

# Defending Youth in Juvenile Court



## Juvenile Law & Procedure in West Virginia

Representing children accused of delinquency or status offenses is a specialization within criminal defense, distinct from representing adults.

This manual is designed to help you excel in juvenile defense.

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Please note the information provided in this manual should not be construed as definitive statements of law. Nothing in this manual should be construed as the provision of legal advice and no lawyer-client relationship between the authors and the readers should be inferred.

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**Public Defender Services**  
OF WEST VIRGINIA







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## I. Overview

In West Virginia, a “juvenile” (“child,” “adolescent,” “teenager,” “young person,” or “minor”) is any person under eighteen years of age.<sup>1</sup> Because adolescents are still maturing and developing their identities, juvenile clients have different needs than adult clients and a different range of legal arguments apply to them.

Juvenile defense is a specialized practice. Juvenile defenders must zealously advocate for their young client’s expressed interests with proficiency in West Virginia juvenile law and court rules, Supreme Court jurisprudence, and the science of adolescent development. Youth also are often involved with more systems than adult clients. The juvenile defender likely will have to interact with parents, school, educational/vocational programs, counseling services, and the Department of Health and Human Resources (DHHR).

The purpose of this manual is to provide an overview of representation at all stages of the delinquency process and the status offender process in West Virginia—from entry into the system through appeal and sealing of records— as a primer for attorneys new to the practice and as a reference guide for seasoned juvenile defenders. This manual is a comprehensive overview of the law relevant to juvenile defense, but it is not all inclusive. Furthermore, nothing in this manual should be construed as legal advice.

### NATIONAL JUVENILE DEFENSE STANDARDS

#### 1.1 Ethical Obligations of Juvenile Defense Counsel

Counsel must provide competent, diligent, and zealous advocacy to protect the client’s procedural and substantive rights.

- a. Counsel must be skilled in juvenile defense. Counsel must be knowledgeable about adolescent development and the special status of youth in the legal system. Counsel must be familiar with relevant statutes, case law, and court rules;
- b. Counsel must provide continuous, active representation throughout the entirety of the client’s contact with the juvenile justice system. Counsel should avoid delays in proceedings, especially when the client is held in detention; and
- c. Counsel should litigate the client’s case vigorously and challenge the state’s ability to prove its case beyond a reasonable doubt. Counsel must always advocate for protection of the client’s due process rights and ensure that any court-ordered services are provided in the least restrictive setting.

National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 1.1 (2012), pp.18-19 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

Children facing the power of the state have a right to fundamental fairness and should have a skilled lawyer at every step in the process.<sup>2</sup> This manual is a tool that can help make that a reality.

## II. Purpose of Juvenile Court

The Juvenile Justice System in West Virginia is defined and governed by both statutes and rules, namely the Child Welfare Act (Juvenile Act) found in Chapter 49 of the West Virginia Code and the Rules of Juvenile Procedure.

The purpose of the Child Welfare Act is “to provide a system of coordinated child welfare and juvenile justice services for the children of this state. The state has a duty to assure that proper and appropriate care is given and maintained.”<sup>3</sup> The focus of the Child Welfare Act is the **care and rehabilitation** of children, **not the punishment** of children who commit unlawful acts.

<sup>1</sup> W.Va. Code § 49-1-202. Once adjudicated delinquent, the court has jurisdiction over the juvenile until he or she reaches 21 years of age. W.Va. Code § 49-4-701(f) (1). If the juvenile is adjudicated as a status offender, the court has jurisdiction until either age 18 or age 21, depending upon which status offense is involved. The court has jurisdiction over those children adjudicated truant until age 21 or until the child graduates from high school. W.Va. Code § 49-4-701(f)(2). The court has jurisdiction over those children adjudicated incorrigible until age 18 (when the child is no longer a legal child).

<sup>2</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>3</sup> W.Va. Code § 49-1-105(a).



As stated in West Virginia Code § 49-1-105(b)(1)-(12):

[T]he juvenile justice system shall:

- (1) Assure each child care, safety and guidance;
- (2) Serve the mental and physical welfare of the child;
- (3) Preserve and strengthen the child's family ties;
- (4) Recognize the fundamental rights of children and parents;
- (5) Develop and establish procedures and programs which are family-focused rather than focused on specific family members, except where the best interests of the child or the safety of the community are at risk;
- (6) Involve the child, the child's family or the child's caregiver in the planning and delivery of programs and services;
- (7) Provide community-based services in the least restrictive settings that are consistent with the needs and potentials of the child and his or her family;
- (8) Provide for early identification of the problems of children and their families, and respond appropriately to prevent abuse and neglect or delinquency;
- (9) Provide for the rehabilitation of status offenders and juvenile delinquents;
- (10) As necessary, provide for the secure detention of juveniles alleged or adjudicated delinquent;
- (11) Provide for secure incarceration of children or juveniles adjudicated delinquent and committed to the custody of the director of the Division of Juvenile Services; and
- (12) Protect the welfare of the general public.

#### LITIGATION POINTS:

- A juvenile defender may challenge any intervention that does not meet the aims of the juvenile court system as outlined in the Child Welfare Act.
- An attorney may use the legislatively defined purpose of the Act to remind magistrates and judges that the focus is to be on **the child and his or her needs and not punishment**, regardless of the seriousness of the child's alleged offense.

### III. The Rules of Juvenile Procedure

The Rules of Juvenile Procedure govern the procedures for hearings and other proceedings for status offenses and delinquency offenses.<sup>4</sup> **Importantly, “If these rules are in conflict with other rules or statutes, these rules shall apply.”**<sup>5</sup> The Rules of Juvenile Procedure include powerful language that may be helpful in your advocacy.

Juvenile Rule 1(c) provides, “[Creating uniform practices and procedures to protect juveniles’ statutory and constitutional rights] should be pursued through means that are **fair and just**, that **recognize the unique characteristics and needs of juveniles**, and that give juveniles **access to opportunities for personal and social growth**, while promoting public safety and reducing juvenile offenses. These rules shall be construed to achieve these ends.”<sup>6</sup>

Additionally, the rules specify that “juveniles charged with delinquency or status offenses are given the same rights as adults charged with criminal offenses, and in some instances, they are afforded more protection.”<sup>7</sup> Note, the existence of these Juvenile Rules does not render the other rules of court and procedure irrelevant to juvenile practice. The Rules of Criminal Procedure and the Rules of Evidence are applicable in juvenile proceedings unless they conflict with the Rules of Juvenile Procedure.

<sup>4</sup> “These rules govern the procedures in the courts of West Virginia having jurisdiction over delinquency and status offense matters pursuant to West Virginia Code, §§ 49-2-901 through 49-2-913; 49-2-1001 through 49-2-1006; 49-4-701 through 49-4-725; and 49-5-101 through 49-5-106 and apply to both delinquency and status offense proceedings except where otherwise specified or limited.” W.Va. R.Juv.P. 1(a).

<sup>5</sup> W.Va. R.Juv.P. 1(a) (emphasis added).

<sup>6</sup> W.Va. R.Juv.P. 1(c) (emphasis added).

<sup>7</sup> W.Va. R.Juv.P. 1(d).





*Comparison and Terminology of Adult and Juvenile Systems in West Virginia*

	ADULT	JUVENILE
<b>Burden of Proof</b>	Beyond a Reasonable Doubt	Beyond a Reasonable Doubt <sup>8</sup>
<b>Right to Notice of Charges</b>	Yes	Yes <sup>9</sup>
<b>Right to Attorney</b>	Yes	Yes <sup>10</sup>
<b>Right to Confront and Cross-Examine Witnesses</b>	Yes	Yes <sup>11</sup>
<b>Right to Remain Silent</b>	Yes	Yes <sup>12</sup>
<b>Right to a Jury Trial</b>	Yes	Yes <sup>13</sup> (limited)
<b>Elements of Charge Defined in Criminal Code</b>	Yes	Yes <sup>14</sup>
<b>Primary Purpose of the System</b>	Retribution	Rehabilitation <sup>15</sup>
<b>Fact Finding Hearing</b>	Trial	Adjudicatory Hearing <sup>16</sup>
<b>Accused</b>	Defendant	Respondent <sup>17</sup>
<b>Charging Document</b>	Complaint	Petition
<b>Sentencing Hearing</b>	Sentencing Hearing	Disposition Hearing <sup>18</sup>
<b>Adversarial</b>	Yes	Yes
<b>Rules of Professional Conduct Apply</b>	Yes	Yes

## IV. Supreme Court Jurisprudence

These cases from the United States Supreme Court outline the Court’s evolution of juvenile justice jurisprudence

- ***Kent v. United States***, 38. U.S. 541 (1966) – A child facing the possibility of transfer to adult court must receive a hearing with the assistance of counsel and a written ruling regarding the transfer decision.
- ***In re Gault***, 387 U.S. 1 (1967) – Children in juvenile court have the right to due process, including the right to notice of the charges against them, to an attorney, to remain silent, and to confront and cross-examine witnesses.
- ***In re Winship***, 397 U.S. 358 (1970) – The standard for adjudicating a child delinquent is proof beyond a reasonable

<sup>8</sup> *In re Winship*, 397 U.S. 358 (1970). See also W.Va. Code § 49-4-711(3). The burden of proof for a status offense is clear and convincing evidence. W.Va. Code § 49-4-711(4).

<sup>9</sup> *In re Gault*, 387 U.S. 1 (1967). See also W.Va. Code § 49-4-701(j) (“At all adjudicatory hearings held under this article, all procedural rights afforded to adults in criminal proceedings shall be afforded the juvenile unless specifically provided otherwise in this chapter.”).

<sup>10</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> W.Va. Code § 49-4-709(a); W.Va. R.Juv.P. 29.

<sup>14</sup> W.Va. Code § 49-4-701(f)(1). Juveniles also may be charged with “status offenses,” which constitutes behavior that is unlawful based upon their status as a child. Examples include truancy and curfew violations.

<sup>15</sup> W.Va. Code § 49-1-105(b)(9).

<sup>16</sup> W.Va. Code § 49-4-711.

<sup>17</sup> W.Va. Code § 49-4-704(a)(2).

<sup>18</sup> W.Va. Code § 49-4-714(b).



doubt.

- *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) – Children in the juvenile justice system have no federal constitutional right to trial by jury.
- *Breed v. Jones*, 421 U.S. 519 (1975) – The double jeopardy clause applies to juveniles and prevents children from being subjected to charges in criminal court after being subjected to charges for the same offense in delinquency court.
- *Fare v. Michael C.*, 442 U.S. 707 (1979) – The appropriate test for determining whether a child’s waiver of rights was voluntary and knowing is a totality of the circumstances.
- *Schall v. Martin*, 467 U.S. 253 (1984) – The preventative detention of children accused of delinquent acts while pending an adjudication does not violate due process.
- *Roper v. Simmons*, 543 U.S. 551 (2005) – Imposition of the death penalty for crimes committed by juveniles is unconstitutional.
- *Graham v. Florida*, 560 U.S. 48 (2010) – A sentence of life without the possibility of parole is unconstitutional for non-homicide crimes committed by juveniles.
- *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) – Age is a factor to be considered in the totality of the circumstances when determining if a child is in police custody for *Miranda* purposes.
- *Miller v. Alabama*, 567 U.S. 460 (2012) – Mandatory life without parole sentences are unconstitutional for homicide offenses committed by juveniles.
- *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) - The holding in *Miller*—that mandatory life without parole sentences are unconstitutional for homicide offenses committed by juveniles—has retroactive effect in state collateral review.

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## v. The Role of the Juvenile Defender

### Expressed Interest

A juvenile defender must zealously advocate for the expressed interests of his or her client, just like an attorney must when representing an adult client.<sup>19</sup> Other actors in the juvenile system have the job to pursue the “best interests” of the child. The defense attorney is the sole actor whose job it is to articulate and to advocate for the child’s stated interest. An important part of the attorney-client relationship in a juvenile case is explaining this relationship to both the client and his or her parent(s) or guardian. The role of the juvenile defender remains the same—representing the child and not the parent or guardian, even in cases where counsel has been privately retained by and paid by the child’s parent(s) or guardian.

Although a juvenile defender may have the impulse to supersede his or her client’s decisions (especially if he or she believes such decisions are bad ones), the West Virginia Rules of Professional Conduct make clear that even when a client has diminished capacity, one should maintain a normal client-lawyer relationship as far as reasonably possible.<sup>20</sup> Counseling and educating the client is an important part of juvenile representation, especially for youth who lack knowledge about the legal system.<sup>21</sup> This role of the juvenile defender is in line with the constitutional mandate of a youth’s right to an attorney, as outlined in *In re Gault*,<sup>22</sup> as well as national best practices, as outlined in the National Juvenile Defense Standards drafted by the National Juvenile Defender Center.<sup>23</sup>

<sup>19</sup> National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 1.2 (2012), pp. 19-20 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>20</sup> W.Va. R.P.C. 1.14.

<sup>21</sup> W.Va. R.P.C. 1.2 (explaining scope of representation and allocation of authority between client and lawyer) and W.Va. R.P.C. 1.14 (explaining dealing with a client with diminished capacity).

<sup>22</sup> 387 U.S. 1 (1967).

<sup>23</sup> National Juvenile Defender Center (NJDC), National Juvenile Defense Standards (2012)(online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).



### NATIONAL JUVENILE DEFENSE STANDARDS

#### 1.2 Elicit and Represent Client's Stated Interests

Counsel's primary and fundamental responsibility is to advocate for the client's expressed interests.

- a. Counsel may not substitute his or her own view of the client's best interests for those expressed by the client;
- b. Counsel may not substitute a parent's interests or view of the client's best interests for those expressed by the client;
- c. Where counsel believes that the client's directions will not achieve the best long-term outcome for the client, counsel must provide the client with additional information to help the client understand the potential outcomes and offer an opportunity to reconsider; and
- d. If the client is not persuaded, counsel must continue to act in accordance with the client's expressed interests throughout the course of the case.

National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 1.2 (2012), pp. 19-20

### WEST VIRGINIA RULE OF PROFESSIONAL CONDUCT 1.14 CLIENT WITH DIMINISHED CAPACITY

"When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, **maintain a normal client-lawyer relationship with the client.**" (emphasis added).

## Confidentiality

As stated above, the juvenile defender's role is to represent the child, not the parent or guardian. The attorney must have one-on-one conversations with clients outside of the presence of the parent(s) or guardian(s), both so clients have an opportunity to communicate with counsel information that they may not desire to share with their parents/guardians and to maintain attorney-client privilege, which can be interrupted by the presence of a third party. Private conversations between the client and the attorney may feel strange for families who are new to the system, therefore, counsel should explain why this procedure is necessary to both the child and the parent or guardian early in the process.

Confidentiality still applies to juvenile clients, just as with adults, which means information learned in the course of representing your client cannot be shared with anyone, including the parent or guardian, without the client's permission.<sup>24</sup> Even information learned by the lawyer in the course of representation from sources other than discussions with the child, like a child's school attendance record or drug test results, should **not be disclosed to the parent** without the client's permission. The juvenile defender should carefully explain confidentiality early in the attorney-client relationship and revisit the topic as often as is necessary in developmentally appropriate language.<sup>25</sup>

As noted in the commentary to National Juvenile Defense Standard 2.2, an attorney-client relationship with a young person takes special care:

"Young clients are often surprised to learn that they, and not their parent or attorney, are 'in charge' of their representation. This requires youth to adopt a new posture, and demonstrate control and collaboration at exactly the moment they are likely to feel most powerless and vulnerable. It is important for attorneys to recognize that, for youth, being 'in charge' of their representation may be a difficult adjustment."<sup>26</sup>

<sup>24</sup> W.Va. R.P.C. 1.6; National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 2.3 (2012), pp. 38-39 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>25</sup> National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Commentary to Std. 2.1 (2012), p. 34 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>26</sup> *Id.* at Commentary to Std. 2.2, p. 37; see Emily Buss, *You're My What? The Problem of Children's Misperception of Their Lawyer's Roles*, 64 *FORDHAM L. REV.* 1699 (1996).



### NATIONAL JUVENILE DEFENSE STANDARDS

#### 2.5: Parents and Other Interested Third Parties

Counsel must inform the client and third parties (e.g., parents, other family members, clinicians, teachers, counselors, service providers, and other interested adults) that counsel is required to treat private communications with the client as confidential. Counsel is required to maintain confidentiality even when third parties are providing services to the client.

- a. Counsel must know state case law, statutes, and codes of professional conduct regarding all disclosures to third parties;
- b. Counsel should explain to the client the need to share information with third parties, and specify the information to be shared, the purpose of sharing it, and the possible consequences. Counsel must obtain permission from the client prior to communicating certain information to third parties. Counsel may not permit a third party, including a parent, to interfere with counsel's assessment of the case. Counsel shall not substitute a third party's wishes for those of the client; and
- c. When a third party, including a parent, is trying to direct the representation of the client, counsel should inform that person of counsel's legal obligation to represent only the expressed interests of the client. In the event of a disagreement, counsel is required to exclusively abide by the wishes of the client.

National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 1.2 (2012), pp. 19-20

### STANDARD 2.1: ROLE OF JUVENILE DEFENSE COUNSEL AT INITIAL CLIENT CONTACT

Counsel must provide a clear explanation, in developmentally appropriate language, of the role of both the client and counsel, and demonstrate commitment to the client's expressed interests. Counsel must elicit the client's point of view and encourage the client's full participation.

- a. Counsel must meet the client as soon as practicable following counsel's appointment;
- b. The initial interview should be in person in a private setting, away from the client's parent or other people, to maintain privilege and assure that the client knows the communication is confidential. Counsel of a detained juvenile client must visit the client in detention and ensure that the meeting occurs in a setting that allows for a confidential conversation; and
- c. Counsel must support the client's participation in the defense by providing information and advice in developmentally appropriate language.

National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 2.1 (2012), pp. 34

## VI. Understanding the Youth Client

### Adolescent Development

Adolescents are not miniature adults, but rather are developmentally and constitutionally different from adults. A significant distinction between the representation of adults and children lies in the differences between the adolescent brain and the adult brain, including the legal ramifications stemming from those differences.

The brain continues to develop, both in psychosocial functioning and in basic cognitive capacity, during adolescence and into a person's mid-twenties. Continuing adolescent brain development influences a young person's capacity to assess risk, anticipate long-term consequences, and make reasoned decisions.

Young people also place a higher emphasis on fairness than adults, which makes their participation in the court process and their relationship with their juvenile defenders even more important.<sup>27</sup>

<sup>27</sup> National Research Council. *Reforming Juvenile Justice: A Developmental Approach*. Committee on Assessing Juvenile Justice Reform, Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers, and Julie A. Schuck, Eds. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, D.C.: The National Academies Press. Pp. 190-99, 209-10 (2013)(discussing juveniles' perceptions of fairness and how it impacts their approaches to the juvenile justice system).



Juvenile defenders must be aware of the impact of adolescent development on every aspect of a child's case—from his susceptibility to coercion by authority figures in police encounters, to his relationship with his attorney during a case, to his culpability in an alleged crime, and his potential for change to be argued at a transfer hearing.

Scientific research has shown adolescence has hallmark features of psycho-social development:<sup>28</sup>

- Plasticity, desistence, and potential for change;
- Susceptibility to peer influence;
- Compliance with authority figures;
- Preference for immediate rewards;
- Lack of future-orientation;
- Increased sensation-seeking;
- Impulsivity; and
- Difficulty regulating emotional responses.<sup>29</sup>

Landmark United States Supreme Court decisions have relied on this psycho-social research in the context of determining culpability as it relates to the Eighth Amendment and to the *Miranda* custody analysis, the decisions of which are outlined below.

## Recognition and Use of Adolescent Development in the Law

***Roper v. Simmons***, 543 U.S. 551 (2005)

Holding: The Eighth and Fourteenth Amendments forbid the imposition of the death penalty on people who were under the age of 18 at the time of their offenses.

***Developmental concepts affirmed:***

Youth are:

- » immature and reckless;
- » more susceptible to peer pressure;
- » developing and therefore, character is transient by nature. 543 U.S. at 598.

***Graham v. Florida***, 560 U.S. 48 (2010)<sup>30</sup>

Holding: The Eighth Amendment prohibits the imposition of a life-without-parole (LWOP) sentence for those who were under the age of 18 at the time of their offenses and who committed non-homicide offenses. Such sentences must provide a meaningful opportunity for release based upon demonstrated maturity and rehabilitation.

***Developmental concept affirmed:***

Juveniles' "lack of maturity and underdeveloped sense of responsibility ... often result[s] in impetuous and ill-considered actions and decisions" and "they are less likely to take a possible punishment into consideration when making decisions." 560 U.S. at 72.

***J.D.B. v. North Carolina***, 564 U.S. 261 (2011)

Holding: Due Process requires a child's age to be considered as a factor in the *Miranda* custody analysis, so long as the child's age was known to the officer at the time of police questioning or would have been objectively apparent to a reasonable officer.

***Developmental concept affirmed:***

"[C]hildren characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." 564 U.S. 261 at 261.

<sup>28</sup> Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCHOL., PUB. POL'Y & L. 410 (2017).

<sup>29</sup> See also, Brief for the American Medical Association and the Academy of Child and Adolescent Psychiatry as Amici Curiae Supporting Petitioners at 7, *Miller v. Alabama*, 567 U.S. 460 (2012)(online at: [https://www.aacap.org/App\\_Themes/AACAP/docs/Advocacy/amicus\\_curiae/miller\\_vs\\_alabama\\_and\\_jackson\\_vs\\_hobbs\\_amicus\\_brief.pdf](https://www.aacap.org/App_Themes/AACAP/docs/Advocacy/amicus_curiae/miller_vs_alabama_and_jackson_vs_hobbs_amicus_brief.pdf)).

<sup>30</sup> A great resource is the amicus brief filed in *Graham* by the American Psychological Association, et. al. Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners, 560 U.S. 48 (2010)(online at: <https://www.apa.org/about/offices/ogc/amicus/graham-v-florida-sullivan.pdf>).



**Miller v. Alabama**, 567 U.S. 460 (2012)

Holding: Mandatory life-without-parole sentences for those under the age of 18 at the time of their offenses violate the Eighth Amendment’s prohibition on cruel and unusual punishments. A judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.

**Developmental Concepts affirmed:**

“A sentencer misses too much if it treats every child as an adult.” 567 U.S. at 477. A mandatory LWOP sentence precludes consideration of a child’s:

chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds [the child]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

*Id.* at 477-478.

**Montgomery v. Louisiana**, 136 S.Ct. 718 (2016)

Holding: The decision in *Miller* is retroactive to juvenile offenders whose sentences were final before *Miller* was decided.

**Developmental Concept affirmed:**

“*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.” 136 S.Ct. at 735.

## Trauma and Adolescent Development

Childhood trauma can impact adolescent development and increase the likelihood of contact with the juvenile court system.<sup>31</sup> Adverse childhood experiences, including trauma, can have a direct impact on later life.<sup>32</sup> For example, ongoing stress causes a nearly constant activation of stress response neural systems in children.<sup>33</sup> This activation can alter key neurochemicals in the brain, affecting memory and emotional processing, and can cause heightened anxiety, depression, and aggression.<sup>34</sup> Research also has linked the experience of childhood trauma with an increased likelihood of engaging in high-risk behaviors.<sup>35</sup> If your client has experienced trauma, you can use your knowledge of this research to support your advocacy for your client’s expressed interests. Be cautious that discussing your client’s trauma is both done with your client’s consent and does not further entrench your client in the juvenile justice system by emphasizing his or her “needs” if your client is not interested in receiving more services.

### LITIGATION POINTS:<sup>36</sup>

#### Adolescent Development in Plea Negotiations and Disposition

- Delinquent acts are not necessarily reflective of future delinquent patterns of behavior. Youth have a great likelihood of desistance and rehabilitation.
- Even mental health professionals find it difficult to predict who will continue to commit crimes in adulthood and who will not do so.

<sup>31</sup> The National Child Traumatic Stress Network, *Effects of Complex Trauma*, online at: [https://www.nctsn.org/what-is-child-trauma/trauma\\_types/complex-trauma/effects](https://www.nctsn.org/what-is-child-trauma/trauma_types/complex-trauma/effects).

<sup>32</sup> Michael T. Baglivio, et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, Office of Juvenile Justice and Delinquency Prevention, 3(2) *Journal of Juvenile Justice* 1 (Spring 2014)(online at: <https://www.ncjrs.gov/pdffiles/246951.pdf>).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Juvenile Defense Network, *Adolescent Brain Development: Implications in the Courtroom*, online at: <https://www.publiccounsel.net/ya/wp-content/uploads/sites/6/2014/08/Understanding-the-Parts-of-the-Brain.pdf>. See also Samantha Buckingham, *Trauma-Informed Juvenile Justice*, 53 *Am. Crim. L. Rev.* 641 (2016) (explaining how chronic traumatic stress can lead to high-risk and/or maladaptive behavior).

<sup>36</sup> See the section titled Research: Rehabilitation, Recidivism, and Client Needs beginning on page 65 of this manual for more information.



### Adolescent Development and Plea Negotiations and Trial

- Adolescent development research may support that your client did not have the requisite intent for the crime charged, especially for clients with a history of trauma.

### Adolescent Development and Suppression

- Youth, because they tend to be focused on the present and have difficulty assessing long-term consequences, are especially vulnerable to police pressure, directly affecting their abilities to waive their rights and to freely, voluntarily, and knowingly make a statement. Research on adolescent development is relevant for the purposes of suppressing evidence under the Fourth and Fifth Amendments.<sup>37</sup>
- The Fourth Amendment protects all people, including children, from unreasonable searches and seizures. Anytime the police restrain a child's liberty in any significant way, they must justify that restraint by showing either that the person consented or that there was reasonable articulable suspicion that the child was engaged in criminal conduct. Courts evaluate the seizure and consent-to-search inquiries from the lens of the person being seized and searched. Courts also evaluate the reasonableness of the police officer's stated basis for reasonable articulable suspicion. You should consider utilizing commonsense knowledge about youth (which are confirmed by the science of adolescent development) to argue that the court should evaluate any consent, seizure, or facts given as the basis for reasonable articulable suspicion through the lens of the "reasonable child."<sup>38</sup>

### Adolescent Development and Trauma

- If your client has a trauma history that requires residential treatment, you should advocate for your client's expressed interest in regards to placement. You should counsel your client about the availability of trauma informed care.
- Plasticity means a child's best chance at successful rehabilitation and positive life outcomes is to ensure the client is placed in a stimulating environment, where he or she can continue to learn during this critically important period of his or her life. Many secure facilities are not typically stimulating environments for the purposes of brain development.
- Adolescent development and trauma means your client should not be held culpable in the same manner as an adult would be for the purposes of punishment, which also would be in antithesis to the purpose (rehabilitation) of the West Virginia juvenile justice system.

### SOGIE – Sexual Orientation, Gender Identity, and Gender Expression

It is important that all clients feel respected by their attorney and the court. Attorneys need to make safe spaces for their adolescent clients to express their full identities. SOGIE refers to characteristics of all human beings. LGBTQ-GNC stands for lesbian, gay, bisexual, transgender, questioning and gender non-conforming. Each person has a sexual orientation and a gender identity. Each person expresses his or her gender.

- **Gender identity** refers to one's inner sense of being a girl/woman, boy/man, other genders, all, or neither.
- Gender identity is not determined by sex assignment.
- **Gender expression** refers to how an individual expresses his or her sense of self.
- **Sexual orientation** refers to romantic and/or sexual attraction to men, women, both, or neither.

Adolescence is a time of identity development, including one's sexual orientation and gender identity.

- This can be difficult to do when living in a setting with strict rules and expected compliance.
- A sexually healthy adolescent distinguishes personal beliefs from that of peers and is thus able to make better choices.

Sexuality, including same-sex relationships and gender identities, can be a very sensitive topic to discuss. The following provides general guidance for the juvenile defender:

- Treat all clients, including LGBTQ-GNC clients, with fairness, dignity and respect, including advocating against any attempts to ridicule or change a youth's sexual orientation or gender identity.
- Advocate in a client-centered manner, including considering how a child's sexual orientation and gender identity may impact decisions at each stage of the proceedings.

<sup>37</sup> Feld, Barry C., *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395, 429 (2013) (online at: <https://scholarship.law.cornell.edu/cjlp/vol23/iss2/3>).

<sup>38</sup> Kristin N. Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 Am. U. L. Rev. 1513 (2018).



- » Discuss with your client all legal options and the potential advantages and disadvantages of each option.
- » Do not disclose your client's sexual orientation and/or gender identity without their permission. Remember your ethical duty to confidentiality.
- » Be aware of LGBTQ-GNC-competent services, programs and placements, as well as those that have been unsupportive of LGBTQ-GNC youth in the past.
- Convey a nonjudgmental attitude.
  - » Use gender neutral language (For example, you should ask “are you seeing anyone”? instead of “do you have a girlfriend?”).
  - » Ask the client what his or her preferred name and pronouns are, and be sure to use those pronouns.

### Disparate Impact in the Juvenile Justice System

- LGBTQ-GNC youth represent 5-7% of the nation's youth population, but 20% of those in juvenile detention facilities.<sup>39</sup>
- LGBTQ-GNC youth are detained more frequently than other youth.
  - » Argue your client's right to the least restrictive alternative.
  - » Make sure the standard for pretrial detention is met (child actually is a flight risk or palpable threat to public safety).
- LGBTQ-GNC youth tend to be marginalized in the juvenile justice system due to conscious or unconscious perceptions and biases.
  - » These perceptions and biases may be intensified for youth of color.
- Many factors cause LGBTQ-GNC youth to come into the juvenile justice system including extensive trauma and higher rates of homelessness.<sup>40</sup>

### Risks to LGBTQ-GNC Youth in the Juvenile Justice System

- LGBTQ-GNC youth are more likely to be victims of abuse.<sup>41</sup>
- LGBTQ-GNC youth are less likely to report being victimized.<sup>42</sup>
  - » May not report because the youth believes nothing will happen or his or her safety will be put in danger if reported.<sup>43</sup>

The growing focus on and understanding of the challenges that LGBTQ-GNC youth face in society urges professionals working in state facilities to use this information in all decisions regarding LGBTQ-GNC youth, including in treatment and placement decisions. This approach may enhance safety and security for all confined youth and staff by giving all correctional staff better insight into the needs and challenges LGBTQ-GNC youth face, and may significantly reduce liability for agencies that are engaged in these efforts.

### Things Attorneys Can Do<sup>44</sup>

- Seek orders to prevent institutions from treating LGBTQ-GNC youth differently than their straight and cisgender peers.
- Demand access to qualified mental health practitioners who are *knowledgeable* about LGBTQ-GNC youth for court-ordered evaluations and treatments.
- Ensure youth receive necessary medical services from qualified healthcare practitioners.
- Watch for and investigate anything that appears discriminatory and then initiate a proper response.
- Ensure all clients have access to personal hygiene products and clothing consistent with their gender identity.

<sup>39</sup> National Juvenile Defender Center, *Bench Card: Access to Juvenile Justice Irrespective of Sexual Orientation, Gender Identity, and Gender Expression (SOGIE)*, (2017) (available online at: [http://njdc.info/wp-content/uploads/2017/08/NJDC\\_SOGIE\\_Benchcard-1.pdf](http://njdc.info/wp-content/uploads/2017/08/NJDC_SOGIE_Benchcard-1.pdf)).

<sup>40</sup> Katayoon Majd, Jody Marksamer, Carolyn Reyes, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts* (2009) (available online at: <http://njdc.info/wp-content/uploads/2013/11/Hidden-Injustice.pdf>).

<sup>41</sup> *Bench Card* supra.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> National Juvenile Defender Center, *Bench Card: Access to Juvenile Justice Irrespective of Sexual Orientation, Gender Identity, and Gender Expression (SOGIE)*, (2017), available at: [http://njdc.info/wp-content/uploads/2017/08/NJDC\\_SOGIE\\_Benchcard-1.pdf](http://njdc.info/wp-content/uploads/2017/08/NJDC_SOGIE_Benchcard-1.pdf)





## Relevant Law in Advocating for Clients

### *Prison Rape Elimination Act (PREA)*

PREA standards require that all placement decisions must be individualized, taking into consideration safety concerns, including a youth's LGBTQ-GNC identity.<sup>45</sup>

- PREA standards specifically prohibit LGBTQ-GNC from being placed in particular housing based solely on their identification.<sup>46</sup>
- PREA also provides that a youth's sexual orientation and gender identity are not by themselves valid indicators during screening of a propensity to abusive behavior toward others.<sup>47</sup>

### *Due Process and Other Claims*

- Children in state custody have constitutionally protected due process rights, including a right to safety.<sup>48</sup>
  - » Staff should never ignore a substantial risk of harm to a particular youth.
  - » Youth in juvenile justice facilities have the right to adequate medical and mental health care.<sup>49</sup>
- Claims regarding unfair and discriminatory treatment may be brought under the Due Process Cause (14<sup>th</sup> Amendment) as violating the youth's liberty interest.<sup>50</sup>
  - » Youth cannot be placed in conditions of confinement that punish, stigmatize or humiliate them.<sup>51</sup>
  - » Youth in the State's custody are completely dependent upon the State for their care.
- When LGBTQ-GNC youth in juvenile justice settings are denied access to services or are harassed or abused based on their sexual orientation or gender identity, their constitutional right to equal protection is violated.<sup>52</sup>
- Under the First Amendment, LGBTQ-GNC youth have a right to express their sexual orientation and gender identity while in State custody.<sup>53</sup>
  - » Be prepared for the potential pushback on this is an argument regarding the safety of the institution.

### *Helpful Resources*

Bench Card: Access to Juvenile Justice Irrespective of Sexual Orientation, Gender Identity, and Gender Expression (SOGIE), available at:

[http://njdc.info/wp-content/uploads/2017/08/NJDC\\_SOGIE\\_Benchcard-1.pdf](http://njdc.info/wp-content/uploads/2017/08/NJDC_SOGIE_Benchcard-1.pdf)

Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts, available at:

<http://njdc.info/wp-content/uploads/2013/11/Hidden-Injustice.pdf>

<sup>45</sup> National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA) 28 C.F.R. Part 115 Docket No. OAG-131 RIN 1105-AB34 May 17, 2012—Juveniles Sec. 115.342. Available online at <https://www.prearesourcecenter.org/sites/default/files/content/preafinalstandardstype-juveniles.pdf>

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Rudy Estrada, Jody Marksamer, *The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know When Working with LGBT Youth*, (June 2006). Available online at [http://www.nclrights.org/wp-content/uploads/2013/07/LegalRights\\_LGBT\\_State\\_Custody.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/LegalRights_LGBT_State_Custody.pdf)

<sup>49</sup> *Id.* at 7.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 8.

<sup>53</sup> *Id.* at 9.



## VII. Representation at All Stages of the Proceedings

A child's right to counsel is more extensive than an adult's right in criminal court, as "a juvenile has the right to be effectively represented by counsel at all stages of proceedings" under the juvenile court's jurisdiction.<sup>54</sup> You are the child's advocate for the entirety of the case, including all review hearings and any associated appeals. As such, attorneys must be familiar with the procedure at every stage to provide effective representation.

A juvenile in a delinquency proceeding has a constitutional right to counsel, including the right to court-appointed counsel if indigent.<sup>55</sup> Under the United States Constitution, the "child and his parents must be notified of the child's right to be represented by counsel retained by them or, if they are unable to afford counsel, that counsel will be appointed to represent the child" in every delinquency case.<sup>56</sup> West Virginia Rule of Juvenile Procedure 5 requires counsel be appointed when privately retaining counsel would cause "substantial hardship for the juvenile or the juvenile's family."<sup>57</sup> Where the family can afford an attorney but has not retained one, the judge may appoint an attorney and order the family to pay for the representation.<sup>58</sup>

## VIII. Pre-Petition Informal Resolutions

The juvenile defense attorney may encounter clients who have been offered, completed in a prior matter, or have failed to complete "pre-petition diversion" or "noncustodial counseling or community services" in lieu of formal court intervention.

*Pre-petition diversion* refers to when the child and the family agree to complete some combination of accessing services for the child and/or parents, community service work, school attendance, community-based sanctions for noncompliance, and any other "efforts" that will "reasonably benefit the community, the juvenile and his or her parent, guardian, or custodian"<sup>59</sup> in exchange for a petition not being filed.

Prior to a petition being formally filed, the court may refer the matter for review to determine if it can be resolved "informally" through a diversion agreement.<sup>60</sup> The prosecutor *must* refer the matter for diversion for truancy and other status offenses, unless the juvenile has a prior adjudication or if the prosecutor determines that there is "a significant and likely risk of harm to the juvenile, a family member, or the public."<sup>61</sup> For nonviolent misdemeanors, the prosecutor decides if the matter can be resolved informally through diversion.<sup>62</sup>

When developing a diversion agreement, the case worker, probation officer or truancy diversion specialist must assess the child's needs and obtain consent to the terms of the diversion agreement from the child and his or her parent, guardian, or custodian.<sup>63</sup>

1. If the child and his or her parent, guardian, or custodian do not consent to the diversion agreement, a formal petition may be filed.<sup>64</sup> It is in the prosecutor's discretion whether to file a formal petition.
2. Outcomes of pre-petition diversion agreements:

<sup>54</sup> W.Va. Code § 49-4-701; W.Va. R.Juv.P. 5(a) ("Generally, the juvenile has the right to be represented by an attorney at all stages of proceedings brought under the delinquency and status offense provisions of W.Va. Code § 49-4-701, *et seq.* This right attaches no later than when the juvenile first appears before a magistrate or circuit judge. The attorney shall initially consult with the juvenile privately, outside of the presence of any parent or legal guardian. The attorney, whether court-appointed or privately retained, shall act solely as the counsel for the juvenile.").

<sup>55</sup> *In re Gault*, 387 U.S. 1, 36-37 (1967).

<sup>56</sup> *Id.* at 41.

<sup>57</sup> W.Va. R.Juv.P. 5(c)(1).

<sup>58</sup> W.Va. R.Juv.P. 5(c)(1) & (2).

<sup>59</sup> W.Va. Code § 49-4-702(d)(2).

<sup>60</sup> W.Va. Code § 49-4-702(a). The review is done by a caseworker, probation officer or truancy diversion specialist. *Id.*

<sup>61</sup> W.Va. Code § 49-4-702(b).

<sup>62</sup> W.Va. Code § 49-4-702(c).

<sup>63</sup> W.Va. Code § 49-4-702(d)(1).

<sup>64</sup> W.Va. Code § 49-4-702(d)(5).



- a. If the child and his or her family consent to the diversion and they successfully complete the terms of the diversion agreement, a petition is not filed with the court and no further action is taken.<sup>65</sup>
- b. If the child and his or her family consent to the diversion, but the juvenile fails to comply with the terms, the case may be referred to a pre-petition review team to determine if different or more intensive services are needed. The pre-petition review team may refer a modified diversion agreement back to the caseworker, advise the caseworker to file a petition with the court, or advise the caseworker to open an investigation for child abuse or neglect.<sup>66</sup>

### Noncustodial Counseling or Community Services in Lieu of Formal Court Involvement

Similar to diversion discussed above, noncustodial counseling is an alternative informal resolution of a juvenile matter. The court or the department or other specified person may refer a juvenile alleged to be a delinquent or a status offender to a counselor, usually at the Department of Health and Human Resources (the DHHR), rather than filing a petition.<sup>67</sup> The length of the period for noncustodial counseling or community services may not exceed six months, but the court may extend this period by another six months.<sup>68</sup> While similar to a pre-petition diversion, this intervention focuses on counseling for the child and possibly his or her parent or guardian, making it a less intensive intervention.

If the juvenile does not respond to or comply with the referral, the DHHR may seek a court order directing the juvenile to comply with the identified services.<sup>69</sup> Such an order is only obtained after a hearing.<sup>70</sup> Arguably, the child has a right to an attorney at this hearing, although counsel is not mentioned in the statute. An attorney is likely not appointed at this point, unless appointed to the client in a separate matter.

#### LITIGATION POINTS:

- Note the prosecuting attorney *must* refer a child accused of truancy or a status offense for diversion, unless the child has a prior adjudication or there is “a significant and likely risk of harm to the juvenile, a family member or the public.”<sup>71</sup> If a formal petition has been filed, ask the client whether there was any discussion about resolving the matter informally. If there was not, consider moving to dismiss the petition so that the matter may be referred for diversion pursuant to the statute.
- If the matter involves a nonviolent misdemeanor offense, the prosecutor must determine if an informal resolution is appropriate and, if so, refer the matter for creation of a diversion agreement.<sup>72</sup> Therefore, if a formal petition has been filed for a nonviolent misdemeanor offense, ask the client whether there was any discussion regarding resolving the matter informally and whether a diversion program was attempted. If not, consider discussing the matter with the prosecutor and moving to dismiss the petition so that the matter may be referred for diversion pursuant to the statute.
- A diversion agreement may include referrals to services for the parent, guardian, or custodian, as well as the child.<sup>73</sup> If the child is willing to comply with diversion, but the parent, guardian, or custodian refuses to comply, and this non-compliance is causing a problem for the client because he or she is at risk of a formal petition being filed, you may consider requesting that the referring caseworker ask the court to order the parent, custodian or guardian to carry out the agreement.<sup>74</sup>
- If your client has previously participated in diversion, be sure to discuss with your client what exactly the diversion program entailed. In some instances, diversion may have entailed minimal intervention, such as one meeting. As you move forward in the case with your client, it will be important to paint a clear picture for the court of what services your client has not had an opportunity to access yet when you argue for community-based services. Furthermore, if a client has tried and wishes not to repeat a certain intervention, knowing the details of the diversion experience can help you explain to the court how and why the intervention did not work for your client’s individual needs.

<sup>65</sup> W.Va. Code § 49-4-702(e)(1).

<sup>66</sup> W.Va. Code § 49-4-702(f).

<sup>67</sup> W.Va. Code § 49-4-702a(a).

<sup>68</sup> W.Va. Code § 49-4-702a(c).

<sup>69</sup> W.Va. Code § 49-4-702a(a).

<sup>70</sup> *Id.*

<sup>71</sup> W.Va. Code § 49-4-702(b)(1)-(3)(B).

<sup>72</sup> W.Va. Code § 49-4-702(c).

<sup>73</sup> W.Va. Code § 49-4-702(d)(2)(B).

<sup>74</sup> W.Va. Code § 49-4-702(d)(4).



## ix. The Initiation of Formal Court Intervention

Formal court intervention is initiated when:

1. A petition is filed and a formal order is issued directing the child to be taken into custody (akin to an arrest warrant),<sup>75</sup>
2. A petition is filed and notice to appear issued, or<sup>76</sup>
3. The child is arrested.<sup>77</sup>

### Petition

A child is brought under the jurisdiction of the court by the “filing of a petition,” which is the juvenile court term equivalent to a “complaint” for adults.<sup>78</sup> Petitions may be filed by any person “who has knowledge of or information concerning the facts alleged,” but are generally filed by a prosecutor, law enforcement officer, or DHHR employee, in the circuit court in the county where the alleged offense occurred.<sup>79</sup>

The petition *must* contain:

- » *specific* allegations of the conduct and facts upon which the petition is based;
- » the approximate time and place of the alleged conduct;
- » a statement of the right to have appointed counsel and consult with counsel at every stage of the proceedings; and
- » the relief sought.<sup>80</sup>

When the petition is filed, “the court shall schedule a preliminary hearing and may appoint counsel.”<sup>81</sup> The petition and summons must be served upon the child and his or her parent(s) or legal guardian. An order of arrest may issue if the child fails to appear.<sup>82</sup>

Rules for notice:

- » A copy of the petition and summons may be served on the child by **first class mail** or by **personal service of process**.
- » If the child does not appear in response to a summons served by mail, the court must **personally serve** the child with a copy of the petition and summons before further proceedings are held.
- » If a child fails to appear after being served notice in person, the court may issue an order for arrest.<sup>83</sup>

A juvenile must receive a copy of the signed petition at the first appearance before a circuit court judge or a magistrate (i.e., at the detention hearing or preliminary hearing). However, West Virginia Rule of Juvenile Procedure 7(a) allows the petition to be provided to the child within two days of the detention hearing if it is not available at that hearing.<sup>84</sup>

### LITIGATION POINT

Juvenile clients have a right to notice under West Virginia law<sup>85</sup> and also have a **constitutional right to notice of the charges against him or her** under *In re Gault*, 387 U.S. 1 (1967). *Gault* held “[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded,

<sup>75</sup> W.Va. Code § 49-4-705(a) & (b)(6); W.Va. R.Juv.P. 6(a).

<sup>76</sup> W.Va. Code § 49-4-704(a)(2); W.Va. R.Juv.P. 8.

<sup>77</sup> W.Va. Code § 49-4-705(b)(1); W.Va. R.Juv.P. 6(b). Note that the standard for probable cause to arrest a child is the same as an adult under identical circumstances.

<sup>78</sup> W.Va. Code § 49-4-704.

<sup>79</sup> W.Va. Code § 49-4-704(a)(1); W.Va. R.Juv.P. 8(a).

<sup>80</sup> *Id.*

<sup>81</sup> W.Va. Code § 49-4-704(a)(2).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> W.Va. R.Juv.P. 7(a).

<sup>85</sup> W.Va. Code § 49-4-704(a)(2); W.Va. R.Juv.P. 7



and it must ‘set forth the alleged misconduct with particularity.’<sup>86</sup> Counsel may consider arguing for the dismissal of the petition if it is constitutionally or statutorily deficient.

Common issues to watch for with petitions and notices include:

- » Not receiving a copy of the petition;
- » The petition is missing the complainant’s name;
- » The petition is missing a co-respondent’s name;
- » Overly vague descriptions of what is being alleged, including only using legally conclusory language, e.g., “Respondent engaged in disorderly conduct;”
- » Not specifying when the conduct took place, e.g., the date *and* time;
- » Not specifying where the conduct is alleged to have taken place;
- » Receiving notice of a hearing within one or two days of the hearing; and,
- » Lack of verified written statement by a person with knowledge or information

When challenging the sufficiency of notice or the petition, counsel should be sure to ground arguments in *both* West Virginia and United States Supreme Court law when possible. For example, counsel may wish to move for dismissal due to inadequate notice as a violation of due process under West Virginia and United States Supreme Court law.

## Custody Orders

After the filing of a delinquency petition, a judge or magistrate may issue an order for immediate custody if either one finds “probable cause to believe one of the following conditions exists:”

- A. [t]he petition shows grounds exist for the arrest of an adult in identical circumstances;
- B. the “health, safety, and welfare” of the juvenile “demand custody;”
- C. the juvenile is a fugitive from a lawful custody or commitment order of a court; or
- D. the juvenile is alleged to be a juvenile delinquent with a record of willful failure to appear at juvenile proceedings and custody is necessary to assure the juvenile’s presence before the court.<sup>87</sup>

After the filing of a status offense petition, a judge or magistrate may issue an order for immediate custody if either one finds “probable cause to believe one of the following conditions exists:”

- A. “the health, safety, and welfare of the juvenile demand such custody;” or
- B. the juvenile is a fugitive from a lawful custody or commitment order of a court.<sup>88</sup>

### LITIGATION POINTS:

- You, as counsel, may file a motion to quash your client’s custody order if the grounds for the issuance of the custody order under the statute and/or the Rules do not exist.<sup>89</sup>
- If you find out that a custody order has been issued for your client, counsel your client about next steps, the risk of arrest, and the impact of such an arrest.
- Status offenders cannot be held in Division of Juvenile Services (locked) facilities.<sup>90</sup>

## Arrest Without a Court Order

A child may be taken into custody by a law enforcement official without a court order when:

- (1) Grounds exist for the arrest of an adult in identical circumstances;
- (2) Emergency conditions exist which, in the judgment of the officer, pose imminent danger to the health, safety and welfare of the juvenile;

<sup>86</sup> 387 U.S. 1, 33 (1967).

<sup>87</sup> W.Va. Code § 49-4-705(a)(1)-(4); *see also* W.Va. R.Juv.P. 6(a)(2)(A)-(D).

<sup>88</sup> W.Va. R.Juv.P. 6(a)(3)(A)-(B).

<sup>89</sup> Arguably, if a child is sexually active without more, than that activity (by itself) is insufficient to threaten the health, safety and welfare of the juvenile.

<sup>90</sup> W.Va. Code § 49-4-712(g).



- (3) The official has reasonable grounds to believe that the juvenile has left the care of his or her parents or guardian without the consent of that person **and** the health, safety and welfare of the juvenile is endangered;\*
- (4) The juvenile is a fugitive from a lawful custody or commitment order of a juvenile court;
- (5) The official has reasonable grounds to believe the juvenile has been driving a motor vehicle with any amount of alcohol in his or her blood; or,
- (6) The juvenile is the named respondent in an emergency domestic violence protective order issued pursuant to [W.Va. Code § 48-27-403] and the individual filing the petition for the emergency protective order is the juvenile's parent, legal guardian, custodian, or other person with whom the juvenile resides.<sup>91</sup>

\*Note that for the State to take a child into custody under (3) (on the grounds the child has left the care of his or her parents or guardian without consent **and** the health, safety, and welfare of the juvenile is endangered), the child must not only be a runaway, but also must (1) behave in a self-destructive way; (2) expose himself/herself to imminent physical harm; (3) be under the influence of drugs or alcohol; or (4) be incoherent and confused. *State v. Todd Andrew H.*, 196 W.Va. 615, 474 S.E.2d 545 (1996).

### Domestic Violence Emergency Protective Order

The West Virginia Code allows emergency protective orders to be sought in response to allegations of domestic violence if there is clear and convincing evidence of immediate and present danger of abuse to a petitioner or minor children. An emergency protective order may be taken out against a child under the age of 18 if the child is the one alleged to have engaged in domestic violence.

If an emergency protective order is entered against a child on behalf of a person with whom the child resides, the petition for the protective order is treated as a delinquency petition.<sup>92</sup> The magistrate court that issued the emergency protective order notifies the prosecutor of the order within 24 hours, and the prosecutor then has “two judicial days” to file an amended petition to comply with the delinquency petition requirements.<sup>93</sup> There are special procedures for release, detention, removal, and bond for children brought into the system by a domestic violence emergency protective order, discussed in the section on Detention.<sup>94</sup>

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## x. Custodial Interviews and Interrogations

Once a child has been brought into custody, law enforcement may attempt to interview the child. The custodial interview or interrogation often takes place prior to an attorney being appointed. Once an attorney is appointed and Sixth Amendment rights attach, law enforcement may not attempt to initiate an interview of the child without counsel under the United States Constitution.<sup>95</sup> As such, attorneys typically only know about interview attempts and subsequent statements after they already have occurred, and the admissibility of any statements must be litigated in court.

West Virginia provides juveniles certain additional protections regarding custodial interviews and interrogations:<sup>96</sup>

- Under 14 years old: Statements are not admissible unless they “were made in the presence of the juvenile’s counsel.”
- 14-15 year olds: Statements are not admissible “unless they were made in the presence of the juvenile’s counsel or in the presence of, and with the consent of, the juvenile’s parent or custodian,” and the parent or custodian was fully

<sup>91</sup> W.Va. Code § 49-4-705(b); W.Va. R.Juv.P. 6(b).

<sup>92</sup> W.Va. Code § 48-27-403(h); W.Va. Code § 49-4-704(f); W.Va. R.Juv.P. 15(a).

<sup>93</sup> *Id.*

<sup>94</sup> W.Va. R.Juv.P. 15(c)-(g).

<sup>95</sup> Both the Fifth and Sixth Amendments to the United States Constitution provide a right to counsel, albeit at different times. The Sixth Amendment’s right begins when judicial proceedings have been initiated against a defendant as evidenced by the filing of formal charges, the occurrence of a preliminary hearing, the filing of an indictment or information, or the occurrence of a formal arraignment. *State v. Williams*, 226 W.Va. 626, 704 S.E.2d 418 (2010). The Fifth Amendment right to not incriminate oneself is in effect at the time of the arrest, however, the child must overtly exercise this right by refusing to answer questions. *See id.* Given a child’s developmental immaturity, it is unlikely a child will spontaneously exercise his or her Fifth Amendment right. Pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981), police may not continue to question an accused person after counsel has been appointed, even with full Miranda warnings and waivers, unless the accused person himself initiates communication with police.

<sup>96</sup> W.Va. Code § 49-4-701(l).



informed of the juvenile's rights to a prompt detention hearing, to counsel or appointed counsel, and to the juvenile's privilege against self-incrimination.

- 16 year olds and older: *Miranda* analysis for the admissibility of any juvenile statements, informed by a youth's age as discussed in *J.D.B. v. North Carolina*; no attorney or parent/guardian need be present.<sup>97</sup>

Remember, for all statements, no matter who was or was not present when a statement was made, the admissibility of the statement is contestable by arguing both:

- *Miranda* warnings were not given or were insufficient,<sup>98</sup> and
- Waiver of *Miranda* was not knowing, intelligent, and voluntary.<sup>99</sup>

## xi. Detention Hearings

A child is entitled to the least restrictive placement.<sup>100</sup> There is a presumption in favor of release at detention hearings. The presumption in favor of release continues even after a child is arrested and taken into custody. Additionally, the child retains his or her right to be presumed innocent until proven guilty, which supports the presumption in favor of release.<sup>101</sup>

If a child is in custody through arrest or through a custody order and is not immediately released, a detention hearing must be held without unnecessary delay, **either the same day or the next calendar day** (not business or judicial day).<sup>102</sup> The child still retains the presumption of innocence and the presumption in favor of release.

The detention hearing determines whether the youth should be “detained pending further court proceedings.”<sup>103</sup> In West Virginia, in addition to the presumption of release, there also is a presumption of release on one's own recognizance (with conditions such as attending school), though the Code allows for the court to impose bail “if warranted.”<sup>104</sup> The court may detain the child if it finds that release would “endanger” the “health, safety and welfare of the juvenile.”<sup>105</sup> Because of the presumption of release, the court must release the child unless the State meets this burden.

The role of the juvenile defense counsel at the detention hearing is the same as it is in other proceedings—to advocate for the expressed interests of the client (which is usually release). National standards call for the juvenile defender to be familiar with research on the harms of detention to youth and to have visited the jurisdiction's detention facilities in order to most effectively advocate for the client.<sup>106</sup>

### Research on the Harms of Detention

In order to best advocate at a detention hearing, counsel should have a working knowledge of the harms of detention for children. West Virginia has long held that detention for children should be a last resort. As the Supreme Court of Appeals of West Virginia held in *State ex rel. M.C.H. v. Kinder*, “We [...] believe, as a matter of common sense, that young children should not be placed in secure detention except in the most extraordinary cases.”<sup>107</sup>

<sup>97</sup> *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

<sup>98</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966); *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980). In juvenile cases, there also is the issue of whether the child comprehended his or her rights as given to him or her. Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26 (2006). See also Joseph Eastwood et al., *Engineering Comprehensible Youth Interrogation Rights*, 19 New Crim. L. Rev. 42 (2016) (explaining many children do not understand their *Miranda* rights and therefore, cannot properly exercise them).

<sup>99</sup> *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

<sup>100</sup> W.Va. Code § 49-4-714(b)(6).

<sup>101</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>102</sup> A detention hearing is typically not held if the child appears after receiving notice of a petition and summons while in the community. W.Va. Code § 49-4-705(c) (4).

<sup>103</sup> W.Va. Code § 49-4-706(a).

<sup>104</sup> *Id.*; see also W.Va. R.Juv.P. 11 (stating a juvenile may be released under bond conditions, with or without surety.)

<sup>105</sup> W.Va. Code § 49-4-706(a).

<sup>106</sup> National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 3.8 (2012), pp. 62-63 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>107</sup> *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 394, 317 S.E.2d 150, 157 (1984). See also *Facilities Review Panel v. Coe*, 187 W. Va. 541, 420 S.E.2d 532 (1992) (recognizing young children should not be detained except in the most extraordinary cases as part of a review of juvenile detention practices).



The reluctance to detain children pretrial is in line with national trends and a growing body of research. For example, the National Council of Juvenile and Family Court Judges explained, “Secure detention and commitment should be reserved for cases in which there are significant concerns about court appearance and public safety.”<sup>108</sup> The Council recognized even brief stays in detention can have a lasting negative effect: “[u]nnecessary institutional confinement may increase recidivism and even one or two days of detention may be traumatic, expose youth to negative influences, and have the unintended consequence of a youth self-identifying as an offender.”<sup>109</sup>

While the United States Supreme Court held the preventive detention of children accused of delinquent acts while pending adjudication does not violate due process, Justice Marshall, in his dissent, recognized “the impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably ‘delinquent.’”<sup>110</sup>

Being detained upsets a child’s regular life and routine, interrupting school and taking the child away from supportive people within his or her community. Being detained may increase the youth’s likelihood of recidivism.<sup>111</sup> The youth is placed with other delinquent youths, which may create an atmosphere of peer deviancy training.<sup>112</sup> If a youth has mental health problems, those problems may become worse in detention.<sup>113</sup> Additionally, “[i]solation from family and friends in an alien and impersonal environment with a looming threat of punishment or violence causes psychological trauma or exacerbates preexisting trauma.”<sup>114</sup> There also is the potential for both physical abuse and sexual abuse while detained.<sup>115</sup> Children who spend time in juvenile detention are less likely to graduate high school and more likely to have low paying employment.<sup>116</sup> Overall, “juvenile detention is not a cost-effective way of promoting public safety or meeting detained young people’s needs.”<sup>117</sup>

## Preparing for the Detention Hearing

As soon as possible, the juvenile defender should visit the child in detention and counsel the client, both so the client understands what will happen in the first court appearance and so the defender is prepared to argue for the child’s release.

The defender should remember to advise the client during the initial interview about the following issues:

- Explain that how the child behaves while detained will likely impact the chances of his or her release.
- Advise the client not to speak with anyone other than you (not his or her parents, the police, cellmates, or visitors) about the pending charges or anything related to the facts of the case. Explain that the police may read their letters, listen to any non-attorney visits or telephone conversations at the police station or detention center.
- Advise your client not to consent to participate in any identification procedures without you present, if possible. If the client is forced to participate in a live identification procedure, advise him or her to comply with the procedure rather than doing anything that will draw attention to himself or herself, and you will address the issue later in court.
- Advise your client not to sign any forms or papers and not to write down anything for the police or anyone but you.
- Counsel should practice with the client what he or she will say if asked questions or asked to participate in an identification procedure. For example, “Okay, what are you going to say when the police tell you that you can go home if you tell them what happened?”

The defender should remember to ask the child the following during the initial interview, so as to better prepare for release arguments:

<sup>108</sup> National Council of Juvenile and Family Court Judges, *Bench Card: Applying Principles of Adolescent Development in Delinquency Proceedings*, (2017), p. 2 (online at: <http://www.ncjfcj.org/Adolescent-Development-Bench-Card>).

<sup>109</sup> *Id.*

<sup>110</sup> *Schall v. Martin*, 467 U.S. 253, 291 (1984)(Marshall, J., dissenting).

<sup>111</sup> Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, A Justice Policy Institute Report (2006)(online at: [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf)).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* See also Rachel Ehrlich Albanese, Sean C. Robinson, & Devin Carpenter, *Confined Without Cause: The Constitutional Right to Prompt Probable Cause Determinations for Youth*, A National Juvenile Defender Center DLA Piper Brief (2018).

<sup>114</sup> Rachel Ehrlich Albanese, Sean C. Robinson, & Devin Carpenter, *Confined Without Cause: The Constitutional Right to Prompt Probable Cause Determinations for Youth*, A National Juvenile Defender Center DLA Piper Brief (2018), p. 5.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, A Justice Policy Institute Report (2006), p. 11 (online at: [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf)).





- School: Attendance? Grades? Special education? Any tests coming up?
- Family: Who is in the household? What is his or her parent's or guardian's work schedule? What kinds of rules and supervision exist? Any prior incidents of running away?
- Work: Is the child working? Where and when?
- Extracurricular activities: What activities does the child participate in?
- Services: Has the child been in counseling? Is the child currently in counseling?
- History: Any previous arrests or adjudications?
- Drug Use: What will the drug test say? Explain that you need to be to address the issue if brought up by the government.

The National Juvenile Defender Center also suggests the defender do the following to prepare for the detention hearing, if possible:

- Obtain a copy of the declaration of probable cause or other police reports.
- Obtain a copy of your client's juvenile court record and school records.
- Talk with your client's parents or guardian to gain information helpful to your arguments for release; listen to their concerns and try to address them. Advocate for your client with his or her parents or guardian to gain their support for a release plan. Prepare the parents or guardian for the hearing—the court will likely want to hear from the parents or guardian in making its decision regarding continued custody. Encourage the parents or guardian to develop a plan including stricter rules, more supervision, a curfew, etc., to present to the court. The parents' or guardian's willingness to take responsibility for their son or daughter and impose strict discipline and rules in the home will convince many judges that release pending adjudication will be acceptable.
- If a parent or guardian is unable or unwilling to supervise their child, find another adult willing and able to supervise the client upon release.
- Talk with the prosecutor and the probation officer to discover what they know about the situation and hear their recommendations on detention; learn about their concerns and advocate for your client.
- Make a plan for the release of your client.
- Gather supporting documents, including letters of support and information about community-based alternative services. Bring copies of supporting documents for you, the judge, the prosecutor, the probation officer and your client and his or her parents or guardian.<sup>118</sup>

## Detention Law in West Virginia

**A juvenile is entitled to “community-based services in the least restrictive settings that are consistent with the needs and potentials of the child and his or her family.”**<sup>119</sup> As such, secure detention should be a last resort.

A status offender or a child accused of domestic violence against another person within his or her own home may only be detained in a **non-secure or staff-secure facility**<sup>120</sup> under the legal custody of the Department of Health and Human Resources.<sup>121</sup> In the case of a delinquency petition based on a domestic violence protective order, if serious physical violence formed the basis for the order or there is a “substantial or credible risk of bodily injury,” then the child may be detained in a locked/secure facility.<sup>122</sup>

Under the Code, a child who is alleged to be delinquent is subject to being detained if:

- (A) Circumstances present an immediate threat of serious bodily harm to the juvenile if released;
- (B) No responsible adult can be found into whose custody the juvenile can be delivered. However, each day the juvenile is detained, a written record must be made of all attempts to locate a responsible adult;\* or
- (C) The juvenile is charged with an act of delinquency for which secure detention is permissible.<sup>123</sup>

<sup>118</sup> Elizabeth Calvin, National Juvenile Defender Center, *Legal Strategies to Reduce the Unnecessary Detention of Children* (2004), pp. 12-14 (online at: <http://njdc.info/wp-content/uploads/2013/11/Legal-Strategies-to-Reduce-the-Unnecessary-Detention-of-Children.pdf>).

<sup>119</sup> W.Va. Code § 49-1-105(b)(7).

<sup>120</sup> W.Va. R.Juv.P. 15(d).

<sup>121</sup> W.Va. Code § 49-4-706(a)(3); see also W.Va. R.Juv.P. 14.

<sup>122</sup> W. Va. R.Juv.P. 15(d).

<sup>123</sup> W.Va. Code § 49-4-706(a)(2)(A)-(C); see also W.Va. R.Juv.P. 12(c)(1)-(2).



\*Note that the statute only states a child must be released to a responsible adult; it does not state that a child may only be released to a responsible parent or guardian.

**Release is presumed** under the West Virginia Rules of Juvenile Procedure, unless the child fits into one of the following seven categories outlined in Rule 13 (in which case detention is possible, but not automatic):

1. The charge is a category 1 offense.
2. The charge is a category 2 or 3 offense *and* there is a judicial finding that the juvenile presents a danger to the public if not securely detained.
3. The charge is a category 2 or 3 offense *and* the juvenile is an escapee from detention or any commitment setting ordered; *or* the juvenile has a recent record of willful failure to appear at juvenile court proceedings and no measure short of secure detention can be imposed to reasonably ensure appearance.
4. The charge involves a violation of an alternative method of disposition.
5. The juvenile is awaiting adjudication or disposition for an offense which would be a felony under the criminal jurisdiction, *and* is charged with committing another offense during the interim period which would be a felony.
6. The juvenile is awaiting adjudication or disposition for an offense which would be a felony under the criminal jurisdiction, *and* was released on bond conditions but is found by a judicial authority to have committed a *material* (not technical) violation of bond.
7. The juvenile has been determined to be a fugitive from another jurisdiction, *and* an official of such jurisdiction or an official from the West Virginia Interstate Compact Office has formally requested that the juvenile be placed in detention.

**But don't give up!** Importantly, **the court may not automatically detain a child who is disqualified from mandatory release in the factors above.** The court “shall first consider and determine whether the juvenile qualifies for an available diversion program or release under bond conditions, or whether any other form of control short of detention is available to reasonably reduce the risk of flight or misconduct.”<sup>124</sup> The rule also provides that “[w]hen appropriate, the court shall consider staff-secure detention alternatives prior to committing a juvenile to a secure detention facility.”<sup>125</sup> Finally, the court’s discretion is quite broad, so zealous advocacy is key. “[E]ven if a juvenile meets one or more of the detention factors above, the court has broad discretion to release that juvenile following the detention hearing if other less restrictive measures would be adequate under the specific circumstances as determined by the court.”<sup>126</sup>

Probable Cause involves two determinations:

1. Is there probable cause to show a crime was committed?
2. Is there probable cause to show this child committed the alleged crime?

\*\*These are two separate questions which must be disentangled. If there has been no finding of probable cause that a crime has been committed, then the child’s dangerousness and/or flight risk is irrelevant and should not be discussed at all.

## Between Detention and Unconditional Release

A juvenile also may be released under bond conditions, with or without surety, if the judge determines it will protect the community and the juvenile.<sup>127</sup> The judge may give the child “any reasonable” terms in a release agreement, including, but not limited to, drug testing, visits with a probation officer, attending school, and a curfew.<sup>128</sup> A substantial violation of any one or a combination of any of the limitations and restrictions is sufficient grounds to detain the juvenile pending further proceedings.

## Common Arguments for Release

1. **My client is not a flight risk.** We know this because:
  - » The child surrendered voluntarily, thus demonstrating a lack of desire to flee or avoid responsibility.

<sup>124</sup> W.Va. R.Juv.P. 13(c)(1).

<sup>125</sup> W.Va. R.Juv.P. 13(c)(2).

<sup>126</sup> W.Va. R.Juv.P. 13(f).

<sup>127</sup> See W.Va. R.Juv.P. 11.

<sup>128</sup> *Id.*



- » The child has reliably appeared for other court proceedings, services, and meetings with probation.
- » The child does not have a history of failing to appear.
- » The child's family has a stable household and there is no reason to believe the child would flee from his or her primary source of support.
- » The child's parent or guardian is willing to take responsibility for ensuring the child's appearance at all further proceedings.
- » The child is regularly attending school.
  - If the State argues the child is failing in school even though attending, argue there is a need for additional services, including special education services, and the attorney will work with the family to identify and arrange those services. Remember to clarify that academic achievement is not related to risk of flight.

## 2. My client does not present a risk of danger.

- » My client is presumed innocent until proven guilty and should not be detained based on the allegations in the petition alone.
- » My client is charged with a non-violent offense.
- » The child has no history with the juvenile justice system (or if the child does have a history, the previous offenses were non-violent).
- » If applicable, the child is enrolled in and attending appropriate services such as individual therapy.
- » If the State is concerned about the child's curfew, argue the judge can set the child's curfew and the parent or guardian will enforce it.
- » If the State argues the child needs treatment, argue there are treatment options in the community which can provide the same services at a lower cost and with less disruption to the child's life than an out-of-home placement.
- » Although my client has the risk factors that the government has mentioned (do not bring them up on your own), my client also has protective factors that support him or her being released to his or her parents or guardian, such as a supportive family, a support system through school or church, and services he or she is accessing or can access while at home.<sup>129</sup>

## 3. Ultimately, incarceration may increase the risk of recidivism and therefore, is not in line with the purpose of the juvenile justice system in West Virginia.<sup>130</sup>

### LITIGATION POINTS:

- **Counsel should request at the outset of the hearing that the court prohibit any mention of previously dismissed cases or police contacts.** Counsel should argue those are irrelevant because they are not probative on the issue of the child's dangerousness. The inevitable response to this request will be a rejoinder (on the part of either the prosecutor or the judge) that juvenile court procedure presumes the judge's ability to ignore irrelevant and even prejudicial matters in making a decision. Counsel should point out that if the judge intends to ignore such information, then there can be no legitimate justification for even relating it.
- Unless the juvenile is charged with a category 1 offense, there must be further justification for detention.
- Become familiar with the detention facility in which your client would be placed and become familiar with the problems with that detention facility. **Known deficiencies at the place of detention, including overcrowding, lack of educational training, and lack of appropriate services including medications, should be highlighted in your detention argument.**
- If detention is ordered, make sure medical, mental health and education issues are affirmatively addressed in the detention order.
- Request review of the order of detention at every possible opportunity. The judge has discretion to modify or vacate detention orders under West Virginia Code § 49-4-707.

<sup>129</sup> Development Services Group, Inc., *Protective Factors for Delinquency, Literature Review*, Washington, DC.: Office of Juvenile Justice and Delinquency Prevention (2015)(online at: <https://www.ojjdp.gov/mpg/litreviews/Protective%20Factors.pdf>). This literature review identifies and explains protective factors across five dimensions: individual, family, peer, school, and community. *Id.*

<sup>130</sup> The Pew Charitable Trusts, *Re-Examining Juvenile Incarceration: High Cost, Poor Outcomes Spark Shift to Alternatives*, (2015)(online at: [http://www.pewtrusts.org/~media/assets/2015/04/reexamining\\_juvenile\\_incarceration.pdf](http://www.pewtrusts.org/~media/assets/2015/04/reexamining_juvenile_incarceration.pdf)).



## XII. Preliminary Hearing

Under the West Virginia Code, the magistrate or the circuit court judge will determine whether probable cause exists to support a petition for delinquency or a status offense. The magistrate or the judge must do so within 10 days of the filing of the petition for detained youth and 20 days for released/undetained youth.<sup>131</sup> According to the United States Supreme Court in *Riverside v. McLaughlin*, under the federal Constitution, probable cause determinations must be made within 48 hours of the child's detention.<sup>132</sup> The juvenile must be represented by counsel or have counsel appointed at this hearing.<sup>133</sup>

If probable cause is not found, the case must be dismissed, and the child released.<sup>134</sup> If probable cause is found, counsel may still advocate for release for a client who is detained under West Virginia Code § 49-4-707.<sup>135</sup> This hearing is an excellent opportunity to review the need for detention.

### Before You Start

If counsel is appointed the same day as the preliminary hearing, counsel should request time to review the petition and the police report, interview the client and prepare for the hearing (but not to the detriment of the client, for example, if doing so would result in the client's further detention).

West Virginia Rule of Juvenile Procedure 18(e) requires preliminary hearings be recorded.<sup>136</sup> Recording a preliminary hearing is important because statements by witnesses can be used for impeachment at trial.

At a preliminary hearing before a circuit court judge, the juvenile may request a “**pre-adjudicatory community supervision period**” for up to one year (this intervention is different from a pre-petition diversion), with the understanding that if successful, the case will be dismissed.<sup>137</sup> A pre-adjudicatory community supervision period is an agreement by the child to be supervised in the community and to receive services by the DHHR voluntarily. If the child violates the conditions of his or her community service period, he or she may have the period revoked and proceed to adjudication on the original charge within 30 days of the revocation.<sup>138</sup>

Also, counsel should be aware if the allegation against the child is the equivalent of an adult felony, the potential for transfer to adult criminal justice jurisdiction still exists and counsel should conduct the preliminary hearing with that reality in mind. This is discussed further in the section on the law of transfer.

### The Preliminary Hearing

Counsel for the child “has the right to cross-examine the state's witnesses and introduce evidence” at preliminary hearings.<sup>139</sup>

**Preliminary hearings offer an excellent opportunity to learn more about the state's case early, as well as to lock in testimony of a witness that can later be used for impeachment.** They also offer an opportunity to observe the demeanor of a witness and to give the prosecutor a chance to see his or her witness on the stand. The prosecutor may be more willing to offer a generous plea if the hearing illustrates the government has a weak case.

1. At a preliminary hearing, the Rules of Evidence used for adult criminal trials are applicable, but there are relaxed rules for hearsay.<sup>140</sup> Specifically, “hearsay evidence may be received if there is a substantial basis for believing: (1) the source of the hearsay is credible; (2) there is a factual basis for the information furnished; and (3) that it would impose an unreasonable burden on one of the parties or a witness to require the primary source of the evidence be produced.”<sup>141</sup>

<sup>131</sup> W.Va. R.Juv.P. 18(a). In the West Virginia juvenile justice system, once a child is arrested, a detention hearing must occur within 48 hours. The issues at the detention hearing are the same as at an adult bail hearing – is there probable cause to show a crime was committed? will the child show up for future court dates/flight risk? does the child represent a significant threat to the community?

<sup>132</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)(stating after a juvenile is arrested with a warrant, a probable cause hearing must occur within 48 hours of the arrest).

<sup>133</sup> W.Va. Code § 49-4-708(a)(1)-(2).

<sup>134</sup> W.Va. Code § 49-4-708(a)(3).

<sup>135</sup> W.Va. Code § 49-4-707.

<sup>136</sup> Although West Virginia Code § 49-4-701(m) excludes preliminary hearings in the list of hearings that must be recorded, because the Juvenile Rules trump the Code when there is a conflict, counsel should make sure that the preliminary hearings are recorded. See W.Va. R.Juv.P. 1(a).

<sup>137</sup> W.Va. Code § 49-4-708(b); W.Va. R.Juv.P. 19.

<sup>138</sup> See W.Va. R.Juv.P. 19 for more details.

<sup>139</sup> W.Va. R.Juv.P. 18(c).

<sup>140</sup> W.Va. R.Juv.P. 18(b).

<sup>141</sup> W.Va. R.Juv.P. 18(b)(1)-(3).



2. While crafting the cross-examination, counsel should remain aware that the judge may not allow counsel a great deal of latitude, so counsel should consider structuring the cross-examination to bring out the most important information first. If counsel believes that the court may dismiss for lack of probable cause, counsel may want to limit his or her cross-examination, if further questioning could lead to the witness testifying to facts that support a finding of probable cause.
3. Open-ended questions are helpful for eliciting expansive answers containing more information. Leading questions can be helpful if you believe you can elicit the response you want. Because West Virginia law provides the primary purpose of a preliminary hearing is to determine probable cause, not conduct discovery,<sup>142</sup> counsel should be prepared to have an argument for how all lines of questioning relate to the issue of probable cause.

In limited cases, the prosecutor may be willing to offer a concession, such as not asking for secure detention, not asking for transfer, or offering diversion, in exchange for the waiver of the hearing.

**A word of warning:** If a witness from a probable cause hearing is unavailable at the adjudicatory hearing, the State may argue the juvenile had an adequate opportunity to cross-examine the witness at the probable cause hearing and, therefore, the Confrontation Clause does not bar the State from introducing the witness's testimony or other out-of-court statements. Counsel should be prepared to argue why introducing such statements is a violation of the Confrontation Clause. For example, counsel could argue the client has not had the opportunity to conduct a meaningful cross-examination of the now unavailable witness since the probable cause hearing happened prior to receiving discovery or conducting an investigation and much relevant information for cross-examination was obtained from discovery and the defense's investigation.<sup>143</sup>

## xiii. Pre-Trial Preparation and Proceedings

### The Role of the Juvenile Defender Pre-Trial

The role of counsel pre-trial in a juvenile case is similar to the role of counsel pre-trial in a criminal case. Generally speaking, the juvenile defender must:

- Investigate the case,<sup>144</sup> including locating and interviewing both defense and government witnesses;<sup>145</sup>
- Seek discovery;<sup>146</sup>
- Develop a theory of the case;<sup>147</sup>
- File and litigate pre-trial motions;<sup>148</sup> and
- Discuss, evaluate, and negotiate plea agreements.<sup>149</sup>

### Investigation

Defense attorneys have a duty to investigate their cases under the Sixth Amendment and in line with national best practice.<sup>150</sup> Investigation is a pillar of effective representation, as it informs how a defender advises a client regarding a plea, formulates the defense theory, conducts the cross-examinations of government witnesses, and identifies any possible affirmative defense case. Investigation typically may include, but is not limited to:<sup>151</sup>

<sup>142</sup> *Desper v. State*, 173 W.Va. 494, 498, 318 S.E.2d 437 (1984). According to caselaw, these hearings are deemed not for discovery because “[w]e have accorded a liberal right of discovery to a criminal defendant once he has been indicted and, as a consequence, the discovery aspect of a preliminary hearing is of diminished importance.” *State ex rel. Rowe v. Ferguson*, 165 W.Va. 183, 192, 268 S.E. 2d 45, 49-50 (1980).

<sup>143</sup> See *State v. Garner*, 232 W.Va. 8, 750 S.E.2d 123 (2013) (explaining the right of confrontation includes the right to a *meaningful* cross-examination).

<sup>144</sup> National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 4.1 (2012), p. 68 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>145</sup> *Id.* at Std. 4.3, p. 70.

<sup>146</sup> *Id.* at Std. 4.5, p. 74 and Std. 4.6, p. 77.

<sup>147</sup> *Id.* at Std. 4.2, p. 70.

<sup>148</sup> *Id.* at Std. 4.7, p. 79 and Std. 4.8, p. 81.

<sup>149</sup> *Id.* at Std. 4.9, p. 82.

<sup>150</sup> *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

<sup>151</sup> *Ballard v. Ferguson*, 232 W.Va. 196, 751 S.E.2d 716 (2013).



- Visiting where the alleged offense occurred at the time of day the offense occurred to get an idea of whether the allegations on the part of the government make sense and to help develop a defense theory;
  - » For example, in one case, the police alleged that they saw a defendant “drop something” and found a small plastic bag containing traces of cocaine at the feet of the defendant at 9 pm. However, upon visiting the location of the alleged incident, the investigators saw the ground was covered in similar small bags, as the location was where people used drugs often, and there were no street lights, so nighttime visibility would have been reduced.
- Locating witnesses, both for the defense and for the government;
- Social media searches on government witnesses;
- Taking statements from government witnesses;
- Collecting records, both your client’s school records and medical records, as well as other records that may help your case, such as phone records or police misconduct files;
  - » Request records early.
  - » Carry blank release forms with you so your client and their parent or guardian can complete the forms at one of your first meetings.
  - » Carry your client’s release, signed by both your client and their parent or guardian, with you to help you gather the records. Ensure the releases are HIPPA compliant, especially releases for mental health and drug treatment records.
  - » Consider filing FOIA requests where relevant for records that can help your case.
- Finding and preserving exculpatory videos/evidence.

## Discovery

The right to discovery for juveniles is governed by the West Virginia Constitution, West Virginia Rules and West Virginia Code, as well as the United States Constitution. A juvenile client has the same right to *Brady* material as an adult defendant, that is the **constitutional right** to any material in the government’s control, including the police, that would “tend to exculpate” the respondent or reduce the penalty he or she faces.<sup>152</sup>

Counsel should think through the theory of the case and the allegations to ensure he or she has received all the information relevant to the case and to the defense that may be in the government’s possession. For example:

- For drug arrests, do you have a copy of all the relevant test reports?
- Do you have any and all videos that are in the government’s possession, both of the alleged crime and of any interviews with your client? (Note: requesting “any and all videos in the government’s possession” is different than drawing attention to specific videos you know exist. For videos you gather during your own investigation, ensure that the video is exculpatory before alerting the government to its existence.)
- Has the government given you access to tangible evidence, such as allegedly stolen goods, seized clothing, drugs, weapons, or ammunition?

In all your discussions about discovery with the government, ensure the way in which you are requesting discovery does not “tip off” the prosecutor as to your defense theory. Could you get the information you are requesting from an alternative source, or could the request bring attention to a weakness in the prosecution’s case that it could strengthen before trial?

Checklist for items you may consider asking for in discovery (though this list is not an exhaustive list):

- Any written or electronic recordings of oral statements made by your client
- Any written statement(s) by your client
- Any copies of Miranda warnings given to the client, either signed or unsigned
- Statements of co-respondents
- Copies of any and all police reports, documents, or notes
- Any and all medical records of any complainant
- Any and all reports of tests done, including fingerprints, DNA, and chemical testing
- Any tangible evidence seized

<sup>152</sup> *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).



- Any and all photographs
- Any and all video recordings
- Any and all audio recordings
- Impeachment or bias material regarding government witnesses, including prior convictions of witnesses, information about government promises in exchange for testimony, and any arrest of witnesses since the date of the alleged offense at issue in the pending case<sup>153</sup>
- Any prior inconsistent statements of government witnesses
- Any records regarding police misconduct of police witnesses, including prior complaints both substantiated and unsubstantiated<sup>154</sup>
- Any information as to the mental state of government witnesses
- Any information as to whether the government witnesses were under the influence of any alcohol or drugs at the time of the alleged incident
- Any information as to whether the government witness is or has been a police informant
- All deals, benefits, or promises of benefit, threats, or statements that benefit would not be provided without cooperation that were made to any government witness<sup>155</sup>
- Perjury by a government witness at any time<sup>156</sup>
- All information that any government witness has made prior false accusations, including, but not limited to, prior complaints to the police or enforcement agencies that did not result in a conviction or an adjudication
- The names of any person identified as the perpetrator of the offense other than the respondent
- Whether a witness *failed* to identify the respondent in an identification procedure
- Any description of the perpetrator given by a witness that does not match your client

### Initial Disclosures

West Virginia Rule of Juvenile Procedure 21 governs discovery disclosures, timing of disclosures, and duties of counsel. Under Juvenile Rule 21(a), counsel has a right to **initial disclosures** in writing not less than five days prior to the preliminary hearing if his or her client is detained. If the client is not detained, counsel has the right to initial disclosures at least 30 days prior to adjudication.

Initial disclosures include:

- (1) Evidence obtained against the juvenile as a result of any search, seizure or electronic forms of recording voice, pictures or both;
- (2) Statements made by the juvenile including the names of individuals present at the time of the statement and the relationship, if any, to the juvenile;
- (3) Evidence acquired or discovered as a result of witness statements and/or accomplice(s)'s statements; and
- (4) A narrative of identification procedures involving the juvenile including live or photo lineups; and
- (5) Juvenile's Record—provide the juvenile's counsel with prior allegations of delinquency, prior adjudications and pre-adjudicatory community supervision periods.<sup>157</sup>

### Disclosures Prior to Adjudication

The defense has a right to the following from the prosecution, at least 10 days in advance of adjudication hearing for detained clients and 30 days in advance of adjudication hearing for released clients:

- (1) *Witnesses*. The name, address, and telephone number of witnesses the state intends to call in its case-in-chief, and any prior written or recorded statement of such witnesses.
- (2) *Statements of Accomplices*. Summaries of oral statements and copies of transcribed recorded statements made by accomplices of the juvenile.

<sup>153</sup> See *Davis v. Alaska*, 415 U.S. 308 (1974).

<sup>154</sup> See *United States v. Bagley*, 473 U.S. 667 (1995).

<sup>155</sup> See *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>156</sup> See *Moony v. Holohan*, 294 U.S. 103 (1935).

<sup>157</sup> W.Va. R.Juv.P. 21(a)(1)-(5).



- (3) *Documents and Tangible Objects*. Permit the juvenile's counsel to inspect and copy relevant books, papers, documents, photographs and tangible objects that the state intends to introduce at adjudication.
- (4) *Reports of Examinations and Tests*. Provide copies of reports of physical, mental, and/or scientific tests or examinations. A written summary of the anticipated testimony regarding such reports shall also be provided.
- (5) *Juvenile's Record*. Provide the juvenile's counsel with prior allegations of delinquency, prior adjudications and pre-adjudicatory community supervision periods.
- (6) *Exculpatory Information*. Disclose to the juvenile's attorney any material or information known to the state that tends to disprove the allegations of the petition or be in mitigation at disposition.
- (7) *Prior Statements*. Any prior written or recorded statements of the juvenile.<sup>158</sup>

If the government fails to provide discovery in a timely fashion, the defense may consider filing a **Motion to Compel Discovery**. If the government continues to fail to provide discovery, consider filing a motion requesting that the court **sanction the government**. Examples of sanctions include dismissing the case, barring a witness from testifying, barring the government from introducing certain evidence, or requesting a missing evidence instruction in which all inferences regarding the missing evidence should be made in favor of the respondent.

Both the government and the defense have a continuing duty of disclosure.<sup>159</sup>

#### Disclosure by the Juvenile

The juvenile respondent also has an affirmative duty to share the following information with the government at least 10 days before trial:

- (1) *Witnesses*. The name, address and telephone number of witnesses the juvenile intends to call in the juvenile's case-in-chief, and any prior written or recorded statement of such witnesses.
- (2) *Documents and Tangible Objects*. Permit the prosecuting attorney to inspect and copy relevant books, papers, documents, photographs and tangible objects that the juvenile intends to introduce at adjudication.
- (3) *Reports of Examinations and Tests*. Provide copies of reports of physical, mental, and/or scientific tests or examinations which the juvenile intends to introduce in the juvenile's case-in-chief at the adjudicatory hearing. A written summary of the anticipated testimony regarding such reports shall also be provided.
- (4) *Notice of Specific Defenses*. Inform the prosecuting attorney in writing of any alibi, entrapment, duress, insanity, self-defense and lack of jurisdiction defense.<sup>160</sup>

When responding to the prosecution's discovery requests, counsel should **do so thoughtfully and only to the extent required by the Rules**. Furthermore, counsel should consider whether any of the requested information is protected by the attorney-client privilege, work-product doctrine, or the Fifth Amendment, and respond to the requests asserting the appropriate bar. The Rules recognize that such sensitive materials may fall under these reverse discovery requirements and makes clear that certain information is not subject to disclosure: "Unless otherwise provided by these rules, any legal research, records, correspondence, reports or memoranda to the extent they contain opinions, theories, or conclusions of the juvenile, the juvenile's counsel, members of counsel's staff or counsel's agents participating in the representation of the juvenile are not subject to disclosure."<sup>161</sup>

If the defense counsel only becomes aware of evidence after the 10-day deadline, the response by the court may be a continuance, **but should not be to exclude the evidence**. Defense counsel has the right to introduce its evidence regardless of reverse discovery timelines under *Chambers v. Mississippi*, 410 U.S. 284 (1973), which states that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."<sup>162</sup>

<sup>158</sup> W.Va. R.Juv.P. 21(b)(1)-(7).

<sup>159</sup> W.Va. R.Juv.P. 21(i).

<sup>160</sup> W.Va. R.Juv.P. 21(c)(1)-(4).

<sup>161</sup> W.Va. R.Juv.P. 21(g)(1).

<sup>162</sup> *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).





## xiv. Pre-Adjudicatory Motions

Motions practice is an important part of juvenile defense practice. Pre-adjudication motions can result in suppression of crucial evidence, give counsel the opportunity to examine witnesses on the stand before the adjudicatory hearing, and give counsel the opportunity to test the strength of the prosecution's case. Sometimes, these pre-adjudicatory motions can even result in dismissal.

Under West Virginia Rule of Juvenile Procedure 24, the respondent has a right to file motions permissible under the West Virginia Rules of Juvenile Procedure and under the West Virginia Rules of Criminal Procedure. Motions requesting an order by the court should be made in writing, though motions may be made orally during a hearing or during a challenged adjudication.<sup>163</sup> Be sure to renew your objections again at the adjudicatory hearing in the instances in which your written motion has been denied. Doing so is essential to preserving the record for a potential appeal.

Written motions offer an excellent opportunity to educate the judge on an issue, so written motions should include any relevant research or information supporting your argument, while also including the law on which your motion is based. Written motions are the best way to preserve the record with the grounds for the motion and the relief sought; therefore, motions should contain clear and concise statements of each argument with citations to legal authority (both from the Supreme Court of Appeals of West Virginia and the United States Supreme Court) and the state and federal constitutions where applicable. If the motion is denied, the objection must be renewed at the adjudicatory hearing.

The following outlines are intended to assist you in evaluating which motions you may need to file in a case.

### Motion to Suppress Tangible Evidence or Statements under the Fourth Amendment

- A. State Action
- B. Fourth Amendment Law Basics
  - a. Expectation of Privacy: People have the right to be free from unreasonable searches.
  - b. Generally, searches are only reasonable if conducted pursuant to a warrant as:
    - i. A warrant requires an independent finding of probable cause.
    - ii. Specificity: A warrant requires the objects of the search to be particularly described in the application for a search warrant.
  - c. There are some exceptions to the warrant rule.
    - i. It is well settled under the 4<sup>th</sup> and 14<sup>th</sup> Amendments that a search conducted without a warrant issued upon probable cause is per se unreasonable, subject only to a few specifically established and well delineated exceptions.<sup>164</sup>
    - ii. Search incident to valid arrest: Police may search incident to arrest only the space within an arrestee's "immediate control," meaning "the area from within which he might gain possession of a weapon or destructible evidence."<sup>165</sup>
    - iii. Valid consent: What would a reasonable person [consider using *J.D.B.* to argue that a reasonable child standard should be applied] have understood from the exchange between the officer and the suspect?<sup>166</sup>
- C. Six Step Analysis for Fourth Amendment Challenges
  - a. What do you want to suppress?
    - i. Statements
    - ii. Tangible Evidence
    - iii. Eyewitness ID
    - iv. Other?
  - b. Does the client have standing?

<sup>163</sup> W.Va. R.Juv.P. 24(b).

<sup>164</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>165</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969).

<sup>166</sup> See *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).



- i. Standing means the respondent had a property interest or an expectation of privacy in the premises or object searched.<sup>167</sup>
      - c. Was there a seizure?
        - i. What level of seizure occurred?
          1. Encounter/Contact
          2. Stop
          3. Frisk
          4. Arrest
          5. Search
        - ii. When did the seizure occur?
        - iii. “When the officer, by means of physical force, or show of authority, has in some way restrained the liberty of a citizen.”<sup>168</sup>
          1. Whether the police behavior “would ...have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”<sup>169</sup> Again, consider using *J.D.B.* to argue that a reasonable child standard should be applied.
      - d. Was the seizure justified? (Depends on level)
        - i. Justification for police contact when police do not have a warrant
          1. Encounter = None
          2. Stop = Reasonable Articulate Suspicion
          3. Frisk = Reasonable Articulate Suspicion to believe person was armed and dangerous
          4. Arrest = Probable Cause
          5. Search = Probable Cause/Exigent Circumstances (or valid consent)
        - e. Was the scope of the search justified?
        - f. Which fruits are suppressible?
          - i. Tangible evidence
          - ii. Statements
          - iii. Identifications
          - iv. Derivative Evidence
          - v. Test: Whether, granting the establishment of the primary illegality, the evidence to which an objection is made has been obtained by exploitation of that illegality, or instead by means sufficiently distinguishable to be purged of the primary taint?<sup>170</sup>
          - vi. Exceptions to Exclusion
            1. Independent source
            2. Inevitable discovery
            3. Attenuation of the taint
- D. What is the Basis for the Challenge
  - a. Was there reasonable suspicion (if challenging Terry Stop)?
  - b. Was there probable cause for arrest (if challenging fruit of the poisonous tree)?
  - c. Other issues like false confessions and the impact of adolescent development?
- E. Suppression Theory
  - a. What do you want to suppress?
  - b. What are the Defense’s theory and arguments?
  - c. What are the State’s theory and arguments?
  - d. What facts support the Defense’s position?
  - e. Which witnesses can provide this evidence?

<sup>167</sup> See *Rakas v. Illinois*, 439 U.S. 128 (1978)(describing expectation of privacy).

<sup>168</sup> *California v. Hodari D.*, 499 U.S. 621, 625 (1991); *Sibron v. New York*, 392 U.S. 40, 67 (1968)(regarding physical seizure).

<sup>169</sup> *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988); *Dunaway v. New York*, 442 U.S. 200, 203, 207 n.6 (1979)(regarding effect of using a command, gesture, or expression). See also *United States v. Jacobsen*, 466 U.S. 109 (1984)(providing definitions of search and seizure).

<sup>170</sup> *Wong Sun v. United States*, 371 U.S. 471 (1963).



## F. Example Opening Sentence for Motion to Suppress Tangible Evidence

The Respondent, [ name ], by [ his/her ] Counsel, [ counsel's name ], moves this Honorable Court, pursuant to Rule 24 of the West Virginia Rules of Juvenile Procedure and Rule 12(b)(3) of the West Virginia Rules of Criminal Procedure, to suppress the following evidence on the grounds that such evidence was illegally seized from the care, custody and control of the Respondent:

## Motion to Suppress Statements Under the Fifth Amendment

### A. Arguments

- a. Miranda issues
- b. Voluntariness

### B. *Miranda v. Arizona*, 384 U.S. 436 (1966)

- a. Basic Premise: Statements made during custodial interrogation will be excluded unless the police advise youth of Miranda rights *and* youth waives those rights.
- b. Questions to Ask
  - i. Was the child in custody?
    1. Reasonable Child Standard<sup>171</sup>
  - ii. Did an interrogation occur? An interrogation is words or actions by law enforcement that officers should know are reasonably likely to elicit an incriminating response.<sup>172</sup>
  - iii. Was warning/rights given?
  - iv. Did the child waive his or her rights?
    1. Voluntary
    2. Knowing
    3. Intelligent
  - v. Was any necessary person present when the waiver or interrogation occurred?<sup>173</sup>
    1. Below age 14: counsel must be present
    2. Age 14-not yet age 16: either counsel must be present, or parent/guardian must be present and must consent to interrogation or waiver.
    3. Age 16: no requirement
  - vi. Did the child request an attorney?
  - vii. Did the child remain silent and was interrogated anyway?
- c. Exceptions to the Miranda requirement
  - i. Public Safety
  - ii. Routine Booking Question
- d. Relevant research
  - i. “To understand the standard language in a Miranda warning, suspects need a reading level varying between 6<sup>th</sup> and 10<sup>th</sup> grade, or higher. This is above the literacy level of most of those arrested.”<sup>174</sup>
  - ii. Juveniles also sometimes fail to understand their Miranda rights because certain vocabulary in the warning is too complex for them.<sup>175</sup>
  - iii. Most juveniles cannot understand the Miranda warning well enough to either invoke or waive those rights in a meaningful way (in a knowing and intelligent manner).<sup>176</sup>

### C. Can a Terry stop (under Fourth Amendment analysis) ever be enough for “custody” under the Fifth Amendment analysis?<sup>177</sup>

<sup>171</sup> *JDB v. North Carolina*, 564 U.S. 261 (2011).

<sup>172</sup> *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

<sup>173</sup> W.Va. Code § 49-4-701(1).

<sup>174</sup> Laura LaMontagne, *Children under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 30, 40 (2013).

<sup>175</sup> Heather Zell, Christina L. Riggs Romaine, & Naomi E.S. Goldstein, *Juveniles' Miranda Comprehension: Understanding, Appreciation, and Totality of Circumstances Factors*, 39 LAW & HUM. BEHAV. 281 (2015).

<sup>176</sup> Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINNESOTA L. REV. 26, 41 (2006).

<sup>177</sup> See *United States v. Perdue*, 8 F.3d 1455, 1464 (10<sup>th</sup> Cir. 1993); *United States v. Smith*, 3 F.3d 1088, 1097-98 (7<sup>th</sup> Cir. 1993); *United States v. Elias*, 832 F.2d 24, 26 (3<sup>rd</sup> Cir. 1987).



#### D. Voluntariness

- a. Research on false confessions
  - i. Interrogation techniques
  - ii. Police errors
    1. Misclassification errors
    2. Coercion errors
    3. Contamination errors
- b. Research on adolescent development

#### Motion to Suppress Identification

##### A. Grounds for suppressing or excluding identification

- a. Fourth Amendment
  - i. Fruit of an illegal seizure<sup>178</sup>
  - ii. If a Terry stop is not valid, then a corresponding show-up ID is not valid.
- b. Sixth Amendment (line up)
  - i. Youth has a right to counsel at line-up after the right to counsel attaches.<sup>179</sup>
- c. Unreliable as evidentiary matter
  - i. An identification may be so unreliable that it lacks probative value.<sup>180</sup>
- d. Unreliable as a matter of due process (Fifth and Fourteenth Amendments)
  - i. Requires state action.<sup>181</sup>
  - ii. Two Step Inquiry
    1. Was it unduly suggestive?
    2. Even if unduly suggestive, under the totality of the circumstances, was it nevertheless reliable?
  - iii. Identification may be so unreliable even without improper police conduct that it would violate the state due process clause under the state constitution.
  - iv. Central question: whether, under the totality of the circumstances, the identification was reliable even though the identification procedure was suggestive?<sup>182</sup>

##### B. Identification Procedures

- a. Suggestiveness Factors
  - i. Show Up Identification – this is him/her, isn't?
  - ii. Photo Spread
  - iii. Single Identification Photo
  - iv. Line-up

<sup>178</sup> *Wong Sun v. United States*, 371 U.S. 471 (1968). See also *United States v. Crews*, 445 U.S. 463 (1980).

<sup>179</sup> *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967). See also *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

<sup>180</sup> *State v. Johnson*, 312 Conn. 687, 94 A.3d 1173 (2014); *Beatty v. United States*, 544 A.2d 699, 702 (D.C. 1988).

<sup>181</sup> See *Perry v. New Hampshire*, 565 U.S. 228 (2012).

<sup>182</sup> See *Neil v. Biggers*, 409 U.S. 188 (1972).



- b. Reliability Factors
  - i. Check case law<sup>183</sup>
  - ii. Witness's opportunity to observe perpetrator at time of the offense
  - iii. Witness's degree of attention
  - iv. Accuracy of witness's prior description of suspect
  - v. Certainty of witness at the time of the identification
  - vi. Time between the offense and the identification procedure
  - vii. Additional reliability factors
    - 1. Identification of strangers
    - 2. Weapons focus
    - 3. Violence
- c. Cross Racial Identification
- d. In-Court Identification – is there an independent source of the in-court identification?

### Motion for an Expert Witness

- A. Why do you want/need an expert?
- B. Frame the referral question
- C. Under the Fourteenth Amendment's due process guarantee of fundamental fairness, each indigent defendant is entitled to the basic tools of an adequate defense, including an expert witness when necessary.<sup>184</sup>
  - a. State must fund a defense expert where needed.
  - b. Need for expert is examined with a three-prong balancing test:<sup>185</sup>
    - i. What is the private interest that will be affected by the State's action?
    - ii. What is the governmental interest that will be affected if the safeguard is provided?
    - iii. What is the probable value of the additional or substitute procedural safeguards that are sought, and what is the risk of an erroneous deprivation of the affected interest if those safeguards are not provided?
  - c. "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or the introduction of expert evidence."<sup>186</sup>
- D. West Virginia is a *Daubert* state.
- E. West Virginia Rule of Evidence 706: Court-Appointed Expert Witnesses
  - a. The court may on its own motion or the motion of any party enter an order to show cause why expert witnesses should be appointed and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he or she consents to act.<sup>187</sup>
- F. File motion requesting expert *ex parte* and under seal to avoid alerting the prosecution to the defense's theory of the case and strategy.

There are benefits to litigating motions even when the motion is not granted. For example, litigating motions strengthens the attorney-client relationship as it provides an opportunity for the client to see the attorney fighting for him or her. This effort may afford the client greater trust in the attorney's advice. Additionally, it allows the prosecution to see counsel fighting for the child, potentially giving the defense more leverage in plea bargaining.

<sup>183</sup> *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

<sup>184</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985).

<sup>185</sup> *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

<sup>186</sup> *Hinton v. Alabama*, 571 U.S. 263, 273 (2014). See also W.Va. R.Crim.P. 28 (regarding the appointment of expert witnesses).

<sup>187</sup> W.Va. R.Evid. 706(a)(in part).



### NATIONAL JUVENILE DEFENSE STANDARDS

#### 4.7 Represent the Client through Pre-Trial Motion Practice

Counsel must file motions in a timely manner, after thorough investigation and review of applicable laws. Counsel has the ongoing obligation to file motions as new information and evidence are obtained.

- a. Counsel must be aware of all the applicable statutes, case law, and court rules regarding the requirements of proper motions practice. With limited exception, motions should be in writing and should comport with the formal requirements of statutes and court rules;
- b. Counsel must be current on legal and scientific research informing motion practice;
- c. Counsel must consider filing all potentially colorable motions, so that the absence of a particular pre-trial motion is the result of a defensible strategic decision, rather than negligence or error;
- d. Counsel must respond to all pleadings in a timely manner, and if necessary and proper, seek an extension or file an imperfect motion to preserve the client's rights pending the result of further investigation; and
- e. Counsel must actively pursue opportunities to challenge the prosecution's case, including through oral motions when new evidence comes to light or in order to preserve an issue on which counsel did not file a written motion.

National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 4.7 (2012), p. 79 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

## xv. Transfer to the Criminal Justice System (Adult Court)

West Virginia prosecutes youth in adult court under certain circumstances.

All juvenile petitions begin in the juvenile justice system.<sup>188</sup> The prosecutor then may seek to move the proceeding to adult criminal court. In order to do so, the prosecutor must file an appropriate motion within the time limits under law.<sup>189</sup> The court will then set the matter for a hearing regarding the existence of probable cause to transfer (and a consideration of relevant factors as applicable).<sup>190</sup> In certain cases, the judge *must* transfer the case, and, in certain cases, the judge has the discretion to transfer the case.<sup>191</sup> Juvenile respondents over the age of fourteen also may request to be transferred to adult court.<sup>192</sup>

The role of counsel when a child faces possible prosecution as an adult is highly specialized. Generally speaking, the juvenile defender must:

- Obtain the knowledge and the experience necessary before representing a child in a transfer proceeding;<sup>193</sup>
- Inform the child of the nature of the transfer proceedings and the consequences of transfer;<sup>194</sup>
- Conduct a thorough investigation when a child faces adult prosecution;<sup>195</sup>
- Advocate against transfer to adult court;<sup>196</sup>
- Preserve the child's opportunity to appeal the transfer decision;<sup>197</sup> and
- Meet obligations to the child following the transfer to adult court<sup>198</sup>

<sup>188</sup> W.Va. Code § 49-4-710(a).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> W.Va. Code § 49-4-710(c), (d), (e), (f), & (g).

<sup>192</sup> W.Va. Code § 49-4-710(c).

<sup>193</sup> National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 8.1 (2012), p. 134-35 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>194</sup> *Id.* at Std. 8.2, p. 136.

<sup>195</sup> *Id.* at Std. 8.3, p. 137.

<sup>196</sup> *Id.* at Std. 8.4, p. 138.

<sup>197</sup> *Id.* at Std. 8.5, p. 141.

<sup>198</sup> *Id.* at Std. 8.6, p. 141.



## The Law of Transfer

If the State wishes to seek transfer of the case to criminal court, the State must give the juvenile written notice of intent to transfer at least eight days prior to the adjudication, stating the grounds upon which the State is seeking transfer.<sup>199</sup> The prosecution has complete discretion over whether to file a motion for transfer. Because the prosecutor has complete discretion about whether to file a motion for transfer, juvenile defense counsel can **advocate for his or her client with the prosecutor** prior to a transfer motion being filed.

Once the prosecutor files the motion for transfer, a juvenile cannot be asked by the State or the court whether he or she wants a jury trial or whether he or she wants to admit or deny the allegations until after the decision regarding transfer is made.<sup>200</sup>

- **Timing:** The transfer hearing is held within seven days of the motion to transfer being filed and may be continued for good cause at the request of the prosecutor or the defense attorney.<sup>201</sup>
- **Burden of Proof:** The state must prove by **clear and convincing evidence** that grounds for transfer exist.<sup>202</sup> Additionally, the State must present its case and establish the existence of probable cause **even if probable cause was established at a preliminary hearing previously.**
- **Discovery:** The defense has the right to full discovery seven days prior to a transfer hearing, and reverse discovery is due four days prior to the transfer hearing.<sup>203</sup>
- **Evidence:** At the hearing, the rules of evidence apply, including the bar on hearsay.<sup>204</sup> The child has a right to testify as to both the allegations and as to personal factors, such as “the juvenile’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors.”<sup>205</sup> If the child testifies only about personal factors, he or she is not subject to cross-examination about the allegations.<sup>206</sup> *Counsel should immediately object if the prosecution or court attempts to ask the child questions as to the allegations if the door to such questions has not been opened.*
  - » The child may file motions to suppress evidence from the transfer hearing.

At the transfer hearing, the state will typically be trying to prove by clear and convincing evidence:

- Probable cause that the child committed the alleged offense;
- Previous juvenile delinquency adjudications;
- Whether the offenses underlying those previous adjudications or the current offense constitute a violent offense, defined as “an offense which involves the use or threatened use of physical force against a person;”<sup>207</sup> and
- That the juvenile’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors tend toward a conclusion that the child should be transferred to criminal court.<sup>208</sup>

Because both the rules of discovery and the rules of evidence apply, and the child may move to suppress evidence, the transfer hearing offers an opportunity to both learn much about the state’s case as well as to defend against the allegations to prevent transfer. Counsel also has the opportunity to present an affirmative case regarding the youth’s “personal factors,” present evidence, and call expert witnesses.

<sup>199</sup> W.Va. § 49-4-710(a); W.Va. R.Juv.P. 20(b).

<sup>200</sup> W.Va. R.Juv.P. 20(c). *See also State v. Larry T.*, 236 W.Va. 74, 697 S.E.2d 110 (2010)(explaining it is prejudice per se to ask a juvenile respondent whether he or she wishes to admit or deny the charge or whether he or she wants a jury trial before the decision regarding transfer has been made).

<sup>201</sup> W.Va. R.Juv.P. 20(e).

<sup>202</sup> W.Va. Code § 49-4-710(a); W.Va. R.Juv.P. 20(e)(2).

<sup>203</sup> W.Va. R.Juv.P. 20(e)(5).

<sup>204</sup> W.Va. R.Juv.P. 20(e)(6).

<sup>205</sup> W.Va. R.Juv.P. 20(e)(8). In a case involving mandatory transfer, while a child may testify to his or her unique factors, the judge does not consider these factors in making a determination regarding transfer; the only consideration is whether the State has established probable cause. W.Va. Code § 49-4-710.

<sup>206</sup> W.Va. R.Juv.P. 20(e)(8).

<sup>207</sup> W.Va. Code § 49-4-710(h).

<sup>208</sup> These factors only are relevant at a transfer hearing involving a discretionary transfer. W.Va. Code § 49-4-710(e), (f), & (g).



## Mandatory Transfer<sup>209</sup>

A judge must transfer a case, notwithstanding any mitigating factors,<sup>210</sup> if the child meets any one of these three sets of criteria:

1. At least fourteen years old and there is probable cause of:
  - » Treason;
  - » Murder;
  - » Robbery with the use of or presenting of firearms or other deadly weapons;
  - » Kidnapping;
  - » First Degree Arson; or
  - » Sexual Assault in the First Degree.
2. At least fourteen years old, probable cause of “an offense of violence to the person” that would be a felony in the adult system, *and* a previous delinquency adjudication for such an offense of violence;
3. At least fourteen years old, probable cause of an offense which would be a felony if the juvenile was an adult, *and* two previous delinquency adjudications for such a felony offense.

## Discretionary Transfer

A case *may* be transferred where:

1. A child is *under* fourteen, and there is probable cause to believe he or she committed treason, murder, robbery with a deadly weapon, kidnapping, first degree arson, or first degree sexual assault, and thus, would be subject to mandatory transfer but for his age.<sup>211</sup>
2. A child is *under* fourteen, and:
  - » Probable cause of “an offense of violence to the person”<sup>212</sup> that would be a felony in the adult system exists and there is a previous delinquency adjudication for such an offense of violence, *and*
  - » Consideration of the juvenile’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors lead the judge to determine that transfer of the child to criminal court is appropriate.<sup>213</sup>
3. A child is *under* fourteen, and:
  - » Probable cause of an offense which would be a felony if the juvenile was an adult exists, *and* there are *two* previous delinquency adjudications for such a felony offense, *and*
  - » Consideration of the juvenile’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors lead the judge to determine transfer of the child to criminal court is appropriate.<sup>214</sup>
4. The child is *over* fourteen, and:
  - » Probable cause of an “offense of violence to the person” which would be a felony if the juvenile was an adult exists, *and*
  - » Consideration of the juvenile’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors lead the judge to determine transfer of the child to criminal court is appropriate.<sup>215</sup>
5. The child is *over* fourteen years old, and:
  - » Probable cause of an offense which would be a felony if the juvenile was an adult exists, *and*
  - » There is a previous delinquency adjudication for the commission of a crime which would be a felony if the juvenile was an adult, *and*

<sup>209</sup> W. Va. Code § 49-4-710(d)(1)-(3).

<sup>210</sup> W. Va. Code § 49-4-710(d).

<sup>211</sup> W. Va. Code § 49-4-710(e).

<sup>212</sup> Note that for purposes of the transfer statute, an “offense of violence means an offense which involves the use or threatened use of physical force against a person.” W. Va. Code § 49-4-710(h).

<sup>213</sup> W. Va. Code § 49-4-710(f).

<sup>214</sup> W. Va. Code § 49-4-710(f).

<sup>215</sup> W. Va. Code § 49-4-710(g)(1).





- » Consideration of the juvenile's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors lead the judge to determine transfer of the child to criminal court is appropriate.<sup>216</sup>
- 1. The child is *over* fourteen years old and:
  - » Probable cause that the child used or presented a firearm or other deadly weapon during the commission of a felony exists, *and*
  - » Consideration of the juvenile's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors lead the judge to determine transfer of the child to criminal court is appropriate.<sup>217</sup>
- 1. Probable cause the juvenile committed a violation of West Virginia Code § 60A-4-401, which would be a felony if the juvenile was an adult, involving the manufacture, delivery or possession with the intent to deliver a narcotic drug exists, *and*
  - » Consideration of the juvenile's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors lead the judge to determine transfer of the child to criminal court is appropriate.<sup>218</sup>
- 1. Probable cause the juvenile has committed the crime of second degree arson as defined in West Virginia Code § 61-3-2 involving setting fire to or burning a public building or church exists, *and*
  - » Consideration of the juvenile's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors lead the judge to determine transfer of the child to criminal court is appropriate.<sup>219</sup>

## Voluntary Transfer

“If a juvenile who has attained the age of fourteen years makes a demand on the record to be transferred to the criminal jurisdiction of the court,” the court must transfer the case to the criminal court.<sup>220</sup> In other words, your client may opt to go through the criminal rather than the juvenile justice system. The juvenile defender has an ethical duty to counsel his or her client about all the consequences (both good and bad) of such a decision, including possible collateral consequences of said decision. Note that advocating for a child's expressed desire to have his or her case transferred to adult court should occur only when a child with the capacity to make such a decision has been fully informed of all of the possible ramifications of that decision.<sup>221</sup>

The juvenile defender should consider discussing the following critical differences between the juvenile and adult systems with the client:

- Lack of confidentiality in the adult system
- Possible media exposure
- The impact of an adult conviction on employment, education, and housing applications, including access to public housing
- The impact of an adult conviction on military recruitment
- The impact of an adult conviction on child custody determinations
- The differences in exposure to different lengths of sentences
- The differences in facilities in which he or she may be detained
- Immigration consequences of a criminal conviction in the adult system
- The impact of a prior conviction (vs. a juvenile adjudication) in adult sentencing decisions
- Exposure to the sex offender registry in the adult system for sex offense convictions
- Access to community-based services through the juvenile system vs. the adult system

<sup>216</sup> W.Va. Code § 49-4-710(g)(2).

<sup>217</sup> W.Va. Code § 49-4-710(g)(3).

<sup>218</sup> W.Va. Code § 49-4-710(g)(4).

<sup>219</sup> W.Va. Code § 49-4-710(g)(5).

<sup>220</sup> W.Va. Code § 49-4-710(c).

<sup>221</sup> See National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 8.1-8.6 (2012), pp. 132-142 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).



## xvi. Competence and Capacity

In West Virginia, “competence” relates to competence to stand trial (or make any other significant case decision such as whether to take a plea) and “capacity” generally refers to capacity to commit an offense.<sup>222</sup> Please note these concepts may naturally relate to one another.<sup>223</sup>

### Competence

“Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing so.”

Cooper v. Oklahoma, 517 U.S. 348, 354 (1996).

Under United States Supreme Court jurisprudence, the test for competence to stand trial is “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”<sup>224</sup> In West Virginia, the competency standard mirrors that of the United States Supreme Court: “No person may be subjected to trial on a criminal charge when, by virtue of mental incapacity, the person is unable to consult with his [or her] attorney and to assist in the preparation of his [or her] defense with a reasonable degree of rational understanding of the nature and object of the proceedings against him [or her].”<sup>225</sup>

If, as the defender, you believe your client is not able to aid in his or her defense or does not understand what is happening in the court proceedings, the defense *may* raise competency as a concern. Sometimes, youth have difficulty understanding what is happening because of language disorders, developmental disability, mental illness, or simply age. Lack of developmental maturity “can amplify mental illness or intellectual disabilities.”<sup>226</sup> If advantageous to the client, a juvenile defender can learn from the child’s parent, teacher, or therapist strategies for communicating with the client effectively and for helping the client understand necessary information before the defender must raise competency with the court. If raising the question of competency with the court will be averse to the client’s preferences/stated interests, then the juvenile defender should consider other courses of action.

Once competency has been raised, the process for competence determination is the same for juveniles as it is for adults.<sup>227</sup> The child is referred for a forensic evaluation to be conducted by a psychiatrist or a psychologist.<sup>228</sup> The juvenile defender should request the evaluation be performed by an evaluator who has the experience and the certification to evaluate children as well as an understanding of child development.

The criteria considered in the competency determination may include:

- evidence of irrational behavior;
- a history of mental illness or behavioral abnormalities;
- previous confinement for mental disturbance;
- demeanor before the trial judge;
- psychiatric and lay testimony bearing on the issue of competency; and
- documented proof of mental disturbance.<sup>229</sup>

<sup>222</sup> See, e.g., *State v. Barrow*, 178 W.Va. 406, 414, 359 S.E.2d 844, 852 (1987). Compare W.Va. Code § 27-6A-3 with § 27-6A-4.

<sup>223</sup> See, e.g., *State v. Sanders*, 209 W.Va. 367, 549 S.E.2d 40 (2001); W.Va. Code § 27-6A-2(a).

<sup>224</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

<sup>225</sup> *State v. Barrow*, 178 W.Va. 406, 359 S.E.2d 844 (1987); Syl. Pt. 1, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976).

<sup>226</sup> Kimberly Larson et al., *Developing Statutes For Competence To Stand Trial In Juvenile Delinquency Proceedings: A Guide For Lawmakers* (2011), online at [http://www.njjn.org/uploads/digital-library/Developing\\_Statutes\\_for\\_Competence\\_to\\_Stand\\_Trial\\_in\\_Juvenile\\_Delinquency\\_Proceedings\\_A\\_Guide\\_for\\_Lawmakers-MfC-3\\_1.30.12\\_1.pdf](http://www.njjn.org/uploads/digital-library/Developing_Statutes_for_Competence_to_Stand_Trial_in_Juvenile_Delinquency_Proceedings_A_Guide_for_Lawmakers-MfC-3_1.30.12_1.pdf).

<sup>227</sup> See W.Va. R.Juv.P. 26; W.Va. Code § 27-6A-2 to § 27-6A-4.

<sup>228</sup> W.Va. Code § 27-6A-2(a).

<sup>229</sup> *Drope v. Missouri*, 420 U.S. 162 (1975); *State v. Paynter*, 206 W.Va. 521, 526 S.E.2d 43 (1999); *State v. Arnold*, 159 W.Va. 158, 163-64, 219 S.E.2d 922, 925-26 (1975).



After a record review and interview with the youth, the forensic evaluator submits a report on the youth's competency within 10 days of the interview, although the evaluation report may take up to 30 days after the interview with good cause.<sup>230</sup>

The defense also has a right to an evaluation by a forensic evaluator of its choice at its own expense.<sup>231</sup> Those who are employed by the state public defender system may seek funds through the overseeing agency to hire an independent evaluator, if such an independent evaluation would be helpful to push back on the conclusions of the evaluator appointed by the court. For those who do not have access to such funding, the defense should consider applying to the court for public/court funds for an independent evaluation, arguing the defense is in need of the help of an expert to prepare its defense, consistent with *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

Please note—in some jurisdictions in West Virginia, the court holds the position that if the court *funds* an evaluation, then that evaluation should be made available to all parties, regardless of the results of the evaluation. Counsel should request any independent evaluation requested by the defense be conducted **under seal and only be made available to the defense in order to help in the preparation of the defense**. The respondent has a right to this limitation under *Ake*, where the Court held the defense has a right to a psychiatrist's assistance "to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses," especially when the defense is able to make a threshold *ex parte* showing that competency/sanity is likely to be a "significant factor" in the child's defense.<sup>232</sup>

Remain cognizant of the implications for your client if you raise the issue of competency. As stated in the commentary on the National Juvenile Defense Standards, "Juvenile defenders should approach competency issues with **deliberation and caution**."<sup>233</sup>

- Raising competency subjects your client to forensic evaluation(s).<sup>234</sup>
- If the forensic evaluation is inconclusive or the child is uncooperative, the court may order the client to remain in a residential mental health facility for up to fifteen days.<sup>235</sup>
- If the child is found incompetent, but restorable within three months, he or she may be placed in a residential mental health facility for up to three months.<sup>236</sup>
- A juvenile found to be not competent may risk more time in a mental health hospital than he or she would under the disposition if adjudicated for an offense. Therefore, counsel should be prepared to argue against inpatient restoration when it is not appropriate.<sup>237</sup>
- The outcome for a child who is found incompetent to proceed and unable to be restored to competency varies because the rules and the Code are silent on this issue. **An incompetence finding could lead to anything from case dismissal to placement at an out-of-state facility until the age of 21.** Further, the DHHR retains placement selection rights and must be given the opportunity to designate a facility. It is only after the DHHR has been given this opportunity that a judge may order the child to a placement found by the juvenile defender.
- For some clients, even the worst outcome under a finding of incompetence may be better than the likely outcome if he or she would proceed to trial. And, as stated above, in some jurisdictions, a finding of incompetence may lead to the case being dismissed.

The juvenile defender should be aware of the various factors and familiarize himself or herself with the likely consequences of raising competency in his or her jurisdiction. In all decisions, the defender **must maintain his or her ethical responsibility to represent his or her client's preferences to the best of his or her ability**.

## Capacity

"Capacity" refers to a respondent's criminal responsibility in the charged offense, rather than the client's ability to understand and participate in the court proceedings. The court or the defendant may request a forensic evaluation of the child's mindset

<sup>230</sup> W.Va. Code § 27-6A-2(c).

<sup>231</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985).

<sup>232</sup> *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985).

<sup>233</sup> See National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 1.7 (2012), pp. 29-31 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>234</sup> See W.Va. Code § 27-6A-9.

<sup>235</sup> See W.Va. Code § 27-6A-29(d).

<sup>236</sup> See W.Va. Code § 27-6A-3(e) & (f).

<sup>237</sup> See W.Va. Code § 27-6A-2(c) & § 27-6A-3(f).



at the time of the alleged offense to evaluate the youth for “criminal responsibility or diminished capacity” if there is probable cause to believe that capacity will be a significant factor in the defense.<sup>238</sup>

If both competency and capacity have been raised, the respondent is evaluated for competency first, prior to being evaluated for capacity.<sup>239</sup> Furthermore, to the extent possible and in accordance with your client’s stated interest, the same forensic evaluator who worked with the respondent for the competency evaluation should be the one to conduct the capacity evaluation.<sup>240</sup>

The party requesting the evaluation is to provide to the forensic psychiatrist or psychologist:

- a copy of the warrant or the indictment;
- information pertaining to the alleged crime, including statements by the respondent made to the police, investigative reports and transcripts of preliminary hearings, if any;
- any available psychiatric, psychological, medical or social records that are considered relevant;
- a copy of the defendant’s criminal record; and
- if the evaluation is to include a diminished capacity assessment, the nature of any lesser criminal offenses.<sup>241</sup>

Note: Before turning over the client’s prior records in accordance with the statute, the defense should pause to consider whether records are truly “relevant” to the diminished capacity determination, especially when the psychiatrist/psychologist will be conducting a thorough evaluation and the respondent is constantly changing during this period of rapid development.

Like raising competency, raising the issue of capacity for criminal responsibility may have implications for your client as he or she navigates the forensic evaluation process.

- Your client likely will be subjected to forensic evaluation(s).<sup>242</sup>
- If the forensic evaluation is inconclusive or if the child is uncooperative, the court may order the client to remain in a residential mental health facility for up to fifteen days.<sup>243</sup>
- If the verdict at trial is not guilty by reason of mental illness, the child may be under the court’s jurisdiction until the age of 21.<sup>244</sup>
  - » The disposition of the child is unclear. The statutes regarding competency and capacity only specify how an adult defendant should be handled. There is no statute or case law regarding how to manage a juvenile offender in this situation.
  - » Argue for treatment in the least restrictive environment.

Like in competency, the juvenile defender should be aware of the various factors and familiarize himself or herself with the likely consequences of raising capacity in his or her jurisdiction. In all decisions, the defender **must maintain his or her ethical responsibility to represent his or her client’s preferences to the best of his or her ability.**

Like in the case of competency, the defense has the right to an independent evaluator to help prepare the defense’s case, with an *ex parte* appointment under *Ake*. ***Ake is about the defense’s right to a psychiatric expert to help prepare the defense’s case when lack of criminal capacity is the defense.***

Defense attorneys should consider hiring an independent evaluator in both scenarios:

- **My client lacks capacity and/or criminal responsibility:** to support the argument that the client has a lack of criminal responsibility or capacity (if that is your client’s goal) **or**
- **My client does not lack capacity and/or criminal responsibility:** If your client is concerned about commitment to a mental institution for an indefinite time period given the facts of the case, the jurisdiction, and the judge, the defense may want to argue the client does not lack capacity. An independent evaluator may help the defense challenge or push back on adverse conclusions of the court-appointed evaluator.

<sup>238</sup> See W.Va. Code § 27-6A-1 & § 27-6A-4.

<sup>239</sup> See W.Va. Code § 27-6A-2 & § 27-6A-9.

<sup>240</sup> See W.Va. Code § 27-6A-4 & § 27-6A-9.

<sup>241</sup> See W.Va. Code § 27-6A-2(b) & § 27-6A-4(b). See also W.Va. R. Juv.P. 26.

<sup>242</sup> See W.Va. Code § 27-6A-4 & § 27-6A-9.

<sup>243</sup> See W.Va. Code § 27-6A-4(d) & § 27-6A-9.

<sup>244</sup> See W.Va. Code § 49-4-701.



Providing the independent evaluator's impressions and conclusions is potentially averse to the defense and should not be compelled. Counsel should request any independent evaluation requested by the defense be conducted **under seal and only be made available to the defense as part of the defense's preparation of its case**. If the defense later elects to use the independent evaluation in court, the defense must make all the proper disclosures.

## Navigating Mental Health Evaluations

Mental health evaluations may be helpful for advocacy regarding competency, culpability, transfer, suppression, and disposition planning. Some mental health evaluations will be ordered by the court *sua sponte* or at the request of the government, while in other cases the defense may choose to request an evaluation (and then either pay for it directly or ask the court for funds to pay for it, depending on strategy). The defense also may request independent evaluations to potentially challenge the conclusions of the court-ordered evaluation.

Mental health evaluations can be helpful and hurtful, so counsel should be aware of how to both avoid making things worse for the client and mitigate risk where an evaluation order is out of the defense's control. Some tips:

- Best practices in forensic evaluations requires evaluators to build their evaluations around a particular *referral* question. If the court is ordering an evaluation *sua sponte* or at the request of the government, the defense may ask the court to clarify the specific referral question in the order. For example, an evaluation into a child's competency should not veer off into discussing his or her dangerousness.
- A juvenile may disclose incriminating or harmful information during an evaluation. Counsel should request to be present during a court-ordered evaluation to protect the child's privilege against self-incrimination, especially during violence risk assessments. If counsel is not permitted to be present, counsel should request the court to direct the evaluator to avoid discussing the alleged offense or any other unlawful conduct whatsoever. Regardless of whether counsel is present or not, counsel should request the court order the evaluator to tape the assessment (preferably on videotape). Also, **the client should be advised not to talk about the alleged offense or other unlawful conduct** other than to acknowledge whether he or she understands what it means to have been charged with a crime.
- If the evaluation is not relevant to a *pre-trial* determination, such as competency, the defense counsel should request the evaluation be placed under seal so as not to expose the judge to potentially incriminating or prejudicial information prior to the fact-finding hearing. Such evaluations are arguably only relevant to disposition.
- If your client is going to have an independent evaluation, you may consider providing a roadmap for the evaluator on the type of evaluation needed. Below is a roadmap suggested by Dr. Marty Beyer on how one may tailor the evaluation needs to that of an individual client.<sup>245</sup>
- **Keep in mind**, you should be strategic in your requests for evaluations and in your use of the information contained in evaluations to advance your client's stated interests.
  - » **Even if your client is evaluated to have high needs, even significant mental health needs**, the defender's ethical obligations demand that he or she continue to advocate for the client's expressed interests and should not substitute his or her judgment for his or her client's interests. As the child's attorney, you should counsel your client on any advantages of available services. If your client does not wish to receive services, the attorney must work to limit the services the client is ordered to access—even if counsel privately believes such services are needed or would ultimately benefit the client.



**An excerpt from Marty Beyer, Ph.D. *What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, pp. 11-13 (2013):**

Evaluators can be specifically requested to assess disabilities, trauma and immaturity by tailoring the following questions to each juvenile:

1. Does this young person have problems processing information?
  - Listening
  - Organizing, prioritizing, strategizing
  - Reading, writing, spelling or doing calculations
  - Self-dislike and attention-seeking connected to poor performance
2. Does this young person have the symptoms and history of fetal substance exposure?
  - From early childhood difficulty with:
    - » Attention regulation
    - » Getting easily overstimulated
    - » Limited self-calming skills
    - » Comprehending and following instructions
    - » Being disorganized in play and on tasks
    - » Getting quickly frustrated
  - Does not learn from experience, repeating the same mistakes
  - Surprised by obvious consequences of actions
  - Oblivious to simple rules that other children routinely obey
  - Stimulant medication does not produce improvement
  - Behavior modification does not produce improvement
  - Seems younger than his/her chronological age
  - What was child's biological parents' alcohol, drug and cigarette use prior to conception and during pregnancy?
3. Does this young person have the symptoms of ADD/ADHD?
  - Attention/concentration difficulties/distractibility for child's age
  - High activity level for child's age
  - Impulsiveness (less able to stop behaviors) for child's age
  - High injury rate for child's age
  - Without hyperactivity, excessive daydreaming for child's age
  - Poor social skills/problems with peers for child's age
  - Has he/she had a diagnosis of ADD and ADHD?
    - » When? By whom? Results of treatment?
4. Does this young person have low intelligence?
  - Dates and results of IQ testing, with subtest scores
  - Deficits in adaptive functioning (social behavior, daily living skills, independence, comprehension of others' expectations, indiscriminate compliance to please others)
  - Reading and math grade level
5. Was this young person traumatized?
  - Chronology of physical abuse, sexual abuse, exposure to violence, loss of important individuals, significant failure
    - » What are the symptoms remaining from this trauma? – Slowed development (specifically what areas?)
    - » Trouble concentrating
    - » Fearfulness (being on constant alert)
    - » Nightmares
    - » Emotionally detached/numbing feelings (with substances)
    - » Self-dislike
    - » Controlling
    - » Mistrust of others
    - » Irritability
    - » Depression/suicidal thinking and behavior
    - » Unusual dependence on peers/adults
    - » Unpopularity
    - » Aggressiveness/belligerent outspokenness ("big mouth")



- » Self-protective when threatened (reactive alarm response)
    - Difficulty self-soothing/self-calming
    - Oversensitive/perceives others as hostile, mean, and unfair
    - When feelings are hurt, flooded with anger from the past out of proportion to the present provocation
6. Does this young person have immature thinking?
- Difficulty anticipating consequences/planning
  - Childish decision-making when scared
  - Minimizes danger /not recognizing worst possible outcomes
    - » Sees only one option
    - » Substance abuse?
    - » Envisioned having a weapon would cause injury?
7. Does this young person have an immature identity?
- What is he/she good at?
  - Does he/she have a positive, realistic view of self in the future?
  - Does he/she have a strong sense of belonging to family?
  - Does he/she have strong relationships with positive peers?
8. Does this young person have immature moral reasoning?
- Moral values, including loyalty as a moral principle
  - Intolerant of unfairness—acts to right wrongs
  - For whom does he/she show empathy?

## xvii. Adjudication

**Adjudication** is the fact-finding hearing portion of the juvenile justice case, equivalent to the criminal trial.

West Virginia goes beyond what the United States Supreme Court requires and **grants juveniles the right to a jury trial in certain cases**. This fact alone places West Virginia's juvenile delinquency procedure as one of the most progressive jurisdictions in the country. A child may elect to be tried by a jury where, under the adult equivalent crime of the delinquent act charged, an adult would face the possibility of incarceration upon conviction (for any amount of time).<sup>246</sup>

### The Role of the Juvenile Defender at Adjudicatory Hearings and Trials

The role of counsel when a child faces a juvenile adjudicatory hearing is similar to that of a defender for an adult at trial. Generally speaking, the juvenile defender must:

- investigate the case and develop the case theory;
- prepare the evidence and witness examinations before the hearing;<sup>247</sup>
- prepare for the forum, whether judge or jury, including preparing for the juror voir dire;<sup>248</sup>
- prepare and present opening statements;<sup>249</sup>
- prepare for cross-examination;<sup>250</sup>
  - » including requesting transcripts of prior hearings, such as the preliminary hearing and motions hearings;

<sup>246</sup> W.Va. Code § 49-4-709(a); W.Va. R.Juv.P. 29.

<sup>247</sup> See National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 5.2 (2012), p. 90 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>248</sup> *Id.* at Std. 5.3, p. 92.

<sup>249</sup> *Id.* at Std. 5.4, p. 94.

<sup>250</sup> *Id.* at Std. 5.5, p. 95



the child has the right to obtain these transcripts at the court's expense under West Virginia Rule of Juvenile Procedure 5(h);

- challenge evidence and preserve the record;<sup>251</sup>
- move for judgment of acquittal for each charge at the close of the State's case;<sup>252</sup>
- prepare and examine defense witnesses other than the client;<sup>253</sup>
- ascertain whether the child wishes to testify and prepare and present the child's testimony;<sup>254</sup>
- prepare exhibits and/or other tangible or demonstrative evidence;
- prepare and present closing statements and motions to dismiss; and<sup>255</sup>
- request findings of fact and conclusions of law when not provided by the court.<sup>256</sup>

### A Note on Developing a Case Theory in Delinquency Cases

When developing your defense theory, consider the ways in which adolescent development applies to challenging each element of the crime with which your client is charged. Ultimately, you will use this developmental information in making your closing arguments. Remember, as discussed in the section on Adolescent Development, adolescents think differently than adults. The United States Supreme Court has established, “[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures including peer pressure’; and their characteristics are ‘not as well formed.’”<sup>257</sup> These differences may mitigate or eliminate the establishment of *mens rea* or other elements of an offense.

When developing your case theory, consider how adolescent development research is relevant to your defense, and identify places where the research can be woven into your arguments. For example:

- Was the adolescent's action done without forethought and planning?
- Was the action an exaggerated emotional response to a heated situation?
  - » Based on cognitive abilities, often documented through special education services, does the child have the ability to plan such that he or she could premeditate a crime?

The juvenile defender should ascertain the applicable mental state or *mens rea* provided in the Code and consider the effects of impulsivity and peer influence on the child's ability to form the intent necessary to meet the elements of the offense. The juvenile defender also should argue the fact finder approach the case from the reasonable child (not reasonable person) standard.

### Preparing the Client

Defense counsel must prepare the child for the adjudicatory hearing.<sup>258</sup> The intellectual and emotional maturity of the child should not only be considered when formulating a defense, but counsel also should be sure the child understands his or her rights and what is happening in the trial. These discussions will require the use of developmentally appropriate language and examples.<sup>259</sup>

Counsel must advise their client about any **plea offer**:

- Counsel must explain to the client, in developmentally appropriate language, the strengths and weaknesses of the prosecution's case, the benefits and consequences of accepting a plea, and the rights the client is forfeiting by pleading guilty.<sup>260</sup>

<sup>251</sup> *Id.* at Std. 5.6, p. 96.

<sup>252</sup> *Id.* at Std. 5.7, p. 98.

<sup>253</sup> *Id.* at Std. 5.8, p. 98.

<sup>254</sup> *Id.* at Std. 5.9, p. 100.

<sup>255</sup> *Id.* at Std. 5.10, p. 103.

<sup>256</sup> *Id.* at Std. 5.11, p. 104. See W.Va. Code § 49-4-711(6); W.Va. R. Juv.P. 33.

<sup>257</sup> *Graham v. Florida*, 560 U.S. 48, 68 (2010) citing *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005).

<sup>258</sup> See National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 5.1 (2012), p. 90 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>259</sup> See National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 1.1 (2012), p. 18 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>260</sup> See National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 4.9 (2012), pp. 82-84 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).





- It is the **child's decision** whether to accept an admission offer or proceed to adjudication; it is not a decision to be made by the parent or the attorney.<sup>261</sup>
- There are no binding agreements regarding disposition. Even if the prosecution and the child agree to a particular disposition, the ultimate disposition is completely in the court's discretion.<sup>262</sup>

Counsel also should advise his or her client about the following in anticipation of trial:

- What to expect to happen during the hearing
  - » What a “burden of proof” is and why that means counsel may decide to ask very few questions of the government witness, so the child understands the strategy behind counsel's decisions.
- What to wear to the hearing
  - » Note: If the client is detained, counsel can arrange with detention center staff ahead of time for the client to appear in court in appropriate clothing and without shackles.
- How to conduct himself or herself during the hearing
- His or her right to testify and whether doing so is a wise decision
  - » If the client plans to testify, counsel should prepare the client and practice the testimony with him or her, including practicing what cross-examination will be like.
- Strategies for what the client and the attorney will do in case the child starts to feel emotional

**Note:** Give your client a pen and paper to use at counsel table before the trial begins so that he may communicate with you during the hearing if he has questions about what is happening or ideas to share with you.

## The Law of Adjudication

### Time Limits

- The adjudication hearing must begin within 30 days of a child being placed in detention. If a jury hearing is requested, the adjudication “shall be commenced no later than the next term of court.”<sup>263</sup>
- The adjudication hearing must begin within 60 days of service of the petition for a child who is not in detention.<sup>264</sup>
- If the child is in detention and the adjudication has not begun within 30 days of the child being placed in detention, then the child shall be released under nonmonetary bond conditions; the adjudication hearing must begin within 60 days after release.<sup>265</sup>
- If the pre-adjudicatory community supervision period is revoked, the adjudication hearing must begin within 30 days of revocation.<sup>266</sup>
- Unless a continuance or a pre-adjudicatory community supervision period is granted, the petition must be dismissed without prejudice if the adjudication hearing has not begun in the appropriate time allotted.<sup>267</sup>

### Admissions/Guilty Pleas

- At the beginning of the hearing, the court asks the child whether he or she wishes to admit or deny the allegations in the petition.<sup>268</sup> If the child elects not to say anything, the court must consider that to be a denial of all allegations.<sup>269</sup>
  - » If the child is going to enter a pre-adjudicatory community supervision period, the child does not need to admit or deny the charges.<sup>270</sup>

<sup>261</sup> W.Va. Code § 49-4-701.

<sup>262</sup> W.Va. R.Juv.P. 28.

<sup>263</sup> W.Va. R.Juv.P. 27(a).

<sup>264</sup> W.Va. R.Juv.P. 27(b).

<sup>265</sup> W.Va. R.Juv.P. 27(c).

<sup>266</sup> W.Va. R.Juv.P. 27(e).

<sup>267</sup> W.Va. R.Juv.P. 27(d).

<sup>268</sup> W.Va. Code § 49-4-711.

<sup>269</sup> *Id.*

<sup>270</sup> W.Va. Code § 49-4-708(b).



- » The court must approve the child's entry into a pre-adjudicatory community supervision period and delay the adjudicatory hearing.<sup>271</sup>
- » "At the conclusion of the pre-adjudicatory community supervision period, the court shall dismiss the proceeding if the terms have been fulfilled; otherwise, the court shall proceed to the adjudicatory stage."<sup>272</sup>
- If the child makes an admission, the court must conduct a colloquy.<sup>273</sup>
  - » The court cannot rely on the representations of the child's attorney, but must conduct its own colloquy of the child.<sup>274</sup>
- The **colloquy** must proceed in accordance with West Virginia Rule of Juvenile Procedure 28 as follows:
  - (a) The court shall not accept a juvenile's admission to a charge at any stage of the proceedings without first determining the following based on the juvenile's statements on the record or contained in a written document signed by the juvenile and counsel.
    - (1) The juvenile understands the allegations in the petition and the elements of each charge, and that there is a factual basis for the admission that is reflected by specific facts set forth on the record or by a signed document.
    - (2) The juvenile understands that he or she has a right to adjudication on the merits, and to require proof of all of the elements of all of the charges.
    - (3) The juvenile understands the other rights, and possible consequences, as set forth in Rule 7.
    - (4) The juvenile understands the court's power to make a disposition of the charges if they are admitted, including:
      - (A) the court's dispositional authority includes the most severe step of placing the juvenile in an institution;
      - (B) the court's jurisdiction over an adjudicated delinquent could be up to the juvenile's 21<sup>st</sup> birthday. The court's jurisdiction over status offenders could be up to their 18<sup>th</sup> birthday for incorrigibility;
      - (C) the court can modify a disposition, even repeatedly, until the termination of the court's jurisdiction; and
      - (D) the juvenile understands the potential future consequences of the court's disposition which may include:
        - i. the possible effect on future dispositions imposed as a juvenile; and
        - ii. the possible effect on future sentences imposed as an adult.
    - (b) With the consent of the prosecuting attorney and the approval of the court, the juvenile shall be allowed to enter an admission to a lesser-included offense than is charged.<sup>275</sup>
  - There are no binding agreements regarding disposition. **Even if the prosecution and the child agree to a particular disposition, the ultimate disposition is in the court's discretion.**<sup>276</sup>
  - The child may *withdraw* his or her admission as follows under **West Virginia Rule of Juvenile Procedure 28(e)**:
    - » "A juvenile may, on the record or by written motion filed with the court, request to withdraw an admission to the charges for good cause shown. The court may allow the juvenile to withdraw the admission: (1) before disposition if it is fair and just to do so giving due consideration to the reasons given and any prejudice withdrawal of the admission would cause due to action taken in reliance on the juvenile's admission; or (2) any time upon a showing that withdrawal is necessary to correct manifest injustice."<sup>277</sup>

### The Hearing

- If the child makes an explicit or implied denial, the court will resolve any outstanding pre-trial motions and then proceed to consider evidence in the matter.<sup>278</sup>

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> W.Va. Code § 49-4-711(1).

<sup>274</sup> *In re Harry W.*, 204 W.Va. 583, 585, 514 S.E.2d 814, 816 (1999).

<sup>275</sup> W.Va. R.Juv.P. 28(a)-(b).

<sup>276</sup> W.Va. R.Juv.P. 28(c).

<sup>277</sup> W.Va. R.Juv.P. 28(e).

<sup>278</sup> W.Va. Code § 49-4-711(2).



- Prior to the adjudicatory hearing, if a pre-trial motion has been denied, counsel should remember to renew his or her objection at the adjudicatory hearing in order to preserve the record for appeal.
- The State must prove the allegations against the child by proof beyond a reasonable doubt in delinquency matters and by proof of clear and convincing evidence in status offense matters.<sup>279</sup> Note that the burden of proof is the same in the juvenile delinquency proceedings as it is for the adult criminal court.
  - » At all adjudicatory hearings held under the Juvenile Act, “all procedural rights afforded to adults in criminal proceedings shall be afforded the juvenile unless specifically provided otherwise in this chapter.”<sup>280</sup>
  - » If the State is successful in proving its case, the child will be adjudicated delinquent and the court will set the matter for disposition.<sup>281</sup> If the State is not successful in proving its case, then the court will dismiss the matter and discharge the child from custody.<sup>282</sup>
  - » The court must make adjudication findings within seven days of the conclusion of the adjudication hearing.<sup>283</sup>
    - The findings must:
      1. State which allegations in the petition have or have not been proven;
      2. Be in writing even if the court orally announced the findings at the conclusion of the adjudicatory hearing.

### Evidence

- “At all adjudicatory hearings held under the Juvenile Act, the rules of evidence applicable in criminal cases apply, including the rule against written reports based upon hearsay.”<sup>284</sup>
- “Except as modified in West Virginia Code §49-4-701, the West Virginia Rules of Evidence shall apply, including the use of depositions as contemplated by Rule 15 of the Rules of Criminal Procedure.”<sup>285</sup>

### LITIGATION POINT:

If the State tries to introduce any type of psychological evaluation or assessment at the adjudication hearing, counsel should consider objecting to the relevance of such a document. While an evaluation or assessment may be relevant during disposition, it is rarely relevant and often more prejudicial than probative at the adjudication hearing. The judge should not consider a child’s potential need for services in determining whether the State has proved a delinquency allegation beyond a reasonable doubt.

### COMMON OBJECTIONS:

- Hearsay (including in written reports)
- Relevance
- Leading the witness (on direct)
- Counsel is testifying (on direct)
- Calls for narrative
- Compound question
- Calls for speculation
- Cumulative
- Beyond the scope of direct (on cross)
- Assumes facts not in evidence
- Calls for an opinion on the ultimate issue
- Calls for lay opinion on expert issue
- Calls for improper character evidence
- More prejudicial than probative

<sup>279</sup> W.Va. Code § 49-4-711(3)-(4); W.Va. R. Juv.P. 32. See also *State v. Megan S.*, 222 W.Va. 729, 671 S.E.2d 734 (2008); *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

<sup>280</sup> W.Va. Code § 49-4-701(j).

<sup>281</sup> W.Va. Code § 49-4-711(3); W.Va. R. Juv.P. 33.

<sup>282</sup> W.Va. Code § 49-4-711(5); W.Va. R. Juv.P. 33.

<sup>283</sup> W.Va. R. Juv.P. 33; see also W.Va. Code § 49-4-711(6). “For good cause, the court may extend the time for filing written findings for an additional seven days.” W.Va. R. Juv.P. 33.

<sup>284</sup> W.Va. Code § 49-4-701(k).

<sup>285</sup> W.Va. R. Juv.P. 31.



## xviii. Disposition

### NATIONAL JUVENILE DEFENSE STANDARDS

#### 6.1 Role of Counsel Regarding Disposition Advocacy.

Counsel must work with the client to develop a theory of disposition and a written, individualized disposition plan that is consistent with the client's desired outcome. Counsel must present this disposition plan in court and zealously advocate on the client's behalf for such an outcome.

National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 6.1 (2012), p. 106 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

### The Role of the Juvenile Defender at Disposition Hearings

The disposition hearing in juvenile court is the equivalent of a sentencing hearing in adult court. The role of the juvenile defender at disposition “is essentially the same as at earlier stages of the proceeding: to advocate, within the bounds of the law, the best outcome available under the circumstances according to the client’s view of the matter . . .”<sup>286</sup>

In *State ex rel. R.S. v. Trent*, the Supreme Court of Appeals of West Virginia held:

Counsel for the child is . . . required to **participate actively** at the dispositional stage and has a duty to **make an independent investigation** of the child’s background; to **inform himself [or herself] in detail of the facilities** both within and without the State which are suited to the child’s needs and able to treat him [or her]; to **take the initial steps to secure tentative acceptance of the child by appropriate facilities**; and to **advise the juvenile court** of the terms and conditions under which such facilities will accept the child.<sup>287</sup>

Generally speaking, the juvenile defender must:

- work with the child to develop a theory of disposition and an individualized, developmentally appropriate treatment or disposition plan that reflects the child’s wishes;<sup>288</sup>
- know the range of dispositional options and alternatives;<sup>289</sup>
- prepare the client for the disposition hearing;<sup>290</sup>
- be familiar with the risk assessment or evaluations the court will order and be prepared to challenge the results as warranted;<sup>291</sup>
- be prepared to review the pre-disposition report when one is submitted to the court by the government, and challenge it when appropriate;<sup>292</sup>
  - » If the report is not submitted in a timely manner, challenge its admission on the basis that you did not receive it in sufficient time to fully review it and prepare for the hearing.
- develop, submit, and advocate for the client’s preferred disposition plan;<sup>293</sup>
- where possible, ensure the child’s acceptance into the child’s programs, services, or facility of choice;<sup>294</sup>
- advocate for the child’s legal and procedural rights at the hearing;<sup>295</sup>

<sup>286</sup> IJA-ABA Joint Commission on Juvenile Justice Standards, Standards Relating to Counsel for Private Parties, § 9.3(a) cmt. (1980), p. 179 (online at: [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/JJ/JJ\\_Standards\\_Counsel\\_for\\_Private\\_Parties.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/JJ/JJ_Standards_Counsel_for_Private_Parties.authcheckdam.pdf)).

<sup>287</sup> 169 W.Va. 493, 511, 289 S.E.2d 166, 176-77 (1982)(emphasis added).

<sup>288</sup> See National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 6.1 (2012), p. 104 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>289</sup> *Id.* at Std. 6.2, p. 106.

<sup>290</sup> *Id.* at Std. 6.3, p. 108.

<sup>291</sup> *Id.* at Std. 6.4, p. 109.

<sup>292</sup> *Id.* at Std. 6.5, p. 110.

<sup>293</sup> *Id.* at Std. 6.6, p. 111.

<sup>294</sup> *State ex rel. R.S. v. Trent*, 169 W. Va. 493, 511, 289 S.E.2d 166, 176-77 (1982).

<sup>295</sup> See National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 6.7 (2012), p. 112 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).



- review the disposition ordered and advise the child of the parameters of the order and collateral consequences; and<sup>296</sup>
- advocate for the child awaiting placement to be held in the least restrictive environment possible.<sup>297</sup>

## Disposition Plan

The juvenile defender should work with the child to develop a **disposition plan**. The defender should counsel the client on what realistic options the child has and what the juvenile defender can advocate for with DHHR, the probation officer, and the judge.

Defenders are encouraged **to submit a written disposition memorandum** in the form of a letter to the judge, which advocates for the disposition the child wants and clearly outlines:

- the legal status you are requesting,
- where the child will sleep (home, with a relative, a group home, or residential), and
- what his or her schedule will be from the time he or she wakes up in the morning until the time he or she goes to sleep.

Additional topics the juvenile defender should consider including are:

- helpful mitigating factors or culpability considerations concerning the offense, citing adolescent development research;
- how the child will take responsibility or express remorse for his or her actions;
- favorable information regarding the juvenile and his or her strengths, including information about his or her background, education history, employment record, or employment opportunities;
- challenges to incorrect or incomplete information or inappropriate references and characterizations in the State's evidence;
- arguments for a community-based placement, including the non-violent nature of the offense (if applicable), research on the harms of incarceration vis-à-vis rehabilitation, the likelihood of desistance with a community-based intervention, and the need to place the child in a stimulating environment at the point in his or her life when he or she is most susceptible to positive inputs; and
- the availability of treatment programs, treatment facilities, and community service work opportunities within the community, including any admissions already secured or the qualifications for enrollment that show the child would likely qualify.

One of the greatest challenges facing juvenile defenders across the state of West Virginia is a scarcity of available community-based resources. See the box below for some ideas.

### DESIGNING CREATIVE DISPOSITION PLANS WITH FEW RESOURCES IN THE COMMUNITY

- Come up with creative educational dispositions tailored to the child's strengths, such as reading a book and writing a book report or completing an art project.
- Seek out community service opportunities. Examples include volunteering at nursing homes, local social enterprises or charities like GoodWill, community gardens, animal shelters, or community events.
- Seek out alternative treatment or mentoring options, like Alcoholics Anonymous (AA), Narcotics Anonymous (NA), Big Brothers, Big Sisters, or local faith-based organizations.

## Asking for Dismissal

- Note that under West Virginia law, **dismissal of the petition is an option as a disposition** if the court finds dismissal is in the best interest of the child and the public welfare.<sup>298</sup>
- Dismissal may be in the best interest of the child. Research shows most youth reduce their criminal behavior regardless of intervention, most youth do not reoffend, and probation does not “work” to facilitate rehabilitation.

<sup>296</sup> *Id.* at Std. 6.8, p. 114.

<sup>297</sup> *Id.* at Std. 6.9, p. 116.

<sup>298</sup> W.Va. Code § 49-4-714(b)(1).



- » Most youth who commit felonies reduce offending over time regardless of intervention.
  - See Edward Mulvey, OJJDP, Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders (2011).
- » The majority of youth with arrest records will not become adult offenders.
  - See National Research Council. (2013). *Reforming Juvenile Justice: A Developmental Approach*. Committee on Assessing Juvenile Justice Reform, Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers, and Julie A. Schuck, Eds. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, D.C.: The National Academies Press. P. 24.
- » Surveillance-oriented probation is not effective at reducing delinquent behavior or re-offending.
  - See The Annie E. Casey Foundation. (2018). *Transforming Juvenile Probation: A Vision for Getting It Right*. Online at <http://www.aecf.org/m/resourcedoc/aecf-transformingjuvenileprobation-2018.pdf>.
- » Collateral consequences of a juvenile adjudication impede a child's chance of future success at being a productive member of society.
  - See Joy Radice, *The Juvenile Record Myth*, 106 *Geo. L.J.* 365 (2018).
- Dismissal with referral to a community agency also is an option as a disposition under the statute.
  - » If the child is interested in voluntarily participating in services, a referral and dismissal may be in the best interest of the child. The likelihood of recidivism may increase with increased contact with various aspects of the juvenile system.<sup>299</sup>

#### LITIGATION POINT:

Try to help the judge and the State think of disposition as a learning plan to build competency rather than as punishment, reminding them that the main goal of the Juvenile Act is rehabilitation.

When building the disposition plan and advocacy points, consider:

- Has the child experienced trauma?<sup>300</sup>
- Has the child ever received services or treatment for his or her identified challenges?
  - » If so, why was the prior treatment unsuccessful?
  - » If the child has been given a diagnosis, is that diagnosis accurate?
- What does the child do well? How can the disposition plan build on the child's strengths?
- What protective factors does the child have?
- What would an *individualized* response look like for this child?

## Advocating for Services

### Effective Interventions

- Functional family therapy
- Multi-systemic therapy
- Multidimensional treatment foster care
- Aggression replacement therapy
- Cognitive-behavioral therapy
- See also [www.ojjdp.gov/mpg](http://www.ojjdp.gov/mpg)

<sup>299</sup> Kimberly P. Jordan, *Kids Are Different: Using Supreme Court Jurisprudence About Child Development to Close the Juvenile Court Doors to Minor Offenders*, 41 *N. Ky. L. Rev.* 187 (2014)(explaining detention may increase the likelihood for future court involvement). See also Wade Askew, *Keeping Promises to Preserve Promise: The Necessity of Committing to a Rehabilitation Model in the Juvenile Justice System*, 20 *Geo. J. on Poverty L. & Pol'y* 373 (2013)(explaining how making the juvenile justice system more punitive and less rehabilitative led to increased recidivism rates).

<sup>300</sup> Eduardo R. Ferrer, *Transformation Through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 *Am. Crim. L. Rev.* 549 (2016). See also Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3(2) *J. of Juv. Jus.* 1 (Spring 2014) (online at: <https://www.ncjrs.gov/pdffiles/246951.pdf>).



Effective programs achieve both the goals of rehabilitation of the child and protection of the public welfare by reducing the risk of recidivism. It is important that disposition is individualized to the child's needs.<sup>301</sup> The attorney should argue for individualized, effective interventions for each client.

### *West Virginia's (Over) Placement Problem*

Although juvenile delinquency is decreasing, West Virginia continues to place children into facilities at a rate significantly higher than most of the rest of the nation.<sup>302</sup> Most children who are placed are not violent offenders.<sup>303</sup> These facts may be used to argue against placement. Additionally, community-based interventions have been found to have a greater likelihood of effectiveness than DJS facilities.<sup>304</sup>

### **Multidisciplinary Team Meetings**

Typically, after an adjudication, the case is referred to a "multidisciplinary team" (known as an MDT). The DHHR arranges for a comprehensive assessment (which should be done using a standard uniform protocol) and develops an individual service plan recommendation.<sup>305</sup> If the court plans to consider committing the child to the DHHR or an out-of-home placement, the court must refer the case to an MDT team at least 15 days prior to the disposition.

**Importantly, attendance at the MDT meeting is mandatory.**<sup>306</sup>

The law requires the following people (including the defense attorney) attend each meeting:

- (A) the juvenile;
- (B) the juvenile's case manager in the Department of Health and Human Resources or the Division of Juvenile Services;
- (C) the juvenile's parent, guardian or custodian;
- (D) **the juvenile's attorney;**
- (E) any attorney representing a member of the multidisciplinary treatment team;
- (F) the prosecuting attorney or his or her designee;
- (G) the county school superintendent or the superintendent's designee;
- (H) a treatment or service provider with training and clinical experience coordinating behavioral or mental health treatment; and
- (I) any other person or agency representative who may assist in providing recommendations for the particular needs of the juvenile and his or her family, including domestic violence service providers. In delinquency proceedings, the probation officer shall be a member of a multidisciplinary treatment team. When appropriate, the juvenile case manager in the Department of Health and Human Resources or in the Division of Juvenile Services shall cooperate in conducting multidisciplinary treatment team meetings when it is in the juvenile's best interest.<sup>307</sup>

These parties should be served notice of the meeting at least seven days prior to the meeting.<sup>308</sup> The MDT team must provide the assessment report and the individual service plan recommendation to the court and to the child's counsel at least 72 hours before the dispositional hearing.<sup>309</sup>

It is important to advocate for your client's expressed wishes in the MDT. Successfully advocating for your client in the development of the plan submitted by the DHHR is one of the most important pieces of disposition representation. The judge must submit written findings as to why he or she did *not* adopt the plan submitted by the MDT, should he or she decline to do so.

<sup>301</sup> Elizabeth S. Scott, Natasha Duell, & Laurence Steinberg, *Brain Development, Social Context and Justice Policy*, *Wash. U. J. of Law and Policy*, 57 Spring (2018), (explaining importance of developmentally appropriate disposition planning and matching the individual child with a program designed to meet his or her needs). See also Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 *Criminal J. & Beh.* 497 (May 2013).

<sup>302</sup> WV Center on Budget & Policy, *Improving Juvenile Justice in West Virginia*, online at <http://www.wvpolicy.org/improving-juvenile-justice-in-west-virginia-2/>.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> W.Va. R.Juv.P. 35 & 36; W.Va. Code § 49-4-406; W.Va. Code, § 49-4-714(a); see also W.Va. R.Juv.P. 40(d); *E.H., et al., v. Matin, et al.*, 201 W.Va. 463, 467, 498 S.E.2d 35, 39 (1997).

<sup>306</sup> *E.H., et al., v. Matin, et al.*, 201 W.Va. 463, 498 S.E.2d 35 (1997).

<sup>307</sup> W.Va. Code § 49-4-406(d)(2).

<sup>308</sup> *Id.*

<sup>309</sup> W.Va. R.Juv.P. 35; W.Va. R.Juv.P. 40(d); W.Va. Code § 49-4-714(a)-(b). However, counsel often does not receive the assessment and recommendations until the day of disposition. Do not hesitate to ask for a recess or a continuance if necessary to read the information and discuss it with your client.



The defense attorney should prepare his or her client for the meeting, covering:

- what to expect at the MDT meeting, including who will be there and what they will likely say;
- self-advocacy, since the client's voice should be the most powerful voice at the table;
- creating a list of the client's strengths the attorney will continue to emphasize throughout the meeting;
- creating a coping plan to assist the client in dealing with emotions during the meeting; and
- the client's preferred disposition plan, including researching possible placements, so as to better advocate during the meeting.

#### ATTEND MDT MEETINGS!

MDT meetings offer the attorney a great opportunity to advocate for the client's expressed interest in the development of the DHHR's recommended plan.

1. The attorney should ensure the client is invited to the meeting, as he or she should be under the statute, and
2. Ensure that allies who will support the client's preferred disposition attend, such as ally parents or other authority figures who support the client's plan, like a mentor or current therapist.

In addition to a possible referral to an MDT, in anticipation of disposition, the court may order:

- the probation officer to "investigate the environment of the juvenile and the alternative dispositions possible;"<sup>310</sup>
- "a standardized screener," i.e., a brief, validated non-diagnostic inventory or questionnaire designed to identify children in need of further assessment for medical, substance abuse, emotional, psychological, behavioral, or educational issues, or other conditions; or
- a psychological evaluation.

Under the Code, **each child adjudicated of a status or delinquency offense must undergo a risk and needs assessment** by a probation officer, court official, or state worker (typically an employee of the DHHR) prior to disposition.<sup>311</sup>

### The Disposition Hearing: Procedure

The disposition hearing for youth adjudicated delinquent or adjudicated as status offenders occurs either immediately, within 30 days after an adjudication for a detained youth, or within 60 days for a released youth. The court may extend the timeline for up to 60 days. The rule does not specify who may request the continuance, so defense counsel may request a continuance if strategically appropriate.<sup>312</sup>

If disposition is pushed beyond these timelines, the court **must release a detained client** from custody *and* the court **may dismiss the case**.<sup>313</sup>

If disposition is pushed beyond 90 days for a detained client or 120 days for a released client, defense counsel should ensure any detained client is released and should move for the case to be dismissed.

At a disposition hearing, the juvenile, the State, and any victim must have "an opportunity to be heard."<sup>314</sup> The State and the child have the right to put on witnesses and present evidence.<sup>315</sup>

<sup>310</sup> W.Va. Code § 49-4-714(a).

<sup>311</sup> W.Va. Code § 49-4-724.

<sup>312</sup> W.Va. R.Juv.P. 34.

<sup>313</sup> W.Va. R.Juv.P. 34(b)(3).

<sup>314</sup> *State ex rel Ohl v. Egnor*, 201 W.Va. 777, 500 S.E.2d 890 (1997).

<sup>315</sup> W.Va. R.Juv.P. 34(c).





## The Disposition Hearing: Advocating

The court must consider the child's best interests and the public's welfare when imposing a disposition.<sup>316</sup> The child is entitled to the least restrictive placement that will meet his or her needs and protect the public's welfare.<sup>317</sup> The focus is to be on rehabilitation, not punishment.<sup>318</sup>

Mitigation evidence is admissible at the disposition hearing. A great defense attorney is able to use the disposition hearing as an opportunity to humanize his or her client and tell his or her story. The defender should highlight the client's strengths such as getting good grades, being drug free, having significant positive relationships, and the like. The prosecutor will have highlighted your client's weaknesses and deficiencies; thus, you need to highlight the client's strengths.

### Research: Rehabilitation, Recidivism, and Client Needs

Throughout the disposition hearing, it is important to remind the court that the rehabilitation of the child, not punishment, is the focus at the disposition phase. Punishment is **not** the goal; and the seriousness of the offense committed should not be the focus in this proceeding (although prosecutors often focus on these two things).

If strategically helpful, the defender should continue to remind the court to focus on the child's actual *risk* level, determined by a standardized assessment, rather than the seriousness of the offense. The child may have committed a serious act; however, if the child is low risk, pushing him or her further into the juvenile justice system and providing unnecessary services is not the individualized response that has the greatest likelihood of effectiveness.<sup>319</sup>

Even for clients with high risk scores, counsel should push back on arguments that reduce a client to his or her risk score alone, and counsel should urge the court not to "give up" on clients with high scores.

Decades of research demonstrates that children who have committed crime or delinquency and then interact with the system – particularly those who are detained or incarcerated – commit more future acts of crime and violence as compared to children who commit similar crimes or delinquencies and never become system involved or those who are not detained or incarcerated and instead receive community-based supervision, treatment, and services....**An ever-increasing body of evidence demonstrates that incarcerating children leads to increased violence, recidivism, and poor life outcomes for youth (even when controlling for the severity of offense).**<sup>320</sup>

Remind all the key players the child is still developing and a disposition should not be developmentally *destructive*. The child is in the process of social maturation and educational attainment; interrupting those processes will have a detrimental impact on the child.<sup>321</sup> Teenagers are disproportionately impacted by their environments due to the plasticity of their brains during adolescence and therefore, adolescence is what Laurence Steinberg has deemed *The Age of Opportunity*. The court should take advantage of this unique opportunity to rehabilitate the youth and to use what we know about adolescent development to ensure the child is in an educational and appropriately stimulating environment. Secure environments typically are not appropriately stimulating.<sup>322</sup>

**Aizer, A., J. Doyle, *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges*, National Bureau of Economics Research Working Paper No. 19102, 2013.**

- Juvenile incarceration is estimated to increase adult incarceration by 23%.
- Juvenile incarceration is estimated to decrease high school graduation by 13%.

<sup>316</sup> W.Va. Code § 49-4-714(b); see, e.g., *State ex rel Ohl v. Egnor*, 201 W.Va. 777, 784, 500 S.E.2d 890, 897 (1997) (citing the former version of the disposition statute).

<sup>317</sup> W.Va. R.Juv.P. 34(a).

<sup>318</sup> *State of W.Va. ex rel. A.D., M.D., & D.D. v. The Honorable Jack Alsop, Judge of the 14th Judicial Cir* (unpublished memorandum decision), 2018 WL 3085174 (June 21, 2018)(holding a child must be placed in the least restrictive environment for the purpose of disposition and emphasizing the focus of the juvenile justice system is rehabilitation, not punishment).

<sup>319</sup> Elizabeth S. Scott, Natasha Duell, & Laurence Steinberg, *Brain Development, Social Context and Justice Policy*, *Wash. U. J. of Law and Policy*, 57 Spring (2018), (explaining importance of developmentally appropriate disposition planning and matching the individual child with a program designed to meet his or her needs).

<sup>320</sup> Gabrielle Prisco, *When the Cure Makes You Ill: Seven Core Principles to Change the Course of Youth Justice*, 56 N.Y.L. SCH. L. REV. 1433, 1435 (2011/2012).

<sup>321</sup> Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18(2) *THE FUTURE OF CHILDREN* 15 (2008)(online at: [www.futureofchildren.org](http://www.futureofchildren.org)).

<sup>322</sup> Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* (2014).



Loughran, T.A., E.P. Mulvey, C.A. Schubert, J. Fagan, A.R. Piquero, & S.H. Losoya, *Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, 47 *CRIMINOLOGY* 699 (2009).

- There is no marginal gain from placement in terms of future offending as compared to probation.
- For lengths of stay between 3-13 months, there was no marginal benefit for detaining a juvenile in a placement.

Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 *DEV. & PSYCHOPATHOLOGY* 453 (2010).<sup>323</sup>

- Two years after being adjudicated for a serious offense, a majority of youth (73.8%) reduced their offending to low or zero involvement in offending behavior.
- **For those youth who self-reported the lowest level of offending, placement in an institution raised their level of self-reported offending after release from institutional placement.**

Lipsey, Mark W., *The Primary Factors that Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4(2) *VICTIMS & OFFENDERS* 124 (2009).

- Counseling interventions yielded the largest reductions in recidivism followed by multiple services, skill building programs, restorative programs, and finally surveillance programs. Deterrence programs and discipline programs actually increased recidivism, though the effect of deterrence was relatively small (virtually zero).

**Economic arguments** also appeal to some judges. Find out how much the State will likely spend on the plan it is recommending and counter with the amount of money the plan you have created will cost. The estimate of the cost of sending a youth to a residential facility for one year in West Virginia ranges from \$80,000-\$100,000.<sup>324</sup>

“A year in a West Virginia juvenile facility costs more than \$80,000 per child, compared with \$1,000 to \$33,000 per child in community programs that have **reduced recidivism** by up to 20 percent in other states.”<sup>325</sup>

“State taxpayers spent as much as \$100,000 per year per youth in a residential placement facility, even though research shows that such placements generally fail to reduce reoffending.”<sup>326</sup>

### Sample Arguments Against the DHHR’s Plan and Advocating for Yours

The MDT plan is not “the least restrictive” plan that will “meet [the child’s] needs and protect the welfare of the public,” as the client is entitled to under West Virginia Rule of Juvenile Procedure 34.

- Suggest a plan that would meet the client’s needs and protect public welfare that is less restrictive.

The needs of the client as determined by the MDT and upon which the plan is built are incorrect. In fact, the client’s needs are different.

- Introduce alternative assessments, evaluations, or testimony by members of the MDT that disagreed with the team’s overall findings.

The court should not adopt the plan because the DHHR did not follow protocol in developing the plan as required by West Virginia Code § 49-4-406, and therefore, the plan is deficient. Examples of deficiencies:

- An MDT was never convened.<sup>327</sup>

<sup>323</sup> See also Loughran, T.A., E.P. Mulvey, C.A. Schubert, J. Fagan, A.R. Piquero, & S.H. Losoya, *OJJDP Juvenile Justice Bulletin: Studying Deterrence Among High-Risk Adolescents*, August 2015, (online at <http://www.pathwaysstudy.pitt.edu/documents/Studying%20Deterrence%20Among%20High%20Risk%20Adolescents.pdf>)

<sup>324</sup> The Pew Charitable Trusts, *West Virginia’s 2015 Juvenile Justice Reform*, May 2016 (online at: <http://www.pewtrusts.org/~media/assets/2016/05/west-virginias-2015-juvenile-justice-reform.pdf>).

<sup>325</sup> Dana Goldstein, *Juvenile Injustice*, online at: [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/10/junior\\_smith\\_and\\_juvenile\\_incarceration\\_in\\_west\\_virginia.html](http://www.slate.com/articles/news_and_politics/politics/2014/10/junior_smith_and_juvenile_incarceration_in_west_virginia.html).

<sup>326</sup> The Pew Charitable Trusts, *West Virginia’s 2015 Juvenile Justice Reform*, May 2016 (online at: <http://www.pewtrusts.org/~media/assets/2016/05/west-virginias-2015-juvenile-justice-reform.pdf>).

<sup>327</sup> *E.H., et al., v. Matin, et al.*, 201 W.Va. 463, 498 S.E.2d 35 (1997).



- Not all the persons listed in the statute (§49-4-406(d)) were invited to the meeting, and therefore, the team was missing vital information when crafting the plan.<sup>328</sup>
- The DHHR did not assess the child using a standardized assessment instrument as required under § 49-4-406(c), and therefore, the plan is possibly biased or based on guesses with no standardized basis for the decisions being made.

The MDT did an assessment, but the plan it created is not actually responsive to those needs. For example, the assessment shows the child needs grief counseling, but the team recommends placing him or her in a home or a facility where there is no grief counseling available.

The court should not adopt the MDT's plan (where it is advocating for an out-of-home placement) because it has not considered placing the child with relatives or foster care homes as is required under West Virginia Code § 49-4-403.

- Identify relatives who are willing to care for your client, and ask them to come to court.

The court should not adopt the MDT's recommendation to place the child out of state because it did not consider in-state options suitable to the child's needs as required by West Virginia Code § 49-4-406(d)(3).

- Identify an in-state program or facility that can meet the child's needs.

The person who conducted the psychological evaluation of the client is deficient or unqualified.

- He or she has a history of always recommending residential placement.
- He or she clearly copied-and-pasted his or her findings from other reports.
- He or she does not have experience with children and adolescents.
- He or she is not actually licensed to practice psychology or has a history of complaints.

The disposition plan recommended will not rehabilitate the juvenile so as to enable and promote him or her becoming a productive member of society as required under West Virginia Rule of Juvenile Procedure 36.

**The court, in the alternative, should adopt our plan.**

- It is beneficial if you already have admission into an alternative, community-based program for appropriate treatment or services secured or on the way to being secured. Ask someone from this program to come to court.
- Have client speak for himself/herself

Counsel also should be prepared to argue for his or her plan utilizing a wealth of research, referenced above, available to defense attorneys that show the advantages of community-based programs for rehabilitation.

West Virginia Rule of Juvenile Procedure 36 states **"The goal in disposition should be the rehabilitation of the juvenile to enable and promote becoming a productive member of society."**

## The Disposition Hearing: Dispositions

Dispositions for status offenses and delinquency offenses have different parameters.

### Juvenile Delinquency Dispositions

*Options at disposition:*

- **Dismissal.**<sup>329</sup>
- **Dismissal and referral** to a community agency for assistance.<sup>330</sup>

<sup>328</sup> *Id.* (noting the makeup of the MDT is mandated by statute).

<sup>329</sup> W.Va. Code § 49-4-714(b)(1).

<sup>330</sup> W.Va. Code § 49-4-714(b)(2).



- **Probation**, if the court finds that the child is in need of “extra-parental supervision.” Probation may include a “program of treatment or therapy,” “limit[ing] the child’s activities,” and community service.<sup>331</sup>
- **Temporary foster care** or temporary commitment to a child welfare agency, if the child cannot or will not return to the parent’s care.<sup>332</sup>
- **Commitment to the Division of Juvenile Services (DJS)** for placement in a “juvenile services facility for the treatment, instruction, and rehabilitation of juveniles” for no more than the maximum term for which an adult could have been sentenced for the same offense, taking into account time served in a detention center pending adjudication, disposition, or transfer.<sup>333</sup>
  - » Note, if a juvenile has no past adjudications nor a prior pre-adjudicatory period/probation in the current matter, the court may *only* order him into an out-of-home placement if there is clear and convincing evidence that there is a “significant and likely risk of harm” to the juvenile, family, or public if the child is placed at home, and that the department has made all reasonable efforts to prevent the child from being removed from his or her home, or it is an emergency.<sup>334</sup>
  - » Within the prong of the statute discussing commitment to DJS: “The court maintains discretion to consider alternative sentencing arrangements.”<sup>335</sup>
- **Involuntary commitment** to a mental health facility, if recommended by the child’s treatment plan, following West Virginia’s involuntary commitment procedures.<sup>336</sup>

#### *Possible Additional Penalties*

- A **fine** up to \$100.<sup>337</sup>
- **Restitution** for either full or partial actual damages.<sup>338</sup>
- **Community service**, including participating in the litter control program.
- **Suspension of driving privileges**, preventing the child from getting, or revoking, his or her learner’s permit or driver’s license for up to two years.

#### *Some Notes on Probation*

Probation is usually preferable to clients than an out-of-home placement. To improve your client’s chances of success on probation, try to keep in mind the following advocacy points:

- The judge should explain the conditions of the client’s probation in developmentally appropriate language during the disposition hearing.
- Counsel has a duty to carefully explain the conditions to the juvenile after the hearing and ensure that the juvenile understands each condition. This duty is especially important, keeping in mind:
  - » “Research shows that young adolescents have lower cognitive capacities, particularly in stressful situations, than adults.”<sup>339</sup>
  - » A “long recitation of rules” also may be difficult to understand by a person with impaired language skills, regardless of whether it is oral or written.<sup>340</sup>

<sup>331</sup> W.Va. Code § 49-4-714(b)(3)(A)&(B). See also W.Va. R.Juv.P. 39(e).

<sup>332</sup> If it does so, the court order shall state continuation in the home is contrary to the best interest of the juvenile and explain its reasoning; and whether or not the department made a reasonable effort to prevent the placement or that the emergency situation made those efforts unreasonable or impossible. W.Va. R.Juv.P. 39(b). Whenever the court transfers custody of a youth to the department, “an appropriate order of financial support shall be imposed upon the parents or legal guardians.” W.Va. R.Juv.P. 39(d).

<sup>333</sup> The order shall state continuation in the home is contrary to the best interests of the juvenile and explain its reasoning; it also shall state whether or not the department made a reasonable effort to prevent the placement or that the emergency situation made those efforts unreasonable or impossible. W.Va. Code § 49-4-714(b)(5)(A)-(C). See also W.Va. R.Juv.P. 39(c).

<sup>334</sup> *Id.*

<sup>335</sup> W.Va. Code § 49-4-714.

<sup>336</sup> W.Va. Code § 49-4-714(b)(6). See also W.Va. R.Juv.P. 41. Here, the commitment to a mental health facility is being used as a disposition and thus, does not require the staying of proceedings needed when a child is committed to a mental health facility for an examination of competency.

<sup>337</sup> W.Va. Code § 49-4-715(a)(1)-(4).

<sup>338</sup> *Id.* A child cannot be punished for being poor; a court must consider a child’s ability to pay in determining whether to order a fine or restitution. *State v. Kristopher G.*, 201 W.Va. 703, 500 S.E.2d 519 (1997).

<sup>339</sup> Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children’s Advocates*, 40 COLUM. J.L. & SOC. PROBS. 551, 566 (2007).

<sup>340</sup> Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, 15 U.C. DAVIS J. JUV. L. & POL’Y 37, 80 (2011).



- The probation officer is supposed to develop and implement “an individualized case plan in consultation with the juvenile’s parents, guardian or custodian, and other appropriate parties,” and base the plan upon the results of a risk and needs assessment conducted within the last six months prior to the disposition to probation.<sup>341</sup>
- Once the child is on probation, counsel should ensure the services he or she is matched with are responsive to the client’s needs. If they are not, one can argue a failure to provide matched services is a failure to provide appropriate care as required by the Child Welfare Act (Juvenile Act) to argue against services if the client desires their counsel to do so (and possibly to argue against probation violation allegations).
- An excellent resource: The Annie E. Casey Foundation. (2018). *Transforming Juvenile Probation: A Vision for Getting It Right*. Online at: <http://www.aecf.org/m/resourcedoc/aecf-transformingjuvenileprobation-2018.pdf>.

### Some Notes on Restitution

Although technically analyzing the former version of the restitution statute, the following cases provide gloss on the order of restitution made by the juvenile court, as their underlying logic should still apply:

- When probation is granted in a juvenile case, the trial judge may order restitution as part of a “program of treatment or therapy” designed to rehabilitate child, but such order must be *reasonable in its terms* and *within the child’s ability to perform*.<sup>342</sup>
- A child’s “‘present and probable future ability to repay’ [is] a pertinent consideration in determining whether restitution was justified or reasonable in a particular case.”<sup>343</sup>
- Probation should not be extended *solely* for the purpose of insuring payment of restitution; probation should be as brief as possible with the goal of helping the child get on the right track.<sup>344</sup>

### The Disposition Order

The dispositional order must contain findings of fact to support the order and also must include the following:

- Why public safety and the best interest of the juvenile are served by the disposition ordered;<sup>345</sup>
- What alternative dispositions, if any, were recommended to the court and why such recommendations were not ordered;<sup>346</sup>
- If the child is removed from the home and placed with the DHHR:<sup>347</sup>
  - » the court order shall reflect the issue of reasonable efforts was considered by the judge
  - » the findings of fact that support the treatment and rehabilitation plan the court has adopted upon recommendation of the multidisciplinary team
- If committed to the custody of the Division of Juvenile Services:<sup>348</sup>
  - » the order shall state that continuation in the home is contrary to the best interests of the juvenile and why; and whether the DHHR made a reasonable effort to prevent the placement or that the emergency situation made those efforts unreasonable or impossible
  - » the findings of fact that support the treatment and rehabilitation plan the court has adopted upon recommendation of the multidisciplinary team
  - » commitments to secure (locked) custody shall not exceed the maximum term for which an adult could have been sentenced for the same offense
- If committed to a mental health facility:<sup>349</sup>
  - » the order shall state that continuation in the home is contrary to the best interests of the juvenile and why; and whether the department made a reasonable effort to prevent the placement or that the emergency situation made those efforts unreasonable or impossible

<sup>341</sup> W.Va. Code § 49-4-413(a).

<sup>342</sup> *State v. M.D.J.*, 169 W.Va. 568, 289 S.E.2d 191 (1982).

<sup>343</sup> *In re Michael S.*, 206 W.Va. 291, 295, 524 S.E.2d 443, 447-48 (1999).

<sup>344</sup> *State v. Kristopher G.*, 201 W.Va. 703, 500 S.E.2d 519 (1997).

<sup>345</sup> W.Va. R.Juv.P. 39(a)(1)(A)-(C).

<sup>346</sup> *Id.*

<sup>347</sup> W.Va. R.Juv.P. 39(b).

<sup>348</sup> W.Va. R.Juv.P. 39(c).

<sup>349</sup> See W.Va. R.Juv.P. 41.



- » the findings of fact that support the treatment and rehabilitation plan the court has adopted upon recommendation of the multidisciplinary team
- If placed in an out of state facility:
  - » the reasons the juvenile was not placed in an in-state facility or program.<sup>350</sup>
- If the disposition changes the custody or placement of the juvenile:
  - » “the reasons why public safety and the best interest of the juvenile are not served by preserving the juvenile’s present custody;”<sup>351</sup> and
  - » “suitability of the placement, taking into account the program of the placement facility and assessment of the juvenile’s actual needs.”<sup>352</sup>

#### GREAT CASE LAW LANGUAGE HIGHLIGHT

“Before ordering the incarceration of a child adjudged delinquent, the juvenile court is required to set forth upon the record the facts which lead to the conclusion that no less restrictive alternative is appropriate. The record must affirmatively show that the child’s behavioral problem **is not the result of social conditions beyond the child’s control, but rather of an intentional failure on the part of the child** to conform his actions to the law, or that the child will be dangerous if any other disposition is used, or that the child will not cooperate with any rehabilitative program absent physical restraint.” Syl. Pt. 2, *State ex rel. R.S. v. Trent*, 169 W.Va. 493, 289 S.E.2d 166 (1982).

## Status Offense Dispositions

Status offenses have different disposition rules than those for delinquency offenses:

- If a child is found by clear and convincing evidence to have committed a status offense (or admits to the offense), the case goes to disposition.<sup>353</sup> Based on a risk and needs assessment that should have occurred prior to or at the disposition, the court refers the child to the DHHR for services.<sup>354</sup> If the status offense is truancy, then the court also may refer the child to a probation officer or truancy diversion specialist for supervision and treatment.<sup>355</sup>
  - » The DHHR is ordered to report to the court on the child’s progress every 90 days until the disposition order is deemed completed and the case returns to the court with disposition completed.<sup>356</sup>
  - » The services should be “designed to develop skills and social supports for the juvenile and to resolve problems related to the juvenile and his or her family.”<sup>357</sup>
- If the child or the family does not comply with the services, the DHHR can petition the court to order:<sup>358</sup>
  - » the family participate in the services or “restrain actions that interfere with or defeat a service plan,”<sup>359</sup> *or*
  - » placement of the juvenile either outside of the home in a nonsecure/staff secure placement or in the custody of the DHHR.<sup>360</sup>
- The court may **only** order the child placed outside of the home if:
 

One or more of the following apply:<sup>361</sup>

  - » the child has had a prior adjudication for a status or delinquency offense; *or*
  - » the child has had a prior disposition to a pre-adjudicatory improvement period or probation for the current matter; *or*

<sup>350</sup> W.Va. Code §49-4-714(c).

<sup>351</sup> W.Va. R.Juv.P. 39(a)(1)(c)(i).

<sup>352</sup> W.Va. R.Juv.P. 39 (a)(1)(c)(ii).

<sup>353</sup> W.Va. Code §49-4-711(4).

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* See also W.Va. R.Juv.P. 38.

<sup>356</sup> W.Va. R.Juv.P. 38(a).

<sup>357</sup> W.Va. R.Juv.P. 38(c).

<sup>358</sup> W.Va. Code § 49-4-712(b).

<sup>359</sup> W.Va. R.Juv.P. 38(b)(1). See also W.Va. Code § 49-4-712(b)(1).

<sup>360</sup> W.Va. R.Juv.P. 38(b)(2). See also W.Va. Code §49-4-712(b)(2).

<sup>361</sup> W.Va. Code § 49-4-712(b)(2).



- » there is clear and convincing evidence of a significant and likely risk of harm to the juvenile, a family member, or the public *and* continued placement in the home is contrary to the best interest of the juvenile.

### The Disposition Order for Status Offenders

- The court has discretion, within the statutory limits, when making the final disposition decision.<sup>362</sup>
- If the disposition is placement in a residential facility, the court shall make findings of fact as to the necessity of this placement, which shall be stated on the record or reduced to writing and filed with the record or incorporated into the order of the court.<sup>363</sup> The findings of fact shall include the factors that indicate:
  - » The likely effectiveness of placement in a residential facility for the juvenile; and
  - » The community services which were previously attempted.<sup>364</sup>

**Appealing Disposition for Status Offenses:** A juvenile is allowed to appeal any disposition.<sup>365</sup>

**Reviews of Progress for Status Offense Dispositions:** A child's progress is reviewed every ninety days.<sup>366</sup>

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## xix. Post-Disposition

Children need the assistance of counsel after disposition for the following:

- appeals of both the adjudication and the disposition
- reviews of disposition
- advocacy for access to services the client wants
- education advocacy
- monitoring and challenging of dangerous or unlawful conditions of confinement

The juvenile defender must:

- Explain the right to appeal to the child, and work with the appellate attorney as needed<sup>367</sup>
- Explain the confidentiality of juvenile records and the sealing law and procedure to the child<sup>368</sup>
- Maintain regular contact with the child<sup>369</sup>
- Represent the child post-disposition in hearings, meetings, and in navigating the system<sup>370</sup>
- Provide representation at violation hearings as needed<sup>371</sup>

### Modification of Dispositional Orders

- West Virginia's Juvenile Act provides for modification of a dispositional order at the request of the child, when the child alleges a change of circumstances, or at the request of the government (probation, the DHHR, the DJS, or the prosecutor).<sup>372</sup>
- If it has been at least six months since the last dispositional order, the court must conduct a review hearing with at least 72 hours advanced notice of the hearing to the child and to the child's parent(s), guardian, or custodian.<sup>373</sup>

<sup>362</sup> W.Va. Code § 49-4-712.

<sup>363</sup> W.Va. Code §49-4-712(d)(1).

<sup>364</sup> W.Va. Code § 49-4-712(d)(2)(A) & (B).

<sup>365</sup> W.Va. Code § 49-4-712(f).

<sup>366</sup> W.Va. R.Juv.P. 38(a).

<sup>367</sup> National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 7.2 (2012), p. 121 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>368</sup> *Id.* at Std. 7.6, p. 126.

<sup>369</sup> *Id.* at Std. 7.1, p. 120.

<sup>370</sup> *Id.* at Std. 7.5, p. 124. See also W.Va. R.Juv.P. 43 (explaining the court will conduct regular judicial reviews of each case at least as frequently as once every three months).

<sup>371</sup> *Id.* at Std. 7.7, p. 127.

<sup>372</sup> W.Va. Code § 49-4-718(a). See also W.Va. R.Juv.P. 38(g) & 39(g).

<sup>373</sup> W.Va. Code § 49-4-718(b).



- If it has been less than six months since disposition, the court may or may not schedule a review hearing.<sup>374</sup>
- After reviewing the child's performance, any information regarding the child's family, and any information regarding services and service providers, the court shall consider "the best interests of the child and the welfare of the public" and may modify the disposition.<sup>375</sup>
- Note that absent clear and convincing evidence the child has substantially violated his or her disposition order, the court may not impose a more restrictive alternative; any modification must be less restrictive.<sup>376</sup>

### Probation Reviews

- Ensure your client is advised that the juvenile probation officer is supposed to "submit an overview to the court of the juvenile's compliance with the conditions of probation and goals of his or her case plan" every ninety days.<sup>377</sup>
- The judge has the option to discharge the client early from probation if termination is warranted because of the child's compliance, even without a hearing.<sup>378</sup> Be sure clients know this option exists as they may want to get off probation early.

### Litigating Probation Violations

- Probation revocations are initiated by either the prosecutor or the probation officer, who must file a petition "showing probable cause" the child has violated one or more conditions of his or her probation.<sup>379</sup>
- Once a petition is filed, the court may order immediate custody of the child or schedule a hearing with notice to the child at least 72 hours prior to the hearing.<sup>380</sup>
- If the child is in custody, the hearing must be within 5 judicial days; if not, within 10 judicial days.<sup>381</sup>
- **Most discovery rules for adjudication apply to revocation hearings—know the rules and insist on discovery!**<sup>382</sup>
- For the court to modify probation to be more restrictive or to revoke a child's probation, the State must show by *clear and convincing evidence* that a "substantial" violation of one or more probationary terms occurred.<sup>383</sup>
- Note that clear and convincing evidence is a higher standard than required to substantiate probation violation for adults.
- A juvenile subjected to probation revocation must be afforded all of the constitutional protections afforded an adult in similar proceedings.<sup>384</sup>
- The court *must* look at overall level of compliance with terms of probation and overall progress made when determining whether to revoke probation.<sup>385</sup>

<sup>374</sup> *Id.*

<sup>375</sup> W.Va. Code § 49-4-718(b)-(d).

<sup>376</sup> W.Va. Code § 49-4-718(b).

<sup>377</sup> W.Va. Code § 49-4-718(d)(1).

<sup>378</sup> W.Va. Code § 49-4-718 (d)(2).

<sup>379</sup> W.Va. R.Juv.P. 47(a).

<sup>380</sup> W.Va. R.Juv.P. 47(a).

<sup>381</sup> W.Va. R.Juv.P. 47(c).

<sup>382</sup> W.Va. R.Juv.P. 47(f).

<sup>383</sup> W.Va. R.Juv.P. 47(d).

<sup>384</sup> *State ex rel. E.K.C. by D.C. v. Daugherty*, 171 W.Va. 298, 298 S.E.2d 834 (1982). See also *In re Gault*, 387 U.S. 1 (1967) (explaining children are constitutionally entitled to the same due process protections as adults).

<sup>385</sup> *State v. McDonald*, 173 W.Va. 263, 314 S.E.2d 854 (1984).





### WHAT IS THE DEFINITION OF A “SUBSTANTIAL” VIOLATION?

The statute and the rule regarding probation revocation do not contain a precise definition of “substantial.” The Supreme Court of Appeals of West Virginia grappled with this question in *State v. McDonald*, 173 W.Va. 263, 314 S.E.2d 854 (1984). In that case, the Court held being out after curfew with a person on probation or parole, when both violated the child’s probation terms, were not “substantial violations.”

- The dicta in the case seems to imply the following could be considered when determining whether the violation is substantial:
  - » whether the violation lacked criminal conduct on respondent’s part
  - » whether it is likely the act will recur given respondent’s present attitudes
  - » whether the violation involved a curfew violation
  - » whether the violation involved being with someone else on probation/parole

### Advocating for Clients in Placements

Ongoing advocacy needs:

- For many youths placed in facilities, particularly in residential treatment centers, the youth must meet specific goals before release. Advocacy may be needed to alter these goals or argue for release even if the goals are unmet.
- Once a child is released, he or she should receive aftercare in the community. Advocacy may be needed to ensure the child receives *appropriate* aftercare services.
- If a child in a placement commits a disciplinary infraction, he or she may receive a disciplinary sanction. He or she may even face additional charges depending on the nature of the allegation. Advocacy may be needed to deal with these infractions/charges and mitigate the damage they may cause.

The attorney can advocate for the child on an ongoing basis in the following ways:

- Remain in touch with the child to ensure he or she is not being abused in the placement.
  - » Ensure there is a confidential way for your client to speak to you. Often, phone lines are intercepted, or a staff member is sitting with the child while he or she is on the phone. Ask staff members to allow you to speak to the child confidentially or go visit the child to ensure a confidential visit.
- Ensure the child is in the appropriate placement in line with his or her goals—the youth may be placed in a facility because it has a bed available rather than because it is the best match for the child’s treatment needs.
- Advocate that the child is receiving appropriate services and that his desires are considered, which may increase the child’s chance of success and decrease the chance of infractions.
- Represent the child at disciplinary hearings or informally advocate for the client at the facility if he or she is accused of breaking rules.
- Advocate for the child to progress through the program.
- Ensure the DJS or the DHHR is making a transition plan for the child to return to the community and putting aftercare programming in place in a timely fashion, so the child may return home as soon as possible with supports in place to ensure his or her successful reintegration.
- Represent the child at placement review hearings.

### Review of Placement

The court is supposed to hold periodic review hearings of probation or placement for both children adjudicated of delinquency offenses and children adjudicated of status offenses.<sup>386</sup> The MDT team is to submit written reports to the court and meet with the court at least every three months as long as the child remains in the legal or physical custody of the state.<sup>387</sup> If the child is placed out-of-home, the court is supposed to hold this review **every 90 days**.<sup>388</sup>

<sup>386</sup> W.Va. R.Juv.P. 43(a).

<sup>387</sup> W.Va. R.Juv.P. 35(e).

<sup>388</sup> W.Va. R.Juv.P. 43(a).



- The court is to review progress, needs, the continuing necessity of the placement, or anything else the court “considers pertinent” and issue an order as to whether the department made “reasonable efforts” to “finalize a permanency plan.”<sup>389</sup>
- Hearing participants, including the child, may appear via video conferencing.<sup>390</sup>

#### LITIGATION POINT:

If the court has not scheduled a review hearing your client is due according to the rules/statute, the attorney should make a strategic decision as to whether to push for the hearing to occur. If the child has been doing well, it may be wise to push for a review. If the child is struggling, it may be important to hold the hearing to advocate that he or she can be transferred to a more appropriate placement, or it may be wise to wait until the child’s behavior improves in order to prevent a step-back to a more restrictive environment.

**These review hearings are an opportunity for client advocacy. The juvenile defender can inform the court about the client’s progress in a client-centered manner, highlighting the client’s progress and success, rather than just hearing the report from the State regarding the client’s missteps and failures.**

- Counsel should identify any services that are not working for the child, so the individualized service plan may be modified in accordance with the client’s wishes and needs.
  - » A strong argument for the court is the fact that without appropriate treatment, even though a child may complete his or her treatment program, that child is at increased risk to recidivate.

#### STANDARD 7.3 TRIAL COUNSEL’S OBLIGATIONS REGARDING APPEALS

When the client chooses to appeal, trial counsel must file a notice of appeal and preserve the client’s right to appeal. Whenever possible, trial counsel should assist the client in obtaining appellate representation. When no appellate counsel is available, trial counsel should handle the appeal. When the client declines to appeal, trial counsel must explain to the client the consequences of the decision to waive the right to appeal.

- Trial counsel must be familiar with all state rules of appellate procedure so counsel can adequately preserve the client’s right to appeal. Trial counsel should be aware of and follow procedures for obtaining a stay of execution of the judgment or implementation of the court order pending appellate review. Trial counsel must know court rules and procedure, state statutes, and case law regarding waiver of appeals;
- When the client decides to appeal, trial counsel should, if possible, seek qualified, independent appellate counsel to represent the client on appeal; and
- When the client is unable to decide whether to appeal, trial counsel should err on the side of assisting the client by conducting the preliminary steps of preserving the right to appeal. Counsel must explain all the rights the client is relinquishing by either waiving the right to appeal as part of a plea bargain or not filing a timely appeal, which essentially constitutes a waiver of those same rights.

National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 7.3 (2012), p. 122 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

## xx. Appeals

### Overview

Appellate practice is an important part of juvenile defense. This remains true even if the appellate issue is not resolved until after a child exits placement or the juvenile justice system. Adjudications have long-term consequences, especially for sex offenses and other serious offenses, and may have important implications for plea negotiations or sentencing if the child gets in trouble in the future. The IJA/ABA Standard 10.3 provides that counsel should file appropriate notices of appeal and

<sup>389</sup> W.Va. R.Juv.P. 43(b) & (c).

<sup>390</sup> W.Va. R.Juv.P. 43(d).



either represent clients or arrange for representation on appeal.<sup>391</sup> Attorneys must explain potential appellate issues to juvenile clients, as well as the factors the client should consider in deciding whether to appeal. Attorneys should file appeals whenever their clients want them to do so.<sup>392</sup>

## The Law of Appeal

Like adults, juveniles have the right to file an appeal from a final decision of a circuit court.<sup>393</sup> An appeal also can arise from a certified question.<sup>394</sup>

A child whose case is transferred to adult court, whether by the mandatory or the non-mandatory provisions set forth in West Virginia Code § 49-4-710(d)-(f), can appeal following conviction of the transferred offense.<sup>395</sup>

Of note, West Virginia law provides a special procedure to directly appeal a non-mandatory decision to transfer.<sup>396</sup> The notice of intent to appeal with a request for transcripts must be filed within 10 days of the entry of the order of transfer.<sup>397</sup> The petition for appeal must be filed in the Supreme Court of Appeals within 45 days of the entry of the order of transfer.<sup>398</sup>

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## xxi. Writs of Habeas Corpus and Other Special Writs

The Supreme Court of Appeals of West Virginia has original jurisdiction over proceedings in special writs cases.<sup>399</sup>

- *Habeas Corpus*. A petition for a writ of habeas corpus is used when a child is being illegally detained.<sup>400</sup>
- *Writ of Mandamus*. A writ of mandamus is used to compel a court or an administrative agency to exercise its authority when it is obligated to do so.<sup>401</sup>
- *Writ of Prohibition*. A writ of prohibition is used to prohibit a court from taking any action when it is patently and unambiguously without jurisdiction to do so.<sup>402</sup>

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## xxii. Juvenile Records

### Confidentiality of Juvenile Records

- Records maintained by the court, child welfare agencies, and law-enforcement agencies may not be released to anyone, including any federal or state agencies.<sup>403</sup>
- Notwithstanding the prohibition in West Virginia Code § 49-5-101(a), records may be made available if specifically authorized by West Virginia Code § 49-5-101 or § 49-5-103.

<sup>391</sup> The Institute of Judicial Administration, American Bar Association (IJA-ABA), edited by Robert E. Shepherd, Jr., *Juvenile Justice Standards Annotated: A Balanced Approach*, published by the American Bar Association (1996), *Selected Excerpts* at Std. 10.3, p.15 (online at: <http://tidc.tamu.edu/IDPlanDocuments/Brazos/Brazos%20Juvenile%20Board%20Appendix%20I%20-%20Selected%20Excerpts%20from%20IJA-ABA%20Juvenile%20Justice%20Standards.doc>).

<sup>392</sup> National Juvenile Defender Center (NJDC), National Juvenile Defense Standards, Std. 7.3 (2012), p. 122 (online at: <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>).

<sup>393</sup> W.Va. Code § 58-5-1; W.Va. R.App.P. 5.

<sup>394</sup> W.Va. R.App.P. 17. See e.g., *State v. J.E.*, 238 W.Va. 543, 796 S.E.2d 880 (2017) (involving the Supreme Court of Appeals of West Virginia's consideration of certified questions regarding juvenile sex offender registration).

<sup>395</sup> W.Va. Code § 58-5-1; W.Va. R.App.P. 5.

<sup>396</sup> W.Va. Code § 49-4-710(j).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> W.Va. Const. Art. 8, § 3.

<sup>400</sup> See W. Va. Code § 53-4-1 *et seq.*

<sup>401</sup> See W. Va. Code § 53-1-1 *et seq.*

<sup>402</sup> *Id.*

<sup>403</sup> W.Va. Code § 49-5-101(a); § 49-5-103(b).



- » A copy of a juvenile's records shall automatically be disclosed to certain school officials if the juvenile is charged with certain offenses (involving violence against another person, possession of a dangerous or deadly weapon, or possession or delivery of a controlled substance), and the child's case has progressed to the point where there has been a determination of probable cause, the child has been placed on probation or pre-adjudicatory supervision, or a disposition other than dismissal has been made.<sup>404</sup>
  - Records only may be automatically transmitted to schools in West Virginia. The court shall notify out-of-state schools that the records exist and make an inquiry regarding whether the laws of that state permit the disclosure of juvenile records.<sup>405</sup>
  - "Juvenile records are absolutely confidential by the school official to whom they are transmitted and nothing contained within the juvenile's records may be noted on the juvenile's permanent educational record."<sup>406</sup>
  - Psychological test results and any mental health records shall be released to the designated school psychologist for review. Thereafter, the psychologist may disclose to the principal and other school employees of the child's school who would need to know the psychological test results, mental health records and any behavior that may trigger violence or other disruptive behavior by the child.<sup>407</sup>
- » Juvenile records may be open to the public in certain circumstances pursuant to West Virginia Code § 49-5-103(d)(1)-(4).
- » Juvenile records may be disclosed to other entities (including the child, the parent or guardian, other courts, institutions, or even researchers) pursuant to West Virginia Code § 49-5-103(d)(5).
- Any person who willfully violates the confidentiality of records outlined under West Virginia Code § 49-5-103 is subject to conviction of a misdemeanor.<sup>408</sup>

### Sealing of Juvenile Records

Juvenile court records shall be automatically sealed one year after the latter of a child's 18<sup>th</sup> birthday or the termination of the juvenile court's jurisdiction.<sup>409</sup>

- These records include, but are not limited to, court records and law-enforcement files and records.<sup>410</sup>
- "Sealed" means the records must be returned to the court in which the case was pending, where they must be kept in a separate, secure confidential file and may not be inspected except by order of the circuit court.<sup>411</sup>
- Further, the records must be physically marked as confidential and this **"has the legal effect of extinguishing the offense as if it never occurred."**<sup>412</sup>

Unlike juvenile delinquency records, juvenile proceedings transferred to the criminal jurisdiction are not sealed and the associated records are available to the public.<sup>413</sup> However, if the child is acquitted after transfer, "is found guilty of an offense other than the offense that was transferred," or if the transferred offense is subsequently dismissed, then the record must be sealed.<sup>414</sup>

<sup>404</sup> W.Va. Code § 49-5-103(c)(1)(A) and (B).

<sup>405</sup> W.Va. Code § 49-5-103(c)(6).

<sup>406</sup> W.Va. Code § 49-5-103(c)(8).

<sup>407</sup> W.Va. Code § 49-5-103(c)(14).

<sup>408</sup> W.Va. Code § 49-5-103(f).

<sup>409</sup> W.Va. R.Juv.P. 50 (stating records should not follow the juvenile for the rest of his or her life and thus, should be sealed when the child enters adulthood).

<sup>410</sup> *Id.*

<sup>411</sup> W.Va. Code § 49-5-104(c).

<sup>412</sup> W.Va. Code § 49-5-104(c) & (d).

<sup>413</sup> W.Va. R.Juv.P. 50(b).

<sup>414</sup> W.Va. R.Juv.P. 50(b)(1)-(3).



## xxiii. Special Education and Juvenile Delinquency

Truancy cases make up a high percentage of the juvenile justice cases in West Virginia and many clients have learning difficulties or disabilities. As such, juvenile defenders should familiarize themselves with federal special education laws and their application in West Virginia so that they may effectively advocate for their clients.<sup>415</sup>

Children with educational disabilities are at a higher risk for involvement in the juvenile justice system and are “grossly overrepresented among those confined in juvenile detention and correction systems.”<sup>416</sup> It has been estimated that up to seventy percent of children in the system have an educational disability with most have learning disabilities or an emotional disturbance disorder.<sup>417</sup> Children with an emotional disturbance disorder are “three times more likely to drop out of school” and 73% of those who drop out are arrested within five years.<sup>418</sup>

**Under the Individuals with Disabilities Education Act (IDEA) children with disabilities are entitled to a Free Appropriate Public Education (FAPE).<sup>419</sup> The IDEA is a federal law that West Virginia must follow because the state receives federal funding. Understanding the intersection between the special education and delinquency systems enables juvenile defenders to better advocate for their young clients.**

In West Virginia, education is a state *constitutional* right.<sup>420</sup>

Juvenile defenders can utilize the child’s special education rights and the child’s special education evaluations to ensure that the child is treated appropriately in juvenile court.

### Basics of IDEA and Special Education

- Under federal law, the school system has an affirmative duty to identify students who are in need of special education services and to provide those services. The affirmative duty of the school system to identify students with disabilities is called *ChildFind*.<sup>421</sup>
- Once the school has identified a student as potentially in need of services, the school must evaluate the student.<sup>422</sup>
  - » A child also may be referred to a special education evaluation by other people, including a teacher or a parent.<sup>423</sup>
- If the student is evaluated and is determined to be in need of special education services, the school must provide those services as part of the right to a Free Appropriate Public Education (FAPE).<sup>424</sup>
- Special education gives affirmative rights, such as the right to services and the right to a manifestation hearing before being disciplined for prohibited behavior.<sup>425</sup>
- Special education is defined as “specially designed instruction to meet the unique needs of a child with a disability.” The umbrella of special education services includes related services, such as counseling or speech services, travel to school, vocational education, and post-secondary transition planning.<sup>426</sup>

<sup>415</sup> For an overview of Special Education issues, see Legal Aid of West Virginia’s Special Education Resource guide, online at: <http://www.lawv.net/Resources/Self-Help-Library/Education/Special-Education>; see also West Virginia Department of Education Policy 2419, online at <http://wvde.state.wv.us/osp/policy2419.html>.

<sup>416</sup> Joseph B. Tulman, Chapter One: The Best Defense is a Good Offense: Using Special Education Advocacy for Delinquency Clients, at p. 1-6, in *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) for Children in the Juvenile Delinquency System*, p. 1-6 (Joseph B. Tulman & Joyce A. McGee, eds., Annie E. Casey Foundation Juvenile Detention Alternatives Initiative, spons., University of the District of Columbia School of Law Juvenile Law Clinic, 1998) (online at <http://njdc.info/wp-content/uploads/2014/10/Tulman-McGee-Special-Education-Advocacy.pdf>).

<sup>417</sup> Jim Comstock-Galagan, Esq., & Rhonda Brownstein, Esq., *Stopping the Schoolhouse to Jailhouse Pipeline by Enforcing Federal Special Education Law*, Newsletter of the ABA Children’s Rights Litigation Committee, Winter 2007, Vol. 9, Issue 2, p. 3 (online at: [https://apps.americanbar.org/litigation/committees/newsletter\\_gratis/childrens\\_rights\\_litigation.pdf](https://apps.americanbar.org/litigation/committees/newsletter_gratis/childrens_rights_litigation.pdf)).

<sup>418</sup> *Id.*

<sup>419</sup> 20 U.S.C.A. § 1400(c)(3) (2010).

<sup>420</sup> W.Va. Constitution, Art. 12, § 1.

<sup>421</sup> 20 U.S.C.A. § 1412(a)(3); 34 C.F.R. § 300.111; W.Va. C.S.R. § 126-16-1 *et seq.* Of note, nowhere in the law does it state a child must attend school for 30 days before becoming eligible to be reviewed for an IEP/special education services as some school districts like to argue.

<sup>422</sup> 20 U.S.C.A. § 1412(a)(3)(A) & (a)(7); 34 C.F.R. § 300.301 to .306.

<sup>423</sup> 20 U.S.C.A. § 1414(a)(1)(B).

<sup>424</sup> 20 U.S.C.A. § 1400(d); 34 C.F.R. §§ 300.17 & 300.101; 34 C.F.R. § 300.320 to .324.

<sup>425</sup> 20 U.S.C.A. § 1415 (regarding procedural safeguards); 34 C.F.R. § 300.530 to .536 (regarding discipline).

<sup>426</sup> 20 U.S.C.A. § 1401(9) & (29).



## Ways Special Education Can Help a Juvenile Defender

### 1. Information Gathering

The juvenile defender should attempt to obtain as much information about the child as early as possible. Many clients may already be receiving special education services. The defender can ask broad questions, such as, “do you take any medications to help you with school?” or “do you have an IEP?” to find out if the child might be receiving special education services.

Counsel should request any and all education records for a child receiving special education services, such as:

- current and past psycho-educational assessments
- any and all IEPs
- education-related mental health referrals, assessments and recommendations
- behavioral and disciplinary reports
- pupil logs and transcripts
- expulsion records
- any psychological reports in the child’s cumulative file<sup>427</sup>

Using these records is essential to forming a defense strategy. “Excavating records from kindergarten and first grade through the child’s current grade (or the grade in which the child left school altogether) often unearths a startling pattern of educational neglect, including a failure to diagnose and address learning disabilities or other education-related disabilities, and a corresponding pervasive, punitive, and essentially illegal application of school discipline sanctions.”<sup>428</sup>

The education records also can provide a treasure trove of potential favorable witnesses, as the child’s IEP team must consist of:

- the child’s parents or guardian;
- the child’s general education teacher(s);
- the child’s special education teacher(s) or special education service provider(s);
- a representative of the school district;
- an “individual who can interpret the instructional implications of evaluation results” such as an audiologist, speech/language pathologist, or school psychologist;
- at the discretion of the parent or the school district, other personnel with knowledge or special expertise;
- the student;
- as appropriate, a representative of any agency that will likely be responsible for providing or paying for transition services; and
- past service coordinators or private school or facility representatives as needed.<sup>429</sup>

### 2. Helping Clients Access Services Outside of the Delinquency System

Special education rights afford children access to an array of supports and services they can procure through the education system, including, for example, mental health counseling and tutoring.

#### LITIGATION POINT:

**Explaining that a child will receive the services necessary to meet his or her needs through the education system is a great argument for dismissal at disposition.**

<sup>427</sup> Semuteh Freeman, Marlies Spanjaard & Teresa Eden Zabala, *The Impact of Special Education Advocacy on Juvenile Delinquency Dispositions*, presented at the National Juvenile Defender Center Annual Summit, p. 45 (October 28-29, 2016)(online at: <http://njdc.info/wp-content/uploads/2016/10/Special-Education-Advocacy-PPT.pdf>).

<sup>428</sup> See Eileen L. Ordovery & Joseph B. Tulmen, Chapter 4: School Discipline and Students With Disabilities at p.4-2 in *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) for Children in the Juvenile Delinquency System*, (Joseph B. Tulman & Joyce A. McGee, eds., Annie E. Casey Foundation Juvenile Detention Alternatives Initiative, spons., University of the District of Columbia School of Law Juvenile Law Clinic, 1998)(online at <http://njdc.info/wp-content/uploads/2014/10/Tulman-McGee-Special-Education-Advocacy.pdf>).

<sup>429</sup> WV C.S.R. § 126-16 Attachment at Chapter 5(D); see also West Virginia Department of Education Policy 2419, pp. 47-48, online at: <http://wvde.state.wv.us/osp/policy2419.html>.



If a child is already in special education, the attorney can advocate for new services through the IEP rather than through the delinquency system, assuming the client prefers this option/outcome.

If the child is not receiving special education services but may benefit from an evaluation to determine if he or she qualifies, the defender may work with the parent/guardian or the school to make a referral if that is what the child wants.<sup>430</sup> Because federal special education law requires the involvement of a child's parent/guardian to initiate services, counsel should discuss with the client the need to involve the parent/guardian.<sup>431</sup>

Regardless of referral source, once the referral for evaluation for special education has been made, the school district has five days in which to provide the parent/guardian with a consent form to determine if the parent/guardian wants the eligibility/evaluation process to begin.

Evaluations must be completed and an Eligibility Committee meeting held within eighty calendar (not school) days of the date the school district receives consent from the parent/guardian.

Remember, consistent with representing a child's expressed interest "[a]n attorney representing a child in a delinquency matter cannot, consistent with professional ethics, pursue special education rights if the child does not want to pursue those rights."<sup>432</sup>

Indicators for Special Education Services:<sup>433</sup>

- Poor grades/ Drop in grades
- Poor attendance
- Multiple behavioral incidents
- Mental illnesses
- Delayed speech and language
- Cognitive delays
- Physical impairments

### 3. Integrating Special Education in Your Defense Case

#### *Discipline Overview*

School discipline frequently becomes school exclusion. Exclusion, which includes suspension and expulsion as discipline, is unlikely to improve a child's behavior at school when it separates the child from school-based resources designed to help that student make progress on social and behavioral goals in their IEP. Risk of drop-out increases with the first suspension (and continues to increase with every subsequent suspension).<sup>434</sup>

- A child may be removed from his or her current placement to an alternative placement for 10 school days (or less) before the removal must be reviewed.
- Disciplinary procedures apply when an alternative placement is more than 10 days, either consecutively or cumulatively.
  - » A student is to continue receiving special education so he or she may continue to participate in the general education curriculum, albeit in another setting, and to progress toward meeting his or her IEP's goals, *and*
  - » Decisions must be documented on the Disciplinary Action Review Form (DARF).

<sup>430</sup>

<sup>431</sup> 34 C.F.R. § 300.301(b); *see also* Joseph B. Tulman, Chapter One: The Best Defense is a Good Offense: Using Special Education Advocacy for Delinquency Clients, pp. 1-1 to 1-10 & Joseph B. Tulman & Milton C. Lee, Jr., Chapter 2: Strategies for Using Special Education Law to Improve the Outcome of an Individual Delinquency Case, pp. 2-1 to 2-29, *in* Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) for Children in the Juvenile Delinquency System, (Joseph B. Tulman & Joyce A. McGee, eds., Annie E. Casey Foundation Juvenile Detention Alternatives Initiative, spons., University of the District of Columbia School of Law Juvenile Law Clinic, 1998)(online at: <http://njdc.info/wp-content/uploads/2014/10/Tulman-McGee-Special-Education-Advocacy.pdf>).

<sup>432</sup> Joseph B. Tulman, Chapter One: The Best Defense is a Good Offense: Using Special Education Advocacy for Delinquency Clients, pp. 1-1 to 1-8, *in* Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) for Children in the Juvenile Delinquency System (Joseph B. Tulman & Joyce A. McGee, eds., Annie E. Casey Foundation Juvenile Detention Alternatives Initiative, spons., University of the District of Columbia School of Law Juvenile Law Clinic, 1998)(online at: <http://njdc.info/wp-content/uploads/2014/10/Tulman-McGee-Special-Education-Advocacy.pdf>).

<sup>433</sup> Semuteh Freeman, Marlies Spanjaard & Teresa Eden Zabala, *The Impact of Special Education Advocacy on Juvenile Delinquency Dispositions*, presented at the National Juvenile Defender Center Annual Summit, p. 46 (October 28-29, 2016)(online at: <http://njdc.info/wp-content/uploads/2016/10/Special-Education-Advocacy-PPT.pdf>).

<sup>434</sup> L. Kate Mitchell, "We Can't Tolerate That Behavior in this School!": *The Consequences of Excluding Children with Behavioral Health Conditions and the Limits of the Law*, 41 NYU Rev. L. & Soc. Change 407 (2017)



### *Manifestation Determination Reviews*

Children with an IEP are entitled to a Manifestation Determination Review prior to a child's placement being changed—i.e., being suspended for more than 10 days or expelled from school.<sup>435</sup>

The Manifestation Determination Review (MDR) looks at two factors:<sup>436</sup>

- Was the conduct in question caused by, or had a direct and substantial relationship to, the student's disability?
- Was the conduct in question the direct result of the school district's failure to implement the student's IEP?

If the results of the MDR find the child's behavior was a manifestation of his or her disability:<sup>437</sup>

- The IEP Team will conduct a functional behavioral assessment (FBA).
- The IEP Team will then create and implement a behavioral intervention plan (BIP) for the child.
- If the local educational agency already has conducted such an assessment, then the IEP team will go directly to creating or modifying the behavioral intervention plan (BIP).

If the results of the MDR find the child's behavior was not a manifestation of his or her disability, then no changes to the child's IEP are mandated.

Benefits of the MDR

- It serves as an information gathering event.
- The information elicited and the factual findings at the MDR can be useful in advocating for diversion or outright dismissal, for arguing suppression motions, for mitigation at the detention hearing and at adjudication, and to support alternative dispositional orders if the child is ultimately adjudicated delinquent.<sup>438</sup>

### *Protections for Students Not Yet Eligible for Special Education and Related Services*

If the school district had knowledge *before* the behavior resulting in disciplinary action occurred that the student had a disability, then the student may assert the above protections.

Knowledge exists where:<sup>439</sup>

- The parent has expressed concern to district professional personnel that resulted in written documentation that the student may need special education and related services.
- The parent has requested, in writing, that the student be evaluated for special education.
- The student's teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by the student directly to the school district's director of special education or to other supervisory personnel of the school district in accordance with the district's established "ChildFind" system and referral process.

If a student is not currently receiving special education services and a parent/guardian requests an evaluation while the student is subject to disciplinary measures, the evaluation must be conducted in an expedited manner.

- If student is eligible for special education, then the IEP team will hold a meeting to create an IEP and a manifestation hearing will occur.
- If student is not eligible, discipline will continue as ordered.

IDEA does not:

<sup>435</sup> 20 U.S.C.A. § 1415(k)(1)(E). There are some offenses for which the school may remove the child for more than 10 school days without review first required: (1) the student carries or possesses a weapon at school, on school premises, or at a school function; (2) the student knowingly possesses, carries or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function; and (3) the student inflicts serious bodily injury to another person at school, on school premises, or at a school function. See West Virginia Department of Education Policy 2419, W. Va. C.S.R. § 126-99 (online at: <http://wvde.state.wv.us/osp/policy2419.html>).

<sup>436</sup> 20 U.S.C.A. § 1415(k)(1)(E) & (F).

<sup>437</sup> 20 U.S.C.A. § 1415(k)(1)(F); see also the West Virginia Department of Education Policy 2419, p. 75, online at: <http://wvde.state.wv.us/osp/policy2419.html>.

<sup>438</sup> See Semuteh Freeman, Marlies Spanjaard & Teresa Eden Zabala, *The Impact of Special Education Advocacy on Juvenile Delinquency Dispositions*, presented at the National Juvenile Defender Center Annual Summit, p. 56 (October 28-29, 2016)(online at: <http://njdc.info/wp-content/uploads/2016/10/Special-Education-Advocacy-PPT.pdf>).

<sup>439</sup> 20 U.S.C.A. § 1415(k)(5)(B).





- prohibit an agency from reporting a crime committed by a student with a disability to appropriate authorities, or
- prevent state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a student with a disability.

If a school district reports a crime committed by a student with a disability, the school district must ensure copies of the student's special education and disciplinary records are transmitted for consideration by the authorities to whom the agency reports the crime, but only to the extent permitted by the Family Educational Rights and Privacy Act (FERPA) and West Virginia Board of Education Policy 4350.

### *Special Education Arguments at the Detention Hearing*

If the client is either receiving special education services or needs to be evaluated for special education services, the defender can make the following arguments at the detention hearing:

- Detention may be harmful to the client's ongoing education, which in turn harms his or her chances at rehabilitation.
  - » The client will not receive the special education services to which he or she is entitled under federal law at the facility in which he or she will be placed pretrial.
  - » Remind the court about the importance of education continuity and credit accrual, and that it is unlikely either will occur if the child's school placement is disrupted by detention.
  - » The client can remain in the community and receive services through the special education system. Detail those services for the court.
- If the client is nevertheless detained, defense counsel can advocate for the client to continue to receive the special education services to which he or she is entitled while in pre-trial detention, assuming the client is interested in receiving such services.
- In a special education hearing, an attorney can argue that the juvenile incarceration facility is not providing and cannot provide the child with a free appropriate public education. The attorney could use such a finding to argue that the delinquency court must order that the child be moved to a more appropriate place or be released to the community.

### **Discovery**

- Especially for youth charged with school-based offenses, the concurrent school disciplinary hearing or MDR offers a great opportunity for information gathering about the state's case and for developing witness testimony that may be used later for impeachment material.
- It is wise for the defense attorney to ensure that he or she is present at these hearings to ensure that the client's Fifth Amendment rights are protected and that the client refrains from making statements regarding the alleged offense.

### **Defense Theory**

There are many ways that special education advocacy can assist a juvenile defender in developing a defense theory. The authors of a special education advocacy manual for children in the juvenile delinquency system have provided the following sample theories and strategies for the juvenile defender:

- Truancy.** In a truancy case, an attorney can challenge the delinquency court's jurisdiction based upon an alleged failure of the school system to exhaust administrative remedies regarding the child's special education needs.
- Miranda Waiver.** An attorney can obtain evaluations of the child through the special education process and, if beneficial, use those evaluations to demonstrate the child was not capable of waiving *Miranda* (*Miranda v. Arizona*, 384 U.S. 436 (1966)) rights knowingly and intelligently.
- Mens Rea.** An attorney can demonstrate through expert testimony that, notwithstanding appearances and people's ordinary interpretations, a child with a developmental disability or with a receptive and expressive language disorder



was not interacting meaningfully or knowingly (i.e., was not acting with criminal intent) with a purported co-defendant in an alleged crime or delinquent act.<sup>440</sup>

### Disposition

The disposition should meet the child's special education needs, including services ordered in the IEP. Use the goals and recommendations in the IEP to advocate for the least restrictive alternative and/or a client's preferred placement.

### Post-Disposition

**Children do not lose their eligibility for special education services just by being involved in the juvenile justice system or by being placed by the juvenile justice system.**<sup>441</sup>

- Eligible students with disabilities who are in state correctional institutions are afforded special education and related services that are in accordance with applicable state and federal laws and regulations.<sup>442</sup> This group includes students who had received services in accordance with an IEP, but who had left school prior to their incarceration, as well as students who did not have an IEP in their last educational setting, but who had actually been identified as a student with a disability for Part B services.<sup>443</sup>
- Children in facilities receive special education services at a rate four times as high as children in public school programs.<sup>444</sup>
- Eligibility for special education services extends until the child reaches the maximum age of entitlement identified by state law, no longer requires special education or graduates from high school with a regular diploma, including children placed in adult correctional facilities secondary to transfer.<sup>445</sup>
- **Behavior Management Program** - For a child who is incarcerated and has a disability or emotional disturbance, the attorney can develop with the assistance of a clinical psychologist, a behavior management program within the IEP that prohibits the use of aversive techniques (e.g., corporal punishment, restraints, harsh language) and requires the use of positive reinforcement and rewards.
- The Every Student Succeeds Act (ESSA) requires state and local agencies to coordinate with correctional facilities to facilitate successful education transitions for justice-involved youth.<sup>446</sup>
  - » Must be done both when a student is entering a juvenile justice facility and when a student is leaving a juvenile justice facility.<sup>447</sup>
  - » State agencies must ensure students can transfer credits they earned during placement to their local schools.<sup>448</sup>

<sup>440</sup> Joseph B. Tulman & Milton C. Lee, Jr., Chapter 2: Strategies for Using Special Education Law to Improve the Outcome of an Individual Delinquency Case, p. 2-2 in *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) for Children in the Juvenile Delinquency System* (Joseph B. Tulman & Joyce A. McGee, eds., Annie E. Casey Foundation Juvenile Detention Alternatives Initiative, spons., University of the District of Columbia School of Law Juvenile Law Clinic, 1998)(online at: <http://njdc.info/wp-content/uploads/2014/10/Tulman-McGee-Special-Education-Advocacy.pdf>).

<sup>441</sup> 20 U.S.C.A. § 1412(a); 34 C.F.R. § 300.111(a)(1)(i).

<sup>442</sup> See generally W.Va. C.S.R. § 126-53-1.

<sup>443</sup> W.Va. C.S.R. § 126-16-5.

<sup>444</sup> L. Kate Mitchell, "We Can't Tolerate That Behavior in This School!": The Consequences of Excluding Children With Behavioral Health Conditions and the Limits of That Law, 41 N.Y.U. Rev. L. & Soc. Change 407, 428 (2017).

<sup>445</sup> 20 U.S.C.A. § 1414(c)(5)(B); 34 C.F.R. § 300.102.

<sup>446</sup> 20 U.S.C.A. §§ 6421, 6435 & 6438(a).

<sup>447</sup> 20 U.S.C.A. § 6455.

<sup>448</sup> 20 U.S.C.A. §§ 6455 & 6471.



## xxiv. Acronyms Utilized in Special Education

**504** – Section 504 of the Rehabilitation Act

**ABA** – Applied Behavioral Analysis

**ADA** – Americans with Disabilities Act

**ADL**– Activities of Daily Living/Adaptive Daily Living Skills

**ADR** – Alternative Dispute Resolution

**AT** – Assistive Technology

**BD** – Behavioral Disorder

**BIP** – Behavioral Intervention Plan

**CAP** – Corrective Action Plan

**CSOs -- Content Standards and Objectives**

**DD** – Developmental Delay

**ED** – Emotional Disturbance

**EPSDT** – Early Periodic Screening, Diagnosis and Treatment

**ESD** – Extended School Day

**ESY** – Extended School Year

**ESSA** – Every Student Succeeds Act

**FAPE** – Free and Appropriate Public Education

**FAS** – Fetal Alcohol Syndrome

**FBA** – Functional Behavioral Assessment

**FERPA** – Family Educational Rights and Privacy Act

**IAES** – Interim Alternate Educational Setting

**ID** – Intellectual Disabilities

**IDEA** – Individuals with Disabilities Education Act

**IEE** – Individualized Educational Evaluation

**IEP** – Individual Education Plan

**IFSP** – Individualized Family Service Plan

**ITP** – Individualized Transition Plan

**LD** – Learning Disability

**LEA** – Local Education Agency

**LRE** – Least Restrictive Environment

**MD or MH** – Multiple Disabilities or Multiply Handicapped

**MDR** – Manifestation Determination Review

**MMR** – Mildly Mentally Retarded

**Mod MR** – Moderately Mentally Retarded

**MOU** – Memorandum of Understanding

**NCLB** – No Child Left Behind

**OCR** – Office for Civil Rights

**OSEP** – Office for Special Education, U.S. Dep’t of Education

**OT** – Occupational Therapy

**P&A** – Protection and Advocacy

**Part B** – Special Education for School-Aged Children

**PBS** – Positive Behavioral Supports

**PD** – Physical Disability

**PDD** – Pervasive Developmental Disorder

**PLAAFP** – Present Levels of Academic Achievement and Functional Performance

**PLEP** – Present Levels of Performance

**PWN** – Prior Written Notice

**SAT** – Student Assistance Team

**SED** – Serious Emotional Disturbance

**SLD** – Specific Learning Disability

**SLI** – Speech/Language Impairment

**SSDI** – Social Security Disability Income

**SSI** – Supplemental Security Income

**TBI** – Traumatic Brain Injury

**TMH** – Trainable Mentally Handicapped

**TMR** – Trainable Mentally Retarded

**VI** – Visual Impairment

**Voc Ed** – Vocational Education

**VR** – Vocational Rehabilitation



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