reduce the number of repeat substance dependent and DWI offenders by using a team approach in the court system. Upon acceptance, candidates will be provided the opportunity to participate in individual treatment programs designed to promote accountability, self-sufficiency and to enhance public safety. Compliance will be accomplished by using an established system of court ordered sanctions/ incentives as well as community and family support systems.

The parties agree that there are ten principles under which the respective agencies will work cooperatively. They are:

1. The wellness court integrates alcohol and other drug treatment services with criminal justice system processing.
2. The wellness court uses a non-adversarial approach, prosecution and defense counsel to promote public safety while protecting participants' due process rights.
3. Eligible participants are identified early and referred to the wellness court.



4. The wellness court provides access to a continuum of alcohol, drug and other related treatment and rehabilitation services.
5. Frequent alcohol and other drug testing monitors abstinence.
6. A coordinated strategy governs the wellness court responses to the participant's compliance.
7. There is ongoing judicial interaction with each wellness court participant.
8. A monitoring and evaluation plan measures the achievement of program goals and gauges effectiveness.
9. Continuing interdisciplinary education promotes effective substance abuse court planning, implementation, and operations.
10. Forging partnerships among wellness courts, public agencies, and community-based organizations, generate local support and enhance the wellness court's effectiveness.

## **INDIVIDUAL AGENCY RESPONSIBILITIES AND STAFF COMMITMENTS**

### **Wellness Court Judge**

1. The judge will assume the primary role to motivate and monitor the participants of the wellness court program.
2. The judge will ensure a cooperative atmosphere for attorneys, case managers, probation, law enforcement, and treatment providers to stay focused on the task of providing substance abusers with treatment opportunities.
3. The judge will provide the necessary reinforcers when deemed appropriate while maintaining the integrity of the court.
4. The judge will participate as an active member of the staffing team and chairs the Steering Committee.
5. The judge will provide training to new or replacement judges.
6. The judge will act as a mediator to develop resources and improve interagency linkages.
7. The judge will act as a spokesperson to educate the community and peers about the wellness court program.

### **Wellness Court Coordinator**

1. The coordinator will be assigned to the wellness court program for the term of this Agreement, as funding permits, and will participate as an active member of the staffing team and the Steering Committee.
2. The coordinator will provide oversight to the wellness court program.
3. The coordinator will organize events and meetings, compile supporting materials to disseminate to stakeholders and providers of services to maintain linkages, develop marketing strategies, create a press package and act as a media contact person.
4. The coordinator will continuously monitor and evaluate the progress of the wellness court program participants.
5. The coordinator will seek funding sources; respond to grant solicitations; implement and monitor grant funds and provide fiscal, narrative, and statistical information as required by the funding source to ensure the ongoing operation of the program.
6. The coordinator will provide or seek continuing training for the wellness court team.
7. The coordinator will provide an annual report setting forth the incidence of recidivism among wellness court graduates.
8. The coordinator will provide leadership and direction to ensure compliance with the National Standards set forth by the National Association of Wellness Court Professionals.
9. The coordinator will create court calendars; prepare reports for staffings and assure timely dissemination of compliance information; perform case flow coordination; expedite processes of notification, service placement, rescheduling, and preparation of warrants; collect fees; and monitor compliance.
10. The coordinator will provide training to new or replacement coordinator.
11. The coordinator will negotiate and monitor treatment and ancillary service contracts; conduct site visits; review progress reports and assist in audits and certification monitoring; create and monitor standards for urine collection and compliance reporting; ensure gender, age, and culturally specific treatment services.
12. The coordinator will create and maintain a data collection system to monitor client compliance, identify trends, and provide a basis for evaluation.

**County/City Attorney**

1. The county/city attorney will be assigned to the wellness court program for the term of this Agreement, as funding permits, and will participate as an active member of the staffing team and the Steering Committee.
2. The county/city attorney will assist in identifying non-violent defendants arrested for specified drug- or alcohol-related offenses.
3. The county/city attorney may dismiss charges on drug-related offenses only after the participants have successfully completed the wellness court program.
4. The county/city attorney agrees that a positive drug test or open court admission of drug possession or use alone will not result in the filing of additional charges based on that admission.
5. The county/city attorney makes decisions regarding the participant's continued enrollment in the program based on performance in treatment and in the program rather than on legal aspects of the case, barring additional criminal behavior.
6. The county/city attorney will participate as a team member, operating in a non-adversarial manner during court, to promote a sense of a unified team presence.
7. The county/city attorney, during staffings, will advocate for effective sanctions and incentives for program compliance or lack thereof.
8. The county/city attorney will contribute to the team's efforts in community education and local resource acquisition.
9. The county/city attorney will contribute to the education of peers, colleagues, and judiciary in the efficacy of wellness courts.
10. The county/city attorney will provide training to new or replacement prosecutor.

#### **Public Defender**

1. The public defender will be assigned to the wellness court program for the term of this Agreement, as funding permits, and will participate as an active member of the staffing team and the Steering Committee.
2. The public defender will assist in identifying non-violent defendants arrested for specified drug- or alcohol-related offenses.
3. The public defender will advise the defendant as to the nature and purpose of the wellness court, the rules governing participation, the consequences of abiding or failing to

abide by the rules and how participating or not participating in wellness court will affect his/her interests.

4. The public defender will explain all of the rights that the defendant will temporarily or permanently relinquish.
5. The public defender will explain that because criminal prosecution for admitting to alcohol or other drug use in open court will not be invoked, the defendant is encouraged to be truthful with the judge, the case manager, and the treatment staff, and inform the participant that he or she will be expected to speak directly to the judge, not through an attorney.
6. The public defender will participate as a team member, operating in a non-adversarial manner during court, to promote a sense of a unified team presence.
7. The public defender, during staffings, will advocate for effective sanctions and incentives for program compliance or lack thereof.
8. The public defender will contribute to the team's efforts in community education and local resource acquisition.
9. The public defender will contribute to the education of peers, colleagues, and judiciary in the efficacy of wellness courts.
10. The public defender will train a new or replacement public defender.

### **Treatment Provider**

1. The treatment provider will participate fully as a team member and will work as a partner to ensure their success.
2. The treatment provider will ensure that the participant receives the highest level of care available, at a reasonable cost, by all contracted and ancillary service providers.
3. The treatment provider will ensure that the participants are evaluated in a timely and competent process and that placement and transportation are effectuated in an expedited manner.
4. The treatment provider will provide progress reports to the team prior to staffings so that the team will have sufficient and timely information to implement sanctions and incentive systems.

5. The treatment provider will advocate for effective sanctions and incentives during staffings.
6. The treatment provider will provide training to the team on assessment basis of substance abuse, the impact of treatment on the offender and the potential for relapse.
7. The treatment provider will contribute to the team's efforts in community education and local resource acquisition.
8. The treatment provider will contribute to the education of peers, colleagues, and judiciary in the efficacy of wellness courts.

### **Probation Officer**

1. One probation officer will be assigned to provide field supervision of wellness court participants for the term of this Agreement, as funding permits, and will participate as an active member of the staffing team.
2. The probation officer will provide coordinated and comprehensive supervision and case management so as to minimize participant manipulation and splitting of program staff.
3. The probation officer will monitor accountability of social activities and home environment of the participant.
4. The probation officer will develop effective measures for drug testing and supervision compliance reporting that provide the team with sufficient and timely information to implement sanctions and incentive systems.
5. The probation officer will participate in bi-weekly case reviews with the judge, treatment provider, and wellness court staffing team.
6. The probation officer will coordinate the utilization of community-based services such as health and mental health services, victims' services, housing, entitlements, transportation, education, vocational training, job skills training, and placement to provide a strong foundation for recovery.
7. The probation officer will provide on-site progress reports to the judge.
8. The probation officer will provide frequent, observed drug testing on a random basis.
9. The probation officer will participate as an active member of the Steering Committee.
10. The probation officer will contribute to the team's efforts in community education and local resource acquisition.

11. The probation officer will contribute to the education of peers, colleagues, and judiciary in the efficacy of wellness courts.

### **Cass County Sheriff's Department**

1. An officer from the sheriff's department will be assigned to the wellness court program for the term of this Agreement, as funding permits, and will participate as an active member of the Steering Committee.
2. The sheriff's department will provide information of participant appropriateness from law enforcement sources to the team, and make recommendations to the team.
3. The sheriff's department will provide access to in-custody treatment services for those returning to custody as a sanction.
4. The sheriff's department will facilitate the swift delivery of bench warrants for participants who have absconded from the program, and release them into treatment on the judge's orders.
5. The sheriff's department will provide a monitoring function to the team by going on joint home visits, reporting on a participant's activities in the community, and supervising participation in community service.
6. The sheriff's department will provide assistance, information, and support to participants in the community encouraging them to succeed in the program.

### **Police Departments**

1. The police department serves as a liaison between the Steering Committee and the community and provides information to the Steering Committee on community issues related to drug or alcohol abuse.
2. The police department provides feedback on potential candidates for the wellness court program.
3. The police department will provide a monitoring function to the team by going on joint home visits, reporting on a participant's activities in the community, and supervising participation in community service.
4. The police department will provide assistance, information, and support to participants in the community encouraging them to succeed in the program.

5. A representative from the police department will participate as an active member of the Steering Committee.

### **Minnesota State Patrol**

1. The state patrol will serve as a liaison between the Steering Committee and the community and provide information to the Steering Committee on community issues related to drug or alcohol abuse.
2. The state patrol will provide feedback on potential candidates for the wellness court program.
3. The state patrol will provide a monitoring function to the team by reporting on a participant's activities in the community.
4. The state patrol will provide assistance, information, and support to participants in the community encouraging them to succeed in the program.
5. A representative from the state patrol will participate as an active member of the Steering Committee.

### **Ninth Judicial District Wellness Court Coordinator/Evaluator**

1. The district wellness court coordinator will assist in providing oversight to the wellness court program.
2. The district wellness court coordinator will assist the wellness court team with monitoring the progress of the program.
3. The district wellness court coordinator will assist in developing a data collection system that will collect relevant information critical to the program's survival, such as immediately detecting noncompliance of a participant or to observe developmental trends.
4. The district wellness court coordinator will develop evaluation policies and procedures, and manage the evaluation process of the wellness court.
5. The district wellness court coordinator will assist in: seeking funding sources; responding to grant solicitations; implementing and monitoring grant funds; and providing fiscal, narrative and statistical information as required by a funding source to ensure ongoing operation of the program.

6. The district wellness court coordinator will assist in providing or seeking ongoing training of the wellness court team.

In creating this partnership and uniting around a single goal of addressing an underlying problem affecting our community, we are pledged to enhance communication between the courts, law enforcement, and treatment programs. Through this linkage of services, we expect greater participation and effectiveness in addressing drug offenders involved in the criminal justice system.

### **Agreement Modifications**

Any individual agency wishing to amend/modify this Agreement will notify the Steering Committee of the issue(s). The Steering Committee will address the issue(s) for purposes of modifying/amending the Agreement. The issue will be decided by consensus (if possible) or by simple majority, if not.

## **[31.3] Tribal Code Commentary**

**Wellness Court Establishment and Funding**—The Muscogee Creek Nation in its judicial ordinances 26 and 27 establishes a “Family Drug Court” to combat its juvenile and adult drug and order and/or impose sanctions and incentives for participants in the drug court program. These powers include but are not limited to:

- approving and enforcing treatment plans;
- holding participants in direct or indirect contempt of court for willful violations of the court’s orders, including court-ordered treatment plans;
- imposing fines and/or costs;
- ordering the performance of community service;
- ordering participants to receive mandatory inpatient/outpatient drug or alcohol treatment or counseling;
- ordering random and/or periodic urinalysis testing;
- placement of children in the legal and/or physical custody of CFSA and/or other persons;
- authorizing increased or restricted contact with other family members or increased or restricted supervised visitation with children;
- extending, accelerating, and/or terminating treatment plan(s) and/or ordering that noncompliant participants be discharged from the Family Drug Court program;



- ordering that the participant be placed in confinement for a period not to exceed five days for each violation, but only after the court expressly finds that the participant’s violation of the plan was willful and that other sanctions or incentives are inadequate; and
- imposing any other condition, standard, requirement, treatment, service, training, or activity that the court deems appropriate under the facts and circumstances of the case in the exercise of the court’s sound discretion.

Section 103 also establishes the “Family Drug Court Implementation Team.” It designates the Muscogee Nation Behavioral Health as the primary service provider for alcohol and drug abuse assessments, testing, counseling, and treatment services. It also authorizes the “Principal Chief” or his designee to apply to other funding sources for the purposes of implementing the drug court program. Finally, Section 104 authorizes the Principal Chief to negotiate and enter into cooperative agreements with state and local governments to support drug court operations.

**Wellness Court Jurisdiction and Process**—The Eastern Band of Cherokee through Chapter 7C of its “Code of Ordinances” sets out its jurisdiction, rules of evidence, and tribal drug court procedures in order to “offer treatment to both juvenile and adult offenders who have committed a crime that is directly or indirectly related to a substance abuse or addiction issue.” Section 7C-1. In Section 7C-3, the Eastern Band of Cherokee defines the jurisdiction of the Cherokee Tribal Drug Court as “over any case that is transferred by the Cherokee Court.” And that “upon successful completion . . . , or at such a time when a participant . . . becomes eligible to continue in the program . . . , the Cherokee Tribal Drug Court will transfer jurisdiction of each case back to the Cherokee Court for any final dispositions.” Transfers may be made once a criminal defendant pleads guilty, or once he has been convicted of a crime, or as part of a conditional, split, or suspended sentence.

Under Section 7C-5, the Eastern Band of Cherokee prohibits the application of the Rules of Evidence to Cherokee Tribal Drug Court proceedings. Further it mandates that the drug court shall not be a court of record. It also mandates that “all information obtained from or disclosed by a participant . . . is privileged and confidential.” However, “confidential information may always be disclosed after the participant has signed . . . a consent form.”

Finally, Section 7C-6 authorizes the Cherokee Tribal Drug Court Team to develop the policies and procedures for the Cherokee Tribal Drug Court. We note that the majority of tribal wellness courts forgo enacting statutory/code provisions governing the process of their wellness courts and opt instead to follow the state approach of empowering the team to develop “policies and procedures.”

Other notable provisions include the requirement that the sessions be closed to the public, that the drug court be a “strictly non-adversarial forum,” and that the judge “shall make all findings of facts relevant to each participant’s case pursuant to the policies and procedures.”

**Wellness Court Cooperative Agreements**—The Cass County/Leech Lake Band of Ojibwe Wellness Court MOU is an agreement between state, county, city, and tribal law enforcement; the county attorney; public defender; health, human, and veterans services; treatment center; state and county judges and administration; and the Leech Lake Tribal Council and Tribal Court. The parties agree to support a common mission of “reduc[ing] the number of repeat substance dependent and DWI offenders by using a team approach.” The agreement spells out the respective duties of the Wellness Court Judge, the Wellness Court Coordinator, the County/City Attorney, the Public Defender, the Treatment Provider, the Probation Officer, the County Sheriff’s Department, the Police Departments, the State Patrol, and the Wellness Court Coordinator/Evaluator in pursuit of the common mission to implement the tribal wellness court.

Interagency and intergovernmental agreements are crucial to effective wellness court operations for purposes of intake, treatment, monitoring, etc.

## [31.4] Exercises

The following exercises are meant to guide you in developing the healing to wellness court related sections of the tribal juvenile code and/or the tribal wellness code.

- If you currently have a tribal healing to wellness (drug) court, find and examine any code provisions referencing your wellness court. Do you need or want code provisions supporting your wellness court (wellness court establishment, funding, changes to tribal court process to divert cases, modify disposition alternatives, and authorize tribal judges to make special orders, e.g., random alcohol and drug testing)?
  - Adult criminal wellness courts handle alcohol and/or drug abusing adults who are alleged to have committed a crime
  - Family wellness courts handle alcohol and/or drug abusing parents who are alleged to have maltreated their children (e.g., child abuse or neglect)
  - Juvenile wellness courts handle alcohol and/or drug using/abusing youth who are alleged to have committed a status offense or juvenile offense (note that some tribal juvenile wellness courts call them “family wellness courts”)
- If you are interested in developing a juvenile wellness court, list the answers to the following (obtain actual data where possible) . . .
  - What are your youth’s “substances of choice”?
  - What kinds of mental health problems do your youth tend to have?
  - What kinds of family problems do your youth tend to have?

- What kinds of youth misconduct are common in your community?
- Who would you want to be eligible for your juvenile wellness court?
- Make a list of entities that you would need to provide services to youth and their families and with whom you would need to enter into MOAs, MOUs, or contracts with.

## Read and Discuss

Take a hard look: What kinds of substance use/abuse, mental health, and family problems do our families have?

### **The hard lives—and high suicide rate—of Native American children on reservations**

By [Sari Horwitz](#), the [Washington Post](#), March 9, 2014

SACATON, ARIZ. The tamarisk tree down the dirt road from Tyler Owens’s house is the one where the teenage girl who lived across the road hanged herself. Don’t climb it, don’t touch it, admonished Owens’s grandmother when Tyler, now 18, was younger.

There are other taboo markers around the Gila River Indian reservation—eight young people committed suicide here over the course of a single year.

“We’re not really open to conversation about suicide,” Owens said. “It’s kind of like a private matter, a sensitive topic. If a suicide happens, you’re there for the family. Then after that, it’s kind of just, like, left alone.”

But the silence that has shrouded suicide in Indian country is being pierced by growing alarm at the sheer number of young Native Americans taking their own lives—more than three times the national average, and up to 10 times on some reservations.

A toxic collection of pathologies—poverty, unemployment, domestic violence, sexual assault, alcoholism and drug addiction—has seeped into the lives of young people among the nation’s 566 tribes. Reversing their crushing hopelessness, Indian experts say, is one of the biggest challenges for these communities.

“The circumstances are absolutely dire for Indian children,” said Theresa M. Pouley, the chief judge of the Tulalip Tribal Court in Washington state and a member of the Indian Law and Order Commission.

Pouley fluently recites statistics in a weary refrain: “One-quarter of Indian children live in poverty, versus 13 percent in the United States. They graduate high school at a rate 17 percent lower than the national average. Their substance-abuse rates are higher. They’re twice as likely as any other race to die before the age of 24. They have a 2.3 percent higher rate of exposure to trauma. They have two

times the rate of abuse and neglect. Their experience with post-traumatic stress disorder rivals the rates of returning veterans from Afghanistan.”

In one of the broadest studies of its kind, the Justice Department recently created a national task force to examine the violence and its impact on American Indian and Alaska Native children, part of an effort to reduce the number of Native American youth in the criminal justice system. The level of suicide has startled some task force officials, who consider the epidemic another outcome of what they see as pervasive despair.

Last month, the task force held a hearing on the reservation of the Salt River Pima-Maricopa Indian Community in Scottsdale. During their visit, Associate Attorney General Tony West, the third-highest-ranking Justice Department official, and task force members drove to Sacaton, about 30 miles south of Phoenix, and met with Owens and 14 other teenagers.

“How many of you know a young person who has taken their life?” the task force’s co-chairman asked. All 15 raised their hands.

“That floored me,” West said.

### **A “trail of broken promises”**

There is an image that Byron Dorgan, co-chairman of the task force and a former senator from North Dakota, can’t get out of his head. On the Spirit Lake Nation in North Dakota years ago, a 14-year-old girl named Avis Little Wind hanged herself after lying in bed in a fetal position for 90 days. Her death followed the suicides of her father and sister.

“She lay in bed for all that time, and nobody, not even her school, missed her,” said Dorgan, a Democrat who chaired the Senate Committee on Indian Affairs. “Eventually she got out of bed and killed herself. Avis Little Wind died of suicide because mental-health treatment wasn’t available on that reservation.”

Indian youth suicide cannot be looked at in a historical vacuum, Dorgan said. The agony on reservations is directly tied to a “trail of broken promises to American Indians,” he said, noting treaties dating back to the 19th century that guaranteed but largely didn’t deliver health care, education and housing.

When he retired after 30 years in Congress, Dorgan founded the Center for Native American Youth at the Aspen Institute to focus on problems facing young Indians, especially the high suicide rates.

“The children bear the brunt of the misery,” Dorgan said, adding that tribal leaders are working hard to overcome the challenges. “But there is no sense of urgency by our country to do anything about it.”

At the first hearing of the Justice Department task force, in Bismarck, N.D., in December, Sarah Kastelic, deputy director of the National Indian Child Welfare Association, used a phrase that comes up repeatedly in deliberations among experts: “historical trauma.”

Youth suicide was once virtually unheard of in Indian tribes. A system of child protection, sustained by tribal child-rearing practices and beliefs, flourished among Native Americans, and everyone in a community was responsible for the safeguarding of young people, Kastelic said.

“Child maltreatment was rarely a problem,” said Kastelic, a member of the native village of Ouzinkie in Alaska, “because of these traditional beliefs and a natural safety net.”

But these child-rearing practices were often lost as the federal government sought to assimilate native people and placed children—often against their parents’ wishes—in “boarding schools” that were designed to immerse Indian children in Euro-American culture.

In many cases, the schools, mostly located off reservations, were centers of widespread sexual, emotional and physical abuse. The transplantation of native children continued into the 1970s; there were 60,000 children in such schools in 1973 as the system was being wound down. They are the parents and grandparents of today’s teenagers.

Michelle Rivard-Parks, a University of North Dakota law professor who has spent 10 years working in Indian country as a prosecutor and tribal lawyer, said that the “aftermath of attempts to assimilate American and Alaska Natives remains ever present . . . and is visible in higher-than-average rates of suicide.”

The Justice Department task force is gathering data and will not offer its final recommendations to Attorney General Eric H. Holder Jr. on ways to mitigate violence and suicide until this fall. For now, West, Dorgan and other members are listening to tribal leaders and experts at hearings on reservations around the country.

“We know that the road to involvement in the juvenile justice system is often paved by experiences of victimization and trauma,” West said. “We have a lot of work to do. There are too many young people in Indian country who don’t see a future for themselves, who have lost all hope.”

The testimony West is hearing is sometimes bitter, and witnesses often come forward with great reluctance.

“It’s tough coming forward when you’re a victim,” said Deborah Parker, 43, the vice chair of the Tulalip Tribes in Washington state. “You have to relive what happened. . . . A reservation is like a small town, and you can face a backlash.”

Parker didn’t talk about her sexual abuse as a child until two years ago, when she publicly told of being repeatedly raped when she “was the size of a couch cushion.”

Indian child-welfare experts say that the staggering number of rapes and sexual assaults of Native American women have had devastating effects on mothers and their children.

“A majority of our girls have struggled with sexual and domestic violence—not once but repeatedly,” said Parker, who has started a program to help young female survivors and try to prevent suicide. “One of my girls, Sophia, was murdered on my reservation by her partner. Another one of our young girls took her life.”

### **Stories of violence and abuse**

Owens recalls how she used to climb the tamarisk tree with her cousin to look for the nests of mourning doves and pigeons—until the suicide of the 16-year-old girl. The next year, the girl’s distraught father hanged himself in the same tree.

“He was devastated and he was drinking, and he hung himself too,” Owens said.

She and a good friend, Richard Stone, recently talked about their broken families and their own histories with violence. When Owens was younger, her uncle physically abused her until her mother got a restraining order. Stone, 17, was beaten by his alcoholic mother.

“My mother hit me with anything she could find,” Stone said. “A TV antenna, a belt, the wooden end of a shovel.”

Social workers finally removed him and his brothers and sister from their home, and he was placed in a group home and then a foster home.

Both Owens and Stone dream about leaving “the rez.” Owens hopes to get an internship in Washington and have a career as a politician; Stone wants to someday be a counselor or a psychiatrist.

Owens sometimes rides her bike out into the alfalfa and cotton fields near Sacaton, the tiny town named after the coarse grasses that once grew on the Sonoran Desert land belonging to the Akimel O’Odham and Pee Posh tribes. She and her friends sing a peaceful, healing song she learned from the elders about a bluebird who flies west at night, blessing the sun and bringing on the moon and stars.

One recent evening, as the sun dipped below the Sierra Estrella mountains, the two made their way to Owens’s backyard. They climbed onto her trampoline and began jumping in the moonlight, giggling like teenagers anywhere in America.

But later this month on the reservation, they will take on an adult task. Owens, Stone and a group of other teenagers here will begin a two-day course on suicide prevention. A hospital intervention trainer will engage them in role-playing and teach them how to spot the danger signs.

“In Indian country, youths need to have somebody there for them,” Owens said. “I wish I had been that somebody for the girl in the tamarisk tree.”

\*Taken from *The Washington Post*, March 9, 2014.





# Chapter 32: Peacemaking Courts

## [32.1] Overview

There are about thirty-four tribes that currently have peacemaking courts. Some focus on youth and family, while the majority of peacemaking courts are for both adults and youth and families. Historically, tribes dealt with disputes according to their own customs and traditions. Peacemaking courts are seen as a way to continue or reassert those traditional means of dealing with conflict and disputes. Many tribes organized peacemaking courts in the 1990s. Peacemaking courts are often led by respected members of the tribe and are not necessarily led by a judge. Peacemaking allows for all parties to come together, discuss problems, voice their perspectives and concerns, and eventually come to a resolution. The goal is to restore balance and harmony to the community through consensus and personal responsibility.

We include a chapter on peacemaking courts as an example of working with youth to demonstrate their role in the community and to take responsibility for their actions. Often peacemaking can supplement tribal court sentences and can be used in conjunction with probation. If the issue that brings the youth into court is not too serious or it is the first court appearance, then a peacemaking court may be the only venue necessary to resolve the issue.

## [32.2] Tribal Code Examples

### **Little River Band of Ottawa Indians**

#### **[Peacemaking Guidelines](#)**

#### **Section 1. Establishment of Odenaang Enjinoojimoying (A Place of Healing Many Hearts)**

**1.01** The Tribal Government of the Little River Band of Ottawa Indians has established a Peacemaking System to be used in cooperation with the present court system for cases involving minors and adults. Cases can be referred to Peacemaking through tribal courts, state courts, any federally recognized tribe, any historic tribe or Anishinaabek of the Three Fires, or employees of the Little River Band of Ottawa Indians.

#### **Section 2. Vision Statement**

**2.01** The vision of Odenaang Enjinoojimoying is to provide a traditional conflict resolution process for children, families, and tribal employees. This process of applying traditional

values to alternative dispute resolution will focus on promoting the resolving of a problem or dispute and the healing between participants to restore their relationship.

### **Section 3. Philosophy**

**3.01** The peacemaking setting is much different from state court proceedings. Unlike the state court system, which is divisive by its nature and involves a judge or jury making the decisions for others, Peacemaking encourages people to solve their own problems. Peacemaking sessions are conducted by two Peacemakers: one male and one female to create balance. Peacemaking involves (1) discussing issues in a respectful manner; (2) assisting individuals with understanding and accepting responsibility for his/her wrongdoings; (3) promoting healthy relationships; and (4) working with participants to plan and make group decisions about future actions. Planning, respect, and consensus in Peacemaking sessions replace imposed decisions that use punishment to correct behavior. Rather than judge people, peacemaking addresses bad decisions and their consequences and substitutes healing in place of force.

### **Section 4. Purposes of Peacemaking**

**4.01** Little River Band of Odawa Indians Peacemaking Department encourages people to solve their own problems in a safe environment. In Peacemaking, decisions are reached through discussing the wrongdoing of the child, a family member, or a tribal employee, and any other underlying issues. In a Peacemaking session, the Peacemakers will use their knowledge and draw from the customs and traditions of the Anishinaabek. The Peacemakers will strive to achieve a setting that will (1) allow active participation from parents and families whose children are in trouble; (2) provide an environment for the wrongdoer to take responsibility for his/her wrongful behavior; (3) provide an environment that is safe for victims and wrongdoers to work out problems and begin the healing process; and (4) assist in locating traditional practices and teaching and community based services to children, youth, families, and others.

### **Section 6. Eligibility and Request for Peacemaking**

**6.01 Individuals for peacemaking** include children, youth, adult tribal members, and tribal employees.

- (a) Children and youth who have a case pending, and adults who have a civil case pending before the Little River Band of Ottawa Indians Tribal Court.
- (b) Children and youth who have a case pending, and adults who have a civil case pending before another tribal court.

- (c) Children and youth who have a case pending, and adults who have a civil case pending before the state court in Michigan.
- (d) Members of a federally recognized tribe, state historic tribes, or any Anishinaabek who would like to voluntarily become a participant can assist in the Peacemaking process.
  - (1) Examples of possible Peacemaking session could include but not be limited to the following situations involving children, youth, adult tribal members, and tribal employees.
    - (1.1) Child in need of care.
    - (1.2) Delinquent offenders who have committed minor offenses.
    - (1.3) Youth, and adults referred to Peacemaking from another federally recognized tribe.
    - (1.4) Referral from the Case Intake Team (CIT) explained further in the Juvenile Code.
    - (1.5) Representatives from other outside agencies, i.e., school, and nontribal social services referrals.

#### **6.02 Peacemaking may hear the following type of cases.**

- (a) All children and youth who are facing a status offense or a nonstatute offense in the Little River Band of Ottawa Indians Tribal Court System. If another tribal court or state court request that a case be transferred to Peacemaking. Also adult civil cases.
  - (1) **Status Offense:** a violation of criminal law due to the person's status as a minor. Examples include truancy, minor in possession of alcohol, and incorrigibility.
  - (2) **Nonstatus Offense:** all crimes that are considered felonies or misdemeanors regardless of a person's age. Examples include shoplifting, larceny, and assault.
  - (3) **Civil Cases:** involves disputes, conflicts, and/or a wrongdoing committed between private individuals and/or organizations. Examples include contracts, divorce, and personal injury.
  - (4) Individuals who voluntarily seek the services of Peacemaking.

(Sections omitted)

#### **6.05 Case Intake Team**

The CIT is multidisciplinary group and they shall convene on a regular basis to determine if the case should (1) be delayed for prosecution in order to develop and implement an appropriate plan or (2) if it should be forwarded for prosecution in the Tribal Court.

### **6.07 Review**

The CIT shall review the juvenile's progress every thirty (30) days. If at any time the CIT concludes that the juvenile is not working toward the goals of the plan, the CIT shall ask the Presenting Officer to file a petition for formal adjudication.

## **Section 8. Peacemaking Cases.**

### **8.01 Steps in Peacemaking Sessions.**

The following is a guideline to conduct a Peacemaking session. Alternative Dispute Resolution (ADR) may be used upon the participant request. The Peacemaking Session will follow these steps:

- (a) **Smudging.** The peacemakers will begin the session by smudging.
- (b) **Prayer.** The session will open with a prayer that is appropriate for the participants and the occasion. A peacemaker may lead the prayer or designate any person to open with the prayer.
- (c) Preparatory Instructions.
  - (1) **Introductions.** All of the participants will introduce themselves and the Peacemakers will explain the following ground rules:
    - (2) **Rules.** Describe the ground rules that all participants must follow during the Peacemaking session.
      - (2a) Peacemaking sessions are voluntary.
      - (2b) Listen with respect.
      - (2c) It is okay to disagree. There will be no name calling or personal attacks. (No cussing.)
      - (2d) Each participant will get a chance to speak, there will be no interrupting.
      - (2e) Speak for yourself and not as the representative of any group.
      - (2f) Explain that judges and lawyers have no direct role in the Peacemaking session.

- (2g) Peacemaking participants will comply with the peacemaking agreement. If they fail to follow the agreement, the Tribal Court shall enforce the agreement through a court order.
- (d) Some or all of the participants may decide that they do not want a traditional peacemaking session, and opt for an ADR session. The rules for an ADR session are the same; however the Anishinaabek customs and traditions will be absent. The participants' decision shall be respected.

### **8.02 Confidentiality.**

Confidentiality is what builds the trust and the respect for the peacemaking process. A strict confidentiality policy shall be adhered to. Aside from the peacemaking agreement, the documents and case files are confidential. As mandatory reporters of suspected child abuse, the peacemakers are required to disclose the information to proper authorities.

### **8.03 Record Keeping.**

All juvenile and adult Peacemaking files and records shall be destroyed six (6) months after completion and discharge from peacemaking. If the peacemaking file is part of a condition of probation, the file will remain in the probation file until the youth reaches the age of eighteen, at that time all documents, records, and case files will be destroyed.

### **8.04 Peacemaking Objectives.**

Each participant is encouraged to discuss their issue, problems, or conflict openly. The Peacemakers will facilitate the discussion and ensure that there is balance. The Peacemakers will create a safe environment of Respect, Humility, Truth, Empathy, Trust, and Forgiveness.

- (a) The objectives are to reveal the issues, problems, or conflicts to make it clear, so the participants will be able to understand, and start to resolve the issues.
- (b) Restate the purpose of the Peacemaking Session, and what the participant's roles and objectives are in this process.
- (c) Anishinaabek traditions and customs will be used to assist in the process. Developing strategies and different approaches to resolve the issues will help the participants in creating an agreement that will be beneficial to all parties involved.
- (d) Be specific about times, dates, functions, and assignments of what each person's responsibilities are, and what they will do to satisfy the agreement.
- (e) Ensure that all participants are heard and their ideas considered, and that the session is productive and constructive.

## Little River Band of Ottawa Indians

### Juvenile Code

#### Section 4. Components and Process.

##### 4.01 Components.

- a. **Creation of the Case Intake Team.** The Case Intake Team (CIT) is created the purpose of assisting juveniles, their families, and the community at the earliest point of intervention. The Case Intake Team shall promote the stability and security of the Tribe and its families by fully exercising the Tribe's rights and responsibilities under this Code and the Indian Child Welfare Act of 1978 (25 U.S.C. § 902-1963). *See Section 6 of this Code.*
- b. **Creation of Peacemaking.** Peacemaking is created in this Code for the purpose of providing a traditional conflict-resolution process to children, youth, and families. The vision of Peacemaking is to provide opportunities for resolution and healing to the parties involved, which will promote healthier lifestyles and relationships. See Odenaang Enjinoojimoying ("*A Place of Healing Many Hearts*")—the *Peacemaking Guidelines*.

##### 4.02. Process.

The process explained in this section provides a broad overview of this Code. All other provisions in this Code that appear to be in conflict with this Section shall govern.

- a. The Presenting Officer shall determine the type of offense (status or nonstatus) that the juvenile allegedly committed and if it falls under the jurisdiction of the Tribe. If the case falls under Tribal jurisdiction, the Presenting Officer shall forward it to the Peacemakers or Case Intake Team. See Odenaang Enjinoojimoying—*Peacemaking Guidelines* and Section 6 of this Code.
- b. The following cases shall be immediately referred to the Peacemakers:
  1. When a case represents the juvenile's first appearance before the Little River Band of Ottawa Indians' Children's Court on a status offense. This section applies regardless of whether the juvenile has committed a status and/or nonstatus offense in another court in the past.
- c. All other cases shall be forwarded to the Case Intake Team who shall forward it to the appropriate investigator. The investigator shall investigate the allegations and write a report that shall include recommendations. This report will then be presented to the Case Intake Team.

- d. The Case Intake Team shall convene on a regular basis and determine if the case should: (1) be investigated; (2) be delayed for prosecution in order to develop and implement an appropriate plan; or (3) be forwarded for prosecution in the Tribal Court.
- e. If the case is not immediately referred to the Tribal Court, the Case Intake Team shall develop an appropriate plan for the juvenile and/or family and review it on a regular basis. The plan may include Peacemaking sessions and counseling sessions.
- f. A case shall be referred to the Court for adjudication if rejected by the Case Intake Team or within nine months of when the alleged inappropriate behavior occurred. *See Section 11.03(b) of this Code.*

(Sections Omitted)

## **Section 8. Peacemaking.**

### **8.01. Guidelines Governing Peacemaking.**

The Tribal Judiciary shall promulgate the guidelines governing Peacemaking. *See Odenaang Enjinoojimoying—Peacemaking Guidelines.*

### **8.02. Cases to Be Heard.**

The Peacemakers have the authority to hear:

- a. all juvenile cases involving a first-time status offense in the Little River Band of Ottawa Indians Tribal Court system;
- b. all other cases referred by the Case Intake Team;
- c. all other cases that are referred by the Tribal Court; and
- d. cases from persons requesting to voluntarily access Peacemaking.

### **8.03. Case Denial.**

Peacemakers have the right to refuse any case after it has been referred and denied in writing by two Peacemaking groups. *See Odenaang Enjinoojimoying—Peacemaking Guidelines.*

## **Northern Arapaho Nation**

### **Title 7. Peacemaker Code**

#### **SECTION 103 Establishment of Peacemaker Court.**

The Peacemaker Court of the Northern Arapaho Nation is hereby established as a department of the Shoshone and Arapaho Tribal Court (“Tribal Court”) of the Wind River Indian Reservation, Wyoming. The chief judge of the Tribal Court shall supervise the activities of the Peacemaker Court and shall exercise supervisory control over any Peacemaker appointed pursuant to these rules.

#### **SECTION 104 Scope.**

Subject to the limitations under Section 203, a judge of the Tribal Court may appoint a Peacemaker in a community where the parties to the dispute are members of the Northern Arapaho Tribe, or Indians residing on the Wind River Indian Reservation, Wyoming, or where the matter in dispute involves certain personal and community relationships including, but not limited to, the following:

- (a) Marital disputes and disputes involving family strife;
- (b) Disputes among parents and children;
- (c) Minor disputes between neighbors as to community problems such as nuisances, animal trespass or annoyance, disorderly conduct, breaches of the peace and like matters;
- (d) Alcohol use or abuse by family members or neighbors;
- (e) Conduct causing harm, annoyance, or disunity in the immediate community;
- (f) Minor community business transactions of a sum of \$1,500 or less; and
- (g) Any other matter which the chief or associate judge of the Tribal Court finds should or can be resolved through the use of the Peacemaker Court.

(Sections Omitted)

#### **SECTION 202 Powers of Peacemakers.**

Peacemakers are officers of the Tribal Court when acting as a Peacemaker and performing the functions of the Peacemaker Court under these rules, and they shall have the privileges and immunities of court officers. Peacemakers shall have the power to:

- (a) Mediate disputes among persons involved in the peacemaking process by attempting to get them to agree as to the nature and scope of the problems affecting them and to agree on what should be done to resolve those problems;



- (b) Use traditional Northern Arapaho culture and other ways of mediation and community problem solving;
- (c) Instructor lecture individuals on the traditional Northern Arapaho teachings relevant to their problem or conduct;
- (d) Compel persons involved in a dispute, affected by it, or in any way connected with it, to meet to discuss the problem being worked on and to participate in all necessary peacemaking efforts; and
- (e) Use any reasonable means to obtain the peaceful, cooperative, and voluntary resolution of a dispute subject to peacemaking. No force, violence, or the violation of rights secured to individuals by the American Indian Civil Rights Act will be permitted.
- (f) If parties to a dispute agree in writing or orally before the Tribal Court, a Peacemaker may arbitrate a dispute by hearing all sides of it and then issuing a decision. Any such decision will have the effect of a court judgment when submitted to the Tribal Court for entry as a written judgment. Such decision may be appealed pursuant to the rules of the Tribal Court regarding civil appeals.

### **SECTION 203 Limitations; Peacemakers Not Judges.**

Peacemakers shall only have the authority to use traditional and customary Northern Arapaho methods and other accepted nonjudgmental methods to mediate disputes and obtain the resolution of problems through agreement. Peacemakers shall not have the authority to decide a disputed matter unless all parties to the dispute agree to such authority. Appointed Peacemakers shall not have authority to hear any appeal from any decision of:

- (a) The Northern Arapaho Business Council;
- (b) The Tribal Court including, but not limited to, any appeal from a final decision of the Tribal Appellate Court;
- (c) Employers, when the decision of the employer is regarding any rights or obligations of the employer or employee governed by personnel policies or procedures of the employer.

(Sections Omitted)

## **PART 600 — TRANSFER OF CASES FROM TRIBAL COURT TO PEACEMAKER COURT**

### **SECTION 601 General Policy.**

Certain civil and criminal actions in Tribal Court may be transferred to the Peacemaker Court where they fall within one of the kinds of matters within the jurisdiction of the Peacemaker

Court described in Sec. 104, or where it is in the interest of justice to make such a referral for good cause shown.

**SECTION 602 Civil Matters.**

Civil actions falling within the provisions of Sec. 104 may be referred to Peacemaker Court with the written stipulation of all the parties to the action or for good cause shown to the Tribal Court.

**SECTION 603 Criminal Matters.**

Any criminal matter may be transferred to the Peacemaker Court where:

- (a) The case does not involve injury to a person or property;
- (b) Where the victim to the alleged offense consents;
- (c) Where the offense is a victimless crime; or
- (d) Where there is a finding of guilty, the victim consents to peacemaking, and peacemaking would be an appropriate condition of probation for achieving harmony and reconciliation with the victim.

**SECTION 604 Criminal Probation.**

The Tribal Court may, as a condition of criminal probation, require the defendant to submit to the Peacemaker Court for traditional and customary counseling, instruction, and lectures appropriate to his or her offense. The Tribal Court may require the defendant to pay a reasonable fee as required of other parties before the Peacemaker Court pursuant to Section 307.

**SECTION 605 Transfer on Condition.**

Any case may be transferred to the Peacemaker Court on any reasonable condition, with a stay of proceedings before the Tribal Court, and the Tribal Court may reassume jurisdiction over a case upon breach of or the failure to satisfy any condition imposed.

## Navajo Nation

### Title 7. Courts and Procedure: Chapter 3. Judicial Branch: Subchapter 10. Navajo Nation Peacemaking Program (Hózhóójí Naat'áanii) \*

#### 7 NAVAJO CODE § 409

##### § 409. Establishment

It is hereby recognized and affirmed that there is a Navajo Nation Peacemaking Program (Hózhóójí Naat'áanii) within the Judicial Branch of the Navajo Nation. The Peacemaking Program shall be the central point of peacemaking information and coordination with the Navajo Nation Judicial Branch.

##### § 410. Purposes

The purposes of the Navajo Nation Peacemaking Program include to promote a nonadversarial forum for solving disputes where the parties to the dispute voluntarily agree or are referred to peacemaking; to promote peacemaking counseling services to clients of the Navajo Nation Courts; to promote peacemaking support and assistance to Navajo Nation Courts when requested to make recommendations on sentencing; to provide education and training on Navajo culture, traditions, and other Navajo accepted beliefs to individuals, organizations, and communities; to provide support and technical assistance to peacemakers; to promote the research, development, and learning of Navajo culture, traditions, and other Navajo-accepted beliefs in support of judicial and community programs; and to provide problem-solving assistance to peacemakers, judges, court staff, and others concerning the peacemaking process. Peacemaking is intended to promote healing and reestablish harmony among those persons participating in peacemaking.

##### § 411. Responsibility and Authority

The Navajo Nation Peacemaking Program shall have the authority and power to undertake the following functions and duties:

- A. To conform the procedures of Hózhóójí Naat'áanii to traditional Hózhóójí Naat'áanii concepts, including K'é, clanship, and other principles of Navajo culture, traditions, and other Navajo-accepted beliefs, establish standards and procedures for that process, and otherwise develop standards, principles, and procedures for the development of Hózhóójí Naat'áanii in accordance with Navajo culture, traditions, and other Navajo-accepted beliefs and the laws of the Navajo Nation.
- B. To maintain a list of peacemakers and provide technical support to peacemakers to facilitate the conduct of peacemaking.

- C. To periodically evaluate the techniques of peacemakers and the peacemaking process.
- D. To authorize peacemakers to enter into funding agreements with the Judicial Branch for mileage and training.
- E. To perform such other functions and duties that are in accordance with Navajo Nation law and purposes of the Navajo Nation Peacemaking Program and that will promote the practice of peacemaking.

#### § 412. Personnel

The Navajo Nation Peacemaking Program shall be administered by a Peacemaking Program Coordinator. All personnel, including the coordinator, shall be subject to Navajo Nation Judicial Branch personnel policies and procedures approved by the Judiciary Committee of the Navajo Nation Council.

#### § 413. Legislative Oversight

The Navajo Nation Peacemaking Program shall operate under the legislative oversight of the Judiciary Committee of the Navajo Nation Council pursuant to the powers granted that Committee in 2 N.N.C. § 571 et seq. The Navajo Nation Peacemaking Program shall operate pursuant to a Plan of Operation approved by the Judiciary Committee of the Navajo Nation Council.

\* Not available online as of May 2015.

## [32.3] Tribal Code Commentary

The tribal statutes highlighted provide examples of things to consider when structuring a peacemaking court.

### Establishing Peacemaking Courts

The Little River Band of Ottawa Indians (“Little River”) has a specific “Peacemaking Guidelines” code and also covers peacemaking courts in their Juvenile Code. In Section 1.01 the peacemaking guidelines (“guidelines”) explain that the peacemaking court can be used in conjunction with the current court system. It also states that both juveniles and adults can participate. The Northern Arapaho Nation (“Northern Arapaho”) explains in Section 103 that the peacemaking court operates under the tribal court. Similarly, the chief judge may exercise oversight of the peacemaking court. In Section 409 of the Navajo Nation Code (“Navajo”) the peacemaking court is established within the Navajo Nation Judicial Branch.

It is up to your tribe to decide how much oversight the judicial branch has over the peacemaking court and the details of how it operates within your tribal government.

## **Vision, Philosophy, Objectives, and Purpose of Peacemaking**

In the Little River guidelines Section 2.01, the vision includes working with children, which is important because it reaffirms the tribal commitment in using the peacemaking process to assist juveniles. It is also important to note that the tribe uses traditional conflict resolution and values in the process. Similarly, the focus is on resolving issues and healing. It is important to have these, or similar, terms memorialized in the code because it demonstrates the tribes' support of such programs.

The Little River peacemaking court philosophy is stated in Section 3.01. It explains how the peacemaking process is different from state court in that peacemakers do not judge the participants. In addition, the peacemaking system is not adversarial like Western courts. The peacemakers assist the participants to solve their own problems. It also emphasizes the importance of respect and healing.

In Section 4.01 of the Little River guidelines the tribe explains the purposes of peacemaking. The goal is to have participants solve their own problems. In doing so, “the wrongdoer” takes responsibility and all can heal; in addition, traditional practices and community services are sought out for the participants. Within Navajo code Section 410, the Nation explains its purposes of peacemaking within its jurisdiction. The peacemaking program is not adversarial and may make sentencing recommendations to the Navajo Nation Courts. The peacemaking program provides education and training on Navajo culture, traditions, and teachings to participants. The program seeks to promote healing and harmony to its participants. Both of these programs emphasize the nonadversarial nature of the peacemaking process and the importance of traditional culture.

Under Section 8.04 of the Little River guidelines, the peacemaking court objectives are to reveal the issues, problems, or conflicts to make it clear, so the participants will be able to understand and start to resolve the issues. The objectives are met by ensuring that everyone is heard, using customs and traditions, all within a safe environment.

## **Who Is Eligible, What Types of Cases Can Be Heard**

The Little River Guidelines Section 6.01 states that children, youth, adult tribal members, and tribal employees are eligible for peacemaking. It delineates that children and youth who have civil cases pending before the Little River Court, another tribal court, or the state court in Michigan are eligible. Other possible situations are child in need of care, delinquent offenders who have committed minor offenses, youth referred to peacemaking from another federally recognized tribe, a referral from the Case Intake Team (CIT) (a multidisciplinary team that works for the tribe and intervenes in juvenile issues to assist), and referrals from other outside agencies, that is, school and nontribal social services referrals. This is important because the scenarios in which a juvenile can come into the peacemaking court are set out in the code.

In the Little River Guidelines Section 6.02 and the Little River Juvenile Code 8.02 the tribe explains what cases can be heard in the peacemaking court: all children and youth who are facing a first time status offense, a nonstatute offense, or civil case in the Little River Band of Ottawa Indians Tribal Court System, or a request from another tribal court or state court that a case be transferred to peacemaking. The peacemaking court can also hear all other cases referred by the CIT, all other cases that are referred by the Tribal Court; and cases from persons requesting to voluntarily access peacemaking.

Under Northern Arapaho Section 104 peacemaking court participants must be members of the Northern Arapaho tribe or an Indian residing on the Wind River Indian Reservation. The peacemaking court can also hear an issue if it involves certain personal and community relationships including, but not limited to, the following: marital disputes, disputes among parents and children, minor disputes between neighbors, alcohol use or abuse by family members or neighbors, or any other matter that the chief or associate judge of the Tribal Court finds should or can be resolved through the use of the Peacemaker Court.

## **Process/Steps of Peacemaking**

An example of how a peacemaking session may be conducted is described in the Little River Guidelines Section 8.01. This includes a traditional opening and prayer, introductions, rules, and the opportunity to use Alternative Dispute Resolution if desired.

## **Confidentiality and Record Keeping**

The Little River Guidelines set out some good strategies for confidentiality and record keeping. In Section 8.02 the guidelines explain that peacemakers must abide by confidentiality, including keeping documents and case files confidential. However, in the case of suspected child abuse the peacemakers are required to disclose information to proper authorities. In Section 8.03 the guidelines state that all peacemaking files are to be destroyed six months after peacemaking is completed. However, if the peacemaking is a condition of probation then the file will stay with probation until the juvenile is eighteen years old. At that point, all the documents and files will be destroyed. It is important for peacemaking court participants to feel comfortable and safe with the process. Laying out confidentiality requirements in the code memorializes the courts commitment to confidentiality and the expectations of the peacemaking court process.

## **Peacemaker's Role and Authority**

In Section 202 of the Northern Arapaho code, the peacemaker's powers are defined. They are given the power to mediate disputes between peacemaking court participants; use traditional Northern Arapaho culture mediate and instruct individuals; move the peacemaking process along; and issue decisions that are binding in court. In Section 203, the Northern Arapaho code explains that peacemakers can only use custom, tradition, and nonjudgmental methods in peacemaking court. They can only hear a case if all parties agree to participate in peacemaking court. They do not have

the authority to hear an appeal from a decision of the business council, tribal court, or an employer. It is a good practice to define what the peacemaker can and cannot do.

The peacemaking court authorities and power are described in the Navajo Nation code Section 411. The peacemaking court ensures that Navajo culture, traditions, and beliefs determine the peacemaking process and procedures. The peacemaking court also keeps a list of peacemakers and provides them with support. The peacemakers and the peacemaking process are also subject to review by the peacemaking court. Here, the peacemaking court has a list of enumerated powers that it exercises independent of the peacemakers.

## **Transfer from Other Courts**

In Section 601, the Northern Arapaho code states that only certain civil and criminal cases (described in Section 104) may be transferred into the peacemaking court, unless a referral shows good cause. Section 603 explains which criminal matters can be transferred: the case does not involve injury to a person or property; a case in which the victim to the alleged offense consents; a case in which the offense is a victimless crime; or a case in which there is a finding of guilty, the victim consents to peacemaking, and peacemaking would be an appropriate condition of probation for achieving harmony and reconciliation with the victim. This ensures that victims are not compelled to participate if they are not comfortable.

In Section 604, the code authorizes the tribal court to transfer a defendant on criminal probation into the peacemaking court for traditional and customary counseling, instruction and lectures appropriate to his or her offense. Section 605 explains that any case can be transferred into the Northern Arapaho peacemaking court on any condition, while the case is stayed in tribal court. If the condition is not completed, then tribal court will reassert jurisdiction over the case.

## **Unique Issues for Juvenile Cases**

The Little River Band of Ottawa Indians has a juvenile code that specifically addresses juvenile participation in peacemaking court. In the Guidelines Section 6.05, the CIT's role is stated. The CIT determines whether a juvenile case will be forwarded to prosecution or if it will be delayed for participation in the peacemaking court. Under guidelines Section 6.07, if a juvenile case is referred to peacemaking court, the CIT will review the case every thirty days. If the juvenile is not making progress the CIT will defer to prosecution to move forward on formal adjudication.

Little River Juvenile Code 4.01 (b) explains that peacemaking is established to provide traditional conflict resolution for children, youth, and families, as well as provide healing for all involved in the process. Section 4.02 outlines the process of peacemaking for juveniles. A juvenile's first offense in the Little River tribal court will be immediately referred to the peacemaking court. All other cases will proceed through the CIT, which refers the case to an investigator who in turn investigates and makes a recommendation. The CIT can determine how a case will proceed and develop a plan for the juvenile and/or family if not immediately forwarded to the tribal court. If the CIT rejects a case

then the case will be referred to tribal court. It is helpful to have timelines and procedures spelled out in the code.

## [32.4] Exercises

The following exercises are meant to guide you in developing the peacemaking related sections of the tribal juvenile code and or the tribal peacemaking code.

- Find and examine your tribal codes to see if you have any provisions related to mediation or “peacemaking” (note that these might be contained in a judicial code, court establishment code, and/or court rules).
  - Who is eligible to participate in peacemaking?
  - What types of issues can be handled by the current process?
  - What is the outcome of the peacemaking (how will a juvenile court judge know what happened)?
- If possible, flow chart what happens in your peacemaking process from beginning to end.
- Make a list of the pros and cons of using peacemaking as part of your juvenile justice process.
- Make a list of any needed changes to accommodate juveniles and their families (e.g., where in the juvenile code would you divert to peacemaking, or what types of peacemakers should be recruited/trained to work with juveniles and their families)

## Read and Discuss

### What is peacemaking? How does it work?

FORT McDOWELL YAVAPAI NATION, SCOTTSDALE, ARIZ., Dec. 6, 2011—Twelve practitioners and policymakers from both tribal and state courts participated in a roundtable about Indian peacemaking with an eye toward introducing peacemaking in non-Indian settings.

The roundtable was sponsored by the U.S. Department of Justice’s Bureau of Justice Assistance, in collaboration with the Center for Court Innovation.

Peacemaking is a traditional Native American approach to justice. While the exact form peacemaking takes varies among tribes, it usually consists of one or more peacemakers—often community elders—who gently guide a conversation involving not only those directly involved in an offense or conflict but family members, friends, and the larger community. Most forms of peacemaking follow a few simple rules. Among them, according to Barry Stuart, the retired chief judge of the Yukon Territorial Court, are “don’t dump and run”—in other words, participants must



stay until the end and listen respectfully to all speakers. Other rules include “speak the truth” and “no shaming or blaming,” Stuart said.

While conventional Anglo-Western criminal courts generally focus on determining a defendant’s guilt and sentence, peacemaking is restorative, focusing less on punishing the individual and more on mending relationships and healing the community. It does this by creating a safe space that nurtures participatory skills and new connections.

Peacemaking also differs from mediation. Barbara A. Smith, a justice on the Supreme Court of the Chickasaw Nation, said that the difference between western mediation and Indian peacemaking is that “mediation is about an issue; peacemaking is about relationships. . . . The key is the peacemakers go in not with the thought of solving the issue. Instead, it’s about helping everyone learn to talk to one another” so that they can resolve the problem themselves.

Stanley L. Nez, peacemaker liaison in the Aneth Judicial District of the Navajo Nation, said peacemaking has deep roots in Indian culture, religion and outlook. Native Americans value harmony and interconnectedness, he said, noting that harmonious relationships among humans are just as important as a harmonious relationship among the basic elements of the universe—“earth, air, water, and fire.”

David D. Raasch, an associate judge with the Stockbridge-Munsee Tribal Court, said a peacemaking session is less structured than a courtroom, where procedures are dictated by case law and legislation. Peacemaking is “like opening the floodgates on a dam. The water can flow where it will flow,” he said.

All participants agreed that peacemaking is perpetrator, victim, families and the community at large to address the damage caused by an offense and put safeguards in place to reduce the likelihood of recidivism.

“We say all the people in the circle are now probation officers because they can call together another circle if the [offender] does something wrong,” said Michael A. Jackson, the keeper of the circle in the Village of Kake and magistrate in Alaska District Court.

By the end of the roundtable, which took place over a day and a half, participants seemed to agree that it was possible to adapt the key components of peacemaking for use in a non-tribal setting, including a state court.

The peacemaking roundtable is one of several initiatives sponsored by the Center for Court Innovation’s Tribal Justice Exchange. Funded by the U.S. Department of Justice, the Exchange encourages state and tribal practitioners to consider the question: What lessons can state and tribal courts learn from each other? The hope is the answers will help strengthen both tribal and state court systems by expanding knowledge of proven strategies and fostering mutual understanding.

The peacemaking roundtable was moderated by Brett Taylor with assistance from Aaron Arnold and Erika Sasson. The roundtable will be summarized in a report, scheduled to be completed in early 2012, that will serve as a resource for those interested in creating peacemaking programs in their communities, tribal and non-tribal.

\*Taken from “Can Peacemaking Work Outside of Tribal Communities?,” Center for Court Innovation, September 25, 2014. Go to <http://www.courtinnovation.org/research/can-peacemaking-work-outside-tribal-communities>.

# Chapter 33: Teen Courts

## [33.1] Overview

The National Association of Youth Courts defines *teen courts* (also known as youth, peer, and student courts) as a program “in which youth sentence their peers for minor delinquent and status offenses and other problem behaviors.”<sup>56</sup> Teen or youth courts have been growing in number since the mid-1990s. There are a few teen courts in Indian country, however, the Kake Youth Circle Peacemaking program is currently the only one that is codified within the tribal code. Other tribal teen courts may be operating, but they are not codified. This may be due to the fact that some tribal teen courts are operated by tribal agencies other than the court or by community organizations.<sup>57</sup>

A teen court can be dispositional or adjudicatory. A dispositional court is one in which the youth has already admitted to the behavior that brings them into court, and the teen court program is established to determine a “fair and appropriate disposition”<sup>58</sup> for the youth. Whereas an adjudicatory teen court allows the youth to enter a not guilty plea, the court must determine their responsibility for the offense. Most teen courts allow referrals from judges, police, probation officers, and schools. Cases heard often include theft, criminal mischief, vandalism, minor assault, possession of alcohol, minor drug offenses, truancy, and other status offenses and nonviolent misdemeanor offenses.<sup>59</sup>

There are many ways to structure a teen court. Tribes should explore different options to determine what best fits the community and cultural values. Ada Pecos Melton discusses in her article “Building Culturally Relevant Youth Courts in Tribal Communities” four basic teen court models: Adult Judge, Youth Judge, Youth Tribunal, and Peer Jury. However, a hybrid could be created as well. The Adult Judge model is one that most state programs use. It requires an adult for a judge (often times a volunteer attorney), while the youth volunteer as prosecution, defense, court clerk, bailiff, and jurors. In a Youth Judge model, a teen volunteer serves as judge. The teen has typically served as an attorney in previous sessions. All of the other roles are also filled by teen volunteers. In the Youth Tribunal there are no jurors, instead youth attorneys present the case to a youth judge or panel of youth judges. Often there is one experienced youth judge who consults with two not as experienced judges. This model is used for arraignments if a court is adjudicatory. A Peer Jury court does not use attorneys; instead a case presenter reads the facts to the court. The case presenter may

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<sup>56</sup> [http://www.youthcourt.net/?page\\_id=24](http://www.youthcourt.net/?page_id=24) (accessed September 2, 2014).

<sup>57</sup> Ada Pecos Melton, Building Culturally Relevant Youth Courts in Tribal Communities (From Selected Topics on Youth Courts: A Monograph, P 65-91, 2004, Tracy Godwin Mullins, ed – See NCJ-208164).

<sup>58</sup> Taken from report: “An Update on Teen Court Legislation,” September 2006, 5. [http://www.youthcourt.net/wp-content/uploads/2010/05/update\\_on\\_teen\\_court\\_legislation.pdf](http://www.youthcourt.net/wp-content/uploads/2010/05/update_on_teen_court_legislation.pdf).

<sup>59</sup> Melton, Building Culturally Relevant Youth Courts in Tribal Communities, 71.

be the teen court coordinator, probation, law enforcement, or volunteer (youth or adult). A jury made up of six to eight youth poses questions to the teen and then makes sentencing recommendations. The judge is an adult.<sup>60</sup>

There are many benefits of having a teen court, for example it provides a forum to deal with status offenses like truancy and minor offenses such as traffic violations and nonviolent crimes. Teen courts also allow for youth to participate in their tribal government and understand how courts work. Similarly, youth become engaged in their community and gain leadership skills. Those youth who are “sentenced” in the teen court can learn traditional skills through cultural-based community service, and can become more connected with their community. The court provides benefits to the tribe in that it provides opportunities for tribal agencies to work together on these issues, as well as potential opportunities to work with off-reservation agencies. Overall tribal youth who need assistance are brought into the teen court for intervention and the underlying problems can be addressed.<sup>61</sup>

As previously mentioned, the majority of tribal teen courts are not codified within tribal codes. Most are programs that receive support from different tribal agencies. Similarly, there are less state teen courts operating under legislation than there are teen court programs that operate without legislation. One benefit of codifying your teen court is the potential for funding (whether that is from the tribe or outside sources); codifying the teen court demonstrates that your program is established and has parameters. Other benefits of codification include sources for referral into the court and providing sentencing options.

## [33.2] Tribal Code Example

### [Keex' Kwan Judicial Peacemaking Code](#)

#### **Organized Village of Kake**

#### **Chapter 4: Kake Youth Circle Peacemaking**

#### **Section 1: Purpose of Kake Youth Circle Peacemaking**

The Youth are our treasures of our Tribe and hope for the future. The purpose of the Kake Youth Circle Peacemaking is to encourage responsible behavior and choices among our Youth, to empower them to participate in decision-making when problems arise among their peers, and to preserve and promote the cultural values and practices of the Kake Youth Circle Peacemaking Tribe. The Consensus Agreement ordered by the Kake Youth Circle Peacemaking shall be designed to help and heal victims, wrongdoers, and the Village of Kake. This Ordinance outlines the basic structure and procedures of the Kake Youth Circle

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<sup>60</sup> Ibid., 73.

<sup>61</sup> Ibid., 72–3, 76.

Peacemaking, and is intended to provide a fair and equitable process that is consistent with the Organized Village of Kake Tribal Constitution, OVK tribal ordinances, the requirements of the Indian Civil Rights Act, and compatible with the unwritten laws and values of Organized Village of Kake.

(Section 2. Omitted)

### **Section 3. Jurisdiction of the Kake Youth Circle Peacemaking**

The Kake Youth Circle Peacemaking shall have limited jurisdiction over health, safety, and welfare matters arising among the village Youth between and including the ages of 8 through 18. Those subjects include use of alcohol and illegal drugs, vandalism, trespass, theft, bullying, harassment, disorderly conduct, tardiness, truancy and juvenile curfew. However, the Kake District Court of Alaska may at any time, initially take, or take over a case when the complexity or seriousness of the situation warrants it.

### **Section 4. Youth Coordinator and Youth Panel**

The OVK shall designate a Youth Coordinator and establish a panel of at least two youth to work with and advise the Youth Coordinator. Duties of the Youth Coordinator and Panel may include:

- Receiving petitions or referrals filed with the Kake Youth Circle Peacemaking, Tribal Youth Court.
- Answering the phone calls or receiving mail for the Youth Court.
- Maintaining files for the Court and a Court calendar.
- Helping to select Circle participants when asked to do so.
- Notifying parties and Circle participants of Circle hearings.
- Drafting Consensus Agreements for the Keeper of the Circle to sign.
- Receiving proof of Compliance with Consensus Agreements.
- Maintaining records of Youth Court finances.

### **Section 5. Beginning a Case by Petitioning or Referral**

#### **A. Beginning Cases by Petitions:**

A case may begin by anyone giving a Petition describing an incident, problem, or situation to the Youth Coordinator, or to any one of the Organized Village of Kake Social Services and/or SEARHC (SouthEast Alaska Regional Health Consortium) Counselors. Petition

forms shall be made available at the OVK Office. The person filing a Petition shall be called the Petitioner and may be asked to sit in the Circle on the case. Two youth and staff shall meet to review the petition and decide whether or not the Kake Youth Circle Peacemaking should hold a Circle on the case. If so, they shall proceed to select Circle participants under Section 7(B) of this Ordinance. The OVK Youth Coordinator shall schedule a date for the Circle, and notify the parties.

**B. Beginning Cases through Referrals:**

A case may begin by a referral from a state court judge or law enforcement officer, or by referral from another tribal court. A Review meeting shall be called by the Clerk to review the referral and decide whether or not the Kake Youth Circle Peacemaking should hold a Circle on the case. If so, the OVK Tribal Youth Coordinator or designated OVK staff person shall proceed to select Circle participants. The Tribal Youth Coordinator shall schedule a date for the Circle, and notify the parties.

**Section 6. Determining Circle Participants and Keeper of the Circle**

Circle participants and the Keeper of the Circle shall be chosen by the Tribal Youth Coordinator or designated OVK staff.

**Section 7. Notification of Circle Hearings**

The Tribal Youth Coordinator shall notify the parties being accused of a wrongdoing and Circle participants about the date, time, place of Circle hearings. The notice to the parties shall include a copy of the petition or reason they are being brought to the Peacemaking Circle, and shall state that if the parties believe they are being wrongly accused that they may immediately notify the OVK Youth Coordinator who will schedule a hearing before the OVK Council. Notice for Peacemaking Circles shall be given at least three days prior to the Circle date.

**Section 8. Kake Youth Circle Peacemaking**

**A. Peacemaking Circle:**

The Kake Youth Circle Peacemaking Tribal Youth Court shall be conducted through the use of Peacemaking Circles.

**B. Choosing the Circle participants and Circle Keeper:**

Circle participants and the Facilitator of the Circle shall be chosen by the OVK Youth Coordinator plus two Youth from the Youth Panel, and shall not be parties in the case or live in the same household as the wrongdoer coming before the circle.

### **C. Circle Participants:**

In general, participants of Peacemaking Circles shall include resident Youth between and including the ages of 8 and 18, [and] are selected by the Youth Coordinator and two youth. The OVK Youth Coordinator shall be present at Circle hearings in order to write the decision of the Circle on a Consensus Agreement form. Circles may also include adult community members, parents, teachers, counselors, and any other person who those choosing Circle participants decide should be in the Circle.

### **D. Keeper's Role for Opening and Conducting the Circle:**

- The Keeper of the Circle shall begin the Circle process by opening the Circle.
- Opening the Circle may include a prayer or special comments from an Elder or someone in the Circle.
- The Keeper shall ask the participants to agree to the Oath of Confidentiality and Fairness written in Section 8 of this Ordinance.
- One person shall talk at a time with no interruptions.
- The Keeper shall outline the rules of the Circle and ask participants if there are any additional rules they would like to see the Circle go by.
- Comments shall be limited to maximum of five minutes, unless permission granted by Facilitator.
- The Keeper shall state what the situation is that the Circle will be hearing.
- The Keeper shall begin the Circle by passing the talking stick or other special object in a clockwise direction.
- The Keeper shall be responsible for keeping order in the Circle should that become necessary.
- The Keeper shall summarize the highlights of what has been said after each round of discussion.
- Participants shall show respect to one another and not point blame.
- The Keeper shall state the final consensus of the Circle, and make sure that it is an accurate summary of the Circle's decision, and sign the written Consensus Agreement after the Tribal Court Clerk or OVK Youth Coordinator has prepared it.

- All comments made in the Circle shall be confidential.

#### **E. Basic Rules of the Circle:**

The most basic rule of the Circle is that persons shall have respect for one another. Only one person shall speak at a time, which shall be the person with the talking stick, or as directed by the Keeper of the Circle. What is said in the Circle shall stay in the Circle, and shall not be discussed outside of the Circle.

#### **F. Order of Speaking:**

Once the Keeper has opened the Circle, he or she shall pass the talking stick around the Circle and participants shall speak only when they hold the stick. If a person chooses not to speak, they may pass the stick on to the next person in the Circle. The discussion of the Circle shall continue in this manner unless the Keeper directs otherwise.

#### **G. Process of the Circle:**

The first round: quick introductions shall be made, stating name and the person being supported (victim, wrongdoer). The second round of the Circle discussion shall be for participants to voice their feelings (speaking from the heart), opinions, share information, and generally talk about the situation. After these things are thoroughly aired, the Keeper shall begin a new round of discussion focusing on appropriate solutions and sentencing.

#### **H. Decision of the Circle:**

The decisions of the Circle shall be made by consensus. The discussion in the Circle shall proceed until everyone can stand behind the decisions being made. The decision of the Circle shall be written on a Consensus Agreement form by the OVK Youth Coordinator or Court Clerk and signed by the Keeper of the Circle, by the victim, and the wrongdoer. The decision shall include who shall do specific tasks that may be decided by the Circle, who shall Mentor the wrongdoer, and specify guidelines for the sentences decided.

#### **I. Mentors:**

Specific adult mentors shall be assigned to oversee the progress of wrongdoers in completing their sentences. Mentors shall sign off on proof of compliance forms when wrongdoers complete tasks assigned in Consensus Agreements within the allowed timeframe.

#### **J. Follow-up on Circle Consensus Agreements:**

Before a Circle adjourns a session, it shall make a specific plan for how follow-up will be monitored, and may set a date to reconvene the Circle to examine the progress of a case if appropriate in 30 days. If a party is not complying with an Consensus Agreement of the



Circle, the person may be brought before the Circle again, or the case may be referred to the Kake District Court.

### **Section 9. Oath of Confidentiality and Fairness**

Participants of the Circle shall agree to the following oath:

“I promise to not discuss what is said in this Circle outside of the Circle. I will work towards a fair agreement about what should be done.”

### **Section 10. Failure to Appear for a Peacemaking Circle**

If a wrongdoer was served with a notice about a Circle hearing but fails to show up for a Hearing, the Kake Youth Circle Peacemaking Tribal Youth Circle may send a designated adult to get the person if the person is in the Village, or set another Circle date.

### **Section 11. Creative Sentencing—Options for Consensus Agreements**

The Circle participants shall design sentences intended to help and heal victims, offenders, and the Village of Kake. The Circle shall assign specific adult mentors to oversee the completion of sentences. The Circle may choose one or more from the following options:

#### **A. Community Service Work:**

Work sentences shall benefit the needy, the village residents as a whole, the Elders, the victim of an offense, offenders, and/or the youth. Work sentences may include and are not limited to cutting wood, hauling water, shoveling snow, doing laundry, or cleaning homes or yards for needy people or the community hall or church, working in the school, conducting village surveys, helping the local police officer, working with carpenters or other tradesmen in the village, working in the OVK or City Offices, participating in preparations for community events, building maintenance or repair and cleaning up trash in the Village of Kake. Circle participants shall not order work sentences that only benefit themselves personally. Work sentences shall not displace persons employed in the Village or employment opportunities. Work sentences shall be completed within 30 days unless otherwise directed by the Court.

#### **B. Restitution:**

The Circle may order a wrongdoer to make restitution to his or her victims or to the Village. Restitution is defined to include payment of money, repairing property, and apologies. Restitution payment shall go through the OVK Youth Coordinator. Non-monetary restitution shall be supervised by [a] OVK Youth Coordinator or by another person designated by the Circle.

**C. Apologies:**

The Circle may order wrongdoers to make apologies to victims, parents or guardians, and/or to the whole village at OVK meetings or gatherings. The Circle may specify if the apologies shall be in writing or oral or both.

**D. Essays and Presentations:**

The Circle may order wrongdoers to write essays and/or to give presentations. The Consensus Agreement shall specify the topics for such essays and the minimum length. If a presentation is required, the audience such as the OVK Council, school or Elders shall be specified

**E. Organize Events or Fundraisers:**

The Circle may order wrongdoers to organize events for the Youth and village residents. Wrongdoers may also be ordered to organize fundraisers for restitution or village projects.

**F. Counseling by Professional Counselors, Peacemakers, and Elders:**

The Circle participants may counsel wrongdoers in a helpful spirit. The Circle may order professional counseling, as long as the counseling is available in the village, or counseling by specific Kake Elders. The Circle may also order peer counseling by specific peers, or participation in talking circles.

**G. Substance Abuse Awareness Sessions and Talking Circles:**

The Circle may order participation in substance abuse awareness sessions or talking circles in the Village.

**H. Traditional Activities:**

The Circle may order a person found in violation of an ordinance to participate in seasonally appropriate traditional activities such as fish camps, trapping, hunting, putting up fish or meat, culture camps, preparing Native foods, traditional crafts and Native language activities, and other tribally sponsored or approved traditional activities.

**Section 12. Proof of Compliance with Circle Consensus Agreements and Failure to Comply**

If a party is ordered to do something, the party shall file a Proof of Compliance form with the OVK Youth Coordinator within 7 days after completion of the Consensus Agreement forms. Mentors shall sign off on Proof of Compliance forms. Mentors shall notify the OVK Youth Coordinator in the event the person they are mentoring does not complete the requirements

of a Consensus Agreement. The OVK Youth Coordinator may schedule another Circle or report any failures to comply with Consensus Agreements to the regular Kake Youth Circle Peacemaking, schedule a Contempt of Court hearing, and provide notice to the party of the hearing.

### **Section 13. Appeals**

A panel of three Peacemakers from the Organized Village of Kake Tribal Court shall serve as the Appellate Court for the Kake Youth Circle Peacemaking, Tribal Youth Court. A Youth who wishes to appeal a case may file a Notice of Appeal with the OVK Youth Coordinator or Court Clerk within 10 days after receiving a Consensus Agreement from the Kake Youth Circle Peacemaking, Tribal Youth Court. A Review Meeting shall be held, and the decision made to accept the appeal or not shall be made. If the appeal is accepted, the Review Team shall determine which three Peacemakers shall serve as the Appellate Court for the case. Appeals filed after 10 days shall not be considered.

## **[33.3] State Code Example**

### **Wyoming State Statutes**

#### **Title 7 Criminal Procedure**

#### **Chapter 13 Sentence and Imprisonment**

#### **ARTICLE 12 - TEEN COURT PROGRAM**

#### **7-13-1201. Short title.**

This act shall be known and may be cited as the “Wyoming Teen Court Program.”

#### **7-13-1202. Definitions.**

(a) As used in this act:

- (i) “Minor offense” means any crime punishable as a misdemeanor or the violation of any municipal ordinance, provided the maximum penalty authorized by law for the offense does not exceed imprisonment for more than six (6) months and a fine of not more than seven hundred fifty dollars (\$750.00);
- (ii) “Supervising court” means the municipal court or circuit court by whose order a teen court program is established pursuant to rules and regulations promulgated by the Wyoming supreme court;
- (iii) “Teen” for the purposes of this act means a person who has attained the age of thirteen (13) years of age and is under the age of majority;

- (iv) “Teen court” or “teen court program” means an alternative sentencing procedure under which regular court proceedings involving a teen charged with a minor offense may be deferred and subsequently dismissed on condition that the defendant participate fully in the teen court program and appear before a jury of teen peers for sentencing and that the defendant successfully complete the terms and conditions of the sentence imposed. This sentencing is in addition to the provisions of W.S. 7-13-301 and 35-7-1037;
- (v) “This act” means W.S. 7-13-1201 through 7-13-1205.

**7-13-1203. Authority to establish teen court program.**

- (a) The Wyoming supreme court shall adopt rules and regulations governing teen court by July 1, 1996.
- (b) In addition to any other power authorized, a municipal court judge, with the approval and consent of the governing body of the municipality, or any circuit court judge, with the approval and consent of the board of county commissioners, may by order establish a teen court program and training standards for participation in accordance with this act to provide a disposition alternative for teens charged with minor offenses.
- (c) In any case involving the commission of a minor offense by a teen defendant, the supervising court may, without entering a judgment of guilt or conviction, defer further proceedings and order the defendant to participate in a teen court program, provided:
  - (i) The teen defendant, with the consent of, or in the presence of, the defendant’s parents or legal guardian, enters a plea of guilty in open court to the offense charged;
  - (ii) The restitution amount, if any, owed to any victim has been determined by the supervising court;
  - (iii) The defendant requests on the record to participate in the teen court program and agrees that deferral of further proceedings in the action filed in the supervising court is conditioned upon the defendant’s successful completion of the teen court program; and
  - (iv) The court determines that the defendant will benefit from participation in the teen court program.
- (d) If the supervising court determines that the teen defendant has successfully completed the teen court program, the supervising court may discharge the defendant and dismiss the proceedings against him.

- (e) If the defendant fails to successfully complete the prescribed teen court program, the supervising court shall enter an adjudication of guilt and conviction and proceed to impose sentence upon the defendant for the offense originally charged.
- (f) Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for any purpose. If the original offense charged was a traffic offense, the court shall, within thirty (30) days after the discharge and dismissal is entered, submit to the department of transportation an abstract of the record of the court evidencing the defendant's successful completion of the teen court program. The department shall maintain abstracts received under this subsection as provided by W.S. 31-5-1214(f).

**7-13-1204. Program criteria.**

- (a) A teen court program may be established under this act in accordance with the following criteria:
  - (i) The judge of the teen court shall be the judge of the supervising court or an attorney admitted to practice in this state appointed by the supervising court to serve in a voluntary capacity and shall serve at the pleasure of the supervising court;
  - (ii) Procedures in teen court shall be established by order of the supervising court in conformance with the provisions of this act and shall be subject to any uniform procedures for teen courts as may be prescribed by the Wyoming supreme court;
  - (iii) The supervising court may authorize the use of its courtroom and other facilities by the teen court program during times when the courtroom and facilities are not required for the normal operations of the supervising court;
  - (iv) The teen defendant, as a condition of participation in the teen court program, may be required to pay a nonrefundable fee not to exceed ten dollars (\$10.00). Fees collected under this paragraph by a municipal court shall be credited to the treasury of the municipality. Fees collected under this paragraph by a circuit court shall be credited to the treasury of the county;
  - (v) The teen court program may involve teens serving as voluntary teen court members in various capacities including, but not limited to jurors, prosecutor-advocates, defender-advocates, bailiffs, clerks and supervisory duties;
  - (vi) Every teen defendant appearing in teen court shall be accompanied by a parent or guardian;

- (vii) The teen court jury shall impose restitution, if any, in the amount established by the supervising court;
- (viii) The supervisory court, in accordance with the rules and regulations promulgated by the Wyoming supreme court, shall establish a range of sentencing alternatives for any case referred to teen court. Sentencing alternatives shall include, but not be limited to:
  - A. Community service as authorized by the supervising court;
  - B. Mandatory participation in law related education classes, appropriate counseling, treatment or other education programs;
  - C. Require the teen defendant to participate as a juror or other teen court member in proceedings involving teen defendants;
  - D. Fines, not to exceed the statutory amount.
- (ix) The teen court jury shall not have the power to impose a term of imprisonment.

**7-13-1205. Juvenile courts authorized to establish teen court program.**

- (a) Notwithstanding any other provision of the Juvenile Justice Act, W.S. 14-6-201 through 14-6-252, a juvenile court may establish and offer a teen court program substantially complying with the provisions of this act as an alternative to any disposition authorized by W.S. 14-6-229(d), provided:
  - (i) Participation in the teen court program shall be limited to teens charged under the Juvenile Court Act with having committed a minor offense and who have been adjudicated delinquent;
  - (ii) The juvenile and all parties to the proceeding, including any guardian ad litem appointed in the juvenile court proceeding to represent the best interests of the juvenile, consent to the juvenile's participation in the teen court program;
  - (iii) The juvenile and the juvenile's parents or guardian waive any rights to confidentiality otherwise available under the Juvenile Court Act; and
  - (iv) The juvenile court finds that participation in the teen court program would be in the best interest of the juvenile.

## [33.4] Tribal Code and State Legislation Commentary

The tribal code is helpful in providing examples of integrating cultural practices into a court process that is not adversarial and can assist youth. Although the Kake program is technically called a Peacemaking Court, it is also a teen court. Many aspects of the Kake program could be adapted into a tribal teen court. The Wyoming teen court provides helpful examples that can be applied to tribes as well.

### **Purpose**

It is a good idea to have the reasons listed as to why the tribe wants a teen court. In Chapter 4, “Kake Youth Circle Peacemaking,” Section 1, the Kake Village explains that the program not only empowers youth, but preserves cultural values and practices. It also emphasizes how important the youth are to the tribe. It is a good practice to explain that the program is consistent with the tribal constitution, tribal ordinances, ICRA, and unwritten cultural values.

### **Authority to Establish**

Laying out the power to establish the teen court is a good practice. The state of Wyoming in Section 7-13-1203 explains that the Wyoming Supreme Court lays out the rules for lower courts to set up teen courts in their jurisdictions. A municipal court or circuit court judge may establish a teen court program as long as the governing body approves and consents to the program. The teen court is defined as a “disposition alternative for teens charged with minor offenses.”<sup>62</sup> This exact language may not fit all tribes, but it is a good example to describe which government branch(es) of tribal government has the power to establish the teen court.

Further, in Section 7-13-1205 the Wyoming statute explains that a juvenile court may “establish and offer” a teen court. However, the teen court program must follow the acts requirements such as described later in the section “Who Participates?”

### **Jurisdiction**

In Section 3 of the Kake code, it explains that teen court jurisdiction is over youth between ages eight through eighteen years of age. The program has a limited jurisdiction over health, safety, and welfare matters that occur among the village youth. The matters include alcohol and drug use, vandalism, trespass, theft, bullying, harassment, disorderly conduct, tardiness, truancy, and juvenile curfew. The Kake District Court can initially take or take over a case if it is too complex or serious for the teen court.

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<sup>62</sup> Wyoming Code §7.13.1203.

## **Youth Panel and Youth Coordinator**

Section 4 of the Kake code lays out the youth coordinator and youth panel roles. The village chooses a youth coordinator and a panel of two or more youth. Their duties include receiving referrals and petitions, taking phone calls, receiving mail, maintaining court files, assisting with the court calendar, assisting in selecting teen court participants, notifying participants and parties of hearings, drafting consensus agreements, receiving consensus agreement proof of compliance, and maintaining youth court finance records.

These roles are helpful in defining what the youth court organizational staff will do. These roles and expectations can be altered to what best fits a particular tribal culture and how involved the staff will be with the teen court.

## **How a Case Comes into the Teen Court**

According to the Kake code Section 5, a case enters the teen court through either petition or referral. Anyone can file a petition (which describes an incident, problem, or situation) with the teen court youth coordinator, village social services, or Southeast Alaska Regional Health Consortium Alaska Counselors. Petition forms are at the Organized Village of Kake office. The person filing the petition (“petitioner”) may be asked to participate in the circle. Two youth and staff will meet to review the petition and decide whether or not to take the case.

A case may enter the court by referral from a state court judge or law enforcement officer or from another tribal court. The clerk will call for a review meeting to determine if the teen court will take the case. It would also be helpful if the code stated that the Kake court can refer a case to the teen court. This would simply further strengthen tribal court authority and jurisdiction over the teen court.

According to Wyoming statute 7-13-1203, a case enters the teen court by a teen defendant committing a minor offense. The court determines that the teen defendant will benefit from a teen program. The court has the option to defer the proceedings (and not enter a judgment) and order the teen defendant into the teen court program. However, the teen defendant must enter a guilty plea to the offense in open court with the consent of his or her parent or guardian. Any restitution amount must be determined by the court. The teen defendant must request on the record to participate in the teen court program; he or she must also agree that deferring the proceedings in the supervising court is conditioned on his or her successfully completing the teen court program.

The Wyoming statute gives the court discretion over who enters the program. It is positive that the judgment against the teen can be deferred while he or she completes the program. The requirements allow the teen to demonstrate that he or she wants to participate in the program. It also allows the court to have a guilty plea in case the teen does not complete the program.



## Who Participates?

In the Kake code, Section 6 explains that the youth coordinator or designated Organized Village of Kake staff will choose the teen court circle participants. This allows the program to have discretion over who participates. This also can be problematic because there are no clear rules as to who is admitted, however it is up to the individual tribal court to decide who participates based on norms and culture.

According to the Wyoming statute 7-13-1205, teens may participate in the teen court program if they have committed a minor offense and have been adjudicated delinquent. The teen and parent/guardian (or guardian ad litem) must consent to the teen's participation in the program. The teen and parent/guardian must waive any rights to confidentiality available under the Juvenile Court Act. Also the court must decide that the program is in the teen's best interest. This process only includes teens who have committed an offense and does not allow for the program to allow participants who may need the program, but have not been convicted of an offense. Whereas the Kake program has the potential to admit teens who may be in trouble, but have not been convicted of an offense.

## How the Program Functions

According to the Wyoming statute 7-13-1205, the teen court allows the teen into the court as described in "How a Case Comes into the Teen Court" and "Who Participates?" Under 7-13-1204, the judge in the teen court shall be a judge in the supervising court or an attorney admitted to practice in Wyoming, who is appointed by the supervising court. The teen court will take place in the supervising court's courtroom. The teen participant is required to pay a nonrefundable fee of ten dollars, which goes to the county treasury. It is not clear if the fee goes back into the program, but that is a possibility for tribes to exercise if they choose. The jurors, prosecutor-advocates, defender-advocates, bailiffs, and clerks may be teens who are involved with the teen court. Every teen defendant appearing in teen court must be accompanied by a parent or guardian.

Under Section 12-5, if the teen completes the program, then the court may dismiss the proceedings against him or her. If the teen does not complete the program, then the court will enter the guilty plea and will impose a sentence for the original offense. This ensures that the teen completes the program and that if he or she does not, then the teen will be sentenced for their offense.

According to the Kake code Section 8, the teen court (which also functions as a peacemaking circle) is based on respect. The tenets are tribally based and are different than that of the Wyoming court. The steps of the Kake program are spelled out in great detail. Only one person is allowed to speak at a time and everything spoken in the circle is to be kept confidential. The leader of the circle (keeper) begins the circle discussion with introductions and stating the names of the victim and wrongdoer. The second round allows for participants to speak their feelings and opinions, share information, and talk about the situation. Finally, the keeper leads a discussion on solutions and sentencing. Any decision that the circle makes must be by consensus. Adult mentors will be assigned to watch over

the wrongdoers in completing their sentences. This circle program works according to Kake culture and has many beneficial components that allow all participants to be heard.

## Sentencing

The Wyoming statute Section 7-13-1204, lays out sentencing options for the teen court program. The teen court can impose restitution. The supervisory court can impose community service and mandatory participation in law-related education classes; prescribe appropriate counseling, treatment, or other education programs; require the teen defendant to participate as a juror or other teen court member in proceedings involving teen defendants; and impose fines. These sentencing options are good ones and allow the court discretion in working with the teen. However, they do not cover any potential culture issues that tribes may want to include.

The Kake code in Section 11 allows for cultural issues in sentencing. The program assigns an adult mentor to oversee the completion of the sentencing options. The options include community service; restitution; apologies; essays and presentations; organizing events or fundraisers; counseling by professional counselors, peacemakers, and elders; substance abuse awareness sessions and talking circles; and/or traditional activities. These options allow the circle to be creative in sentencing and integrate the teen into traditional and community practices as appropriate.

## [33.5] Exercises

The following exercises are meant to guide you in developing the teen court–related sections of the tribal juvenile code.

- How do we want to structure our teen court—adjudicatory or dispositional?
- Who could make referrals into the teen court?
- What types of cases would the teen court hear?
- What type of model fits our community: Adult Judge, Youth Judge, Youth Tribunal, Peer Jury, or a hybrid?
- How involved will adults be in the teen court?
- What kind of sentencing options will the court provide?
- What traditional/cultural activities can be used in sentencing?

## Read and Discuss

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BuzzFeed News Reporter

posted on Jan. 16, 2015, at 7:11 a.m.

### Welcome To Teen Court

At legally authorized teen courts across the country, teens decide the real-life fate of other teens who've committed low-level offenses. The weirdest part? It seems to work — so why aren't there more of them?

One day after school last December, 15-year-old Michael took the stand in a Brooklyn courtroom. His crime: jumping a subway turnstile instead of paying for the \$2.50 ride, classified as the most serious level of misdemeanor in New York.

“How are you feeling today?” the jury foreman asked him.

“Nervous,” Michael said. (His name has been changed since he is a minor.) He had walked in with a scowl, but now looked like he was about to cry.

The New York Police Department takes turnstile jumping very seriously. More than 37,000 people received incarceration time for fare evasion from 2008 to the first half of 2014, according to state data; 1,802 of them were minors.

If Michael didn't take care of his ticket before his next birthday, he could have even become one of the nearly 50,000 16- and 17-year-olds who end up in the state's criminal courts every year, most of whom are charged with nonviolent crimes — New York is one of only two states where the age of adult criminal responsibility is 16. The overwhelming majority of youths sentenced to incarceration, 80%, are black and Latino.

But adults wouldn't decide Michael's fate that afternoon. Instead of giving him a ticket, the police officer who caught Michael trying to sneak into the subway sent him to teen court, which is run for and by teenagers.

The judge Michael faced was a teen. The jury members were teens. His “youth advocate” defender, as well as the “community advocate” who played a vaguely prosecutorial role, were teens as well.

“We are here to help you, not to judge you,” the 17-year-old foreperson reassured Michael before the questioning began.

Teen court, also called youth or peer court, may sound like the premise of a sitcom, but there are more than 1,000 youth court programs in 49 states and the District of Columbia, according to the National Association of Youth Courts, and some states have even passed teen court-related legislation.

Teen courts are a diversion program, not a court of law, and the majority don’t adjudicate guilt or innocence the way real courts do. Instead, the goal is to determine a fair sentence for first offenders who have admitted guilt for low-level offenses rather than throwing them to the mercy of the criminal justice system. Advocates also believe teens can get through to other teens in a way out-of-touch adults cannot. Some jury members are former “respondents” who went through the teen court system themselves.

“Here we treat respondents as people who have stories to tell that go beyond the mistake they made,” said Jah-Neyce, a 17-year-old member of the Red Hook Youth Court. “In a regular court, the judge doesn’t really care who you are.”

Teen court hasn’t been around very long — 20 years ago, there were only 78 in operation, according to the National Youth Court Database — although some say its roots stem back to the late 19th century, when social welfare leader William Reuben George founded the George Junior Republic in Freeville, New York, which promoted youthful self-government. His son-in-law may have founded the first youth court in the 1960s.

Police, probation officers, schools, district attorney’s offices, or family and criminal courts may refer minors to teen court who have already confessed to low-level crimes ranging from marijuana possession to shoplifting to assault. The jury attempts to target the root cause of an offender’s actions, after which they might be referred to social services, face community service, attend mandated motivational group counseling, or write a personal essay or public apology.

Advocates say positive peer pressure is more cost-effective than scaring nonviolent offenders straight. It costs about \$500 to send a kid to teen court compared to the roughly \$5,500 cost per child of appearing in juvenile court, said Jack Levine, program director of the National Association of Youth Courts.

But not everyone is so convinced that it’s a great idea.

Some critics are horrified at the prospect of going so easy on crime. “This scheme combines the worst of soft sentencing and silly gimmicks,” Centre for Crime Prevention’s Peter Cuthbertson told the Daily Mail last summer after a peer court opened in West Yorkshire, England. Those on the other side of the spectrum are concerned by a study and anecdotal evidence that suggested police

might refer some kids to teen court who would have otherwise simply been sent home with a stern lecture.

Others are just skeptical that the program actually prevents reoffending. Every teen court is different — some employ adult judges, while peers preside over others, and there’s a vast variation in referral sources — so it’s difficult to evaluate their effectiveness. Teen court participation also typically requires a formal or informal admission of guilt, which means it’s hard to compare it to the traditional court system. And, since teen court is designed for first-time offenders with low-level offenses, recidivism rates are low to begin with.

The lack of concrete data may be the reason why few people know teen courts exist — municipalities strapped for cash aren’t typically excited to invest in something that isn’t proven to work.

Though teen courts seem popular with some legal experts — the former New York State chief judge launched a fund to provide financial support and has unsuccessfully lobbied for legislation — funding is scarce. Most courts in New York are funded by local government, although they can also receive money from the state and federal government, private donors, and local school districts and foundations. Although the majority of youth courts in New York state have an annual operating budget of \$50,000 or less, New York’s youth courts are barely scraping by, their employees say.

“People love the idea of youth court,” said Beth Broderick, project director of the Staten Island Youth Justice Center, which hosts the borough’s youth court, “but they don’t seem to want to pay for it.”

But some research is promising. An Urban Institute study of four courts found that those who attended teen court had less than half the one-year recidivism rate of those who passed through the juvenile justice system. Advocates compare that to extensive research that shows that imprisoning young offenders actually increases their odds of committing more serious crimes and returning to prison while also making them less likely to graduate from high school.

“Teens take risks without understanding the long-term consequences,” said Dory Hack, director of Youth Justice Capacity Building at the Center for Court Innovation, a nonprofit that works closely with the New York State Unified Court System. “We strongly feel that youth court is a better way to respond to many minor offenses than the criminal system. We want them to have a positive experience and feel heard.”

In New York City’s youth courts, where teen members are paid a small monthly stipend after undergoing intensive training and hear cases twice a week, annual compliance rates average 93%, Hack said.

There are more than 80 youth courts in New York State (called “youth” because some respondents are as young as 10 years old, although members are 14-18). The Center for Court Innovation

operates five youth courts in New York City and one in Newark, New Jersey. In 2013, the Red Hook Youth Court heard 146 cases, most for larceny, truancy, and assault. The Staten Island Youth Court heard 170, many for shoplifting, thanks to the borough's most popular teen hangout: the mall.

For New Yorkers 16 and older, the alternative to youth court isn't necessarily jail time, but the "escalation of a case through the system," Hack said. In other words, if a kid like Michael doesn't show up to court, or is later charged with another offense, he might face increasingly serious consequences. By housing the courts in community centers, the Center for Court Innovation hopes to connect at-risk kids who come to youth court with other services they might need close to home. Some sessions take place in real-life courtrooms, like the youth court at Youth and Community Programs at the Red Hook Community Justice Center, which was founded as the nation's first multi-jurisdictional community court in 2000, while others, like Staten Island's, are conducted in repurposed office rooms.

"There's an air of legitimacy because of what the kids bring to it," said Broderick, adding that many respondents and their families are "really stressed" by a traditional courtroom setting.

During youth court sessions in Staten Island and Red Hook, teen respondents walked in looking nervous or defensive — most said they had never heard of youth court before, and had no idea what to expect — but quickly opened up once they realized the jury was on their side.

After everyone in the room cited a crucial confidentiality oath — every so often, a jury member and a respondent run into each other in their high school cafeteria — the cases began. One 11th-grader, clad in sequined Uggs, said that her friend had convinced her to shoplift a bag from H&M and that she struggled with peer pressure. The court assigned her an essay on that topic, along with three hours of community service and a behavior workshop. A pair of sisters who were reported truant explained in separate sessions that their mother had taken them to McDonald's for breakfast because they had a half-day at school. In many states, truancy charges can carry serious offenses for both kids and their parents, but the court decided that the sisters hadn't done anything wrong and let them go without any sanctions.

Michael, the turnstile jumper, was questioned more relentlessly.

First, the community advocate assigned to his case (the kids switch positions regularly) argued that the city loses out on funding thanks to fare evasion, and that younger kids might copy Michael's actions and get a ticket or face actual jail time. Michael's advocate, who had met with Michael before the hearing to get to know him better, said he possessed "a multiple of positive attributes," had a good relationship with his family and friends, and had never dealt with the police before. Plus, Michael "liked to play handball after school."

The jury then peppered Michael with questions, speaking as quickly as only teens can.

Did Michael have money with him? (No.) Did he ask anyone, say, in his school office, to borrow some before deciding to jump the turnstile? (No.) Had he ever been suspended? (Yes, twice; once for hitting a teacher, but that was in fifth grade.) Did he feel like anyone deserved an apology? (Yes: the MTA.) Who was his role model? (Biggie Smalls, which elicited some hidden grins from the otherwise professional jury). What were his future goals? (College, although he only said so after some encouragement from the jury.) How would his experience in youth court get in the way of them?

In a closing statement, the community advocate said Michael “lacked motivation and spoke too quickly.”

But his advocate defended him.

“He stated if given the chance he would apologize to the MTA, he does not skip school anymore, and he has learned not to jump the turnstile,” he said before thanking Michael for participating.

“We know how hard it is to admit to one’s fault in front of his peers.”

The jury left the room to deliberate. Some members felt that Michael had learned his lesson, but others thought he was just saying what they wanted to hear.

“He has future goals!” one teenager said in Michael’s defense.

“Well, only after you told him what they should be,” said another. “You had to prompt him.”

Ultimately, the jury assigned Michael a group counseling course, since they felt he needed a group for motivation’s sake, and a letter of apology to the MTA.

Michael and his mother then met with a youth court staffer so she could explain how the center would help him finish his sanctions in time — and that if he didn’t show up, it could stay on his permanent record, at least until he turned 18. (Most jurisdictions send kids who don’t complete their sanctions in time back to the traditional juvenile justice system.) Michael’s mother said she didn’t speak English or have an email account; the staffer told her not to worry.

“The goal isn’t to punish,” a 15-year-old jury member named Marcos said. “But if we see a pattern, we want to help kids fix it up. We all want what’s best for them.”

Asana, 17, who judged Michael’s case, used to think that “every man behind bars is a criminal,” she said. Then, she listened to an elementary schooler explain why he stole an iPhone. He told the court that he only did it because an older group of boys had threatened his family. The experience made Asana cry.

“It made me think of my brothers and sisters,” she said. “Now I’m not so biased.”





# Glossary

## A

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**Abuse:** Physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury.

**Adjudication:** The determination of a dispute and pronouncement of the court's decision.

**Admissible evidence:** Evidence that may be introduced in court to aid the trier of fact – i.e., the judge or jury – in deciding the merits of a case. Each jurisdiction has rules of evidence to determine what evidence is admissible.

**Admission:** The voluntary acknowledgment that certain facts are true; a statement by the accused or by an adverse party that tends to support the charge or claim against him or her but is not necessarily sufficient to establish guilt or liability.

**Adolescent:** A young person who is developing into an adult, typically ages 10 to 17 years of age.

**Adolescent brain development:** New scientific research is emerging with respect to the development of the human brain. The human brain is now understood to have different capacities and abilities depending upon whether it belongs to a child, an adolescent, or a young adult. Juvenile justice system reformers recommend an approximation with age as follows: that a “child” include individuals up to age 10; that an “adolescent” include individuals from 10 to 17; and that a “young adult” include individuals from 18 to 25.

**Adoption:** The legal process by which the parent/child relationship is created between persons not so related by blood. The adopted child becomes an heir and is entitled to all other privileges belonging to a natural child of the adoptive parent.

**Adult:** An individual who is eighteen (18) years of age or older.

**After care:** Aftercare, or continuing care, is the stage following primary treatment (which may include group and individual counseling, psycho-educational programming, etc.) when the participant no longer requires services at the intensity required during primary treatment. Aftercare can occur in a variety of settings, such as periodic outpatient aftercare, relapse/recovery groups, 12-step and self-help groups, and halfway houses. In drug courts, aftercare or continuing care is often included within the final phase of the drug court phased treatment plan.

**Alcohol testing:** Testing for the presence and concentration of alcohol (ethanol) in the blood is commonly referred to as BAC (blood alcohol content). BAC tests are typically administered via a breathalyzer.

**Anthropological documentation:** The documents, records, etc. that are used to prove something or make something official in the study of humans past and present.

**Ankle monitor with GPS:** A device that individuals under house arrest or probation may be required to wear. It is used to track an individual's whereabouts in a designated area. "GPS" stands for global positioning system, which is based on a satellite signal.

**Anti-social behavior:** Characterized by a long-standing pattern of a disregard for other people's rights, often crossing the line and violating those rights. It usually begins in childhood or as a teen and continues into their adult lives.

**Arrest:** To deprive a person of liberty by legal authority. To seize an alleged or suspected offender to answer for a crime.

**Assault:** An intentional threat, show of force, or movement that could reasonably make a person feel in danger of harmful physical contact.

**Attorney:** Synonymous with lawyer. This is one of a class of persons admitted by the state's highest court, federal court or by a tribal court to practice law in that jurisdiction. The attorney is regarded as an officer of the court and is always subject to the admitting court's jurisdiction as to his or her ethical and professional conduct. Violations of those standards of conduct may result in discipline of the attorney in the form of censure, suspension or disbarment.

## B

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**Banishment:** The forcible expulsion of somebody from the community.

**Batterer treatment provider:** Individuals or programs that provide counseling/treatment to batterers to assist in stopping domestic violence abuse.

**Batterers' intervention treatment:** A psycho-educational group led by trained professional facilitators. Batterers learn to identify abusive behaviors and are taught to react non-abusively and instead communicate with their partner. Batterers Intervention Programs differ from and are not replaceable by substance abuse treatments, mental health services, family/marital/couples or other counseling.

**Battery:** The unlawful touching of or use of force on another person willfully or in anger.

**Bill of duties and obligations owed to youth:** A number of more traditional tribes are exploring the responsibilities and rights of extended family members and what rights, privileges, and duties they might have with respect to youth. Some of these rights, privileges, and/or duties have been put into tribal statutes.

**Bill of Rights:** The first ten amendments to the United States Constitution; that part of any constitution that sets forth the fundamental rights of citizenship. It is a declaration of rights that are substantially immune from government interference.

**Burglary:** Any unlawful entry into or remaining in a building or vehicle with the intent to commit a crime.

**Bylaws:** Rules adopted for the regulation of an association's own actions.

## C

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**Calendaring:** Within a court, an ordered list of matters to be considered. Scheduling matters in clusters. Court actions grouped by type: children's court (dependency), juvenile court (status, delinquency, and FINS), family court (paternity, divorce, and probate), criminal court, and wellness court (drug court), etc.).

**Parental/Guardian/Caretaker abuse:** Physical, sexual or emotional maltreatment of a child or children by a parent, guardian or caretaker; any act or series of acts of commission or omission by a parent or other caregiver that results in harm, potential for harm, or threat of harm to a child. This is addressed by dependency codes, also known as child welfare codes. Such codes address the deficiencies of the adults in caring and providing for children.

**Parental/Guardian/Caretaker neglect:** A type of maltreatment that refers to the failure by the caregiver to provide needed, age-appropriate care although financially able to do so or offered financial or other means to do so. This is addressed by dependency codes, also known as child welfare codes. Such codes address the deficiencies of the adults in caring and providing for children.

**Case manager:** A person who is engaged in a collaborative process of assessment, planning, facilitation, care coordination, evaluation, and advocacy for options and services to meet an individual's and/or family's comprehensive health needs through communication and available resources to promote quality, cost-effective outcomes.

**Case management:** Case management is a method of providing services whereby a trained case manager assesses the needs of the participant and the participant's family (when appropriate) and arranges, coordinates, monitors, evaluates, and advocates for a package of multiple services to meet the specific participant's complex needs. In drug courts, although there is a designated primary case manager, case-management monitoring and interventions are team based.

**Ceremonial relatives:** Individuals who are related through tribal traditional adoption ceremonies. The individuals are treated as being immediate or blood relatives. It is understood that with the ceremony and relationship comes responsibility for the relative.

**Charge:** A description of the underlying offense in a written accusation signed by the prosecutor.

**Charging decisions:** The initial decision whether to file criminal charges in a case, and what those charges should be.

**Child:** An individual who is less than eighteen (18) years old.

**Child maltreatment:** Child maltreatment includes all types of abuse and neglect of a child under the age of 18 by a parent, caregiver, or another person in a custodial role (e.g., clergy, coach, teacher). There are four common types of abuse: Physical Abuse, Sexual Abuse, Emotional Abuse, and Neglect.

**Child protection:** A set of usually government run services designed to protect children and people who are underage and to encourage family stability.

**Child support divisions:** More than 50 tribes operate tribal child support programs, providing services to Native American families consistent with tribal values and cultures. Like their state counterparts, tribal child support programs locate custodial and noncustodial parents, establish legal fatherhood (paternity), establish child support orders, enforce orders, and offer family-centered services and referrals.

**Choice of law:** The body of law that contains the rules by which the court in which an action is brought chooses between the applicable law of the court's state (the "forum state") and the differing applicable law of another jurisdiction connected with the controversy.

**Citation:** A writ similar to a summons, in that it commands the appearance of a party in a proceeding. The object of a citation is to give the court proper jurisdiction and to notify the defendant that a suit has been filed.

**Civil jurisdiction:** The power of a court to hear and decide civil actions.

**Clear and convincing evidence:** A medium level of burden of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt. In order to meet the standard and prove something by clear and convincing evidence, a party must prove that it is substantially more likely than not that it is true. This standard is employed in both civil and criminal trials.

**Closed court:** A court proceeding in which members of the public are restricted from access to the court room proceedings due to the nature and sensitivity of the case. In criminal matters, usually

juvenile cases are held in closed court, unless the minor (a) is charged with specified violent crimes or (b) asks the court to open the hearing. The court is also closed if the crime is a sex offense and the victim requests a closed hearing, or during victim's testimony if the victim is under age 16.

**Code:** A systematic compilation of laws.

**Collaborative court:** Also known as problem-solving courts- combine judicial supervision with rehabilitation services that are rigorously monitored and focused on recovery to reduce recidivism and improve offender outcomes. Examples of collaborative justice courts are community courts, domestic violence courts, drug courts, wellness courts, DUI courts, elder abuse courts, homeless courts, mental health courts, reentry courts, veterans' courts, and courts where the defendant may be a minor or where the child's welfare is at issue. These include dating/youth domestic violence courts, drug courts, DUI court in schools' program, mental health courts, and peer/youth courts.

**Competency:** Capacity to testify in a court of law; eligibility to be sworn.

**Confession:** An admission of guilt or other incriminating statement made by the accused; not admissible at trial unless voluntarily made.

**Concurrent jurisdiction:** When two or more courts or legislative or administrative officers have the same authority to deal with a particular subject matter within the same territory.

**Confidentiality:** A set of rules or a promise that limits access or places restrictions on certain types of information.

**Cognitive ability:** The capacity to perform higher mental processes of reasoning, remembering, understanding, and problem solving.

**Confrontation (of witnesses):** Under the Sixth Amendment of the Constitution, the accused in a criminal prosecution is entitled "to be confronted with the witnesses against him." This right entitles the accused to be present at the trial, and to hear and cross-examine all witnesses against him or her. Evidence that is not subject to confrontation, such as the confession of a codefendant who is not subject to cross-examination, may not be used against the accused.

**Consent decree:** Recorded agreement of parties to a lawsuit concerning the form the judgment should take. Such a contract cannot be nullified without the consent of the parties, except for fraud or mistake.

**Consequence:** Something that happens as a result of a particular action or set of conditions.

**Constitution:** The fundamental principles of law by which a government is created and a (country) land base is administered.

**Consolidated:** Combine (a number of things) into a single more effective or coherent whole.

**Conviction:** The result of a legal proceeding in which the guilt of a party is determined and upon which sentence or judgment is founded.

**Counselor:** A mental health worker who works with individuals, families, and groups to address and treat emotional and mental disorders and to promote mental health. They are trained in a variety of therapeutic techniques used to address issues, including depression, addiction and substance abuse, suicidal impulses, stress, problems with self-esteem, and grief. They also help with job and career concerns, educational decisions, issues related to mental and emotional health, and family, parenting, marital, or other relationship problems. A mental health counselor often works closely with other mental health specialists, such as psychiatrists, psychologists, clinical social workers, psychiatric nurses, and school counselors.

**Court opinion:** A statement that is prepared by a judge or court announcing the decision after a case is tried; includes a summary of the facts, a recitation of the applicable law and how it relates to the facts, the rationale supporting the decision, and a judgment; and is usually presented in writing, though occasionally an oral opinion is rendered.

**Crime:** A wrong that the government has determined is injurious to the public and that may therefore be prosecuted in a criminal proceeding.

**Criminal jurisdiction:** The power of courts to hear a case brought by a government accusing a defendant of the commission of a crime.

**Cross examination:** The questioning of a witness, by a party or lawyer other than the one who called the witness, concerning matters about which the witness has testified during direct examination. The purpose is to discredit or clarify testimony already given so as to neutralize damaging testimony or to present facts in a light more favorable to the party against whom the direct testimony was offered.

**Cultural values:** The commonly held standards of what is acceptable or unacceptable, important or unimportant, right or wrong, workable or unworkable, etc., in a community or society.

**Culture:** The beliefs, customs, arts, etc., of a particular society, group, place, or time.

**Curfew:** A regulation requiring people to remain indoors between specified hours, typically at night.

**Curfew violations:** (persons under age 18 only) Offenses relating to violations of local curfew and loitering ordinances where such laws exist.

**Custodian:** A person who has custody; keeper; guardian.

**Custody:** Immediate charge and control over exercised by a person or an authority (as over a ward or a suspect): safekeeping.

**Custom:** Regular behavior (of persons in a geographical area or type of business) that gradually takes on legal importance so that it will strongly influence a court's decision.

**Customary law:** A law based on custom or tradition.

## D

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**Defendant:** In criminal proceedings, the accused.

**Defense advocates:** A legally trained or lay advocate authorized to practice in the tribal court. The advocate provides representation for defendants in tribal courtrooms. Defense advocates may represent juveniles in cases such as curfew violation and any other offense the court may find to be a criminal matter.

**Delinquency:** Minor crime, especially that committed by young people.

**Delinquency code:** A systematic compilation of laws regarding criminal behavior carried out by a juvenile. Typically, the acts are those that otherwise would have been charged as a crime if they were an adult.

**Delinquent act:** An act committed by a juvenile for which an adult could be prosecuted in a criminal court, but when committed by a juvenile is within the jurisdiction of the juvenile court. Delinquent acts include crimes against persons, crimes against property, drug offenses, and crimes against public order, when juveniles commit such acts.

**Delinquent conduct:** Conduct, other than a traffic offense, which violates a law and is punishable by imprisonment or by confinement in jail; or a violation of a reasonable and lawful order which was entered by a juvenile court.

**Dependency:** One who is in need of proper and effective parental care and control and has no parent or guardian, or the parent or guardian is not willing to exercise or is incapable of exercising care and control. Or, a child who is destitute, or who is not provided with the necessities of life, including adequate food, clothing, shelter or medical care, or where the home is "unfit" by reason of abuse, neglect, cruelty or depravity by a parent, guardian or other person having care or custody of the child. Or, a child under the age of eight years and who is found to have committed an act that would result in adjudication as a delinquent juvenile or incorrigible child if committed by an older juvenile or child.

**Dependency code:** A systematic compilation of laws regarding children in need of proper and effective parental care and control and has no parent or guardian, or the parent or guardian is not

willing to exercise or is incapable of exercising care and control. Or, a child who is destitute, or who is not provided with the necessities of life, including adequate food, clothing, shelter or medical care, or where the home is “unfit” by reason of abuse, neglect, cruelty or depravity by a parent, guardian or other person having care or custody of the child. Or, a child under the age of eight years and who is found to have committed an act that would result in adjudication as a delinquent juvenile or incorrigible child if committed by an older juvenile or child.

**Detained:** To keep in custody or temporary confinement.

**Detention:** Holding of a person charged with crime following the person’s arrest on that charge.

**Detention facilities:** Any facility used for the secure detention of children. It is not part of or attached to any facility in which adult prisoners are confined, or which share staff with a facility in which adult prisoners are confined.

**Detention hearing:** A proceeding before a judge to determine whether an accused is to be detained, continue to be detained or released while the proceedings are pending in his/her case.

**Direct File (re: transferring juveniles to adult criminal court):** Statutes in fifteen states define a category of cases in which the prosecutor may determine whether to proceed initially in juvenile or criminal court. Typically, these direct file provisions give both juvenile and adult criminal courts the power to hear cases involving certain offenses or age/offense categories, leaving it up to the prosecutor to make discretionary decisions about where to file them.

**Discretion of the Judge:** The power of a judge to make decisions on various matters based on his or her opinion, within general legal guidelines.

**Disposition:** In criminal law, the sentence of the defendant is the disposition.

**Dispositional alternative:** A legal term that refers to a judge’s decision to give a youthful offender an alternative to incarceration or out-of-home placement. Often the approach is a community-based, family-centered program that provides services to youth and their families. Such alternatives include counseling, case management, enrichment activities, family meetings, referrals and follow-up services.

**Dispositional conditions:** Prerequisites or requirements of the defendant’s sentence.

**Diversion:** A form of sentencing and such programs are often run by a police department, court, a prosecution office, or outside agency designed to enable offenders of criminal law to avoid criminal charges and a criminal record. Problem-solving courts typically include a diversion component as part of their program. The purposes of diversion are generally thought to include relief to the courts, police department and probation office, better outcomes compared to direct involvement of the court system, and an opportunity for the offender to avoid prosecution by completing various



requirements for the program. The concept of diversion is based on the theory that processing certain youth through the juvenile justice system may do more harm than good. Many times youth will have substance abuse and mental health issues which may be the underlying cause of such delinquency.

**Diversion activities:** A program allowing criminal offenders to avoid criminal charges and a criminal record and such requirements may include: education aimed at preventing future offenses by the offender, restitution to victims of the offense, completion of community service hours, avoiding situations for a specified period in the future that may lead to committing another such offense (such as contact with certain people).

**Diversion program:** A program in which the offender is ordered to participate in a work or educational program as part of probation.

**Diversionary court:** Typically hears low-level offenses, particularly those committed by first-time offenders. The diversionary court avoids the regular court process of a plea and sentence or, in the case of a not-guilty plea, a trial. People who are facing charges of this nature can often be helped and deterred from future criminal conduct if they are counseled, rather than punished.

**Docket:** A list of cases on a court's calendar.

**Domestic violence:** The definition of *domestic violence* varies from the federal to the state to the tribe. It includes behaviors used by one person in a relationship to control another. One of the key differences occurs in determining what a domestic relationship is, the possibilities are spouses and former spouses; persons living together or having resided together in the past; persons who have a child in common, including gay and lesbian parenting couples and cases in which the woman is pregnant but the child has not been born; persons related by blood or adoption, including parent-child, siblings, half-siblings and stepsiblings, and gay and lesbian relationships; and persons involved in a significant sexual or romantic relationship. Each law generally defines what type of behaviors would be considered. It could include name calling, stalking, sexual violence, physical violence, and numerous other activities. Some behaviors may be considered criminal and others not, depending upon the statute.

**Domestic violence advocates:** A person who speaks or writes in support or defense of a person who is a victim of domestic violence. The advocate works to affirm the victim's rights and to provide information and services.

**Drug testing:** A drug test is a technical analysis of a biological specimen, for example urine, hair, blood, breath air, sweat, or oral fluid / saliva – to determine the presence or absence of specified parent drugs or their metabolites

**Drug court:** Eligible drug-addicted persons may be sent to Drug Court in lieu of traditional justice system case processing. Drug courts keep individuals in treatment long enough for it to work, while supervising them closely. Participants are:

- provided with intensive treatment and other services they require to get and stay clean and sober;
- held accountable by the Drug Court judge for meeting their obligations to the court, society, themselves and their families;
- regularly and randomly tested for drug use;
- required to appear in court frequently so that the judge may review their progress; and
- rewarded for doing well or sanctioned when they do not live up to their obligations.

**Dual diagnosis:** Co-occurring Mental Illness, Drug Addiction and/or Alcoholism in various combinations.

## **E**

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**Electronic monitoring:** Monitoring performed through the use of a wearable miniature-tracking device worn on the ankle, which is an additional release condition option for some defendants who otherwise may be held on bond. This device uses GPS satellites to track the location of the person wearing the device.

**Emancipation:** Express or implied relinquishing by a parent of rights in, or authority and control over, a minor child.

**Enrollment:** Tribal enrollment requirements preserve the unique character and traditions of each tribe. The tribes establish membership criteria based on shared customs, traditions, language and tribal blood.

**Evidence:** Something that furnishes proof; something legally submitted to a tribunal to ascertain the truth of a matter.

**Exclusive jurisdiction:** That power that a court or other tribunal exercises over an action or over a person to the exclusion of all other courts; that forum in which an action must be commenced because no other forum has the jurisdiction to hear and determine the action.

**Expulsion:** An ejection or banishment, either through depriving a person of a benefit or by forcibly evicting a person.

**Expungement of record:** The removal of a conviction (especially for a first offense) from a person's criminal record.

**Extended family:** A family that extends beyond the immediate family, consisting of grandparents, aunts, uncles, and cousins all living nearby or in the same household.

## F

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**False confession:** An admission of guilt for a crime for which the confessor is not responsible. False confessions can be induced through coercion or by the mental disorder or incompetency of the accused.

**Family drug court:** Created to address the poor outcomes derived from traditional family reunification programs for substance-abusing parents. These specialized civil dockets were adapted from the adult criminal drug court model. As in adult drug courts, substance abuse treatment and case management services form the core of the intervention. However, family drug courts emphasize coordinating these functions with those of child protective services. In addition, participants must attend frequent status hearings in court during which the judge reviews their progress and may administer gradually escalating sanctions for infractions and rewards for accomplishments. Unlike adult drug courts, where the ultimate incentive for the participant might be the avoidance of a criminal record or incarceration, in family drug courts the principal incentive for the participant is family reunification, and a potential consequence of failure may be termination of parental rights or long-term foster care for the dependent children.

**Family group conferencing:** A facilitated group dialogue and decision-making process in which a young person who has done harm is encouraged and supported to be directly accountable to the person who was harmed. The focus is on doing right, not on punishment. Typically, participants in a FGC include a young person accused of a crime, his/her family, the persons who were harmed and their supporters, and a trained facilitator. Depending on the severity of the crime, a member of law enforcement might also be present. Ideally, an FGC results in a consensus based plan for repairing the harm to the extent possible. When the young person completes the plan, filed charges are dropped. The participants also try to understand why the offending happened and tailor the plan to help prevent future wrongdoing. FGC can also be used in lieu of traditional school discipline processes which would otherwise result in suspensions or expulsions for more serious negative behavior on school campuses. Ideally, a single restorative system of youth accountability which addresses both school needs and juvenile charges would result when youth commit crimes on school campuses.

**Family group decision making (FGDM):** Recognizes the importance of involving family groups in decision making about children who need protection or care, and it can be initiated by service providers and/or community organizations whenever a critical decision about a child or youth is

required. In FGDM processes, a trained coordinator who is independent of the case brings together the family group and the service providers to create and carry out a plan to safeguard children and other family members. FGDM processes position the family group to lead decision making, and the statutory authorities agree to support family group plans that adequately address agency concerns. The authorities also organize service providers from governmental and non-governmental agencies to access resources for implementing the plans. FGDM processes are not conflict-resolution approaches, therapeutic interventions or forums for ratifying professionally crafted decisions. Rather, FGDM processes actively seek the collaboration and leadership of family groups in crafting and implementing plans that meet the child's/youth's needs.

**Family-in-Need of Services:**

- (a) a family whose child, while subject to compulsory school attendance, is habitually and without justification absent from school; or
- (b) a family wherein there is allegedly a breakdown in the parent-child relationship based on the refusal of the parents, guardian, or custodian to permit a child to live with them or based on the child's refusal to live with his parents, guardian or custodian; or
- (c) in either of the foregoing situations:
  - (1) the conduct complained of presents a clear and substantial danger to the child's life or health and the intervention of the juvenile court is essential to provide the treatment, rehabilitation or services needed by the child or his family; or
  - (2) the child or his family are in need of treatment, rehabilitation or services not presently being received and the intervention of the juvenile court is essential to provide this treatment, rehabilitation or services.

**Felony:** A crime carrying a minimum term of one year or more in state prison.

**Fine:** A sum of money imposed upon a defendant as a penalty for an act of wrongdoing.

**Foster care:** A system in which a minor has been placed into a ward, group home, or private home of a state-certified caregiver referred to as a "foster parent". The placement of the child is usually arranged through the government or a social-service agency. The institution, group home or foster parent is compensated for expenses. The state via the family court and child protection agency stand *in loco parentis* to the minor, making all legal decisions while the foster parent is responsible for the day-to-day care of the minor.

## G

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**Gang court:** Court-based gang intervention programs. These programs are based on the drug court model and provide gang-involved juvenile and adult offenders with appropriate support and opportunities while seeking to protect the community and reduce recidivism.

**General jurisdiction:** A court's authority to hear a wide range of cases, civil or criminal, that arise within its geographic area.

**Girls' court:** A gender responsive approach for girls in the juvenile justice system that links young "at-risk" females to social service agencies, providing informal sessions on everything from body image, education and counseling with a team of adults to provide trust and support. Some half-dozen such courts have emerged around the United States, each defining itself around the problems in the surrounding area. One common theme is to treat young sex workers as the victims of sex trafficking. Identifying reasons for entry into these behaviors such as childhood abuse and dysfunctional homes are important to understanding the nature of the crime and circumstances unique to girls.

**Group home:** A private residence for children or young people who cannot live with their families, or people with chronic disabilities who may be adults or seniors. Typically, there are no more than six residents and there is at least one trained caregiver there twenty-four hours a day. In some early "model programs", a house manager, night manager, weekend activity coordinator, and 4 part-time skill teachers were reported.

**Guardian:** A person assigned by a court of law, other than a parent, having the duty and authority to provide care, shelter, and control of a child.

**Guardianship:** The duties and responsibilities of one who has the legal authority and duty to care for another's person or property, especially because of the other's infancy, incapacity or disability.

**Gun court:** A gun court is a type of problem-solving court that intervenes with youths who have committed first-time, nonviolent gun offenses that have not resulted in serious physical injury. Most juvenile gun courts are short-term programs that augment rather than replace normal juvenile court proceedings. Juvenile gun courts work as early intervention programs that concentrate on preventing future gun use, reducing recidivism rates, and increasing youths' involvement in community-based programs. This basic model of juvenile gun court includes several principal elements: 1) early intervention (in many jurisdictions, before resolution of the court proceedings); 2) short-term (often a single 2 to 4 hour session), intensive programming; 3) an intensive educational emphasis to show youths the harm that can come from unlawful gun use and the immediate response that will result when youths are involved with guns; and 4) the inclusion of a wide range of court personnel and law enforcement officials working together with community members

## H

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**Habilitation:** Assisting a child with achieving developmental skills when impairments have caused delaying or blocking of initial acquisition of the skills. Habilitation can include cognitive, social, fine motor, gross motor, or other skills that contribute to mobility, communication, and performance of activities of daily living and enhance quality of life.

**Hearsay:** A statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted.

**Hearsay rule:** The rule that no assertion offered as testimony can be received unless it is or has been open to test by cross-examination or an opportunity for cross-examination, except as provided otherwise by the rules of evidence, by court rules, or by statute. The chief reasons for the rule are that out-of-court statements amounting to hearsay are not made under oath and are not subject to cross-examination.

**Historical trauma:** Refers to cumulative emotional and psychological wounding, extending over an individual lifespan and across generations, caused by traumatic experiences. The historical trauma response (HTR) is a constellation of features in reaction to this trauma. The HTR may include substance abuse as a vehicle for attempting to numb the pain associated with trauma. The HTR often includes other types of self-destructive behavior, suicidal thoughts and gestures, depression, anxiety, low self-esteem, anger, and difficulty recognizing and expressing emotions. Associated with HTR is historical unresolved grief that accompanies the trauma. Historical trauma is an example of transgenerational trauma. For example, a pattern of maternal abandonment of a child at a young age might be seen across three generations.

**Home detention:** In justice and law, home detention (also called home confinement, house arrest, or electronic monitoring) is a measure by which a person is confined by the authorities to a certain residence. Travel is usually restricted, if allowed at all. Home detention is a lenient alternative to prison time or juvenile-detention time.

## I

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**Incarceration:** Confinement in prison.

**Incentives:** Positive reinforcement or rewards given to participants in drug courts to promote sustained behavior change while emphasizing a supportive and celebratory approach to treatment and other interventions. Specifically, incentives are typically used as part of a prize or voucher-based system, either with direct prize-giving or by using a fishbowl approach (a form of lottery that gives people chances to win a prize). The goals may include reinforcing abstinence, improving attendance at treatment sessions, and adhering to treatment goals.

**Incompetent:** A person, other than a minor, who is temporarily or permanently impaired by mental illness, mental deficiency, physical illness or disability, or alcohol or drug use to the extent that the person lacks sufficient understanding to make or communicate responsible personal decisions or enter into contracts.

**Indian Child Welfare Act:** The Indian Child Welfare Act (ICWA) is a federal law that seeks to keep American Indian children with American Indian families. Congress passed ICWA in 1978 in response to the alarmingly high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families” (25 U.S.C. § 1902). ICWA sets federal requirements that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe. ICWA is an integral policy framework on which tribal child welfare programs rely. It provides a structure and requirements for how public and private child welfare agencies and state courts view and conduct their work to serve tribal children and families. It also acknowledges and promotes the role that tribal governments play in supporting tribal families, both on and off tribal lands. However, as is the case with many laws, proper implementation of ICWA requires vigilance, resources, and advocacy.

**Indian Civil Rights Act:** Applies to tribes in the United States and makes many, but not all, of the guarantees of the Bill of Rights applicable within the tribes. It was enacted by Congress in 1968, and then amended in 1986, 1991, 2010, and 2013. Tribal inherent sovereignty predates the United States and the U.S. Constitution. Tribes did not participate in the Constitutional Convention and did not ratify the U.S. Constitution. As a result, the Bill of Rights and other individual liberty protections found in the Constitution do not apply to tribal governments.

**Indian Law and Order Commission:** The Indian Law and Order Commission (ILOC) is a federal commission established by the U.S. Congress in the Tribal Law and Order Act, (Public Law 111-211, enacted July 29, 2010). The nine-member commission was charged with conducting a comprehensive study of law enforcement and criminal justice in tribal communities, and submitting a report to the President and Congress with its findings, conclusions and recommendations for, among other things, simplifying jurisdiction in Indian country, improving services and programs to prevent juvenile crime on Indian land, to rehabilitate Indian youth in custody, to reduce recidivism among Indian youth, as well as adjustments to the penal authority of tribal courts and alternatives to incarceration.

**Informal adjustment:** The handling of a juvenile matter informally and can include the giving of advice and counsel to the juvenile and custodian(s), referrals to other agencies, supervision on unofficial probation, temporary placement outside the home and other referrals to other appropriate public and private agencies.

**Inheritance:** Real property or personal property that is received by heirs according to the laws of descent and distribution.

**Intergovernmental agreements:** Any agreement that involves or is made between two or more governments to cooperate in some specific way.

**Interrogation:** In criminal law, process of questions propounded by police to person arrested or suspected to seek solution of crime. Such person is entitled to be informed of his rights, including right to have counsel present, and the consequences of his answers. If the police fail or neglect to give these warnings, the questions and answers are not admissible in evidence at the trial or hearing of the arrested person. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

## J

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**Judge:** One who conducts trials or presides over a court of justice. Judges determine controversies between parties based upon evidence and legal argument presented. They are not investigators or advisors.

**Judicial waiver (re: transferring juveniles to adult criminal court):** One of the more hotly debated subjects with regard to juveniles has to do with the option to waiver to adult court. Currently, there are three mechanisms by which a juvenile's case may be waived to an adult court – judicial waiver offenses, statutory exclusion, and concurrent jurisdiction.

**Jurisdiction:** Legal authority. The geographical area within which a court (or public official) has the right and power to operate; the persons about whom and the subject matters about which a court has the right and power to make decisions.

**Juvenile code:** A systematic compilation of laws devoted to juvenile matters including, but not limited to: offenses, dependency, delinquency, status offenses, and trauma sensitive provisions.

**Juvenile delinquent:** A minor who is guilty of criminal behavior, usually punishable by special laws not pertaining to adults.

**Juvenile drug court:** Dockets within juvenile courts for cases involving substance abusing youth in need of specialized treatment services. The focus is on providing treatment to eligible, drug-involved juvenile offenders with the goal of reducing recidivism and substance abuse.

**Juvenile facility:** Any juvenile facility (other than a school) that cares for juveniles or restricts their movement, including secure detention facilities, alcohol or substance abuse emergency shelter or halfway houses, foster homes, group homes, and shelter homes.



**Juvenile Justice and Delinquency Prevention Act:** A federal statute that provides funding, assistance, training, and support to state and tribal operated juvenile-justice programs, initiatives and court systems.

**Juvenile justice system:** A system that punished and rehabilitates adolescents who exhibit criminal behavior. The intentions of the juvenile justice system are to intervene early in delinquent behavior and act to prevent adolescents from engaging in criminal behavior as adults. The system involves incarceration as well as alternative schooling programs

**Juvenile offender:** A child who commits a “juvenile offense” prior to the child’s eighteenth (18) birthday.

## K

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**Key components:** Purpose and performance benchmarks for drug/wellness courts.

## L

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**Law:** The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure backed by force, in such a society; the legal system.

**Law enforcement:** The detection and punishment of violations of the law.

**Lay advocate:** Not expert with reference to law; non-professional. The advocate typically undergoes training and has experience in representing parties. Many tribal courts allow lay advocates to represent individuals in civil and/or criminal matters.

**Liaison officer:** A person who works with two organizations to communicate and coordinate their activities. Generally, liaison officers are used to achieve the best utilization of resources or employment of services of one organization by another. Liaison officers often provide technical or subject matter expertise of their parent organization. Usually an organization embeds a liaison officer into another organization to provide face-to-face coordination.

**Linguistic ties:** In linguistics, genetic relationship is the usual term for the relationship which exists between languages that are members of the same language family. Languages that possess genetic ties with one another belong to the same linguistic grouping, known as a language family. Two languages are considered to be genetically related if one is descended from the other or if both are descended from a common ancestor. For example, Italian is descended from Latin. Italian and Latin are therefore said to be genetically related.

## M

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**Mediation:** A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.

**Memorandum of agreement:** A document written between parties to cooperate on an agreed upon project or meet an agreed objective. The purpose of an MOA is to have a written understanding of the agreement between parties.

**Memorandum of understanding:** A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement.

**Mental health court:** A recent phenomenon and require collaboration and consideration from practitioners in both the criminal justice and mental health fields. Mental health courts typically involve judges, prosecutors, defense attorneys, and other court personnel who have expressed an interest in or possess particular mental health expertise. The courts generally deal with nonviolent offenders who have been diagnosed with a mental illness or co-occurring mental health and substance abuse disorders. Today, more than 150 of these courts exist, and more are being planned.

**Mental health treatment provider:** Professionals who diagnose mental health conditions and provide treatment. Most have either a master's degree or more advanced education and training.

**Mentoring:** The process for the informal transmission of advising, transmitting knowledge, and providing emotional support; it entails informal communication, usually face-to-face and during a sustained period of time, between a person who is perceived to have greater relevant knowledge, wisdom, or experience (the mentor) and a person who is perceived to have less (the protégé).

**Minor:** A person who has not reached full legal age, a child or juvenile.

**Minority status:** Condition of being under legal age.

**Miranda rights:** The suspect must be advised of the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed if the suspect cannot afford one. If the suspect is not advised of these rights or does not validly waive them, any evidence obtained during the interrogation cannot be used against the suspect at trial (except for impeachment purposes).

**Misdemeanor:** A lesser crime punishable by a fine and/or county jail time for up to one year.

**Mistreatment:** To treat badly or abusively.

**Model code:** An existing code that a government adopts as its own. It is not developed by the government adopting it.

## N

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**Neglect:** The omission of proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or condition of disregarding.

**Non public law 280 state:** A state that does not have a transfer of legal authority (jurisdiction) from the federal government to state government regarding criminal and civil jurisdiction over tribal lands within the affected state.

**Norms:** Values and beliefs held by a community about the proper and improper ways to act toward other people, places and things.

**Notice:** To give legal notice to or of; notification or warning of something, especially to allow preparations to be made.

## O

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**Offender:** A person who commits a crime.

**Oliphant v. Suquamish:** The U.S. Supreme Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) held that tribal sovereignty does not extend to the exercise of criminal jurisdiction over a non-Indian for crimes committed in Indian country.

**Open court:** A court session that the public is free to attend.

**Ordinance:** A local law that applies to persons and things subject to the local jurisdiction.

**Original jurisdiction:** A court's power to hear and decide a matter before any other court can review the matter.

**Out of court statement:** Testimony that is given by a witness who related not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such evidence is generally inadmissible under the rules of evidence.

**Outpatient Treatment Program:** Outpatient treatment is the most common level of addiction care. Participants live at home or in a community residence and attend sessions at the program. Traditionally, regular outpatient treatment will involve one or two visits per week, lasting approximately one to two hours per visit. Participants attend group and individual counseling sessions while participating in the program. Outpatient care should almost always be included in continuing-care plans for participants who are leaving a higher level of care. Participants may stay in outpatient care for 3–12 months or more depending upon their individual needs.

## P

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**Parent:** Includes a natural or adoptive parent, but does not include persons whose parental rights have been legally terminated, nor does it include the unwed father whose paternity has not been acknowledged or established.

**Parental incapacity:** The child has suffered, or there is a substantial risk the child will suffer, serious physical harm or illness as a result of the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse.

**Parental neglect:** A crime consisting of acts or omissions of a parent (including a step-parent, adoptive parent, or someone who, in practical terms, serves in a parent's role) which endangers the health and life of a child or fails to take steps necessary to the proper raising of a child. The neglect can include leaving a child alone when he or she needs protection, failure to provide food, clothing, medical attention or education to a child, or placing the child in dangerous or harmful circumstances, including exposing the child to a violent, abusive or sexually predatory person.

**Parental unfitness:** The definition of an unfit parent is governed by state laws, which vary by state. A parent may be deemed unfit if they have been abusive, neglected, or failed to provide proper care for the child. A parent with a mental disturbance or addiction to drugs or alcohol may also be found to be an unfit parent. Failure to visit, provide support, or incarceration are other examples of grounds for being found unfit.

**Peacemaking:** Peacemaking provides a safe structure where people can talk together to resolve conflict. It is a community-based process that addresses the concerns of all interested parties. This process uses traditional rituals, such as the group circle and Clan relationships, to involve parties that are in a conflict.

**Peacemaking Courts:** A way of resolving disputes that gives everyone involved a chance to talk, both about the facts and any underlying concerns, with the goal of reaching a mutually agreeable resolution.

**Peer court:** Also known as youth or teen court, is an alternative approach to the traditional juvenile justice system. A youth charged with an offense has the opportunity to forgo the hearing and sentencing procedures of juvenile court and agrees to a sentencing forum with a jury of the youth's peers.

**Penalty:** Sanction, usually an amount of money, imposed a punishment for civil or criminal wrongdoing.

**Perpetrator:** One who commits an offense or crime.

**Personal jurisdiction:** A court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests.

**Petition:** A formal request to a court or other authority asking for some kind of action. A "petition" in juvenile court is the same thing as a "charge" in the adult court.

**Police investigation:** The police work of inquiring into criminal activities thoroughly and systematically.

**Privilege against self-incrimination:** A criminal defendant's right not to be asked any questions by the judge or prosecution unless the defendant chooses to testify.

**Probable cause:** A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime.

**Probate:** Handling the will and estate of a deceased person.

**Probate Codes:** A systematic compilation of laws that handle the will and estate of a deceased person.

**Probation:** A legal status created by court order whereby a "juvenile offender" is permitted to remain in his home under prescribed conditions and under the supervision of a person designated by the court. A "juvenile offender" on probation is subject to return to court for further proceedings in the event of his failure to comply with any of the prescribed conditions of probation.

**Problem-solving court:** Courts that address the underlying problems that contribute to criminal behavior and are a current trend in the legal system of the United States. In 1989, a judge in Miami began to take a hands-on approach to drug addicts, ordering them into treatment, rather than perpetuating the revolving door of court and prison. The result was creation of drug court, a diversion program. That same concept began to be applied to difficult situations where legal, social and human problems mesh.

**Proof beyond a reasonable doubt:** Proof that precludes every reasonable hypothesis except that which is tends to support.

**Prosecutor (presenting officer):** The public official who presents the government's case in criminal law.

**Protective custody:** The confinement of an individual by the state in order to protect the individual from being harmed either by himself or herself or some other person.

**Protective order:** A court order instructing a person to desist from abusing or harassing the petitioner (usually a related person) for a fixed period.

**Protocol:** An accepted system of behavior or procedure.

**Public law 280:** A transfer of legal authority (jurisdiction) from the federal government to state governments which significantly changed the division of legal authority among tribal, federal, and state governments. Congress gave six states (five states initially - California, Minnesota, Nebraska, Oregon, and Wisconsin; and then Alaska upon statehood) extensive criminal and civil jurisdiction over tribal lands within the affected states (the so-called “mandatory states”). Public Law 280 also permitted the other states to acquire jurisdiction at their option.

**Punishing:** To inflict a penalty for an offense.

**Punishment:** A sanction - such as a fine, penalty, confinement, or loss of property, right, or privilege – assessed against a person who has violated the law.

## R

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**Reasonable suspicion:** A particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity.

**Reconciliation:** Restoration of harmony between persons or things that had been in conflict.

**Redress:** To set right; to remedy; to compensate; to remove the cause of a grievance or complaint.

**Referral:** The act or an instance of sending or directing another for information, service, consideration, or decision.

**Rehabilitation:** Restoration of someone to a useful place in society.

**Report:** A formal oral or written presentation of facts or a recommendation for action.

**Residential school:** The Aboriginal Residential Schools were a network of “residential” (boarding) schools for Indigenous Canadians (First Nations, Métis and Inuit). Funded by the Canadian government’s Indian Affairs and Northern Development, and administered by Christian churches, predominantly the Roman Catholic Church in Canada (60%), but also the Anglican Church of Canada (30%), and the United Church of Canada (including its pre-1925 constituent church predecessors) (10%). The policy was to remove children from the influence of their families and culture, and assimilate them into the dominant Canadian culture. Over the course of the system's existence, about 30% of native children, or roughly 150,000, were placed in residential schools nationally.

**Resilience:** The ability to become strong, healthy, or successful again after something bad happens.

**Respite care:** The provision of short-term accommodation in a facility outside the home in which a loved one may be placed. This provides temporary relief to those who are caring for family members, who might otherwise require permanent placement in a facility outside the home.

**Restitution:** An act of restoring a wronged or injured person to the person's condition before the wrong, loss or injury.

**Restorative justice:** A system of criminal justice that focuses on the rehabilitation of offenders through reconciliation with victims and the community at large.

**Restraining order:** A court order prohibiting family violence; especially an order restricting a person from harassing, threatening, and sometimes merely contacting or approaching another specified person.

**Retribution:** Punishment or revenge for a previous act.

**Robbery:** Forcible stealing; the felonious taking of property from the person of another by violence or by putting him (or her) in fear.

**Rules of evidence:** The body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding.

**Runaway:** A person (usually a juvenile) who has fled from the custody of legal guardians without permission and who has failed to return within a reasonable time; especially an unemancipated minor who has left home, usually indefinitely.

## S

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**Sanctioning:** Issuing a penalty or punishment attached to a law so that it is obeyed.

**Sanctions:** Penalties for disobeying a law or rule.

**Secure detention:** The holding of youth, upon arrest, in a juvenile detention facility in order to ensure the youth's appearance for all court hearings and to protect the community from future offending.

**Sentencing circles:** A community-directed process, conducted in partnership with the criminal justice system, to develop consensus on an appropriate sentencing plan that addresses the concerns of all interested parties.

**Sex offender:** Person convicted of a sexual offense such as rape (sexual assault), sexual contact or lewdness.

**Sex Offender Registration and Notification Act:** Title I of the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248). The Sex Offender Registration and Notification Act (SORNA) provides a comprehensive set of minimum standards for sex offender registration and notification in the United States. SORNA aims to close potential gaps and loopholes that existed under prior law and generally strengthens the nationwide network of sex offender registration and notification programs. Additionally, SORNA:

- Extends the jurisdictions in which registration is required beyond the 50 states, the District of Columbia, and the principal U.S. territories, to include also federally recognized Indian tribes.
- Incorporates a more comprehensive group of sex offenders and sex offenses for which registration is required.
- Requires registered sex offenders to register and keep their registration current in each jurisdiction in which they reside, work, or go to school.
- Requires sex offenders to provide more extensive registration information.
- Requires sex offenders to make periodic in-person appearances to verify and update their registration information.
- Expands the amount of information available to the public regarding registered sex offenders.
- Makes changes in the required minimum duration of registration for sex offenders.

**Sexual abuse:** An illegal sex act, especially one performed against a minor by an adult.

**Social services:** Government services provided for the benefit of the community, such as education, medical care, and housing.

**Sovereign:** To act independently as a person or nation.

**Standards:** A criterion for measuring acceptability, quality, or accuracy.

**Standard of proof:** The degree or level of proof demanded in a specific case, such as “beyond a reasonable doubt” or “by a preponderance of the evidence.”

**Status offense:** A minor’s violation of the juvenile code by doing some act that would not be considered illegal if an adult did it, but that indicates that the minor is beyond parental control. Examples include running away from home, truancy, and incorrigibility.

**Statute:** A law passed by a legislative body.



**Statutory provisions:** Statutory provisions expand upon the subject matter and describe when the law applies, to whom the law applies and the penalty for violating the law.

**Stigmatized:** To characterize or brand as disgraceful.

**Subject matter jurisdiction:** Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things.

**Substance Abuse:** The excessive use of a substance, especially alcohol or a drug. A frequently cited definition of *substance abuse* is in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, fourth edition* (DSM-IV) issued by the American Psychiatric Association. The DSM-IV definition is as follows:

A maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one or more of the following, occurring within a 12-month period:

1. Recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions or expulsions from school; neglect of children or household)
2. Recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired)
3. Recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)
4. Continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights).

## T

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**Teen court:** The terms teen court, youth court, and peer court are used interchangeably. Their purpose is to provide an alternative disposition for juveniles who have committed a delinquent act, have committed a minor offense, or have been charged with a misdemeanor, and are otherwise eligible for diversion.

**Termination of parental rights:** The legal severing of a parent's rights, privileges, and responsibilities regarding his or her child.

**Therapist:** A person who helps people deal with mental or emotional problems by talking about those problems.

**Tradition:** The transmission of customs or beliefs from generation to generation, or the fact of being passed on in this way.

**Transition plan:** The section of the Individualized Education Program (IEP) that outlines transition goals and services for the student. The transition plan is based on a high school student's individual needs, strengths, skills, and interests. Transition planning is used to identify and develop goals which need to be accomplished during the current school year to assist the student in meeting his post-high school goals.

**Trauma:** A deeply distressing or disturbing experience.

**Treatment facility:** A treatment center that treats patients with substance abuse issues or mental illness.

**Tribal agency:** A tribal government department that is responsible for a particular activity, area, etc.

**Tribal juvenile code:** The laws of the tribe regarding juvenile issues.

**Tribal Law and Order Act amendments:** In 2010 the Tribal Law and Order Act amended the Indian Civil Rights Act to increase tribal sentence limitations to a maximum of three years imprisonment and/or \$15,000 fine. However, to exercise these enhanced sentences tribes must provide certain additional civil protections, including: the provision of effective defense counsel and a licensed and law-trained judge, making the tribal laws publicly available, and maintain a record of the criminal proceeding.

**Tribal nation:** A sovereign nation made up of indigenous tribal citizens.

**Truancy:** The action of staying away from school without good reason; absenteeism.

**Truancy court:** A court designed to improve daily school attendance and reduce truancy.

**Truant:** One who stays out of school without permission.

## V

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**Values:** Foundation upon which other values and measures of integrity are based. They are broad preferences concerning appropriate courses of action or outcomes. As such, values reflect a person's sense of right and wrong or what "ought" to be.

**Victim:** A victim is a person who suffers physical, mental, emotional, and/or spiritual harm due to the behavior of other(s).

**Victim-Offender Mediation:** Victim offender mediation is a process that provides interested victims an opportunity to meet their offender, in a safe and structured setting, and engage in a mediated discussion of the crime.

**Victimizer:** A person who victimizes others.

**Violence Against Women Act:** On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013, or “VAWA 2013.” VAWA 2013 recognizes tribes' inherent power to exercise “special domestic violence criminal jurisdiction” (SDVCJ) over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country.

**Violent offender:** According to 42 USCS § 3797u-2 [Title 42. The Public Health and Welfare; Chapter 46. Justice System Improvement; Drug Courts], the term “violent offender” means a person who--

- (1) is charged with or convicted of an offense that is punishable by a term of imprisonment exceeding one year, during the course of which offense or conduct--
  - (A) the person carried, possessed, or used a firearm or dangerous weapon;
  - (B) there occurred the death of or serious bodily injury to any person; or
  - (C) there occurred the use of force against the person of another, without regard to whether any of the circumstances described in subparagraph (A) or (B) is an element of the offense or conduct of which or for which the person is charged or convicted; or
- (2) has 1 or more prior convictions for a felony crime of violence involving the use or attempted use of force against a person with the intent to cause death or serious bodily harm.
  - (a) Definition for purposes of juvenile drug courts. For purposes of juvenile drug courts, the term “violent offender” means a juvenile who has been convicted of, or adjudicated delinquent for, a felony-level offense that--
    - (1) has as an element, the use, attempted use, or threatened use of physical force against the person or property of another, or the possession or use of a firearm; or
    - (2) by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

**Voluntary Public Law 280 states:** Prior to 1968 nine states (Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah and Washington) voluntarily accepted partial or complete criminal jurisdiction over Indians in Indian Country. Public Law 280 was amended in 1968 requiring

tribes to consent to state jurisdiction. No tribe has given consent since 1968. The Federal Government retains concurrent jurisdiction to prosecute under the Major Crimes Act and General Crimes Act in the so-called “option states.” See *United States v. High Elk*, 902 F.2d 660 (8th Cir. 1990); but see *United States v. Burch*, 169 F.3d 666 (10th Cir. 1999).

## W

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**Wellness court:** A problem-solving court focused on a particular issue (usually drugs or alcohol) in which the defendant is closely supervised as s/he completes a structured treatment plan.

**Will:** A person’s declaration of how he or she desires his or her property to be disposed of after death.

**Wrap around services:** Community based intervention services that emphasize the strengths of the child and family and includes the delivery of coordinated, highly individualized unconditional services to address needs and achieve positive outcomes in their lives.

## Y

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**Young adult:** A person in the early years of adulthood.

**Youth:** The time when a young person has not yet become an adult; the time between childhood and adulthood (maturity).

**Youth domestic violence court:** Juvenile domestic violence courts were established in response to the increase in teen dating violence as well as family violence initiated by teens and violence between teen parents who are not married. The juvenile domestic violence court, sometimes called dating violence or youth violence court, focuses on youth who have committed violence in the context of a specific relationship. These courts address violent incidents against a person who would be considered an intimate, such as a spouse, girlfriend/boyfriend, or someone in a dating relationship, or acts of abuse directed at a close family member, such as a parent or sibling. The approach focuses on two areas: ensuring accountability by addressing the behavior of the minor who is committing the abusive act(s) and ensuring safety and providing support for the victim.

# Helpful Resources

## Juvenile Justice, Generally

### Articles/Reports/Monographs

Byron Dorgan, et al., [Ending Violence So Children Can Thrive](#), Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, November 2014. *The final report from the [Attorney General's Task Force on American Indian and Alaska Native Children Exposed to Violence](#). The task force is a part of Attorney General's Defending Childhood Initiative, a project that addresses the epidemic levels of exposure to violence faced by our nation's children. The task force was created in response to a recommendation in the Attorney General's National Task Force on Children Exposed to Violence December 2012 final report. The report noted that American Indian and Alaska Native children have an exceptional degree of unmet needs for services and support to prevent and respond to the extreme levels of violence they experience. <http://www.justice.gov/defendingchildhood/task-force-american-indian-and-alaska-native-children-exposed-violence>.*

Troy Eid, et al., [A Road Map for Making Native America Safer](#), Indian Law and Order Commission, November 2013.

*TLOA required the ILOC to study the reasons behind the high rates of crime in Indian nations and make recommendations to make Native American and Alaska Native nations safer and reduce the high rates of violent crime. Their final report is one of the most comprehensive assessments ever undertaken of criminal justice systems servicing Native American and Alaska Native communities. See: <http://www.aisc.ucla.edu/iloc/>.*

Dusten Hollist, Jacob Coolidge, et al., [Assessing the Mechanisms That Contribute to Disproportionate Minority Contact in Montana's Juvenile Justice Systems](#), December 2012.

*The objective of the research was to conduct a disproportionate minority contact assessment oriented toward providing an understanding of the contributing factors that influence minority overrepresentation trends in four Montana counties. Specifically, the investigation involved a quantitative examination of the role of extra-legal and social factors in the explanation of disproportionate minority contact. The study used data from focus groups and face-to-face interviews with juvenile justice systems decision makers to put in to context and provide a more complete understanding of the mechanisms that contribute to disproportionate minority contact in Montana. See: <http://mbcc.mt.gov/PlanProj/Pubs/Pubs.asp>.*

## Delinquency, Dependency and Status Offenses

### Articles/Reports/Monographs

American Bar Association, [Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders between Arrest and Disposition](#), 1979.

*These juvenile justice standards delineate the characteristics and structure of decision making affecting a juvenile between arrest on criminal charges and final disposition of the case. See:*

<https://www.ncjrs.gov/App/Search/SearchResults.aspx?txtKeywordSearch=Standards+Relating+to+Interim+Status%3A+The+Release%2C&fromSearch=1>.

Coalition for Juvenile Justice SOS Project, [National Standards for the Care of Youth Charged with Status Offenses](#), 2015.

*A status offender is a juvenile charged with or adjudicated for conduct that would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult. The most common examples of status offenses are chronic or persistent truancy, running away, violating curfew laws, or possessing alcohol or tobacco. The National Standards aim to promote best practices for this population, based in research and social service approaches, to better engage and support youth and families in need of assistance. See:*

[http://www.juvjustice.org/news/resources?title=&field\\_category\\_tid=All&items\\_per\\_page=20&page=10](http://www.juvjustice.org/news/resources?title=&field_category_tid=All&items_per_page=20&page=10).

Development Services Group, [Ungovernable/Incorrigible Youth Literature Review](#), Office for Juvenile Justice and Delinquency Prevention, 2009.

*This provides a review of the literature on underage drinking, theoretical frameworks, and prevention and intervention programs. See: <http://www2.dsgonline.com/>.*

Jessica R. Kendall, [Juvenile Status Offenses: Treatment and Early Intervention](#), 2007.

*This article gives an overview of status offense issues. It describes some of the underlying causes behind status offense behaviors and describes how this population has been treated historically. It argues for family and community based responses to these behaviors and gives examples of existing models that are centered around these concepts. See:*

<http://www.americanbar.org/publications1.html>.

Emily Morgan, Nina Salomon, et al., [The School Discipline Consensus Report: Strategies in the Field to Keep Students Engaged in School and Out of the Juvenile Justice System](#), Council of State Governments (CSG) Justice Center, 2014.

*A report providing school leaders and state and local government officials more than 60 recommendations for overhauling their approach to school discipline. The recommendations focus on improving conditions for learning for all students and staff, strengthening responses to student's behavioral health needs, tailoring school-police partnerships, and minimizing students' involvement with the juvenile justice system. See: <https://csgjusticecenter.org/jc/publications/>.*

Annie Salsich and Jennifer Trone, [From Courts to Communities: The Right Response to Truancy, Running Away, and Other Status Offenses](#), Vera Institute of Justice, 2013

*Young people who run away from home, skip school, or engage in other risky behaviors that are only prohibited because of their age end up in courtrooms every year by the thousands. Responding to these cases, called "status offenses," in the juvenile justice system can lead to punitive outcomes that are out of proportion to the young person's actions and do nothing to assess or address the underlying circumstances at the root of this misbehavior. This document aims to raise awareness about status offenses and spur conversations about how to effectively handle these cases by offering promising examples of state and local reform. See: <http://www.vera.org/resources>.*

Claire Shubick, [What Social Science Tells Us about Youth Who Commit Status Offenses: Practice Tips for Attorneys](#), Child Law Practice, Vol 29, no. 9, 2010.

*Research on adolescent development and antisocial behavior helps explain status offense behavior. This article translates the research and offers practice tips for advocating for clients in status offense cases. See: <http://www.americanbar.org/publications1.html>.*

## Incarceration

### Articles/Reports/Monographs

William Adams, Julie Samuels, [Tribal Youth in the Federal Justice System](#), Justice Policy Center, Urban Institute, July 2011.

*This study explores issues surrounding the population of American Indian juveniles who are processed in the federal justice system. Juveniles in the federal system are rare, and a substantial proportion enters into the system because of crimes committed on American Indians lands, over which the states have no jurisdiction. See: <https://www.ncjrs.gov/App/Publications/AlphaList.aspx?alpha=T&Agency=All>.*

Neelum Arya and Addie Rolnick, [A Tangled Web of Justice, American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems](#), Campaign for Youth Justice Policy Brief, 2008.

*An examination of how Native American youth are disproportionately affected by transfer laws. Key findings include that many Native American youth commit low-level offenses and receive either no court intervention or disproportionately severe sanctions. Also examines the interaction of the tribal justice system with the state and federal justice systems and how that impacts youth transfer. See: <http://www.campaignforyouthjustice.org/research/cfyj-policy-briefs>.*

James Austin, Kelly Dedel Johnson, and Ronald Weitzer, [Alternatives to the Secure Detention and Confinement of Juvenile Offenders](#), Office of Juvenile Justice and Delinquency Prevention Justice Bulletin, 2005.

*Presents a model procedure for reducing the number of juvenile offenders in secure detention and confinement, so as to reduce crowding in custodial facilities and improve the effectiveness of juvenile case management. See: <https://www.ncjrs.gov/App/Publications/AlphaList.aspx#>.*

Barry Holman and Jason Ziedenberg, [The Dangers of Detention: The Impact of Incarcerating Youth in Detention and other Secure Detention Facilities](#), Justice Policy Institute, 2006.

*Despite the lowest youth crime rates in 20 years, hundreds of thousands of young people are locked away every year in the nation's 591 secure detention centers. Detention centers are intended to temporarily house youth who pose a high risk of re-offending before their trial, or who are deemed likely to not appear for their trial. See: <http://www.justicepolicy.org/research/category/38>.*

# Indian Child Welfare Act, Federal Laws

## Website/Web Resources

Native American Rights Fund (NARF) has an online edition of [A Practical Guide to the Indian Child Welfare Act](#), it is intended to answer questions and provide a comprehensive resource of information on the Indian Child Welfare Act (ICWA). See: <http://www.narf.org/nill/documents/icwa/index.html>.

[The National Indian Child Welfare Association \(NICWA\)](#) website provides information on the act, resources for families, information on training and technical assistance, reports and documents. See: [http://www.nicwa.org/Indian\\_Child\\_Welfare\\_Act/](http://www.nicwa.org/Indian_Child_Welfare_Act/).

The Tribal Law and Policy Institute website has a page devoted to [Indian Child Welfare Act](#) information. There is an overview of the act, links to publications and updates on the latest issues regarding the Indian Child Welfare Act. See: <http://www.tribal-institute.org/lists/icwa.htm>.

The Tribal Law and Policy Institute website has a page devoted to [Indian Civil Rights Act](#) information. There is an overview of the law, discussions about the amendments to ICRA, ICRA enforcement, and resources. See: <http://www.tribal-institute.org/lists/icra.htm>.

The Tribal Law and Policy Institute website has a page devoted to [Public Law 280](#) information. There is an overview of the law, links to publications and updates on the latest issues regarding Public Law 280. See: <http://www.tribal-institute.org/lists/pl280.htm>.

The National Congress of American Indians (NCAI) and the National Criminal Justice Association (NCJA) maintains a website devoted the [Tribal Law and Order Act](#). There are webinars, documents, news, events, funding sources and a list of tribes that have implemented the enhanced sentencing authority of the Tribal Law and Order Act. See: <http://www.tribal-institute.org/lists/icra.htm>.

# Restorative Justice and Innovative Court Structures

## Articles/Reports/Monographs

Patricia Leigh Brown, [A Court's All-Hands Approach Aids Girls Most At Risk](#), *The New York Times*, January 28, 2014. See: [http://www.nytimes.com/2014/01/29/us/a-courts-all-hands-approach-aids-girls-most-at-risk.html?\\_r=0](http://www.nytimes.com/2014/01/29/us/a-courts-all-hands-approach-aids-girls-most-at-risk.html?_r=0).

Thomas Carroll, [Gender and Juvenile Justice: New Courts, Program Addresses Needs of Girls](#), National Center for Youth Law, 2009.

*Juvenile justice systems around California are awakening to the needs of a new population: girls. As girls enter the delinquency system in ever-increasing numbers, several California counties have established new delinquency courts and*



treatment programs tailored specifically to girls and their unique issues and needs. See:

<http://youthblaw.org/publication/gender-and-juvenile-justice-new-courts-programs-address-needs-of-girls/>.

The Community Corrections Institute, [Gang Courts: An Innovative Strategy For Gang-Involved Offenders](#), Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, April 2014.

*While many jurisdictions have developed drug courts, mental health courts, and veteran's courts, virtually no jurisdictions have developed gang courts. This publication examines two such courts. The first program reviewed was developed by the U.S. Probation Office for the Eastern District of Missouri, headquartered in St. Louis, Missouri. This program titled "The St. Louis Gang Reentry Initiative Project" (GRIP) focuses on adult federal offenders and has specific criteria for admittance into the program. The second court program reviewed is the Yakima County Gang Court (YGC), located in Yakima, Washington. The YGC program was developed for gang-involved juveniles. The Yakima, Washington area has a significant Hispanic population and has experienced an influx of Hispanic gang members. See: <http://www.communitycorrections.org/resources-publications/>.*

Michelle Heward, [An Update on Teen Court Legislation](#), 2006.

*The issue of whether enabling legislation is needed for the operation of youth court programs is an ongoing debate. However, the number of states attempting to pass some type of enabling legislation related to youth courts has increased over the past few years. Of the 45 states that have youth court programs, 25 states had enacted legislation that specifically addresses youth/teen court in some manner as of November 2001. See:*

[http://www.youthcourt.net/?page\\_id=656](http://www.youthcourt.net/?page_id=656).

Molly McDonough, [Girls Court connects vulnerable girls to social services](#), *ABA Journal*, January 31, 2014. See: <http://www.abajournal.com/news/article/girls-court-connects-vulnerable-girls-to-social-services/>.

Tracy Godwin Mullins, [Selected Topics on Youth Courts: A Monograph](#), National Youth Court Center, 2004.

*This document draws on the ideas and expertise of many who work in youth courts throughout the United States, as well as on the experience of staff at the National Youth Court Center at the American Probation and Parole Association who have researched and worked with youth courts on a national level for more than ten years. See:*

<http://www.aidainc.net/monograph.pdf>.

The Peace Alliance, [Fact Sheet on Evidence Based Prevention and Intervention Programs](#). *Discusses restorative justice among juveniles in Colorado, Wisconsin, Maryland, and an Alberta First Nations community. See: <http://peacealliance.org/issues-advocacy/restorative-justice/>.*

Christine Zuni, [Strengthening What Remains](#), *Kansas Journal of Law and Policy*, Vol. 7, no. 17, 1997.

*A discussion of tribal courts, traditional justice and the future of tribal courts. See:*

<http://web2.law.buffalo.edu/faculty/meidinger/808/reg327402/uploaded/ZuniStrengthRemains.htm>.

# Restorative Justice and Innovative Court Structures

## Website/Web Resources

[Edutopia](#) is a blog that discusses restorative justice in schools. See: <http://www.edutopia.org/blog/restorative-justice-resources-matt-davis>.

Mental Health Courts: The Bureau of Justice Assistance has a webpage regarding [Mental Health Courts](#). This page provides an overview, funding, training and technical assistance, and related resources on mental health courts. See: [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=68](https://www.bja.gov/ProgramDetails.aspx?Program_ID=68).

Restorative Justice: [The Centre for Justice and Reconciliation](#) is a website that provides information on restorative justice around the world. See: <http://restorativejustice.org/restorative-justice/>.

Truancy Courts: The National Drug Court Resource Center provides an overview of [Truancy Courts](#) on their website. See: <http://www.ndcrc.org/node/360>. Additional information on peer or teen courts can be found at: [The National Association of Youth Courts](#) and the [California Courts – The Judicial Branch of California](#). See: [http://www.youthcourt.net/?page\\_id=24](http://www.youthcourt.net/?page_id=24) and <http://www.courts.ca.gov/5991.htm>.

Tribal Healing to Wellness Courts: The Tribal Law and Policy Institute maintains a website devoted to [Tribal Healing to Wellness Court](#) information. There are extensive wellness court resources including forms, publications, drug court partners, federal funding, news, and updates regarding wellness courts. See: <http://www.wellnesscourts.org/>.

Youth Domestic Violence Courts: Information can be found at: [Center for Court Innovation](#) and the [California Courts – The Judicial Branch of California](#). See: <http://www.courtinnovation.org/project/youth-domestic-violence-court> and <http://www.courts.ca.gov/5987.htm>.

Teen Courts: [Montgomery County, Maryland Teen Court](#). A diversion program offered to first time juvenile offenders in which they admit to their involvement in the offense and agree to have their case heard before a peer jury of Teen Court student volunteers in a court setting. See: <http://www.montgomerycountymd.gov/sao/other/TeenCourt.html>.

# Trauma, Mental Health, Brain Development

## Articles/Reports/Monographs

Dolores Subia Bigfoot and Janie Braden, [Adapting Evidence-Based Treatments for Use with American Indian and Native Alaskan Children and Youth](#), Focal Point, Vol 21, no. 1, 2007.

*Examines the adaptation of several evidence-based treatments (EBTs) for child traumatic stress for use in Native American communities. The EBTs that are discussed attend to the broad cultural, historical, and intergenerational traumas that are part of the life experience of many Native American youth. (HRC). See: <http://www.pathwaysrtc.pdx.edu/publications>.*

David Dobbs, "[Teenage Brains](#)," *National Geographic*, October 2011.

*This article focuses teenage brain development. See: <http://ngm.nationalgeographic.com/2011/10/teenage-brains/dobbs-text>.*

Jessica Feierman and Lauren Fine, [Trauma and Resilience, a New Look at Legal Advocacy for Youth in the Juvenile Justice and Child Welfare Systems](#), Juvenile Law Center, April 2014.

*This publication sets forth key risks of and opportunities for using research on trauma in youth advocacy. It focuses on legal strategies advocates can use in court, and the state and local policies needed to support these strategies. It also sets forth basic background, case law analysis, and policy recommendations for the juvenile and criminal justice systems and for the child welfare system. See: <http://www.jlc.org/resources/publications?page=1>.*

Richard Knox, [The Teen Brain: It's Just Not Grown Up Yet](#), *National Public Radio*, *National Public Radio*, March 2, 2010.

*A story/article on teenage brains and development. See: <http://www.npr.org/templates/story/story.php?storyId=124119468>*

Debra Bradley Ruder, [The Teen Brain](#), *Harvard Magazine*, September-October 2008.

*This article focuses on teenage brain development. See: <http://harvardmagazine.com/2008/09/the-teen-brain.html>.*

Kathleen R. Skowyra and Joseph J. Cocozza, [Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System](#), National Center for Mental Health and Juvenile Justice, 2007.

*This document presents a conceptual and practical framework for juvenile justice and mental health systems to use when developing strategies, policies, and services aimed at improving mental health services for youth involved with the juvenile justice system. The model summarizes what is known about identifying and treating mental disorders among youth at key stages of juvenile justice processing and offers recommendations, guidelines, and examples for how best to do this. See: <http://www.ncmbjj.com/blueprint-for-change-a-comprehensive-model-for-the-identification-and-treatment-of-youth-with-mental-health-needs-in-contact-with-the-juvenile-justice-system/>.*

# Tribal Code Resources

## Model Codes

Center of Indigenous Research and Justice, [University of Washington's Center of Indigenous Research and Justice's Model Tribal Juvenile Code](#), University of Washington.

*The Center of Indigenous Research and Justice has assumed responsibility for the continued development of and dissemination of the Model Tribal Juvenile Code, which is intended as an example of a delinquency, truancy, and at-risk-youth code providing numerous opportunities for juveniles to be diverted out of formal processing within the juvenile justice system. See: [http://www.cirj.org/docs/CIRJ\\_Model\\_Tribal\\_Juvenile\\_Justice\\_Code.pdf](http://www.cirj.org/docs/CIRJ_Model_Tribal_Juvenile_Justice_Code.pdf).*

National Indian Justice Center, [Tribal Juvenile Justice Code](#), Bureau of Indian Affairs, 1989.

*Developed by the National Indian Justice Center for the Bureau of Indian Affairs in order to comply with a requirement to develop a model tribal juvenile code in the 1986 Omnibus Drug and Alcohol Act. See: [http://www.tribal-institute.org/codes/juv\\_justice.htm](http://www.tribal-institute.org/codes/juv_justice.htm).*

## Miscellaneous

### Cooperative Agreements

[The Clayton County Juvenile Justice Collaborative Cooperative Agreement](#), *an example cooperative agreement between public school system, police department, child welfare, district attorneys, behavioral health services, and juvenile justice. See: <http://thecollaborative.uncc.edu/>.*

[Shelby County Schools SHAPE MOU](#), *a multisystem approach that offers mentoring, tutoring, counseling, community service, victim restitution support, and other individualized services. See: <http://www.neglected-delinquent.org/topic-areas/coordination-and-collaboration>.*

### Websites/Web Resources

[Attention Homes](#) is an adolescent residential care program. They provide opportunities for at-risk youth to change their lives. They offer shelter, community-based living and teaching of life skills necessary for an independent future. See: <http://www.attentionhomes.org/who-we-are/>.

[Boys Town](#) – an organization that provides services to youth and their families. See: <http://www.boystown.org/>.

Community Works maintains a webpage with information regarding [Family Group Conferencing](#). See: <http://communityworkswest.org/rgc/>.

[The Bureau of Prisons](#) website discusses juveniles within the Bureau of Prisons facilities and family reunification. See: [http://www.bop.gov/inmates/custody\\_and\\_care/juveniles.jsp](http://www.bop.gov/inmates/custody_and_care/juveniles.jsp).

The Kempe Center at the University of Colorado maintains a website devoted to [Family Group Decision Making](#). See:  
<http://www.ucdenver.edu/academics/colleges/medicalschoo/department/pediatrics/subs/can/FGDM/Pages/FGDM.aspx>.

The [National Association of Counsel for Children \(NACC\)](#) is a non-profit child advocacy and professional membership association headquartered in the Kempe Children's Center on the campus of Children's Hospital Colorado in Denver, Colorado. It is a multidisciplinary organization with approximately 2,000 members representing all 51 jurisdictions and several foreign countries. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented. See:  
<http://www.naccchildlaw.org/?page=About>.

The [Office of Juvenile Justice and Delinquency Prevention's \(OJJDP's\) Model Programs Guide \(MPG\)](#) contains information about evidence-based juvenile justice and youth prevention, intervention, and reentry programs. It is a resource for practitioners and communities about what works, what is promising, and what does not work in juvenile justice, delinquency prevention, and child protection and safety. See: <http://www.ojjdp.gov/mpg>.

The Tribal Law and Policy Institute maintains a website [TribalProtectionOrder.org](#) that provides information for drafting and enforcement of tribal protection orders. See:  
<http://tribalprotectionorder.org/>.