

PART II: WORKBOOK

The workbook portion of this resource is designed to be used by a group of people including community members and representatives of youth and justice entities who are interested in developing or revising a juvenile code. Look to the introduction of this resource to identify key community members that might be included in this group (Chapter 1.7). The workbook is designed to be used by both individuals and groups as a starting point for values and policy discussions, system planning and design, and the drafting of specific provisions on identified subtopics.

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

Each chapter in this section leads a group to make certain key decisions that ultimately will affect drafted code structure and provisions. This resource is not designed to be a template for the drafting of a code word for word, but rather it should be used to identify your community's needs, values, and policy preferences relative to key provisions of a juvenile code. Once these decisions are made, they may be communicated to an attorney or someone with legal training to help in drafting the final code. The group should always review the attorney's draft to ensure it follows the groups' wishes.

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

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

CHAPTER 5

GENERAL PROVISIONS OF THE JUVENILE JUSTICE CODE

[5.1] OVERVIEW

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

- The purposes of the two laws are different (child protection versus rehabilitating adolescents and holding them accountable).
- Juvenile delinquency adjudications (trials) require more stringent requirements (with statutory reinforcement of the "Juvenile 7 Rights"—see Chapter 11).
- The required standard of proof for juvenile delinquency adjudications is higher (beyond a reasonable doubt—see Chapters 11 and 12).
- More and specific, tailored, statutory "doors" (using "informal adjustment, consent decrees, and various court orders") are desirable for adolescents and young adults to participate in services, programs, and activities, whether for therapeutic and/or cultural purposes—see Chapters 15, 17, and 19).
- The juvenile delinquency dispositions are different and may be more severe thus requiring special protections for youth (restitution, etc. and placement in a secure juvenile detention facility, in addition to placement in the home with protective supervision, kin and foster care placements, and guardianships—see Chapters 20 and 21).

A second and related decision in designing and drafting your juvenile law is whether to include two separate processes, one for juvenile offenders and one for status offenders (note that family-in-need-of-services [FINS] process is a type of "status offender" process and may be preferred as it prioritizes precourt services to youth and their families). We recommend that tribes design and include both processes in their juvenile law. While the purposes, rights, and doors to services, programs, and activities are the same, status offenders are treated differently in the following ways for the following reasons (see Chapter 21):

- The disposition options for status offenders are much more limited (legal custody may only be transferred temporarily, e.g., for thirty days).
- Placement outside of home, kin or other responsible adult placements, or foster care is limited to "juvenile shelter facilities" (such as shelters, halfway houses, group homes, etc.—placement in secure juvenile detention facilities and adult penal facilities is prohibited, even with sight and sound separation).

- The disposition orders automatically terminate after a short period of time, for example, thirty days with one possible extension of ninety days.

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

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

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

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

[5.2] TRIBAL CODE EXAMPLES

Zuni Children's Code

Title IX of the Zuni Tribal Code

Section 9-1-2 Purpose, Construction and Severability

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

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

The Laws of the Confederated Salish and Kootenai Tribes, Codified

Section 3-2-101. Purpose.

The confederated Salish and Kootenai tribes have enacted this Chapter, recognizing that Tribal children are the Tribes most important resource and their welfare it is of paramount importance to the Tribes. It is the purpose of this Chapter to provide and assure that each Tribal child within the jurisdiction of the tribal court shall receive the care and guidance needed to prepare such children to take their places as adult member[s] of the Tribes; to prevent the unwarranted break-up of Indian families by incorporating procedures that recognize the rights of children and parents or other custodial adults; and, where possible, to maintain and strengthen the family unit; to preserve and strengthen the child's individual, cultural, and Tribal identity. Wherever possible, family life shall be strengthened and preserved, and the primary efforts will be toward keeping the child with his or her family, and if this is not possible, then efforts shall be made toward maintaining the child's physical and emotional ties with the child's extended family and with the Tribal community

3-2-102. Intent. It is the intention of the Tribes in enacting this Chapter to incorporate to the fullest extent possible the honored customs and traditions of the child's particular Tribe, consistent with the Indian Civil Rights Act, 25 U.S.C. Section 1301 et seq. (1968), and with the needs and realities of Tribal members' lives and conditions upon the Flathead Reservation. Evidence may be adopted in any proceeding conducted pursuant to this Chapter of such

customs and traditions. Where it is shown to the satisfaction of the judge having jurisdiction over the hearing that the customs and traditions of the child in particular Tribe are consistent with the provisions of this Chapter, then the judge shall adopt such customs and traditions for the purposes of the hearing and such customs and traditions shall have the effect of law governing that particular hearing.

Sault Ste. Marie Tribal Code

36.102 Purpose.

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

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

Cherokee Indians, Eastern Band, North Carolina

Chapter 7A, Juvenile Code

Sec. 7A-1.—Purpose

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

- a. To divert juvenile offenders from the juvenile system through the intake services authorized herein so that juveniles may remain in their own homes and may be treated

through community-based services when this approach is consistent with the protection of the public safety;

- b. To provide procedures for the hearing of juvenile cases that ensure fairness and equity and that protect the constitutional rights of the juveniles and parents; and
- c. To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety.

[5.3] TRIBAL CODE COMMENTARY

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

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

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

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

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

[5.4] EXERCISES

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

Exercises

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

Read & Discuss*

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

National findings:

- Most delinquent acts by Native youth are low level offenses, many involving alcohol.
- Native youth receive disproportionately severe sanctions for delinquent acts, such as confinement or transfer to adult justice systems.
- There are inadequate law enforcement resources in Indian country.
- State and federal systems lack cultural competence and fail to attend to Native youths' needs.
- There is an overreliance on incarceration of Native youth.
- There is a lack of support and resources for tribal justice systems.
- 44% of the Native population is under 25.
- Native youth are twice as likely as white youth and three times as likely as minority youth to commit suicide.
- Gangs are becoming common in Indian country.
- Native youth suffer disproportionately from risk factors leading to delinquency: poor health, poverty, low education attainment, violence, depression and substance abuse.
- Native youth are overrepresented in the federal and state juvenile justice systems.

**Taken from Neelum Arya, Addie Rolnick, "A Tangled Web of Justice, American Indian & Alaska Native Youth in Federal, State, & Tribal Justice Systems," Policy Brief, Race & Ethnicity Series, Volume 1. Go to http://www.campaignforyouthjustice.org/documents/CFYJPB_TangledJustice.pdf*

CHAPTER 6

SUBJECT MATTER JURISDICTION

[6.1] OVERVIEW

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

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

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

[6.2] TRIBAL CODE EXAMPLES

Sault St. Marie Tribal Code

Chapter 36, Juvenile Code

36.201 Jurisdiction.

(1) There is hereby established for the Sault Ste. Marie Chippewa Indians Tribal Court a division to be known as the Juvenile Division. The Juvenile Division has exclusive original jurisdiction over all proceedings established in this Chapter in which an Indian child is:

- a) alleged to be a juvenile offender as defined in '36.324 of this Chapter, unless the Juvenile Division transfers jurisdiction to the Tribal Court according to '36.202 of this Chapter; or (Section on transfer to adult court)
- b) alleged to be a child who violates the provisions of subchapter V, VI, VII, or VIII of this Chapter. (Sec. V, Status Offenses; Sec. VI, Compulsory School Offenses; Sec. VII, Curfew; Sec. VIII, Provision Related to Alcohol and Drugs)

(2) The Juvenile Division shall have exclusive original jurisdiction over all proceedings under this Chapter in which a child is alleged to be a juvenile offender as defined in '36.324 of this Chapter.

SUBCHAPTER III: DEFINITIONS

36.303 Adult.

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

36.306 Child.

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

36.324 Juvenile Offender.

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

36.325 Juvenile Offense.

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

36.327 Juvenile Status Offense.

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

36.340 Transfer to Tribal Court.

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

36.341 Tribal Lands.

“Tribal lands” shall mean:

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

36.344 Tribal Child.

“Tribal child” means a child who is either:

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

**The Laws of the Confederated Salish and Kootenai Tribes, Codified
Youth Court**

3-3-103. Jurisdiction of the Youth Court. The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation have established a court known as the Confederated Salish and Kootenai Tribal Youth Court. The court has exclusive original jurisdiction over all proceedings established in this code in which an Indian youth is residing in or domiciled on the reservation, alleged to be a “Youth Offender” or “Youth in Need of Supervision,” as defined in Section 3-3-102 of this Chapter, unless the Youth Court transfers jurisdiction to the Tribal Adult Court or a State District Youth Court according to this code. Youth Court does not have jurisdiction over traffic or fish and game offenders, these matters are referred to the appropriate Tribal Court division.

3-2-105. Definitions.

(2) “Child” means any person less than eighteen (18) years of age.

(7) “Delinquent Child” means a child who has committed a delinquent act according to the provisions of the Codes of the Confederated Salish and Kootenai Tribes.

(8) “Domicile” means the place considered to be the child’s home, according to the traditions and customs of the child’s Tribe, or the place where the child is living and is expected to continue living for an indefinite period of time.

(15) “Indian Youth or Indian Child” means a child of Indian descent who is either enrolled or enrollable in an Indian tribe, band, community, or who is a biological descendant of an enrolled member and has significant contacts or identification with an Indian community.

(25) “Youth” means any person less than eighteen (18) years of age.

(34) “Youth Court” means the Court established by the Confederated Salish and Kootenai Tribes, to hear all proceedings in which a youth is alleged to be a delinquent youth, a youth in need of supervision, or a youth in need of care and includes the Youth Court, the judge, and juvenile probation officers.

(37) “Youth in Need of Supervision” means a youth who commits an offense prohibited by law which if committed by an adult, would not constitute a criminal offense, including but not limited to a youth who:

- a) Violates any Tribal, Montana municipal, State, or federal law regarding use of alcoholic beverages or tobacco;
- b) by minors, except that traditional cultural use of tobacco shall not be a youth offense;
- c) Habitually disobeys the reasonable and lawful demands of his parents, or guardian or is ungovernable and beyond their control;
- d) Being subject to compulsory school attendance, is habitually truant from school; or
- e) Has committed any of the acts of a delinquent youth but whom the Youth Court in its discretion chooses to regard as a youth in need of supervision;
- f) Runaway; or
- g) Curfew.

(38) “Youth Offender”: A youth who commits a “Youth Offense” or a “Status Offense” prior to the youth’s eighteenth (18th) birthday.

(39) “Youth Offense”: A violation of the law and order code of the Confederated Salish and Kootenai Tribes, or equivalent city, state, or federal law, which is committed within the exterior boundaries of the Flathead Indian Reservation by a person who is under the age of eighteen (18) at the time the offense was committed.

Zuni Tribal Code

CHAPTER 3 CHILDREN’S COURT

Section 9 -3-1, Children’s Court Establishment and Jurisdiction

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

B. Concurrent Jurisdiction. The Children’s Court shall have concurrent jurisdiction over any minor who within another jurisdiction, commits an act deemed illegal by the criminal laws of that jurisdiction provided that the minor is a resident of the Zuni reservation or under the jurisdiction of the court.

C. Composition. The court shall include the Healing to Wellness Court and other forums for alternative dispute resolution and mediation under the supervision and authority of the court.

Definitions:

B.7 Child. A person under 18 years of age.

B.13 Delinquent Act. An act, which if committed by an adult, would be designated as a crime under the Zuni Criminal Code or the laws of the state of New Mexico. The term “delinquent act” should also include the possession or consumption of alcohol by a minor.

B.20. Indian. A person who is a member or eligible to be a member of a federal recognized tribe, band, community, or Native Alaska village, group, or regional corporation as defined in 43 U.S.C. §1601, et seq.

21. Juvenile Offender. A person who commits a delinquent act prior to his eighteenth birthday, and includes a person who remains subject to the jurisdiction of the Court because of an act committed prior to his eighteenth birthday.

24. Minor in Need of Care. A minor who is:

- A. Neglected by a parent, guardian, custodian, other adult, or other care provider;
- B. Abused by a parent, guardian, custodian, other adult, or other care provider; or
- C. A status offender.

Eastern Band of Cherokee Indians

Juvenile Code

Sec. 7A-3.—Jurisdiction.

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

- (1) Proceedings to determine jurisdiction;
- (2) Proceedings to determine whether the juvenile is within the jurisdiction of the court;
- (3) Proceedings to determine whether the facts alleged constitute a delinquent or undisciplined offense;
- (4) Proceedings to determine whether the facts are sufficiently serious to warrant court action;

- (5) Proceedings to obtain assistance from community resources when court action is not necessary;
- (6) Proceedings to determine whether a juvenile who is on conditional release and under after-care supervision of the court counselor has violated the terms of his conditional release;
- (7) Hearing procedures;
- (8) Proceedings for expunction of records of juveniles adjudicated delinquent or undisciplined.

Sec. 7A-4.—Retention of jurisdiction.

When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or, until the delinquent juvenile reaches his 16th birthday and until the undisciplined juvenile reaches his 18th birthday, except as provided otherwise in this section. The court has continuing jurisdiction over a delinquent juvenile who is in custody and over proceedings to determine whether a delinquent juvenile is on probation or who is under the post-release supervision of the court has violated the terms of the delinquent juvenile's probation or the delinquent juvenile's post-release supervision. In addition, the court retains jurisdiction over the parent, guardian, or custodian of a juvenile who is under the jurisdiction of the court pursuant to this section if the parent, guardian, or custodian has been served with a summons pursuant to section 7A-18.

[6.3] TRIBAL CODE COMMENTARY

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

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

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

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

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

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

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

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

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

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

[6.4] EXERCISES

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

Exercises

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

Read & Discuss*

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

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

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

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

**Taken from "Adolescent Development and Juvenile Justice," Laurence Steinberg, Annu. Rev. Clin. Psychol. 2009, 5:47-73.*

CHAPTER 7

Juvenile Offenses

[7.1] OVERVIEW

Tribal juvenile codes have their own section on “subject matter jurisdiction.” This section acts in a dual capacity, often in conjunction with a definitions section to describe what constitutes a “delinquent act,” “juvenile offense,” or a “juvenile crime.” These categories are to be distinguished from “status offenses” or the conduct giving rise to a FINS. Juvenile offenders are subject to a secure detention sanction whereas status offenders or FINS clients are not. Aside from delimiting tribal power and tribal court adjudicatory jurisdiction, these definitions describe the conduct that will bring a youth and his or her family within both the rehabilitative and punitive power of the tribal government. As such, these definitions should be reflective of actual typical youth misconduct in the region but also known risky behaviors requiring timely intervention given existing resources. Keep in mind that it is now well documented that many states experienced unfounded “moral panics” that fueled punitive statutory reforms in the 1990s and 2000s where youth were viewed as super predators who should be handled by the adult criminal systems. This was bad policy based on misperceptions and unsubstantiated reports of youth crime. In defining your tribe’s “juvenile offenses” use reliable data on the needs of youth in four areas: family problems, mental health, problems with substance use, and youth misconduct. Be sure to include your local treatment providers and youth service providers in the discussion as they will know the circumstances and needs of the youth population. Their perspectives will be invaluable in defining what conduct should trigger tribal government intervention and rehabilitation for youth and their families.

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

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

4. Personal identity is fluid and unformed in adolescence. This is a period when individuals separate from their parent, experiment (often in risky endeavors), and struggle to figure out who they are.¹

It may be helpful to review Section 2.2: “Philosophical Choices” and Chapter 7: “Juvenile Offenses.”

¹ Elizabeth S. Scott and Laurence Steinberg, *Rethinking Juvenile Justice*, Cambridge, MA: Harvard University Press, 2008 at p. 151.

[7.2] TRIBAL CODE EXAMPLES

Eastern Band of Cherokee Indians

PART II—CODE OF ORDINANCES

Chapter 7A—JUVENILE CODE

ARTICLE I. IN GENERAL

Sec. 7A-2. Definitions.

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

(f) Delinquent juvenile shall mean any juvenile who is less than 16 years of age who has committed a criminal offense under tribal or federal laws, including violation of the motor vehicle laws.

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

THE KLAMATH CRIMINAL CODE

Title 2 Chapter 19

JUVENILE OFFENSES

19.313 Juvenile in Possession of Alcohol or Tobacco.

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

19.314 Firearms.

It is a crime for a juvenile to discharge a firearm on the Reservation unless the juvenile discharges the firearm under the supervision of a parent, guardian, or other responsible adult acting with the permission of the juvenile’s parent or guardian. However, if the juvenile is twelve (12) years of age or older and has completed a hunter’s safety course accredited by the Tribes or the State of Oregon, the juvenile is not guilty of an offense under this provision.

Native Village of Barrow Tribe Juvenile Delinquency Prevention and Rehabilitation Code

1-1 SHORT TITLE, PURPOSE, AND DEFINITIONS

1-1 C. Definitions

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

4. Amusement Device: Any machine or device designed to be operated or used for playing a game upon the insertion of a coin, trade check or slug, and which is played or operated essentially for amusement and entertainment, but does not mean or include any machine or device used exclusively for the vending of merchandise.

5. Child or Juvenile: Any person under the age of eighteen (18) years old who is a member or eligible for membership in the Native Village of Barrow Tribe or other person under the age of eighteen (18) years old where consent is obtained.

7. Controlled Substance: Any substances listed in 9.20.040 of the Barrow Municipal Code or AS 11.71.140 through AS 11.71.190 or any amendments thereto, including imitation controlled substances as defined by AS 11.73.099(3).

11. Delinquent Act: Any one of the acts set out in Chapter 1-2 of this Code committed by a child, the commission of which would bring that child within the jurisdiction of the juvenile court.

12. Delinquent Child: A child who commits a delinquent act prior to the child's eighteenth (18) birthday.

15. Drug Paraphernalia: All items, equipment devices, products and materials which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, as further defined in 9.20.040 of the City of Barrow Municipal Code, as that Code may from time to time be amended.

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

1-2 DELINQUENT ACTS

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

1-2 A. Acts Harming People or Animals

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

1-2 B. Acts against Public Order

1. Disorderly Conduct: Engaging in fighting, public indecency, or other acts that in some manner disturb the public or are hazardous to the public.
2. Dangerous or Reckless Driving: Operating any land or water vehicle in a dangerous or reckless manner, with excessive speed that is a threat to the safety of the community, or while under the influence of alcohol or drugs.
3. Excessive Noise: Creating unreasonable noise which disturbs the peace and privacy of another person in their residence. As used in this section, noise is unreasonable if, considering the nature and purpose of the juvenile's conduct and the circumstances known to the juvenile, including the nature of the location and the time of day or night, the conduct involves a gross deviation from the standard of conduct that a reasonable person would follow in the same situation. "Noise" does not include speech that is constitutionally protected.
4. Gambling: Engaging in any monetary gambling, wagering, or betting activity.

1-2 C. Acts against Property

1. Fire Starting: Intentionally starting a fire or causing an explosion which recklessly places another person or any property in danger. For purposes of this section, "another person" includes but is not limited to fire and police service personnel or other public employees who respond to emergencies, regardless of rank, functions, or duties being performed.

2. Vandalism: Willfully cutting, removing, defacing, or in any manner injuring any building, fence or enclosure, street, bridge, or other property without the express permission of the owner of the property at issue.

3. Tampering with Vehicles: Starting or otherwise meddling with, entering, occupying, loitering in, taking, or driving away any automobile or other vehicle belonging to another, without the consent of the owner or person in charge thereof.

4. Throwing or Shooting at Property: Throwing or shooting any stone, shot, or other object into or across any street or alley, or in any place where such action is likely to injure property, or throwing or shooting any stone, shot, or other object at any vehicle, structure, electric light, or other property of another (whether public or private), except in cases where such action is justifiably in defense of oneself, of another person, or of property and discharging any slingshot, firearm, pellet gun, or BB gun within one hundred yards of any residential structure, any business, any area used for storage of equipment or vehicles, or any tribal playground, softball field or cemetery, except in cases where such action is done justifiably in defense of oneself, of another person, or of property.

5. Trespass: Willfully or in any manner trespassing or intruding upon property not one's own against the will of the owner, occupant, or agent thereof.

6. Theft: Taking the property of another person without that person's consent, with the intent to steal or deprive the rightful owner of possession.

7. Depositing Sharp Objects: Throwing or depositing in any street or other public place any broken glass, bottles, crockery, nails, or other substance whatsoever whereby the feet or body of any person or property may be injured.

8. Release of Dogs: Willfully or intentionally releasing the confined dog of another person.

1-2 D. Alcohol and Controlled Substances

1. Possession, Consumption or Being under the Influence of Controlled Substances: Knowingly consuming, possessing or being under the influence of a controlled substance. Provided, however, that it is not a delinquent act for a juvenile to possess or consume a controlled substance for bona fide religious purposes based on tenets or teachings of a church or religious body, in a quantity limited to the amount necessary for religious purposes, and dispensed by a person recognized by the church or religious body. Provided further that a juvenile does not commit a delinquent act by consuming, possessing, being under the influence of a controlled substance which has been lawfully prescribed for him by a medical doctor. To qualify for this exception, the substance must be in the physical possession of the juvenile for whom it was prescribed or his parent or guardian.

2. Possession of Alcohol with Intent to Sell: Possessing an alcoholic beverage with the intent to sell it.
3. Possession or Use of Inhalants: Intentionally inhaling or being under the influence of the gas or vapors of any nonprescribed inhalant with the purpose of reaching a high.
4. Carrying or Transportation of Controlled Substances: Carrying, transporting, or aiding in the transportation of any controlled substance or any drug paraphernalia. Provided, however, that a juvenile does not commit a delinquent act by carrying or transporting a substance which has been lawfully prescribed for him by a medical doctor. To qualify for this exception, the substance must be in the physical possession of the juvenile for whom it was prescribed or his parent or guardian.
5. Manufacture, Sale, or Distribution of Controlled Substances: Participating or aiding in the manufacture, sale, or distribution of controlled substances.
6. Possession of Drug Paraphernalia: Knowingly possessing any drug paraphernalia.

[7.3] TRIBAL CODE COMMENTARY

The tribal statutes highlighted offer three different approaches in defining juvenile offenses. The first is to define juvenile offenses by reference to an existing criminal statute or statutes. For example, the Eastern Band of Cherokee provisions define a “delinquent juvenile” as a person who is less than sixteen years of age who has committed a criminal offense under tribal or federal laws, including violations of motor vehicle laws. The second approach is to adopt a tribal criminal code but to carve out a set of juvenile offenses separate from the adult crimes. See for example the Klamath Criminal Code, which has a separate section entitled “Juvenile Offenses” where it defines two crimes—“Juvenile in Possession of Alcohol or Tobacco” and “Firearms.” A third approach is to set out a list of juvenile offenses in the tribal juvenile court law. See the Native Village of Barrow’s Code, which divides twenty-two delinquent acts into four categories and defines them—acts harming people or animals, acts against public order, acts against property, and acts dealing with alcohol and controlled substances. Whichever approach is used, it is important to craft specific provisions targeted at youth behavior and to understand the purpose for crafting the provision. Is this intended to be a juvenile offense as opposed to a status offense where youth will be subject to secure detention and potential court supervision until they turn eighteen? Does the defined behavior capture risk factors identifying youth who need certain available therapeutic interventions? Do we prefer to establish a juvenile court system that handles only status offenders or that will use only a FINS process (where there will be no secure detention, there will be limited durations for tribal court supervision, and there will be a heavy focus on family habilitation/ rehabilitation)?

[7.4] EXERCISES

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

Exercises

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

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

Read and Discuss*

What are the common youth “crimes”?

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

- #1 Theft/Larceny—Typical Cases: Shoplifting, Stealing a Bicycle, Stealing from Backpacks and Lockers
- #2 Vandalism—Typical Cases: Tagging and Graffiti, Drawing on Public Restroom Walls, Keying a Car and Cutting Auto Tires
- #3 Alcohol Offenses—Typical Cases: Underage Purchase or Possession, Underage Consumption of Alcohol, Providing Alcohol to Underage Persons, Possessing an Open Container in Public/Car
- #4 Disorderly Conduct—Typical Cases: Fighting in a Public Place, Cursing at a Teacher, Flashing, Mooning and Indecent Exposure
- #5 Simple Assault or Battery—Typical Cases: Bullying when it Amounts to Assault, Child/Parent Physical Disagreements, Shoving or Pushing a Person
- #6 Possession of Marijuana—Typical Cases: Possessing Small Amounts of Marijuana, Smoking Marijuana in a Public Place
- #7 Tobacco Offenses—Typical Cases: Illegally Purchasing Tobacco, Chewing or Smoking Tobacco at School, Providing or Enabling Youth to Use Tobacco
- #8 Curfew Violations—Typical Cases: Sneaking Out of Home After Curfew, Walking Home After Curfew, Violating a Park Curfew
- #9 School Disciplinary Offense—Typical Cases: Disrupting Class, Food Fights and Cheating, Violating the Dress Code
- #10 Traffic Violations—Typical Cases: Speeding or Failing to Yield, Not Wearing a Seat Belt, Riding in the Back of a Pickup Truck
- #11 Truancy—Typical Cases: Cutting Class, Having Excessive Tardies, Violating Court Order to Attend School
- #12 Criminal Trespass—Typical Cases: Entering a Vacant Building, Entering Land or a Dwelling Without Permission, Returning to a Store After Being Banned
- #13 Mischief/Criminal Nuisance—Typical Cases: Damaging a Mailbox, Egging or Toilet-papering a House, Picking Flowers in a Restricted or Private Area
- #14 Possession of Drug Paraphernalia, Typical Cases: Having a Pipe in Pocket with Resin, Using Drug Paraphernalia to Use a Controlled Substance, Possessing Drug Paraphernalia to Grow Marijuana
- #15 Harassment—Typical Cases: Bullying, Making Telephone Calls Without Good Reason, Insulting or Taunting Another Person to Provoke a Disorderly Response
- #16 Fraud—Typical Cases: Writing Bad Checks, Impersonating Another Person, Committing Fraud Via E-Mail
- #17 Burglary—Typical Cases: Enter Friends or Relatives Homes to Steal Something, Entering a School Building to Steal Something, Entering a Home/School and Causing Damage
- #18 False Reporting—Typical Cases: Pulling a Fire Alarm, Calling in False 911 Calls, Calling in a Bomb Threat
- #19 Loitering—Typical Cases: Hanging Out in a Group in Front of a Building, Smoking in Groups on the Street Corner, Being in a Park or Store After Closing
- #20 Possession of Stolen Property—Typical Cases: Having a Bicycle you know is Stolen, Receiving Stolen Goods from a Friend, Being in the Company of Someone Who is Stealing
- #21 Possession of a Weapon—Typical Cases: Unlawfully Possessing Pepper Spray, Possessing a BB or Pellet Gun While Underage, Carrying Weapons like Metal Knuckles or Nunchucks
- #22 Reckless Endangerment—Typical Cases: Throwing Snowballs at Cars, Hanging on to a Moving Car, Speeding Out of a Parking Lot
- #23 Resisting an Officer without Violence—Typical Cases: Lying to a Police Officer, including one’s Age, Running Away from Law Enforcement, Refusing to Move When Ordered by an Officer
- #24 Runaways—Typical Cases: Running Away from a Noncustodial Parents House, Going to another City/State when Forbidden by a Parent, Staying at a Friend or Families House without Parent Permission
- #25 Unauthorized Use of a Motor Vehicle—Typical Cases: Driving Without a License, Unlawfully Using All-Terrain Vehicles (ATV’s), Taking Parents or Friends Car without Permission

Taken from Global Youth Justice. Go to http://www.globalyouthjustice.org/TOP_25_CRIMES.html.

CHAPTER 8

TRANSFER TO TRIBAL CRIMINAL COURT

[8.1] OVERVIEW

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

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

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

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

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

It may be helpful to review Chapter 4: “Offenses Discussion.”

[8.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

Chapter 36, Juvenile Code

36.202 Transfer Petition.

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

36.203 Transfer Hearing.

The Juvenile Division shall conduct a hearing to determine whether jurisdiction of the child should be transferred to Tribal Court. The transfer hearing shall be held within ten (10) days of receipt of the petition by the Court. Written notice of the time, place, and purpose of the hearing is given to the child and the child's parent, guardian, or custodian at least three (3) days before the hearing. At the commencement of the hearing, the Court shall notify the child and the child's parent, guardian, or custodian of their rights under '36.402 of this Chapter.

36.204 Deciding Factors in Transfer Hearing.

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

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

36.205 Standard of Proof in Transfer Hearing.

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

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

36.206 Prehearing Report in Transfer Proceedings.

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

36.207 Written Transfer Order.

A child may be transferred to Tribal Court only if the Juvenile Division issues a written order after the conclusion of the transfer hearing which contains specific findings and reasons for the

transfer in accordance with '36.204 and '36.205 above. This written order terminates the jurisdiction of the Juvenile Division over the child with respect to the juvenile offense(s) alleged in the petition. No child shall be prosecuted in the Tribal Court for a criminal offense unless the case has been transferred to Tribal Court as provided in this Chapter.

36.208 Noncriminal Proceedings.

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

36.209 Rules of Procedure.

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

Laws of the Confederated Salish and Kootenai

Title 3, Chapter 3, Youth

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

3-3-201. Transfer of Jurisdiction to Adult Tribal Court. The Youth presenter shall have discretionary authority to file the cause in Adult Tribal Court, based on input provided by the Juvenile Probation Office and consistent with the factors set forth in subsection 2 below.

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

Warm Springs Tribal Code

Chapter 369 Juveniles

360.130 Remand to Tribal Court.

1. Upon motion a juvenile may be remanded to the Tribal Court for disposition as an adult if, following a hearing, the Juvenile Court determines by a preponderance of the evidence that:

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

Pueblo of Zuni

Zuni Children's Code

Title IX of the Zuni Tribal Code

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

A. Petition—The prosecutor may file a petition requesting the court to transfer an alleged juvenile offender to the jurisdiction of the Tribal Court if the minor is at least 16 years of age, and is alleged to have committed an act, which if committed by an adult, would be a Class A offense under the Criminal Code or a felony under the laws of another jurisdiction.

B. Hearing—The Court shall conduct a hearing within 10 days of filing to determine whether the matter should be transferred.

C. Report—The Juvenile Probation Officer shall prepare and present a written report to the court at least three days before the transfer hearing containing information on the alleged offense; and the minor's condition as evidenced by his age, mental and physical condition; past record of offenses; and rehabilitation efforts. Within the same time limit, the prosecutor and other parties may also file written recommendations.

D. Deciding Factors—The following factors shall be considered by the Court in determining whether to transfer jurisdiction:

- 1. The nature and seriousness of the offense as set forth in the petition;
- 2. The minor's emotional maturity, mental condition as indicated in the reports provided to the Court; and
- 3. The past record of offenses and rehabilitation efforts.

E. Standard of Proof and Findings—The Court may transfer the matter to the Tribal Court, if it finds by a preponderance of the evidence no reasonable prospect for rehabilitating the minor through resources available to the Court, and either of the following exists:

1. The past offenses committed by the minor indicate a pattern of conduct constituting a substantial danger to the public; or
2. The offense with which the minor is charged indicates conduct that constitutes substantial danger to the public.

F. The Court's order is a final order for purposes of appeal.

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

[8.3] TRIBAL CODE COMMENTARY

The Sault Ste. Marie Tribal Code requires that a transfer petition be filed in the juvenile division by the prosecutor and that a hearing be held within 10 days of receipt of the petition. Notice to the child and the child's parent/guardian is required at least three days before the hearing. This is an example of the judicial waiver method of transfer. The only difference between Sault Ste. Marie and the National Indian Justice Center (NIJC) Model Tribal Code on this point is that the NIJC code allows any officer of the court to file a petition for transfer.

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

The confederated Salish and Kootenai Nation gives the Youth Presenter (similar to a prosecutor) the discretionary authority to file a case in (adult) tribal court, based on input from the probation office. This is an example of the direct file method of transfer. The juvenile officer is required to prepare a written report for the Youth Presenter to consider. The factors the Youth Presenter is required to consider include that the youth must be sixteen years old or older; he or she must have committed a serious crime; and he or she must be a member of a federally recognized tribe. The code defines a "serious crime" as a felony that seriously damages persons or property or involves dangerous drugs. The youth presenter is required to consider the nature and seriousness of the offense; the child's nature and condition based on age, mental, and physical condition; and past offenses and contacts with the tribe. The youth has a right to a hearing and a right to understand the consequences of a transfer to tribal criminal court.

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

must be some balancing against the negative impact of a criminal conviction for the youth and the inability of the juvenile system to provide rehabilitation programs or facilities for the youth.

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

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

[8.4] EXERCISES

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

Exercises

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

Read & Discuss*

Does your tribe have concurrent jurisdiction with the federal government?

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

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

• **Many different tribal, federal, state, and local law enforcement agencies may be involved in investigating Indian Country cases.** The two federal agencies most often involved in investigations in Indian Country are the Department of Justice's Federal Bureau of Investigation and the Department of the Interior's Bureau of Indian Affairs. Tribes also may operate law enforcement agencies with their own criminal investigators. Tribal police are typically the first to respond to an incident and will contact federal law enforcement if the case seems serious enough to constitute a federal crime.

• **Cases that may warrant federal prosecution are referred to the appropriate U.S. Attorney's Office, which then elects to accept or decline the case based on several factors.** If the federal government decides to proceed with a prosecution, it may prosecute the defendant as a juvenile delinquent or seek to transfer the juvenile to adult status. The decision to prosecute a juvenile case at the federal level is based on a number of considerations. These include the seriousness of the crime, the youth's age and criminal history, strength of the evidence, and the tribe's capacity to prosecute and appropriately sentence the offender. While the final decision to prosecute a case federally rests with the U.S. Attorney, tribal preference is also often taken into account. In general, tribal youth cases processed in the federal system tend to be egregious crimes committed by older offenders (those close to the age of majority) with more extensive criminal histories. Importantly, this reflects the types of cases referred to and accepted by federal prosecutors, rather than the underlying pattern of offending by tribal youth. Less serious offenses tend to be handled at the tribal level. Similarly, a number of factors influence whether a juvenile is processed as a juvenile delinquent or transferred to adult status. Federal law specifies the factors that must be considered in determining whether to transfer a case, including the type

of offense and the offender's age, criminal history, and maturity. Relevant factors differ by type of transfer, although cases meeting certain criteria must be transferred. District practice also influences whether a juvenile is transferred to adult status; the prevalence of transfer varies across districts, occurring more frequently in some districts than in others.

- **Tribal youth cases may be prosecuted in both tribal and federal court.** The tribal case may be initiated first and dropped once the federal case begins, or both jurisdictions can pursue the cases to completion.

- **Federal cases against tribal youth face many processing challenges.** These challenges, some of which apply to Indian Country cases generally, include the physical and cultural distances between many reservations and federal actors, as well as the lack of federal detention facilities for juveniles.

- **The federal justice system is not designed for juveniles, yet it may sometimes be the best option available.**

A consistent theme that emerged throughout the interviews was that, in both the federal and tribal systems, there is a lack of facilities, programs, and services to address the needs of tribal youth. Facilities for housing juveniles sentenced to detention in the federal system are limited and are often located far from the juvenile's home and family. Community-based treatment programs available to these youth are also very limited and are rarely located on or near a juvenile's reservation. Furthermore, these programs may not take into account the beliefs and traditions of the youth's culture. Although many of the officials (both tribal and federal) we interviewed indicated that the federal justice system is not designed for juveniles, they explained that it is sometimes the best option available. Despite its limitations, the federal system can sometimes access or fund services for juveniles that are unavailable to tribal communities. The federal system is also better able to address serious offenders due to its ability to sentence defendants for longer periods of time, given that the sentencing options available to tribal courts are limited by both federal law and, frequently, a lack of tribal detention facilities. Thus the decision of whether to proceed against a juvenile in the federal or tribal system is often based in part upon the nature and resources of the particular tribal system concerned. The availability of local (tribal) resources and the ability of the federal system to access a wide range of treatment, services, programming, and detention settings were consistently cited by federal and tribal stakeholders as important considerations regarding whether and how to adjudicate an American Indian youth at the federal level.

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

Read & Discuss*

Should we be transferring youth to the adult criminal system?

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

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

** Elizabeth Scott, Laurence Steinberg, Rethinking Juvenile Justice, Harvard University Press (2008).*

CHAPTER 9

RELATIONS WITH OTHER AGENCIES AND COURTS

[9.1] OVERVIEW

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

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

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

Reviewing the possibilities of your tribe expanding resources through cooperative agreements is important to ensure maximum resources for tribal youth.

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

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

jurisdiction and with nontribal programs will help in providing comprehensive services to the juvenile and the community.

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

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

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

It may be helpful to review Chapter 4: "Offenses Discussion."

[9.2] TRIBAL CODE EXAMPLES

NIJC Model Juvenile Code

1-5 RELATIONS WITH OTHER AGENCIES

1-5 A. Cooperation and Grants

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

1-5 B. Social Services

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

1-5 C. Contracts

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

1-5 D. Transfers from Other Courts

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

Sault Ste. Marie

Juvenile Code

36.210 Transfers from Other Courts.

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

Proceedings transferred to the Juvenile Division shall be identical with proceedings originally filed in the Juvenile Division.

36.1005 Cooperation and Grants.

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

36.1006 Social Services.

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

36.1007 Contracts.

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

Laws of the Confederated Salish and Kootenai**Title 3, Chapter 3, Youth****Part 2: Transfer to Adult Tribal Court or
State District Youth Court****3-3-202. Transfer of Jurisdiction to State District Youth Court.**

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

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

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

[9.3] TRIBAL CODE COMMENTARY

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

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

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

[9.4] EXERCISES

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

Exercises

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

Read & Discuss*

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

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

WHEREAS,

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

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

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

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

The DEPARTMENT shall:

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

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

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

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

CHAPTER 10

JUVENILE COURT RECORDS

[10.1] OVERVIEW

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

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

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

It may be helpful to review Section 2.5 "Special Issues": "Expungement and Destruction of Juvenile Records."

[10.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.1001 Juvenile Division Records.

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

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

36.1002 Law Enforcement Records.

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

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

36.1003 Destruction of Records.

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

Eastern Band of Cherokee Indians Tribal Code

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

- a) The Clerk of Court shall maintain a complete record of all juvenile cases filed in his office to be known as the juvenile record, which shall be withheld from public inspection and may be examined only by order of the Judge, except that the juvenile, his parent, guardian, custodian or other authorized representative of the juvenile shall have a right to examine the juvenile's record. The record shall include the summons, petition, custody order, court order, written motions, the electronic or mechanical recordings of the hearing, and other papers filed in the proceeding. The recording of the hearing shall

be reduced to a written transcript only when notice of appeal has been timely given. After the time for appeal has expired with no appeal having been filed, the recording of the hearing may be erased or destroyed upon the written order of the Judge.

- b) The court counselor shall maintain a record of the cases of juveniles under supervision by court counselors which shall include family background informational reports of social, medical, psychiatric, or psychological information concerning a juvenile; interviews with his family; or other information which the Judge finds should be protected from public inspection in the best interest of the juvenile.
- c) The records maintained pursuant to subsection (b) may be examined only by order of the Judge except that the juvenile shall have the right to examine them.
- d) Law enforcement records and files concerning a juvenile shall be kept separate from the records and files of adults except in proceedings when jurisdiction of a juvenile is transferred to Tribal court. Law enforcement records and files concerning juveniles shall be open only to the inspection of the prosecutor, court counselors, the juvenile, his parent, guardian, or custodian.
- e) All records and files maintained by the Division of Youth Services shall be withheld from public inspection and shall be open only to the inspection of the juvenile, professionals in that agency who are directly involved in the juvenile's case, and court counselors. The Judge authorizing commitment of a juvenile shall have the right to inspect and order the release of records maintained by the Division of Youth Services on that juvenile.
- f) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parents.
- g) Nothing in the section shall preclude the necessary sharing of information among authorized agencies.

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

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

the petitioner in the community in which he lives and that his character and reputation are good.

- (3) A statement that the petition is a motion in the cause in the case wherein the petitioner was adjudicated delinquent or undisciplined. The petition shall be served upon the prosecutor. The prosecutor shall have ten days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing on the petition.
- d) If the Judge, after hearing, finds that the petitioner satisfies the conditions set out in subsections (a) and (b), he shall order and direct the Clerk of Court and all law enforcement agencies to expunge their records of the adjudication including all references to arrests, complaints, referrals, petitions, and orders.
 - e) The Clerk of the Court shall forward a certified copy of the order to the Chief of Police or other law enforcement agency.
 - f) Records of a juvenile adjudicated delinquent or undisciplined being maintained by a court counselor/intake counselor shall be retained or disposed of by the court.
 - g) Records of juveniles adjudicated delinquent or undisciplined being maintained by personnel at a residential facility operated by the Division of Youth Services shall be retained or disposed of as provided by this section.

(Ord. No. 289, 7-17-00)

Sec. 7A-63.—Effect of expunction.

(a) Whenever a juvenile's record is expunged, with respect to the matter in which the record was expunged, the juvenile who is the subject of the record and his parent may inform any person or organization including employers, banks, credit companies, insurance companies, and schools that he was not arrested, he did not appear before the court and he was not adjudicated delinquent or undisciplined.

(b) Notwithstanding subsection (a), in any criminal or delinquency case if the juvenile is the defendant and chooses to testify or if he is not the defendant but is called as a witness, the juvenile may be ordered to testify with respect to the fact that he was adjudicated delinquent.

Sec. 7A-64.—Notice of expunction.

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

WHITE MOUNTAIN APACHE

JUVENILE CODE

SECTION 7.13 RECORDS; PUBLICATION PROHIBITED

A. The records of proceedings of the Juvenile Court shall be kept in a docket separate from other proceedings, and shall not be opened for inspection or copied by anyone other than the parties to the proceedings, the representatives of the court, and youth counselors having an interest therein, except upon order of the court.

B. No part of the record shall be published by a newspaper or other agency disseminating news or information nor shall a newspaper or agency publish the name of a child charged in the Juvenile Court with being delinquent, in need of supervision or neglected.

SECTION 7.14 DESTRUCTION OF RECORDS

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

[10.3] TRIBAL CODE COMMENTARY

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

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

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

[10.4] EXERCISES

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

Exercises

- Find and examine your juvenile code provisions governing the confidentiality and destruction of juvenile and law enforcement records— what are the requirements?
- Make a list of negative consequences for youth given existing law.

What law changes, if any, would you propose to protect youth?

Points for discussion*

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

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

Pro-Confidentiality of Proceedings/Records

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

Pro-Opening of Proceedings/Records

- Need to punish children, including shame of public knowledge of delinquency
- Need to protect community, allowing them to know who the "dangerous juveniles" are
- Need to ensure that courts and law enforcement officials are basing decisions on complete information
- Lack of system accountability due to confidentiality, allowing system problems to go unaddressed
- Lack of community standards as to what is enough delinquency to warrant incarceration
- Public right of access to government functions, and lack of confidence in "secret" system

The NACC Position

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

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

What about expanding victim participation in the juvenile justice system?

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

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

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

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

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

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

CHAPTER 11

RIGHTS IN JUVENILE PROCEEDINGS

[11.1] OVERVIEW

The early developers of juvenile justice systems in the United States (prior to 1967) intended legal interventions to be civil as opposed to criminal in nature.² The idea was to have informal proceedings, without legal procedures and evidentiary standards, which would allow the judge to get a “total picture” of the juvenile and to deal with the problems of the juvenile with prevention, treatment, and rehabilitation. The downside of this informality, as was demonstrated over and over again in the state court systems, was the absence of established guilt: an adjudication of delinquency was based upon the attitude of the child, the types of peers with whom he or she associated, or his or her family’s situation.

Fair hearings and high standards of proof of delinquency in juvenile proceedings have been generally required in state law since 1967 when the U.S. Supreme Court decided *In re Gault*.³ In *Gault*, the U.S. Supreme Court held that due process is required in juvenile court *adjudicatory proceedings*. *Gault* requires recognition and enforcement of constitutional rights, the application of certain rules of evidence, and the establishment, beyond a reasonable doubt, that allegations are supported by the admissible evidence. In the state systems, post-*Gault*, informality is still often permitted in the prehearing stages and generally accepted in the postadjudicatory hearings on disposition.

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

Whether your juvenile code is civil in nature, it is still necessary to include provisions to protect the rights of juveniles that comply with ICRA’s requirements for criminal proceedings.⁴ When a youth is found to be “delinquent,” it is like being found guilty of a crime, particularly where a juvenile may be subject to secure detention as a disposition whether it is treatment-based or not.

² Characterizations of state juvenile justice system process are taken from Steven M. Cox et al., *Juvenile Justice: A Guide to Theory, Policy and Practice* (2011), Thousand Oaks, Sage Publications, Inc.

³ *In Re Gault*, 387 U.S. 1 (1967).

⁴ 25 U.S.C. Section 1301 et seq.

Tribal laws frequently incorporate the provisions of ICRA or in the alternative, incorporate provisions, often modified, directly from the U.S. Constitution, or even a state constitution. A subset of these provisions relate to due process concerns that are highly relevant for juvenile proceedings and should be incorporated into tribal juvenile statutes. These include:⁵

- Right to counsel at his/her own expense.
- Right to be notified of the charges and have a speedy trial.
- Right to confront witnesses against the juvenile and subpoena and call witnesses on his/her behalf.
- Right to a fair trial.
- Right to not be a witness against oneself or otherwise incriminate self.
- Right that the juvenile's case will not be transferred into the adult criminal court without a hearing and stated reasons for the transfer.⁶
- Right not to be found to be a juvenile delinquent absent proof "beyond a reasonable doubt."

In juvenile proceedings in most jurisdictions, there is no right to a jury trial⁷ and in many jurisdictions juvenile proceedings are closed to the public.

⁵ Indian Civil Rights Act, 25 U.S.C. Section 1302, et seq.

⁶See also *Kent v. United States*, 383 U.S. 541 (1966); the U.S. Constitution Fifth Amendment and the Fourteenth Amendment.

⁷ See also *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); the U.S. Constitution Sixth Amendment and the Fourteenth Amendment.

[11.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.402 Rights of Parties in Juvenile Proceedings.

(1) A child alleged to be a juvenile offender shall from the time of being taken into custody be accorded and advised of the privilege against self-incrimination and should not be questioned without the presence or permission of the parent, guardian, or custodian except to determine identity, to determine the name(s) of the child's parents or legal custodian, or to conduct medical assessment or treatment for alcohol or substance abuse when the child's health and well-being are in serious jeopardy.

....

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

(4) At his first appearance before the Juvenile Division, the child alleged to be a juvenile offender and the child's parent, guardian or custodian shall be informed by the Court of the following:

- (a) The allegations against him.
- (b) The right to an advocate or attorney at his own expense.
- (c) The right to testify or remain silent and that any statement made by him may be used against him.
- (d) The right to cross-examine witness.
- (e) The right to subpoena witnesses on his own behalf and to introduce evidence on his own behalf.
- (f) The possible consequences if the allegations in the petition are found to be true.

36.403 Taking a Child into Custody.

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

- (a) The child has the right to remain silent.
- (b) Anything the child says can be used against the child in court.
- (c) The child has a right to the presence of his parent, guardian, or custodian and/or counsel during questioning.
- (d) The child has a right to an advocate or attorney at his own expense.

NIJC Tribal Juvenile Justice Code

1-7 Rights of Parties in Juvenile Proceedings.

1-7 A. Privilege against Self-Incrimination.

A child alleged to be a "juvenile offender" or a child whose family is "in need of services" shall from the time of being taken into custody be accorded and advised of the privilege against self-

incrimination and from the time the child is taken into custody shall not be questioned except to determine identity, to determine the name(s) of the child's parent or legal custodian, or to conduct medical assessment or treatment for alcohol or substance abuse under section 1-13C of this code when the child's health and well-being are in serious jeopardy.

1-7 C. Fingerprinting and Photographs.

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

1-7 D. Right to Retain Counsel.

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

1-7 E. Explanation of Rights.

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

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

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

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

1. the child has a right to remain silent;
2. anything the child says can be used against the child in court;
3. the child has a right to the presence of his parent, guardian, or custodian and/or retained counsel during questioning, and;
4. the child has a right to an advocate or attorney at his own expense.

Kalispel Youth Code

Section 7-16 Rights of Parties

Section 7-16.01 Rights

All parties are entitled to the following rights in all proceedings under this Code:

1. A statement by the Court to the youth and his or her parent(s), guardian, or custodian that the youth has the right to have a legal representative's advice and representation, at his or her expense. A party may request a continuance of a proceeding in order to seek legal representation;
2. The opportunity to subpoena witnesses;
3. The opportunity to introduce, examine, and cross-examine witnesses;
4. The opportunity to discover, offer, and inspect evidence; and
5. The opportunity to present arguments and statements.

Section 7-16.02 Jury Trial

There is no right to a jury trial for any proceeding under this Code.

Oglala Sioux Tribe Juvenile Code

Chapter 5: Juvenile Code

Section 2.01 Rights in Juvenile Offender Proceedings.

At every stage of a juvenile offender proceeding under Chapter 5 of the Juvenile Code, the minor involved and his parents, guardian, or custodian shall be afforded the following rights, in addition to any others which may be available or provided by any other provisions of the Oglala Sioux Tribal Code:

- a) The right to have retained counsel at all hearings;
- b) The right to be present when any and all Tribal witnesses testify;
- c) The right to introduce evidence for and on their own behalf and to have witnesses subpoenaed to be present to testify for and on their behalf;
- d) The right not to be a witness against or otherwise incriminate themselves;
- e) The right to question or otherwise examine any witnesses who testify for and on behalf of the Tribe;
- f) The right to request a new hearing within ten (10) days after the adjudicatory hearing and the dispositional decision, on the grounds that new evidence has been discovered, which was not available at the original adjudicatory hearing;
- g) The right to appeal to the Oglala Sioux Tribal Court of Appeals, provided appellate procedure under the Tribal Code is followed accordingly.

[11.3] TRIBAL CODE COMMENTARY

The NIJC's Juvenile Justice Code (NIJC Model Code) has served as a "model code" for many tribes to date. Section 1-7 "Rights of the Parties in Juvenile Proceedings" effectively provides for notification of five of the seven rights critical to juvenile proceedings (right to counsel, notice of charges, right to a fair hearing, right to confront and cross-examine witnesses, and protection against self-incrimination). The remaining two (no waiver to adult court absent a hearing and specified reasons and the requirement of proof beyond reasonable doubt) are set out in later sections of the code. It is noteworthy that Section 1-7 "Privilege against Self-Incrimination" provides significant protection for youth where it requires notification of the privilege from the time a child is taken into custody and prohibits the questioning of a child beyond identification and/or treatment or emergency purposes.

A good number of tribes have followed the NIJC Model Code provisions with modifications. A good example of this is the juvenile code of the Sault Ste. Marie Tribe. The Sault Ste. Marie rights provisions are identical to the model with the omission of the right not to be fingerprinted or photographed for criminal identification purposes. This may be due to the fact that many tribes lack the resources to do so for even their adult criminal defendants.

The Kalispel Youth Code, Section 7-16.02 "Jury Trial" provides an example of a tribe that explicitly denies the right to a jury trial in juvenile proceedings. This is consistent with most state juvenile proceedings. It is also consistent with the research on adolescents that argues against the use of public proceedings due to potential harms to youth and stigmatization of youth. In many tribal communities the use of a jury in a kin-based society, would, in effect, publicize the proceeding.

The Oglala Sioux Tribe, in its Section 2.01(f) guarantees a right to request a new hearing where new evidence has been discovered after an adjudicatory hearing or dispositional decision. This right appears unique across the tribal juvenile statutes reviewed.

[11.4] EXERCISES

The following exercises are meant to guide you in writing the “rights” section of the tribal juvenile code.

Exercises

- Find and examine your juvenile code provisions setting out juvenile rights – does your list contain the “Juvenile 7”?
 - right to counsel (lay advocate or lawyer at own expense)
 - right to be notified of the charges and have a speedy trial
 - right to confront/cross-examine witnesses against the youth and to subpoena and call witnesses on his/her behalf
 - right to a fair trial (right to due process)
 - right to not be a witness against oneself or otherwise incriminate oneself
 - right not to have a case transferred into adult criminal court without a hearing and clear and convincing evidence that ...
 - No reasonable prospects for rehabilitating through resources available; and
 - Offense(s) allegedly committed evidences a pattern of conduct that constitutes a substantial danger to the public
 - right not to be found to be a juvenile delinquent absent proof “beyond a reasonable doubt
- If not, find and examine your constitution and/or judicial or court establishment code – do you have a general list that applies to everyone (adults and youth)? – is it based on the Indian Civil Rights Act list (it usually begins, “No Indian tribe in exercising powers of self-government shall”)? or is it based on the federal or a state constitution list?
- Discuss whether you want your youth to have the specially tailored “Juvenile 7” rights in juvenile court.
- Discuss whether you want your youth to have tribally paid for legal counsel in juvenile court (an attorney or lay advocate).

Read and Discuss

Should a tribe pay for and provide attorneys or lay advocates for youth involved in tribal juvenile court?

The question of whether the tribe should provide an attorney or other well trained lay advocate for juvenile offenders is an important decision and could have a dramatic impact on the fairness of your juvenile process. Read the following excerpt from testimony by Nadia Seeratan, Senior Staff Attorney and Policy Advocate, National Juvenile Defender Center at the Hearing on Native Children Exposed to Violence, February 11, 2014 in Scottsdale, AZ and discuss.

The juvenile defender is a unique role in that they are the only person in the justice system whose role it is to express the expressed interest of the child. By representing the expressed interest of a child, the defense attorney becomes the child's voice in a proceeding that is overwhelmingly confusing and frightening for young people. Although decisions of the United Supreme—afford a constitutional right to counsel for youth are not binding on tribal nations—JDC believes these decisions, which recognize developmental science and brain science research, brings important information to bear and should provide persuasive and compelling arguments for the need for legal representation for all juveniles including American Indian and Alaska Native youth in tribal courts. So I'll start with Gault, the United States Supreme Court Case 47 years ago that provided juveniles with the right to counsel. In Galt, the court found that the child requires the guiding hand of counsel at every step in the proceedings, because the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into facts and to insist upon the regularity of proceedings. The court recognized the unique and critical role of the defender, stating the probation officer cannot act as counsel for the child, his role is an arresting officer and witnessing as the child, nor can the judge represent the child.

CHAPTER 12

EVIDENTIARY RULES IN JUVENILE PROCEEDINGS

[12.1] OVERVIEW

In the state juvenile court systems, questions about the admissibility of evidence arise primarily regarding two stages in the process: (1) the police investigatory process; and (2) the court's adjudicatory process.⁸

Police Investigatory Process—Both the *Gault* and *Kent*⁹ decisions have been interpreted to require the application of the U.S. Constitution's Fourth Amendment¹⁰ and the exclusionary rule to the juvenile justice process. The exclusionary rule is the rule that evidence obtained in violation of an accused person's constitutional rights cannot be admitted into evidence (cannot be used to prove guilt in court).

In juvenile cases, the most difficult issue has revolved around the juvenile's competency to waive his or her Miranda rights, and then to make a statement or confession that may be used as evidence of his or her guilt in court. In general, state courts have relied on a "totality of circumstances" approach in determining the validity of the waiver. This standard is used to determine whether a juvenile's statement or confession may be used as evidence in court and includes a weighing by the judge of factors at the time of his or her questioning including his or her age, competency, and educational level; his or her ability to understand the nature of the charges; and the methods used in, and the length of, interrogation.

Many state juvenile acts are based upon the Uniform Juvenile Court Act of 1968.¹¹ The Uniform Juvenile Court Act states that evidence seized illegally will not be admitted over objection.¹² Also, a valid confession made by a juvenile out of court is "insufficient to support an adjudication of delinquency unless it is corroborated in whole or in part by other evidence."¹³

Adjudicatory Process—Two of the post-*Gault* rights implicate evidentiary rules in juvenile adjudicatory proceedings: (1) the right to confront and cross-examine witnesses and (2) the right to remain silent. Under the Uniform Juvenile Court Act, the juvenile is entitled to introduce evidence and otherwise be heard in his or her own behalf and to cross-examine

⁸ Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

⁹ *Kent v. United States*, 383 U.S. 541 (1966).

¹⁰ Fourth Amendment of the U.S. Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

¹¹ National Conference of Commissioners on Uniform State Laws, 1968.

¹² *Id.* at sec. 27(b).

¹³ *Id.*

witnesses.¹⁴ Also under the Uniform Act, a juvenile accused of a delinquent act need not be a witness against or otherwise incriminate himself or herself.¹⁵ While a majority of state juvenile court acts do not set out a detailed set of rules of evidence, most do specify that only competent, material, and relevant evidence is admissible to prove guilt.

About “out-of-court statements” and the general prohibition against “hearsay”—“Hearsay” is defined as testimony that is given by a witness who relates not what he or she knows personally, but what others have said and that is therefore dependent on the credibility of someone other than the witness. This type of testimony is generally inadmissible under rules of evidence. The “hearsay rule” is the rule that no statement made by a witness on the stand offered as testimony can be received unless it is or has been open to test by cross-examination or an opportunity for cross-examination, except as allowed by the rules of evidence. The gist of the rule is that the testimony of the person on the stand who is retelling a story told to them (as opposed to the testimony of the person who actually experienced the event) will not be admitted as reliable evidence.

About Standards of Proof—Finally, although many state and tribal juvenile proceedings are classified as “civil” in nature, the U.S. Supreme Court, post-*Gault*, has required that the highest standard of proof be applied in state juvenile proceedings—proof beyond a reasonable doubt. As discussed in earlier chapters, this higher standard is preferable in tribal juvenile proceedings as well, to ensure fair process and to protect the rights of the juvenile and his or her family by reliably establishing guilt. However, there may be some confusion where the practice in Indian country has been to combine juvenile offender proceedings and child maltreatment (abuse and neglect) proceedings within one tribal statute (ordinance or code). In many cases a lower civil standard of proof is applied as well to the juvenile proceedings. The preferred practice is to apply the standard of “beyond a reasonable doubt” to juvenile offender proceedings and the lower civil standards to child maltreatment proceedings.

¹⁴Id. at sec. 27(a).

¹⁵ Id.

[12.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.402 Rights of Parties in Juvenile Proceedings.

(2) In a proceeding on a petition alleging that a child is a juvenile offender:

(a) An out-of-court statement that would be inadmissible in a criminal matter in Tribal Court shall not be received in evidence.

(b) Evidence illegally seized or obtained shall not be received in evidence to establish the allegations of a petition.

Eastern Cherokee Tribal Code

Sec. 7A-46.—Rules of evidence.

Where delinquent or undisciplined behavior is alleged and the allegation is denied, the court shall proceed in accordance with rules of evidence applicable to criminal cases. In addition, no statement made by a juvenile to the intake counselor during the preliminary inquiry and evaluation process shall be admissible prior to the dispositional hearing.

Absentee-Shawnee Tribe of Indians of Oklahoma

Juvenile Procedure

111 A. Findings of Fact.

The judge, or in the proper case, the jury, shall be trier of fact and shall base the findings upon the requirement that each allegation must be proved beyond a reasonable doubt. Such findings shall be made only upon evidence which is admissible under the rules of the Tribal Court.

NIJC Tribal Juvenile Justice Code

1-7 B. Admissibility of Evidence.

In a proceeding on a petition alleging that a child is a “juvenile offender” or a child whose family is “in need of services”:

1. an out-of-court statement that would be inadmissible in a criminal matter in tribal court shall not be received in evidence;
2. evidence illegally seized or obtained shall not be received in evidence to establish the allegations of a petition;
3. unless advised by counsel, the statements of a child made while in custody to a juvenile counselor, including statements made during a preliminary inquiry, informal adjustment or predispositional study, shall not be used against a child in determining the truth of allegations of the petition;
4. a valid out-of-court admission or confession by the child is insufficient to support a finding that the child committed the acts alleged in the petition unless it is corroborated by other evidence;
5. neither the fact that the child has at any time been a party to a “family in need of services” proceeding nor any information obtained during the pendency of such proceedings shall be received into evidence.

[12.3] TRIBAL CODE COMMENTARY

The Sault Ste. Marie Tribe's Section 36.402 incorporate two limitations on the admissibility of evidence: out-of-court statements that would be inadmissible in a criminal matter in tribal court and evidence illegally seized or obtained. There is no limit on admitting a youth's statement or confession as evidence. Contrast this with Section 111 A. of the Absentee-Shawnee Juvenile statute, which incorporates the tribe's entire body of rules of evidence. The Eastern Cherokee also incorporate the evidence code used in the adult court to juvenile offender adjudications, but excludes any statement made by the juvenile to the intake counselor during the preliminary inquiry and evaluation process. The desire is that the juvenile speaks freely prior to adjudication and that the matter be resolved preadjudication and the juvenile helped. The method used by the Eastern Band of Cherokee seems to keep informality in the prehearing phases where the focus is on screening and identification of problems of the youth, the youth's family, and rehabilitation. However, if there is a hearing to determine whether the youth is delinquent or undisciplined, the youth has all rights afforded by the rules of evidence and additionally cannot be convicted on statements previously made in the process.

The NIJC Model Code makes the following *inadmissible* "in a proceeding on a petition alleging that a child is a 'juvenile offender'":

- An out-of-court statement (by anyone) that would be inadmissible in a criminal matter in tribal court.
- Evidence illegally seized or obtained.
- Statements of a child made while in custody (unless advised by counsel).
- A valid out-of-court admission or confession by the child (unless it is corroborated by other evidence).
- The fact that the child has been a party to a FINS proceeding and any information obtained during such proceeding.

The NIJC Model Code evidence provisions appear to be a reasonable compromise in that they protect fair process for youth while avoiding the application of a jurisdiction's entire body of rules of evidence.

The Absentee-Shawnee Tribe of Indians of Oklahoma code is an example of a law requiring that there be sufficient evidence presented at an adjudication to meet the "beyond a reasonable doubt" standard. This is the highest standard of proof and is required in criminal cases.

[12.4] EXERCISES

The following exercises are meant to guide you in writing the “evidence” section of the tribal juvenile code.

Exercises

- Find and examine your tribal court code provisions or court rules governing “rules of evidence” – is there a special set of evidence rules applicable to your juvenile court?
- Do your evidence rules allow a youth’s “statement” or “confession,” without other evidence, to be used as evidence of guilt in juvenile proceedings?
- Do your evidence rules allow “out-of-court-statements” (otherwise known as “hearsay” and sometimes referred to as “gossip”) to be used as evidence against a youth in juvenile proceedings?
- What types of information would be more reliable for the court to use?

Read and Discuss*

Should we include statutory protections against false confessions?

A false confession is an admission of guilt in a crime in which the confessor is not responsible for the crime. False confessions can be induced through coercion or by the mental disorder or incompetency of the accused. Even though false confessions might appear to be an exceptional and unlikely event, they occur on a regular basis in case law, which is one of the reasons why jurisprudence has established a series of rules to detect, and subsequently reject, false confessions.

False confessions can be categorized into three general types, as outlined by Saul M. Kassin in an article for *Current Directions in Psychological Science*:

- *Voluntary false confessions* are those that are given freely, without police prompting. Sometimes they may be sacrificial, to divert attention from the actual person who committed the crime.
- *Compliant false confessions* are given to escape a stressful situation, avoid punishment, or gain a promised or implied reward.
- *Internalized false confessions* are those in which the person genuinely believes that they have committed the crime, as a result of highly suggestive interrogation techniques.

According to the Innocence Project, approximately 25% of convicted criminals ultimately exonerated had, in fact, confessed to the crime. ... The high pressure generated may push innocent individuals to produce a confession.

Central Park jogger (1989)

In the Central Park jogger case, on April 19, 1989, five teens aged from 14 to 16 were arrested and each confessed on videotape to the crime of attacking and raping a jogger and implicated each other. They later repudiated these confessions and maintained their innocence. The five were: Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Kharey Wise. In 1989, the police were aware that an unidentified sixth person had left semen on the victim's body. In 2002, Matias Reyes, a convicted murderer and rapist, admitted that he was responsible for the rape and attack of the jogger. The DNA obtained from the crime scene matched Reyes. New York state justice Charles J. Tejada vacated the convictions of five defendants on December 19, 2002. Yusef Salaam served six and a half years in prison. Kharey Wise was imprisoned until summer 2002, which was when his sentence was completed.

**Taken from Wikipedia – False Confessions. Go to http://en.wikipedia.org/wiki/False_confession*

CHAPTER 13

TAKING A CHILD INTO CUSTODY

[13.1] OVERVIEW

This chapter sets out a procedure for taking an alleged juvenile offender into custody. Most juvenile courts generally allow for youth to be taken into custody without a warrant if the law enforcement officer reasonably believes that the youth is delinquent, in need of supervision, dependent, abused, or neglected. In the case of truancy, disobedience, or neglect, in any system the legal process should begin with a summons unless waiting for the court's permission would result in an unnecessary and dangerous delay.

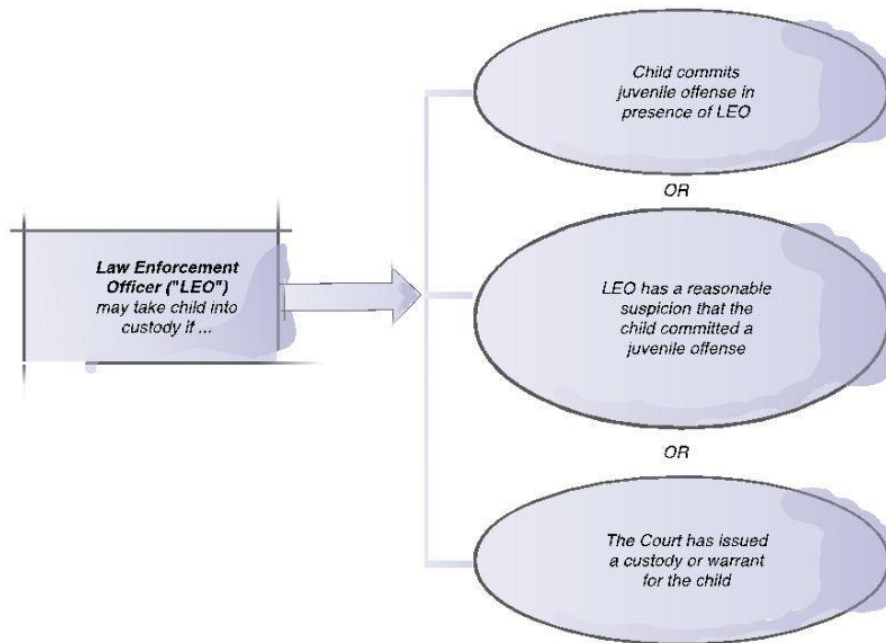
This section of the code should address the following:

- Under what circumstances a child can be taken into custody;
- Who decides when a child is placed in custody;
- Where a child can be placed if in custody;
- Time limits on how long a child can remain in custody;
- Notification of family; and
- Process that must be followed when a child is in custody, including when release is required.

The detention of juvenile offenders must comply with the Juvenile Justice and Delinquency Prevention Act of 1974 (P.L. 96-509) which provides that (1) juvenile status offenders and nonoffenders are not to be placed in secure detention facilities; (2) suspected or adjudicated juvenile delinquents are not to be detained or confined in facilities allowing regular contact with incarcerated adults; and (3) no juvenile is to be detained or confined in any jail or lockup for adults except in low population density areas or where appropriate facilities are unavailable. Many tribal juvenile justice systems have had difficulty meeting the requirements of this act.

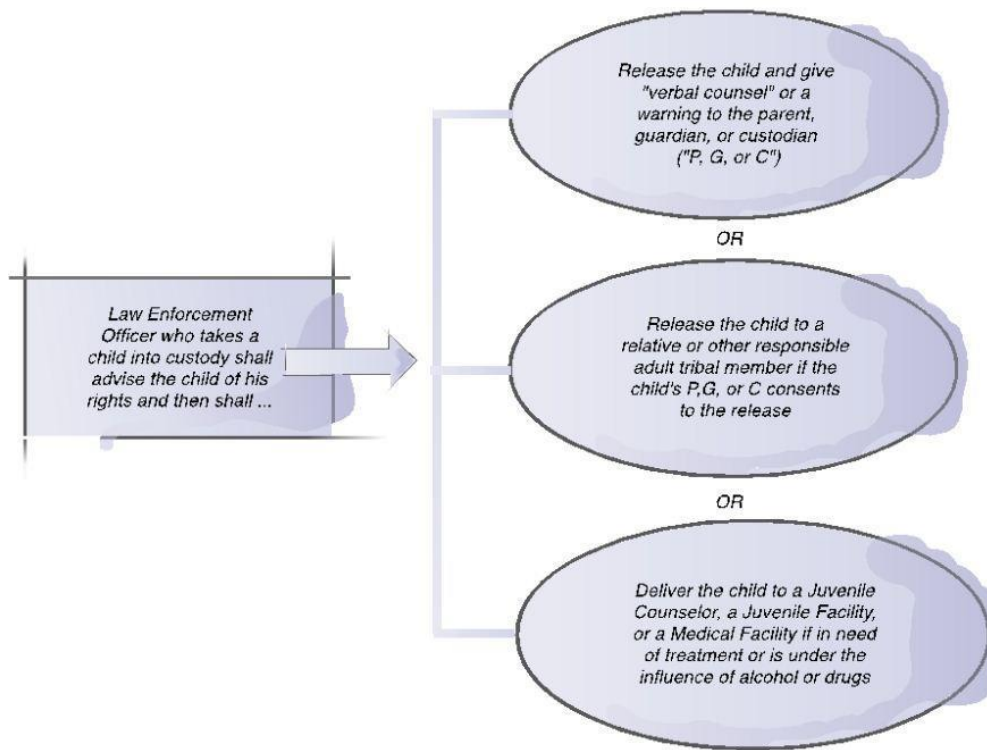
The court must designate appropriate juvenile facilities for various types of alleged "juvenile offender" and also designate the appropriate juvenile official at these facilities to make detention decisions. Keeping in mind that a Native youth has probably already experienced substantial trauma in his/her life and the event of being taken into custody by a law enforcement officer could add to that trauma. There should be a preference to place children in their homes or with a relative. Placement in foster care or other temporary care may also be appropriate in some cases. The court should exam what is reasonable to keep the youth and community safe. Communication among the juvenile system personnel and other agencies is vitally important to find the least restrictive setting for the youth.

Section 1-8 A. Taking a Child Into Custody
National Indian Justice Center Tribal Juvenile Justice Code



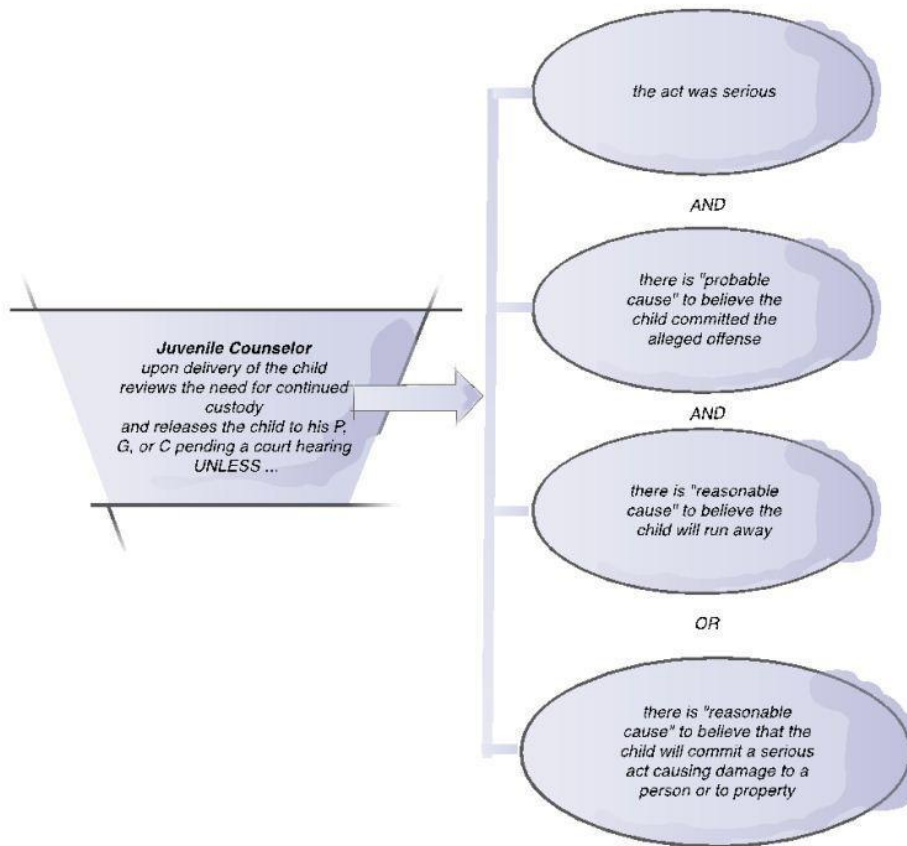
The NIJC Model Code, Section 1-8 A, provides that a law enforcement officer may take a child into custody without a warrant where the youth commits a juvenile offense in the officer's presence or where the officer has a "reasonable suspicion" that the youth has committed a juvenile offense. "Reasonable suspicion" is defined in *Black's Law Dictionary* as "a particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal [here delinquent] activity."

Section 1-8 C. Release or Delivery from Custody
National Indian Justice Center Tribal Juvenile Justice Code



The NIJC Tribal Juvenile Justice Code, Section 1-8 C, provides that once a law enforcement officer has taken a youth into custody, he must advise the youth of his or her rights and then must either release the child to his or her parent, guardian, or custodian (or to a responsible adult tribal member with the consent of the parent, guardian, or custodian), or deliver the youth to the designated juvenile intake officer. In those cases in which the youth is in need of immediate treatment or in which he or she is under the influence of alcohol and/or drugs, he or she may be delivered to a medical facility.

Section 1-8 D. Review by Juvenile Counselor or Juvenile Facility
National Indian Justice Center Tribal Juvenile Justice Code



The NIJC Model Code, Section 1-8 D, provides that where a youth has been taken into custody and then delivered to the appropriate juvenile intake officer, that officer must then review the need for continued custody and release the youth to his or her parent, guardian, or custodian pending a court hearing, unless the alleged act constitutes a serious juvenile offense, there is probable cause to believe that the youth committed it, and/or there is reasonable cause to believe that the youth will run away, and/or there is reasonable cause to believe that the youth will commit a future serious act to a person or property.

[13.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.403 Taking a Child into Custody.

- (1) A law enforcement officer may take a child into custody when:
 - a. The child commits a juvenile offense in the presence of the officer.
 - b. The officer has a reasonable suspicion to believe a juvenile offense has been committed by the child being detained.
 - c. An appropriate custody order or warrant has been issued by the Court authorizing the taking of a particular child.
- (2) At the time the child is taken into custody as an alleged juvenile offender, the arresting officer shall give the following warning:
 - a. The child has the right to remain silent.
 - b. Anything the child says can be used against the child in court.
 - c. The child has a right to the presence of his parent, guardian, or custodian and/or counsel during questioning.
 - d. The child has a right to an advocate or attorney at his own expense.
- (3) A law enforcement officer taking a child into custody shall give the warning listed above to any child he takes into custody prior to questioning and then shall do one of the following:
 - a. Release the child to the child's parent, guardian, or custodian and issue verbal counsel or warning as may be appropriate.
 - b. Release the child to a relative or other responsible adult member if the child's parent, guardian, or custodian consents to the release. (If the child is twelve [12] years of age or older, the child and his parent, guardian or custodian must both consent to release).
 - c. Deliver the child to the juvenile probation officer, or to a juvenile facility as designated by the Court, or to a medical facility if the child is believed to need prompt medical treatment or is under the influence of alcohol or other chemical substances.
- (4) The Juvenile Probation Officer shall, immediately upon delivery of the child for custody, review the need for continued custody and shall release the child to his parent, guardian, or custodian in order to appear at the hearing on a date to be set by the Court, unless:
 - a. The act is serious enough to warrant continued detention.
 - b. There is probable cause to believe the child has committed the offense(s) alleged.
 - c. There is reasonable cause to believe the child will run away so that he will be unavailable for further proceedings.
 - d. There is reasonable cause to believe that the child will commit a serious act causing damage to person or property.
- (5) If a child is taken into custody and not released to his parent, guardian, or custodian, the person taking the child into custody shall immediately attempt to notify the child's parent, guardian, or custodian. All reasonable efforts shall be made to advise the parent, guardian, or

custodian of the reason for taking the child into custody and the place of continued custody. Such reasonable efforts shall include telephone and personal contacts at the home or place of employment or other locations where the person is known to frequent. If notification cannot be provided to the child's parent, guardian, or custodian, the notice shall be given to a member of the extended family of the parent, guardian, or custodian and to the child's extended family.

(6) If the Juvenile Probation Officer determines that there is a need for continued custody of the child in accordance with subsection (4) of this Chapter, then the following criteria shall be used to determine the appropriate juvenile facility for the child:

- a. a child may be detained in a secure juvenile detention facility as designated by the Court only if one or more of the following conditions are met:
 - i. The child is a fugitive from another jurisdiction wanted for a felony offense.
 - ii. The child is charged with murder, sexual assault or a crime of violence, a crime involving a deadly weapon or which has resulted in a serious bodily injury.
 - iii. The child is uncontrollable and has committed a serious physical assault on the arresting officer or on other security personnel while resisting arrest or detention.
 - iv. The child is charged with committing one of the following acts which would be an offense if the child were an adult: vehicular homicide, abduction, rape, arson, assault, domestic assault, battery, burglary, or robbery.
 - v. The child is already detained or on conditional release for another juvenile offense.
 - vi. The child has demonstrable recent record of willful failures to appear at Juvenile Division proceedings.
 - vii. The child has made a serious escape attempt.
 - viii. The child requests in writing that he be given protection by being confined in a secure confinement area and there is a present and immediate threat of serious physical injury to the child.
- b. A child may be housed in a juvenile shelter care facility as designated by the Court only if one of the following conditions exist:
 - i. One of the conditions described in subsection (a) above exists.
 - ii. The child is unwilling to return home or to the home of an extended family member.
 - iii. The child's parent, guardian, custodian, or extended family member is unavailable, unwilling, or unable to permit the child to return to his home.
 - iv. There is an evident and immediate physical danger to the child in returning home, and all extended family members are unavailable, unwilling, or unable to accept responsibility for temporary care and custody of the child.
- c. A child may be referred to an alcohol or substance abuse emergency shelter or halfway house if it is determined that there is a need for continued custody of the child in accordance with '36.403 of this Chapter and:

- i. The child has been arrested or detained for a juvenile offense relating to alcohol or substance abuse.
- ii. There is space available in an alcohol or substance abuse emergency shelter or halfway house designated by the Court.
- iii. The child is not deemed to be a danger to himself or others.

Eastern Band of Cherokee

Juvenile Code

Sec. 7A-20. Duties of person taking juvenile into temporary custody.

(a) A person who takes a juvenile into custody without a court order under section 7A-19 shall proceed as follows:

1. Notify the juvenile's parent, guardian, or custodian that the juvenile has been taken into temporary custody and advise the parent, guardian, or custodian of his right to be present with the juvenile until a determination is made as to the need for secure or nonsecure custody. Failure to notify the parent that the juvenile is in custody shall not be grounds for release of the juvenile;
2. Release the juvenile to his parents, guardian or custodian if the person having the juvenile in temporary custody decides that continued custody is unnecessary;
3. If the juvenile is not released under subsection (2), the person having temporary custody shall proceed as follows: In the case of a juvenile alleged to be delinquent or undisciplined, he shall request a petition be drawn. Once the petition has been drawn and verified, the person shall communicate with the intake counselor who shall consider prehearing diversion. If the decision is made to file a petition, the intake counselor shall contact the Judge or person delegated authority pursuant to section 7A-21 if other than the intake counselor, for a determination of the need for continued custody.

(b) A juvenile taken into temporary custody under this article shall not be held for more than 12 hours unless:

1. A petition or motion for review has been filed by an intake counselor, and
2. An order for secure or nonsecure custody has been entered by a Judge.

Sec. 7A-21. Authority to issue custody orders.

3. In the case of any juvenile alleged to be within the jurisdiction of the court, when the Judge finds it necessary to place the juvenile in custody, he may order that the juvenile be placed in secure or nonsecure custody pursuant to criteria set out in section 7A-22. Any Judge shall have the authority to issue secure and nonsecure custody orders.

Sec. 7A-22. Criteria for secure or nonsecure custody.

(a) Nonsecure custody shall be rendered unless secure custody is appropriate under the criteria set out in subsections (b), (c) and (d) of this section.

(b) When a request is made for secure custody, the Judge may order secure custody only where he finds there is a reasonable factual basis to believe that the juvenile actually committed the offense as alleged in the petition, and:

- 1) That the juvenile is presently charged with one or more felonies, or
- 2) That the juvenile has willfully failed to appear on the pending delinquency charge or has a record of willful failures to appear at court proceedings, or
- 3) That by reason of the juvenile's threat to flee from the court's jurisdiction or circumstances indicating preparation or design to flee from the court's jurisdiction, there is reasonable cause to believe the juvenile will not appear in court on a pending delinquency charge unless he is detained, or
- 4) That the juvenile is an absconder from any training school or facility in this or another state, or
- 5) That the juvenile has a recent record of adjudications for violent conduct resulting in serious physical injury to others, the petition pending is for delinquency and the charge involves physical injury, or
- 6) That by reason of the juvenile's recent self-inflicted injury or attempted self-injury there is reasonable cause to believe the juvenile should be detained for his own protection for a period of less than 24 hours while action is initiated to determine the need for inpatient hospitalization, provided that the juvenile has been refused admittance by any appropriate hospital, or
- 7) That the juvenile alleged to be undisciplined by virtue of his being a runaway may be detained for a period of no more than 82 hours to facilitate evaluation of the juvenile's need for medical or psychiatric treatment or to facilitate reunion with his parents.

(c) When a juvenile has been adjudicated delinquent, the Judge may order secure or nonsecure custody pending the dispositional hearing or pending placement of a delinquent juvenile. The Judge may also order secure custody for a juvenile who is alleged to have violated the terms of his probation or conditional release.

(d) In determining whether secure custody should be ordered, the Judge should consider the nature of the circumstances of the offense; the weight of the evidence against the juvenile; the juvenile's family ties, character, mental condition, and school attendance record; and whether the juvenile is on conditional release. If the criteria for secure custody as set out in subsection (b) or (c) are met, the Judge may enter an order directing an officer to assume custody of the juvenile and to take the juvenile to the place designated in the order.

Sec. 7A-23. Order for secure or nonsecure custody.

(a) The custody order shall be in writing and shall direct a law enforcement officer to assume custody of the juvenile and to make due return on the order. A copy of the order shall be given to the juvenile's parent, guardian, or custodian by the official executing the order. If the order is for secure custody, copies of the petition and custody order shall accompany the juvenile to the detention facility or holdover facility of the jail.

(b) An officer receiving an order for custody which is complete and regular on its face may execute it in accordance with its terms and need not inquire into its regularity or continued validity, nor does he incur criminal or civil liability for its due service.

Sec. 7A-24. Place of secure or nonsecure custody.

(a) A juvenile meeting the criteria set out in section 7A-22(a) may be placed in nonsecure custody with the Department of Social Services or an appropriate person designated in the order for temporary residential placement in:

- 1) A licensed foster home or a home otherwise authorized by law to provide such care, or
- 2) Any other home or facility approved by the court and designated in the order.

(b) A juvenile meeting the criteria set out in section 7A-22(b) may be temporarily detained in an approved detention home or regional detention facility which shall be separate from any jail, lockup, prison, or other adult penal institution.

[13.3] TRIBAL CODE COMMENTARY

The Sault Ste. Marie Code allows a law enforcement officer to take a child into custody when the child commits a juvenile offense in the presence of the officer, the officer has a reasonable suspicion to believe a juvenile offense has been committed, or the juvenile court has issued a custody order. This is a fairly standard provision. The juvenile is read his rights and then the officer must decide what to do with the child. This section is very similar to the NIJC Tribal Juvenile Code and the diagrams earlier in the chapter outline the potential responses.

The Eastern Band of Cherokee follows this process when a youth is taken into custody without a court order.

- Notify the juvenile's parent, guardian, or custodian that child is in custody and advise them of their right to be present when a determination is made as to the need for "secure or nonsecure" custody.
- Release the juvenile to parent, guardian, or custodian if the officer believes continued custody is unnecessary.
- If not released, then the officer requests that a petition be drawn. The petition goes to the intake counselor to consider prehearing diversion. If a decision is made to file a petition the intake counselor contacts the judge for a determination of continued custody.
- No juvenile can be held for more than twelve hours unless a petition is filed by the intake counselor and an order for secure or nonsecure custody has been entered by a judge.

The Eastern Band of Cherokee uses the terms *secure* and *nonsecure custody*. Nonsecured custody is a placement with social services or another person used for temporary residential placement in a licensed foster home or any other home or facility approved by the court. Some communities have safe homes for youth in these situations. A secure facility would include a regional detention facility or a detention home, although the code requires that the juvenile must not come into contact with adult prisoner in a detention facility.

A judge can order secured custody of a juvenile accused of offending only if the juvenile:

- Is charged with one or more felonies.
- Has willfully failed to appear on this or other delinquency proceedings.
- Threatens or has made plans to flee the jurisdiction.
- Is an absconder from a training school or facility.
- Has a recent record of violent conduct resulting in serious bodily harm to others.
- Has recent self-inflicted injury and should be detained for his own protection for a period of twenty-four hours while action is initiated to determine need for inpatient hospitalization.
- Is alleged to be a runaway and may be detained for a period of no more than eighty-two hours to facilitate evaluation of the juvenile's need for medical or psychiatric treatment or to facilitate reunion with his parents.

[13.4] EXERCISES

The following exercises are meant to guide you in writing provisions governing taking a youth into custody and placing youth in a secure juvenile detention facility or in a juvenile shelter care facility under the tribal juvenile code.

Exercises

- Find and examine your juvenile code's provisions governing the taking of youth into custody.
 - Under what circumstances can a youth be taken into custody?
 - What are the parental/guardian/custodian notification requirements?
 - Where may a youth be placed/detained?
 - For how long?
- Make a list of current placement/detention options for youth.
- Make a list of the types of placement/detentions options you would like to develop or contract for.

Read and Discuss

What happens to youth in secure detention facilities in your area?

National findings:*

- Youth are physically and emotionally separated from their families and communities
- Youth find themselves in an environment of chaos and violence
- Youth experience neglect
- Youth become depressed and many become suicidal
- Youth will have an chance of recidivism (more delinquency and/or crime when they get out)
- Youth will be mixed in to a “dumping ground of mentally ill youth”
- If a person is mentally ill already they will get worse

*Taken from “The Dangers of Detention: The Impact of Incarcerating Youth in Detention and other Secure Detention Facilities,” The Justice Policy Institute Report, <http://www.justicepolicy.org>.

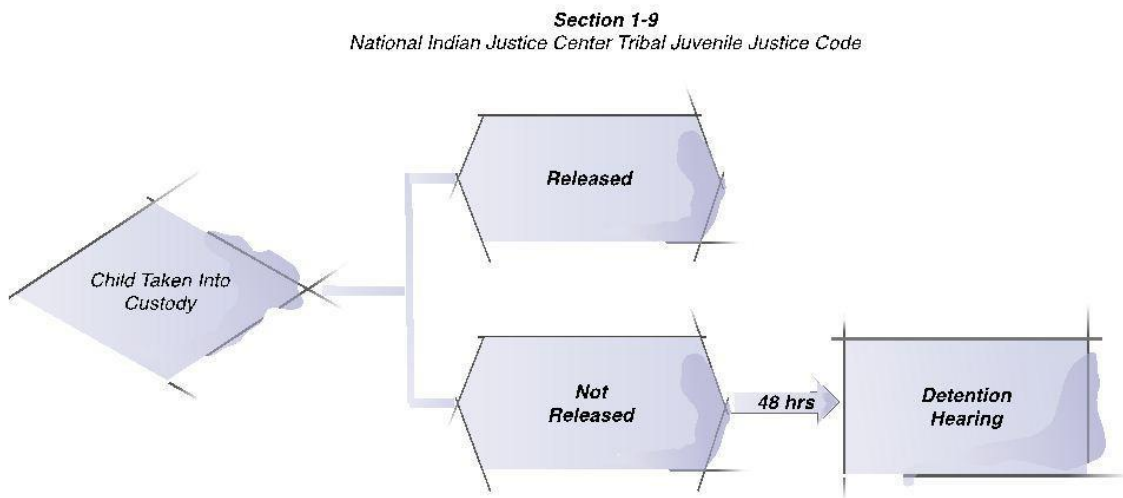
CHAPTER 14

DETENTION HEARINGS

[14.1] OVERVIEW

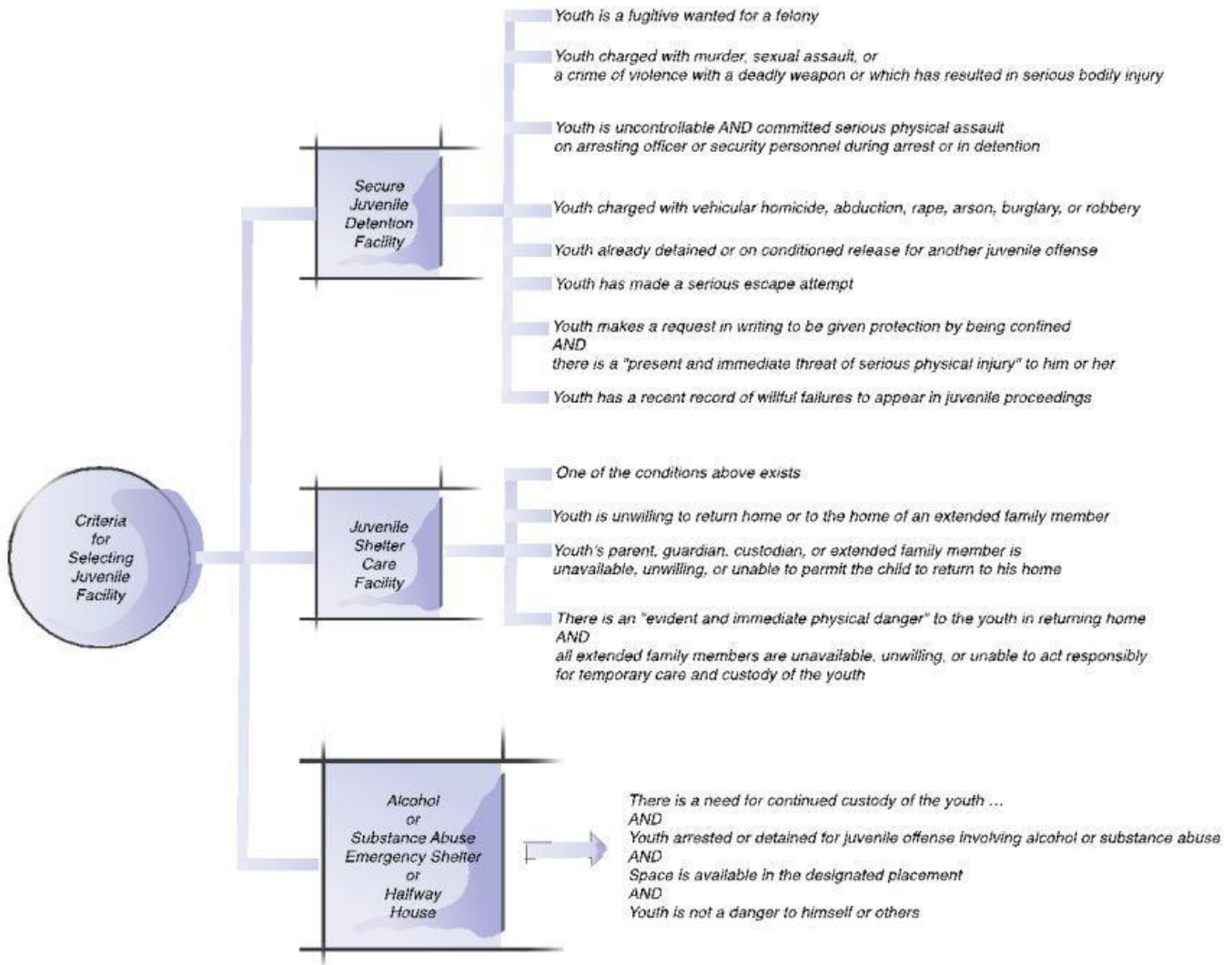
When a youth is not released to his or her parents soon after being taken into custody, a detention hearing is held to determine whether further detention is necessary. This code section describes the purposes of a detention hearing, the notice requirements, the detention hearing procedure, the standards to be considered, the finding at the hearing, and provisions for a rehearing.

Keep in mind that the detention of juveniles should meet the requirements of the Delinquency Prevention Act of 1974, which provides that status offenders (runaways, truants, or curfew violators) and nonoffenders (abuse/neglect victims) are not to be placed in secured detention facilities. Those youth suspected or adjudicated juvenile delinquents are not to be confined in facilities allowing regular contact with adults. If placed in a facility where adults are also confined, they must be separated by both sight and sound from the adult population.



Under Section 1-9 of the NIJC Tribal Juvenile Justice Code if a youth is taken into custody and is not released, a detention hearing must be held within forty-eight hours. Notice of the hearing must be given to the youth, his "parent, guardian, or custodian," and his advocate or attorney as soon as the hearing is set. These detention hearings must be conducted in juvenile court separate from other hearings. They must also be closed to the general public. At the detention hearing the judge must advise the youth and his or her parent, guardian, or custodian of their rights. The purpose of the hearing is to determine whether the detention criteria has been met for continued detention and, if it is met, whether the criteria has been met for placement in a secure detention facility versus a juvenile shelter care facility or whether the child should be referred to an alcohol or substance abuse emergency shelter or halfway house.

Section 1-8 F. Criteria for Selecting Juvenile Facility
National Indian Justice Center Tribal Juvenile Justice Code



The NIJC Model Code requires that both Juvenile Counselors and Judges determine whether certain criteria have been met before continuing custody of a youth. See excerpt of NIJC Tribal Juvenile Justice Code, Section 1-8 D in the following text. The NIJC Model Code also requires that juvenile counselors and judges determine whether further criteria have been met in deciding where to place youth—whether in a secure detention facility, a juvenile shelter care facility, or an alcohol or substance abuse emergency shelter or halfway house. The criteria for placement in secure detention are the most difficult to meet. A juvenile counselor or judge must find that one or more of the conditions set out in the following diagram exist before placement is warranted and required under the NIJC Model Code. The NIJC Model Code favors the release of youth to parents, guardian, custodian, or extended family and the placement of youth in a secure juvenile detention facility only as a last resort.

[14.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.404 Detention Hearing.

(1) Where a child who has been taken into custody is not released, a detention hearing shall be convened by the Court within seventy-two (72) hours, inclusive of holidays and weekends, of the child's initial detention.

(2) The purpose of the detention hearing is to determine:

(a) Whether probable cause exists to believe the child committed the alleged juvenile offense.

(b) Whether continued detention is necessary pending further proceedings.

(3) Notice of the detention hearing shall be given to the child and the child's parent, guardian, or custodian and the child's counsel as soon as the time for the detention hearing has been set.

The notice shall contain:

(a) The name of the court.

(b) The title of the proceeding.

(c) A brief statement of the juvenile offense the child is alleged to have committed.

(d) The date, time, and place of the detention hearing.

(4) Detention hearings shall be conducted by the Juvenile Division separate from other proceedings. At the commencement of the detention hearing, the Court shall notify the child and the child's parent, guardian, or custodian of their rights under '36.402 of this Chapter.

(5) The Court shall consider the evidence at the detention hearing as it pertains to the detention of the child. If the Court determines that there is a need for continued detention, the Court shall specify where the child is to be placed until the adjudicatory hearing.

(6) The Court shall issue a written finding stating the reasons for release or continued detention of the child. If the Court determines that there is a need for continued detention, the Court shall specify where the child is to be placed until the adjudicatory hearing.

(7) If the child is not released at the detention hearing, and a parent, guardian, custodian, or relative was not notified of the hearing and did not appear or waive appearance at the hearing, the Court shall rehear the detention matter without unnecessary delay upon the filing of a motion for rehearing and a declaration stating the relevant facts.

NIJC Tribal Juvenile Justice Code

1-8 D. Review by Juvenile Counselor or Juvenile Facility.

The juvenile counselor or juvenile official at the juvenile facility (as designated by the court) shall, immediately upon delivery of the child for custody, review the need for continued custody and shall release the child to his parent, guardian, or custodian in order to appear at the hearing on a date to be set by the court, unless:

1. the act is serious enough to warrant continued detention and;
2. there is probable cause to believe the child has committed the offense(s) alleged; and

4. there is reasonable cause to believe the child will run away so that he will be unavailable for further proceedings; or
5. there is reasonable cause to believe that the child will commit a serious act causing damage to person or property.

1-8 F. Criteria for Selection Juvenile Facility

If the juvenile counselor or juvenile official at the juvenile facility (as designated by the court) determines that there is a need for continued custody of the child in accordance with section 1-8D of this code, then the following criteria shall be used to determine the appropriate juvenile facility for the child:

1. A child may be detained in a Secure Juvenile Detention Facility (as defined in section 1-1C of this code) as designated by the court only if one or more of the following conditions are met:
 - a) the child is a fugitive from another jurisdiction wanted for a felony offense; or
 - b) the child is charged with murder, sexual assault, or a crime of violence with a deadly weapon or which has resulted in a serious bodily injury; or
 - c) the child is uncontrollable and has committed a serious physical assault on the arresting officer or on other security personnel while resisting arrest or detention; or
 - d) the child is charged with committing one of the following acts which would be an offense if the child were an adult: vehicular homicide, abduction, rape, arson, burglary or robbery; or
 - e) the child is already detained or on conditioned release for another “juvenile offense”; or
 - f) the child has a demonstrable recent record of willful failures to appear at juvenile court proceedings; or
 - g) the child has made a serious escape attempt; or
 - h) the child requests in writing that he be given protection by being confined in a secure confinement area and there is a present and immediate threat of serious physical injury to the child.
2. A child may be housed in a Juvenile Shelter Care Facility (as defined in section 1-1C of this code) as designated the court only if one of the following conditions exist:
 - a) one of the conditions described in section 1-8F(1) above exists; or
 - b) the child is unwilling to return home or to the home of an extended family member; or
 - c) the child’s parent, guardian, custodian, or an extended family member is unavailable, unwilling, or unable to permit the child to return to his home;
 - d) there is an evident and immediate physical danger to the child in returning home, and all extended family members are unavailable, unwilling, or unable to accept responsibility for temporary care and custody of the child.
3. A child may be referred to an Alcohol or Substance Abuse Emergency Shelter or Halfway House (as defined in section 1-1C of this code) if it is determined that there is a need for continued custody of the child in accordance with section 1-8D of this code and
 - a) the child has been arrested or detained for a “juvenile offense” relating to alcohol or substance abuse,

- b) there is space available in an alcohol or substance abuse emergency shelter or halfway house designated by the court; and
- c) the child is not deemed to be a danger to himself or others

1-9 A. Requirement of Detention Hearing.

Where a child who has been taken into custody is not released, a detention hearing shall be convened by the court within forty-eight (48) hours, inclusive of holidays and weekends, of the child's initial detention under chapter 1-8 of this code.

1-9. D. Detention Hearing Procedure

Detention hearings shall be conducted by the juvenile court separate from other proceedings. At the commencement of the detention hearing, the court shall notify the child and the child's parent, guardian or custodian of their rights under chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties or the court shall be admitted.

1-9 E. Standards to Be Considered at Detention Hearing

The court shall consider the evidence at the detention hearing as it pertains to the detention criteria set forth in sections 1-8D and 1-8F of this code.

Eastern Band of Cherokee

Juvenile Code

Sec. 7A-25. Hearing to determine need for continued secure or nonsecure custody.

(a) No juvenile shall be held under a custody order for more than five calendar days without a hearing on the merits or a hearing to determine the need for continued custody. In every case in which an order has been entered by an official exercising authority delegated pursuant to chapter 21 of this Code, a hearing to determine the need for continued custody shall be conducted on the day of the next regularly scheduled session of court, if such session precedes the expiration of the five calendar day period.

(b) Any juvenile who is alleged to be delinquent shall be advised of his right to have an attorney represent him.

(c) At a hearing to determine the need for continued custody, the Judge shall receive testimony and shall allow the juvenile and his parent, guardian, or custodian an opportunity to introduce evidence, to be heard in their own behalf, and to examine witnesses. The Tribe shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that restraints on the juvenile's liberty are necessary and that no less intrusive alternative will suffice. The Judge shall not be bound by the usual rules of evidence at such hearings.

(d) The Judge shall be bound by criteria set forth in section 7A-22 in determining whether continued custody is warranted.

(e) The Judge shall impose the least restrictive interference with the liberty of a juvenile who is released from secure custody including:

1. Release on the written promise of the juvenile's parent, guardian, or custodian to produce him in court for subsequent proceedings, or
2. Release into the care of a reasonable person or organization, or
3. Release conditioned on restrictions on activities, associations, residence, or travel if reasonably related to securing the juvenile's presence in court, or
4. Any other conditions reasonably related to securing the juvenile's presence in court.

(f) If the Judge determines that the juvenile meets the criteria in section 7A-22 and should continue in custody, he shall issue an order to that effect. The order shall be in writing with appropriate findings of fact. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

[14.3] TRIBAL CODE COMMENTARY

The Sault Ste. Marie statute requires a hearing be held within seventy-two hours of the time of the youth's initial detention. The statute gives a judge the authority to use his/her discretion in determining whether continued detention is warranted or required.

Criteria for continued detention of youth at detention hearing—The Sault Ste. Marie statute at Section 36.404 (5) omits the criteria, set out at NIJC Model Code Section 1-9 E for when a judge determines whether continued detention is warranted or required: “The court shall consider the evidence at the detention hearing as it pertains to the detention criteria set forth in sections 1-8 D and 1-8 F of this code.” Compare: “The Court shall consider the evidence at the detention hearing as it pertains to the detention of the child” at Sault Ste. Marie statute, Section 36.404 (5). This is a significant omission as it gives the judge total discretion to decide whether to continue to detain a youth and where to detain the youth.

[14.4] EXERCISES

The following exercises are meant to guide you in writing the detention hearing section of the tribal juvenile code.

Exercises

- Find and examine your juvenile code's provisions governing the detention hearing and placement/detention alternatives – what are the designated placement/detention options?
- Make a list of the actual placement/detention options available both in your community and in neighboring towns/cities.
- Make a list of what placement/detention options you would like to develop or contract for in your community and/or in neighboring towns/cities.

Points for discussion*

Should we consider developing an adolescent “respite care” program?

Attention Homes’ Adolescent Residential Care program provides residential treatment to adolescents in crisis. We offer them emotional and behavioral support in a safe, structured, RCCF-licensed (Residential Child Care Facility) home-like setting. We use a systems approach to improve family dynamics and relationships. This program operates out of our Chase Court home.

Service Demographic - Services are provided to youth, ages 12-18, who are abused, neglected, troubled, delinquent, recovering, from families in crisis and/or are beyond the control of their parents. Residents are typically referred to us through social services departments or the court and juvenile systems. Teens may be privately referred through their families. Services are provided on a sliding scale fee structure based on income level and family size.

Evidence-based Practices - Our program’s design is based on best practices of successful youth residential care programs displaying the following characteristics: "family involvement, supervision and support by caring adults, a skill-focused curriculum, service coordination, development of individual plans, positive peer influence, building self-esteem, family-like atmosphere, and planning and support for post-program life" (Colorado State University Social Work Research Center).

Attention Homes' behavior change program, “Choices,” is a strength-based system of choices and consequences supported by Cognitive Behavioral Therapy (CBT). CBT teaches residents positive decision-making skills. CBT is an intervention of choice for many RCCFs and is also used to teach residents to better manage their emotions and resulting behavior.

Respite / Extended Care - Teens develop an individual behavior plan, participate in group curriculum and learn how to regulate and stabilize their behavior and emotions through our behavioral level system.

Substance Abuse - Youth practice skills to learn how to function sober in the larger community. They participate in NA/AA, psycho-educational and life skills groups, and are helped finding part-time employment and important educational opportunities.

Transitional Living - Teens may stay up to several months before moving on to a safe and appropriate long-term placement. While at Attention Homes they learn independent living skills, and have help in finding part-time employment and important educational opportunities.

Services - Boys and girls living in our Adolescent Residential Care program are provided the following services:

- Safety, stability, security and supervision in a highly structured, RCCF-licensed, home-like environment
- Shelter and healthy meals
- Case management and individual, group and family coaching
- “Choices” behavioral-change level system program anchored in cognitive behavioral therapy
- In-home psycho-educational groups
- Regular attendance at Alcoholics Anonymous/Narcotics Anonymous groups
- Frequent, random poly-urine analysis screens
- Opportunities to practice pro-social skills
- Community-based living norms for home, school, work and recreation
- Access to accredited educational options and job training
- Access to physical, dental and mental health care
- Access to recreational activities and community service projects
- Life skills lessons and positive adult role models
- Access to part-time employment
- Experiential educational opportunities
- Optional aftercare services

**Taken from Attention Homes - Boulder Colorado - Adolescent Residential Care Program. Go to www.attentionhomes.org*

CHAPTER 15

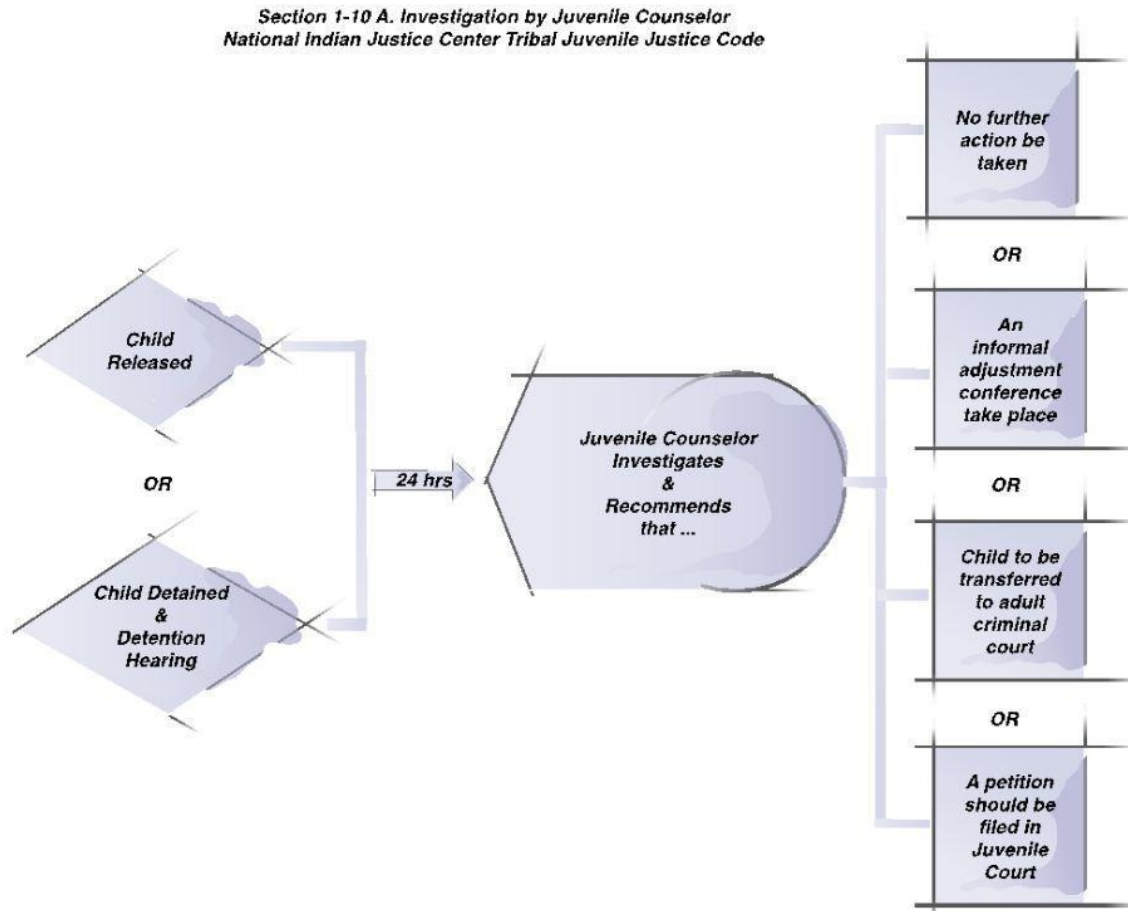
INFORMAL ADJUSTMENT IN JUVENILE PROCEEDINGS

[15.1] OVERVIEW

The “informal adjustment” is a critical stage in the juvenile proceedings. It diverts the child away from the formal judicial proceeding and instead offers ways to provide help and accountability for the child with less formality. It prevents the child from being labeled a juvenile offender.

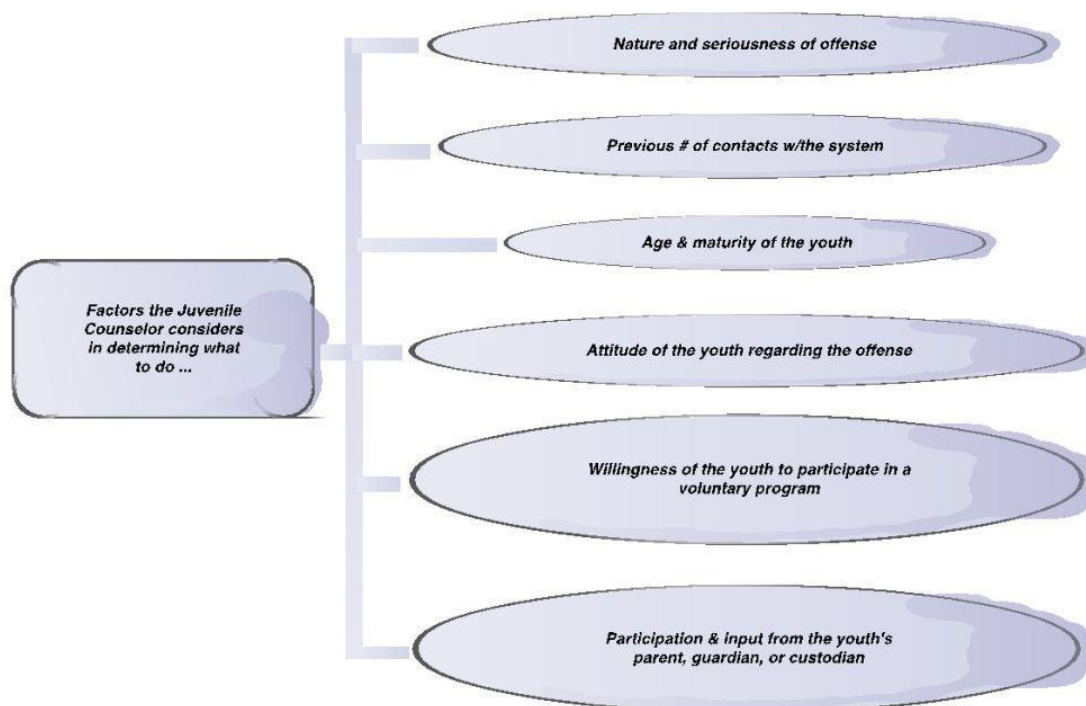
The manner in which the informal adjustment is applied may vary slightly from one court to the next, but the example of the NIJC Tribal Juvenile Justice Code is typical of how it might be applied. The NIJC Tribal Juvenile Justice Code, Section 1-10 A, provides for a “juvenile counselor” to review, investigate, and recommend. The juvenile counselor must do this within twenty-four hours of a youth being released from custody or within twenty-four hours of any detention hearing. The juvenile counselor may recommend that no further action be taken, that the youth and his or her parents, guardian, or custodian participate in an “informal adjustment conference,” that a presenting officer, or in some tribal jurisdictions, the prosecutor, petition to transfer the youth to adult criminal court, or that the presenting officer/prosecutor file a juvenile delinquency petition in juvenile court.

**Section 1-10 A. Investigation by Juvenile Counselor
National Indian Justice Center Tribal Juvenile Justice Code**



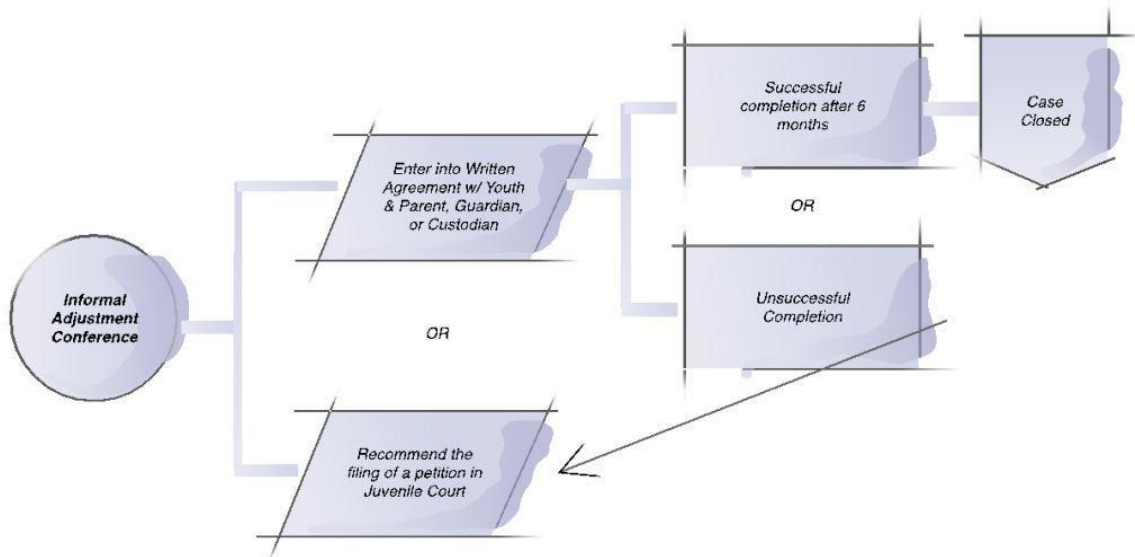
Under the NIJC Tribal Juvenile Justice Code, Section 1-10 B.1, the juvenile counselor determines whether “adjustments or agreements” may be made to avoid the filing of a petition in the juvenile court. Under Section 1-10 B.2, the juvenile counselor must consider a list of factors in determining whether to recommend the filing of a formal petition in juvenile court. See the following diagram for each factor.

Section 10 B. 2. Informal Adjustment
National Indian Justice Center Tribal Juvenile Justice Code



Section 1-10 A of the NIJC Tribal Juvenile Justice Code sets out the process and requirements for an informal conference. The purpose of the conference is to discuss alternative courses of action, including “diversion programs.” If the youth and his parents, guardian, or custodian are agreeable, they may enter into a written agreement specifying the terms and conditions of the given diversion program. Under the NIJC Tribal Juvenile Code, the “informal adjustment period” is limited to six months. If the youth successfully completes his or her diversion program (a.k.a. agreement with its terms and conditions) within this time frame, the case is closed and no further action is required or taken. If, however, the youth fails to successfully complete his or her diversion program, the juvenile counselor may recommend that the presenting officer or prosecutor file a petition in juvenile court, thus initiating the juvenile court process. If a youth and his or her parent, guardian, or custodian, does not wish to participate in any diversion program, they may decline to do so and the juvenile counselor must recommend that the presenting officer/prosecutor file a petition in juvenile court.

Section 1-10 C. Informal Conference
National Indian Justice Center Tribal Juvenile Justice Code



There are all kinds of assessments, evaluations, examinations, services, treatment, and programs that may comprise any given type of “diversion program.” The terms and conditions for these make up the terms and conditions that go into the agreement signed by the youth and his or her parent, guardian, or custodian. Diversion programs are the core of any effective tribal juvenile justice system and may require referrals, consent decrees, and/or sentencing orders or other types of court orders that “divert” youth. The U.S. Department of Justice through its Office of Juvenile Justice and Delinquency Prevention lists and describes evidence-based models for juvenile programming. They divide these into the categories of “immediate sanctions,” “intermediate sanctions,” “residential,” and “reentry.” The immediate sanctions may be applicable through referral by a juvenile counselor as part of an informal adjustment period. Some of the intermediate sanctions, residential, and reentry options are likely to require a court order for various reasons. See the following chart for a list of applicable models. Many of the special courts or special calendars are described in Section 2.4 Collaborative Justice Courts in Juvenile Court Systems of this resource. Also, go to <http://www.ojjdp.gov/mpg> for a full description of the model and evaluation research on the model’s efficacy.

OJJDP Model Programs Guide for Juvenile Services and Programming

<http://www.ojjdp.gov/mpg>

Immediate Sanctions	Intermediate Sanctions	Residential	Reentry
Afterschool/ Recreation	Afterschool/ Recreation	Cognitive Behavioral Treatment	Aftercare
Cognitive Behavioral Treatment	Cognitive Behavioral Treatment	Correctional Facilities	Cognitive Behavioral Treatment
Conflict Resolution/ Interpersonal Skills	Day/Evening Reporting Center	Day/Evening Reporting Center	Day/Evening Reporting Center
Diversion	Drug Court	Group Home	Reentry Court
Drug/Alcohol Therapy/ Education	Drug/Alcohol Therapy/ Education	Residential Treatment Centers	Vocational/ Job Training
Family Therapy	Family Therapy	Wilderness Camps	
Gender-Specific Programming	Gender-Specific Programming		
Parent Training	Home Confinement		
Teen/Youth Court	Mental Health Court		
Restorative Justice	Probation Services		
Wraparound/ Case Management	Restorative Justice		
	Shelter Care		
	Wraparound/ Case Management		

Quick Reference: 16 Steps for Planning a Diversion Program*

*Taken from the *Juvenile Diversion Guidebook, Models for Change Juvenile Diversion Workgroup* (2011)

A. Purpose

1) Objectives: The main purpose(s) for developing a diversion program will need to be identified.

- What will be the primary objectives of the diversion program?
- In your community, what stakeholders from the juvenile justice public/private youth services systems will be involved to provide input and support in shaping the development of your diversion program?

2) Referral Decision Points: There are various points within the juvenile justice processing continuum where youth can be targeted for diversion.

- At what point or points will referral decisions be made?
- Who, within the processing spectrum, will be responsible for making the decision to divert youth?

3) Extent of Intervention: The diversion program must consider the kind and degree of intervention it will have in the youth's life.

- What degree of intervention(s) will the program utilize?
- Will the program provide the youth with a written contract (either formal or informal)?

B. Oversight

4) Operations: It is necessary to determine who will have primary responsibility for implementing and operating the diversion program and what the level of community oversight will be.

- What agency or entity will establish and maintain the program policies, provide staffing, and take responsibility for program outcomes?
- Will an advisory board or panel be developed to oversee the development of policies and procedures for the diversion program?
- How will the engagement and buy in of stakeholders be obtained?

5) Funding: Jurisdictions developing or implementing a diversion program must determine how the program will be funded and sustained for both the short and the long run.

- How will the diversion program be funded?
- Are secure funding streams currently in place that can help to sustain the program in the future?
- Has the possibility of using other local, state, or federal resources to help support the diversion program or key aspects of the program been explored?

C. Intake Criteria

6) Referral and Eligibility: A diversion program will need to establish criteria that specify who is eligible for entry into the diversion program.

- What youth will be eligible for diversion?
- What offenses will be accepted for diversion? Are there any offenses that might make a youth ineligible and will there be options for discretion?
- Are there any offenses that might make a youth ineligible and will there be options for discretion?

7) Screening and Assessment: Diversion programs may utilize evidence-based screening and assessment tools to assess risk, needs, and behavioral or mental health problems.

- Will any screening and/or assessment methods/tools be used to determine a youth's eligibility, and if so, how will these tools be chosen and who will administer them?
- For what purposes will screening and assessment be used?
- Are there any protocols in place to deal with the sensitive nature of information collected and how, if at all, it can be shared among child-serving agencies?

D. Operation Policies

8) Participant Requirements: It is important to determine the conditions and responsibilities youth will have to follow in order to ensure meaningful program participation.

- What obligations and conditions will the program require for the youth's participation and successful completion?
- How will requirements focus on youths' strengths, address behavioral health needs, satisfy victim concerns, and involve community efforts?

9) Services: The diversion program will need to consider what services, if any, will be provided to the youth by the program or through referral to community-based services, as well as how those services will be administered.

- What services will be provided for the youth while participating in the diversion program?
- Will the diversion program need to perform an inventory of community services, and if so, who will be responsible for this effort?
- Will the diversion program encourage or require the youth's family to participate in services?
- Are there any agreements in place or MOU among the program and community service providers that will better facilitate services to the youth?

10) Incentives: Incentives should be employed by a diversion program in order to motivate youth and caretakers to meet the terms of the diversion program and to ensure successful program completion.

- Will the diversion program use any incentives to motivate youth and/or caretakers throughout the diversion process? If so, what forms of incentives will be used?
- Is the use of incentives economically feasible for the diversion program and what funding source will support incentives?
- Will the court agree to dropping charges against the youth or expunging records once the youth successfully completes the terms of diversion?

11) Consequences of Failure to Comply: Consequences must be specified for youth since some may have trouble fulfilling the terms of their diversion, either by failing to comply with the program's requirements or by declining to participate altogether.

- Will there be any negative consequences for youth who fail to comply with the diversion program's requirements? If so, what will these sanctions be?
- Will the youth ultimately be formally processed for failing to comply with diversion?

12) Program Completion/Exit Criteria: Criteria must be established that will define when a youth has successfully completed the terms of their diversion and is ready to exit the program.

- How will the diversion program monitor a youth's success or failure during program participation?
- How will successful program completion be defined, and will there be established exit criteria?

E. Legal Protections

13) Information Use: The diversion program will need to consider what procedures and protocols should be in place that will establish how sensitive information is collected and will be kept confidential.

- What will be the conditions/guidelines for the use of information obtained during the youth's participation in the diversion program?
- How will policies concerning the collection and use of information be clearly established and conveyed to youth and caretakers prior to participation in diversion?

14) Legal Counsel: In the absence of a state statute or local policies, the program should have established guidelines for the role of counsel.

- What role will defense counsel play? Are there local policy provisions in place or statutory guidelines that establish the role of counsel?
- Will the diversion program make counsel available to youth and family?

F. Quality

15) Program Integrity: It is important to carefully attend to the diversion program's development and maintenance to ensure continued quality and program fidelity.

- Are there clear policies and procedures that will be put into manual form for program personnel to maintain program quality and fidelity?
- How will training be developed and delivered for diversion program personnel?
- How will information be collected and in what formats?
- Will the program conduct a process evaluation?

16) Outcome Evaluation: To ensure the diversion program is meeting its objectives and goals, a record keeping and data collection system should be in place to assist in providing periodic evaluations.

- What kind of record keeping and data collection will be used to provide periodic evaluations of the diversion program and monitor achievement of goals and objectives?
- What youth and program outcomes will be used to measure success?

[15.2] TRIBAL CODE EXAMPLES

Pascua Yaqui Tribe Code

120 Informal Adjustment.

(A) During the course of the preliminary investigation to determine what further action shall be taken, the juvenile counselor and presenting officer shall confer with the child and the child's parents for the purpose of effecting adjustments or agreements that make the filing of the petition unnecessary.

(B) The presenting officer shall consider the following factors in determining whether to proceed informally or to file a petition:

- (1) Nature and seriousness of the offense.
- (2) Previous number of contacts with police, juvenile counsel or the Court.
- (3) Age and maturity of the child.
- (4) Attitude of the child regarding the offense.
- (5) Willingness of the child to participate in a voluntary program.
- (6) Participation and input of the child's parents.

(C) Informal Conference.

- (1) After conducting the preliminary investigation, the presenting officer shall hold an informal conference with the child and the child's parents, guardian, or custodian to discuss alternative courses of action in the particular case.
- (2) The presenting officer shall inform the child, the child's parents, guardian, or custodian of their basic rights under 3 PYT R.Juv.P. Rule 20. Statements made by the child at the informal conference shall not be used against the child in determining the truth of the allegations in the petition.
- (3) At the informal conference upon the basis of information obtained during the preliminary investigations, the presenting officer may enter into a written agreement with the child and the child's parents, guardian, or custodian, specifying particular conditions to be observed during the informal adjustment period, not to exceed six months. The child and the child's parents, guardian, or custodian, shall enter into the agreement with the knowledge that consent is voluntary and that they may terminate the adjustment process at any time and petition the Court for a hearing on the case.
- (4) The child is permitted to be represented by counsel at the informal conference.
- (5) If the child does not desire to participate voluntarily in a diversion program, the presenting officer shall file a petition under 3 PYT R.Juv.P. Rule 50.
- (6) Upon successful completion of the informal adjustment agreement, the case shall be closed with no further action taken in the case.
- (7) If the child fails to complete the terms of his informal adjustment agreement, the presenting officer may file a petition in the case under 3 PYT R.Juv.P. Rule 50.

NIJC Tribal Juvenile Justice Code

1-10 Juvenile Offender—Initiation of Proceedings.

1-10 A. Investigation by the Juvenile Counselor

The juvenile counselor shall make an investigation within twenty-four (24) hours of the detention hearing or the release of the child to his parent, guardian, or custodian, to determine whether the interests of the child and the public require that further action be taken. Upon the basis of his investigation, the juvenile counselor shall:

1. recommend that no further action be taken; or
2. suggest to the child and the child's parent, guardian, or custodian that they appear for an informal adjustment conference under sections 1- 10B and 1-10C of this code; or
3. request the juvenile presenter to begin transfer to adult tribal court proceedings under chapter 1-3 of this code; or
4. recommend that the juvenile presenter file a petition under section 1-10D of this code. The petition shall be filed within forty-eight (48) hours if the child is in custody. If the child has been previously released to his parent, guardian, custodian, relative, or responsible adult, the petition shall be filed within ten (10) days.

1-10 B. Informal Adjustment

1. During the course of the preliminary investigation to determine what further action shall be taken, the juvenile counselor shall confer with the child and the child's parent, guardian or custodian for the purpose of effecting adjustments or agreements that make the filing of the petition unnecessary.

2. The juvenile counselor shall consider the following factors in determining whether to proceed informally or to file a petition:

- a. nature and seriousness of the offense;
- b. previous number of contacts with the police, juvenile counselor, or the court;
- c. age and maturity of the child;
- d. attitude of the child regarding the offense;
- e. willingness of the child to participate in a voluntary program, and;
- f. participation and input from the child's parent, guardian, or custodian.

1-10 C. Informal Conference

1. After conducting a preliminary investigation, the juvenile counselor shall hold an informal conference with the child and the child's parent, guardian, or custodian to discuss alternative courses of action in the particular case.

2. The juvenile counselor shall inform the child, the child's parent, guardian, or custodian of their basic rights under chapter 1-7 of this code. Statements made by the child at the informal conference shall not be used against the child in determining the truth of the allegations in the petition.

3. At the informal conference, upon the basis of the information obtained during the preliminary investigation, the juvenile counselor may enter into a written agreement with the child and the child's parent, guardian, or custodian specifying particular conditions to be observed during an informal adjustment period, not to exceed six (6) months. The child and the child's parent, guardian, or custodian shall enter into the agreement with the knowledge that consent is voluntary and that they may terminate the adjustment process at any time and petition the court for a hearing in the case.

4. The child shall be permitted to be represented by counsel at the informal conference.

5. If the child does not desire to participate voluntarily in a diversion program, the juvenile counselor shall recommend that the juvenile presenter file a petition under section 1-10D of this code.

6. Upon the successful completion of the informal adjustment agreement, the case shall be closed and no further action taken in the case.

7. If the child fails to successfully complete the terms of his informal adjustment agreement, the juvenile counselor may recommend that a petition be filed in the case under section 1-10D of this code.

Sault Ste. Marie Tribal Code

36.405 Bekaadziwiin (Peaceful Life)

(1) The Sault Ste. Marie Chippewa Tribal Court shall promulgate the guidelines governing Peacemaking.

(2) The Tribal Prosecutor shall present cases that meet the Bekaadziwiin guidelines to the Tribal Peacemaking Committee. The Tribal Peacemaking Committee shall review all cases presented and shall:

- a. decide not to proceed with any action.
- b. refer the matter to Bekaadziwiin for peacemaking.
- c. develop a case plan for the juvenile.
- d. refer the matter to the Juvenile Division.

(3) The Tribal Peacemaking Committee may request the Tribal Prosecutor to file a formal petition upon a finding that the case plan has not been substantially followed.

(4) The Peacemakers shall have the authority to hear the following cases consistent with the established Bekaadziwiin guidelines:

- a. any juvenile offenses.
- b. any juvenile status offenses.
- c. any other cases that are referred by the Tribal Court.

- d. cases from individual Tribal members requesting to voluntarily access Peacemaking.

Warm Springs Tribal Code

Juveniles

360.220 Diversion.

- (1)** Upon the petition of the Juvenile Coordination/Presenting Officer or any interested party, and based upon a written diversion plan agreed to by the Juvenile Coordinator/Presenting Officer, the juvenile and the juvenile's parent(s), guardian, or custodian, the Juvenile Judge may direct that the case proceed to a diversion program, provided that the following conditions are met:
 - (a)** The admitted facts bring the case within the jurisdiction of the Juvenile Court;
 - (b)** An informal disposition of the matter would be in the best interests of the juvenile and the Warm Springs Tribe; and
 - (c)** The juvenile and his or her parent, guardian, or custodian voluntarily consent to an informal disposition of the matter.
- (2)** The written diversion plan, which shall be presented to the Juvenile Judge with a petition for approval of diversion, as provided in Section (1) above, shall consider a number of alternatives to a formal jurisdictional hearing in Juvenile Court. Alternatives shall include, but are not limited to, the following:
 - (a)** Refer the juvenile and the parent, guardian, or custodian to a community agency for needed assistance;
 - (b)** Order terms of supervision, calculated to assist and benefit the juvenile, which regulate the juvenile's activities and which are within the ability of the juvenile to perform;
 - (c)** Accept an offer of restitution if voluntarily made by the juvenile.
- (3)** A program for diversion of a juvenile matter shall not exceed twelve (12) months in duration.
- (4)** The Juvenile Coordinator/Presenting Officer shall, during the course of the diversion program, review the juvenile's progress every thirty (30) days. At the end of the first thirty (30) days, and every thirty (30) days thereafter during the period of the diversion program, the Juvenile Coordinator/Presenting Officer shall submit a monthly report on the status of the diversion program to the Juvenile Judge. If, at any time after the initial thirty (30) day period but before the end of the diversion program, the Juvenile Coordinator/Presenting Officer determines that satisfactory progress is not being achieved, the Juvenile Coordinator/Presenting Officer shall request that the Court schedule a formal jurisdictional hearing in the matter. Upon the juvenile's satisfactory completion of the informal diversion program, the petition will be dismissed.

[15.3] TRIBAL CODE COMMENTARY

The Pascua Yaqui statute at Section 120 is almost identical to the NIJC Model Code at Sections 1-10 B and C. The only significant difference is the omission of “guardian or custodian” in its Section 120(A) and 120 (B)(6). Compare the NIJC Model Code’s Section 1-10 B.1. “During the course of the preliminary investigation to determine what further action shall be taken, the juvenile counselor shall confer with the child and the child’s parent, guardian or custodian. . . .” Also compare the NIJC Model Code’s Section 1-10 B.2. “The juvenile counselor shall consider the following factors in determining whether to proceed informally or to file a petition: . . . (f) participation and input from the child’s parent, guardian, or custodian. These omissions of “guardian or custodian” in the Pascua Yaqui statute appear to be inadvertent as later sections include this language.

The NIJC Model Code was finalized in 1989. This was before the launch of a national wraparound case management initiative in the early 2000s. Contemporary tribal juvenile justice codes should include, within the role and mandates of their equivalent of “Juvenile Counselor,” the duty to conduct case management activities, preferably of the “wraparound” type that ensures tailored, individualized, and comprehensive case management for youth and their families.

The Sault Ste. Marie Tribal Code at Section 36.405 replaces the NIJC Model Code’s “informal adjustment” process with a designated “peacemaking” process. The purpose and nature of the Sault Ste. Marie peacemaking process is set out in a separate set of guidelines. The prosecutor is authorized to take cases to a Peacemaking Committee that then will decide whether to proceed with peacemaking, do nothing, develop a case plan, or refer the entire matter back to the juvenile court system. We note that while it is the prerogative of sovereign Native Nations to further local values, ways, and priorities, it would be in the interest of these Nations to add such peacemaking or other traditional or hybrid processes onto their informal adjustment processes, rather than replacing the informal adjustment process wholesale—to accommodate diversions to additional programs like wellness court (drug court), or any of the many programs or services listed in the preceding table, and where such program or service is not covered as part of the peacemaking program.

The Warm Springs Code is somewhat similar to NIJC Model Code; however it references specific types of adjustments such as:

- Referring the juvenile and the parent, guardian, or custodian to a community agency for assistance.
- Prescribe terms of supervision that assist and benefit the juvenile by regulating the juvenile’s activities.
- Accept an offer of restitution voluntarily made by the juvenile.

It also requires the diversion plan be submitted to the judge for approval. Supervision can be up to one year and at a minimum monthly monitoring is required by statute.

[15.4] EXERCISES

The following exercises are meant to guide you in developing the informal adjustment sections of the tribal juvenile code.

Exercises

- Find and examine your juvenile code to determine whether you have “informal adjustment” provisions (or any process where a juvenile counselor or probation officer assists youth and their families with a case plan and/or treatment plan before a hearing or trial takes place) – what factors make the youth eligible for this?
- Identify who is responsible for such case management and/or treatment planning.
- Make a list of available services (healthcare, mental health, substance use/abuse, etc.).
- Make a list of available diversion programs (mentoring, educational, therapeutic, cultural, wellness court, teen court, peacemaking, mediation, etc.)
- Make a list of desired but as of yet unavailable services and programs.

Read and Discuss*

Should your tribe require early and follow-up mental health screening and assessments for youth involved in the juvenile justice system by statute?

“[R]egardless of the level of care or geographic region of the country, the majority of youth in the juvenile justice system meet the criteria for at least one mental health diagnosis. Overall 70.4 percent of youth were diagnosed with at least one mental health disorder, with girls experiencing a higher rate of disorders (81%) when compared to males (66.8%). For many of the youth in the study their mental health status was complicated by the presence of more than one disorder. Of those youth who were diagnosed with a mental health disorder, 79.1 percent met criteria for at least one other mental health diagnosis. The majority of youth who met criteria for a mental health diagnosis were also diagnosed with a co-occurring substance use disorder. Among those youth with at least one mental health diagnosis, approximately 60 percent also met criteria for a substance use disorder.”

Selected “Core Principles”:

- Youth should not have to enter the juvenile justice system solely in order to access mental health services or because of their mental illness.
- Whenever possible and when matters of public safety allow, youth with mental health needs should be diverted into evidence-based treatment in a community setting.
- If diversion out of the juvenile justice system is not possible, youth should be placed in the least restrictive setting possible, with access to evidence-based treatment.
- Information collected as part of a preadjudicatory mental health screen should not be used in any way that might jeopardize the legal interests of youth as defendant.
- Whenever possible, families and/or caregivers should be partners in the development of treatment decisions and plans made for their children.
- Multiple systems bear responsibility for these youth. While at different times, a single agency may have primarily responsibility, these youth are the community’s responsibility and all responses developed for these youth should be collaborative in nature, reflecting the input and involvement of the mental health, juvenile justice, and other systems.

*Taken from Kathleen R. Skowrya and Joseph J. Cocozza, PhD, “Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System,” a report by the National Center for Mental Health and Juvenile Justice Policy Research Associates, Inc. (2007).

CHAPTER 16

PETITION FOR JUVENILE OFFENDER PROCEEDINGS

[16.1] OVERVIEW

Juvenile court proceedings begin with the filing of a petition naming the youth and sometimes the parents/guardians, alleging that the youth has committed a juvenile offense. It varies with respect to who is authorized to file a petition.

A petition generally begins with the words “in the interest of.” Petitions tend to give the name and age of the youth and the names and address of the parents. Petitions typically indicate whether a minor is currently detained and when they were taken into custody. A tribal petition would contain a provision consistent with the code provision relating to tribal affiliation and/or residence in the nation that gives the juvenile court jurisdiction over certain youth. They must also contain a statement of the facts that bring the youth within the jurisdiction of the juvenile court. The petition may also contain allegations related to the child’s need for treatment or rehabilitation. Once completed, a petition is then filed with the prosecutor who then decides whether or not to prosecute. If he does so, proper notice must be given to the youth and his or her parents or guardian. The petition in every sense must be consistent with your code provisions.

[16.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.406 Filing and Content of Petition.

Formal juvenile offender proceedings shall be instituted by a petition filed by the prosecutor on behalf of the Tribe and in the interests of the child. The petition shall set forth with specificity:

- (1) The name, birth date, residence, and tribal affiliation of the child.
- (2) The names and residences of the child's parents, guardian, or custodian.
- (3) A citation to the specific section(s) of this Chapter which give the Court jurisdiction over the proceedings.
- (4) A citation to the criminal statute or other law or ordinance which the child is alleged to have violated.
- (5) A plain and concise statement of facts upon which the allegations are based, including the date, time, and location at which the alleged acts occurred.
- (6) Whether the child is in custody and, if so, the place of detention and time he was taken into custody.

36.407 Issuance of Summons.

(1) After a juvenile offender petition has been filed, the Court shall direct the issuance of summons to:

- (a) The child.
- (b) The child's parents, guardian, or custodian.
- (c) The child's counsel.
- (d) Appropriate medical and/or alcohol rehabilitation experts.
- (e) Any other person the Court deems necessary for the proceedings.

(2) The summons shall contain the name of the Court, the title of the proceedings, and the date, time, and place of the hearing. The summons shall also advise the parties of their applicable rights under '36.402 of this Chapter. A copy of the petition shall be attached to the summons.

(3) The summons shall be served upon the parties at least seven (7) days prior to the hearing. The summons shall be delivered personally by a law enforcement officer or appointee of the Court. If the summons cannot be delivered personally, the Court may deliver it by registered mail. If the summons cannot be delivered by registered mail, it may be by publication. A party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing.

NIJC Tribal Juvenile Justice Code

1-10 G. Service of the Summons

The summons shall be served upon the parties at least five (5) days prior to the hearing. The summons shall be delivered personally by a law enforcement official or appointee of the court. If the summons cannot be delivered personally, the court may deliver it by registered mail. If the summons cannot be delivered by registered mail, it may be by publication. A party, other

than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing.

[16.3] TRIBAL CODE COMMENTARY

Section 36.406 of the Sault Ste. Marie Tribal Code sets out the requirements for filing and content of the petition. These are identical to the requirements set out under Section 1-10 D of the NIJC Model Code. Most other tribal code provisions are similar as well, so no further examples were given.

Section 36.407 of the Sault Ste. Marie Tribal Code increases the number of days for serving a summons on the parties to seven, as opposed to the NIJC Model Code's five days at Section 1-10 G.

See sample petition in the following text based upon the NIJC Model Code.

In the Juvenile Court of the X Tribe

IN THE MATTER OF:
() CHILD.

PETITION FOR
A FINDING THAT
CHILD IS A
JUVENILE OFFENDER

I, _____, Presenting Officer, on oath state on information and belief:

1. That _____ is a male/female, born on _____, who is eligible for membership/a member of _____ Tribe, who resides or may be found at _____, X reservation, in X state.

2. The names and residence addresses of the child's parents are:

The child and the persons named in this paragraph are designated respondents.

3. The Juvenile Court has original and exclusive jurisdiction over this matter where:

☐ The child resides within the X reservation.

OR

☐ The child is domiciled within the X reservation.

AND

☐ The child is alleged to be a "juvenile offender" under Section X of the Juvenile Justice Code.

AND

☐ The child is alleged to have committed a "juvenile offense," by allegedly violating the following criminal provision: _____, at Section X, of the Law and Order Code of the X Tribe.

AND

☐ At the time of the alleged commission of the juvenile offense, the child was under the age of eighteen (18).

4. The following is a plain and concise statement of facts upon which the allegations are based, including the date, time, and location at which the alleged acts occurred:

5. The child:

- ☐ Was not taken into custody.
- ☐ Was taken into custody at _____ a.m./p.m. on _____ date, and was placed with _____.
- ☐ The child is/is not presently in custody.

6. It is in the best interests of the child and the public that the child be adjudged a "juvenile offender."

I have read the Petition for a Finding that a Child is a Juvenile Offender and do hereby swear that the facts contained herein are true and correct to the best of my knowledge and belief.

Presenting Officer of the X Tribe

Subscribed and sworn to before me this _____ day of _____, 2013.

Notary Public

[16.4] EXERCISES

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

Exercises

- Find and examine your juvenile code's provisions governing the drafting and filing of "petitions" or "complaints."
 - Who is responsible for drafting and filing petitions/complaints with the juvenile court?
 - What types of information must they include?
 - Who is responsible for arguing before the judge on behalf of the petition/complaint in the tribal juvenile court?
- Make a list of the pros and cons of having you're a tribal social worker, child protection worker, juvenile counselor, or juvenile probation officer do the petitioning/complaining in juvenile court?
- Many tribes designate a tribal prosecutor or presenting officer to be responsible for the petition/complaint drafting/filing/arguing process – is this desirable in your juvenile justice system?

Read and Discuss

What is the purpose of the petition? Who fills it out and signs it? What does it look like?

Tribal Trends:

- The purpose of the petition is to invoke the jurisdiction of the juvenile court, to begin the fact-finding process to determine whether the youth committed a juvenile offense (if he or she does not admit to it), and to review the need for (continued or additional) services, treatment, and/or (continued) detention or placement.
- Tribal courts vary in assigning the duty of petition drafting/signing and making arguments to the juvenile court. Some tribes use a "presenting officer" or "prosecutor," others use a "juvenile probation officer," or "juvenile counselor." Still others use a "social worker" or "child protection worker" to handle the petitions.
- Petition templates should be drafted to fit the requirements of each tribe's juvenile statute and the tribal criminal statute, as well as any statutes governing relevant diversion programs like peacemaking or wellness court.

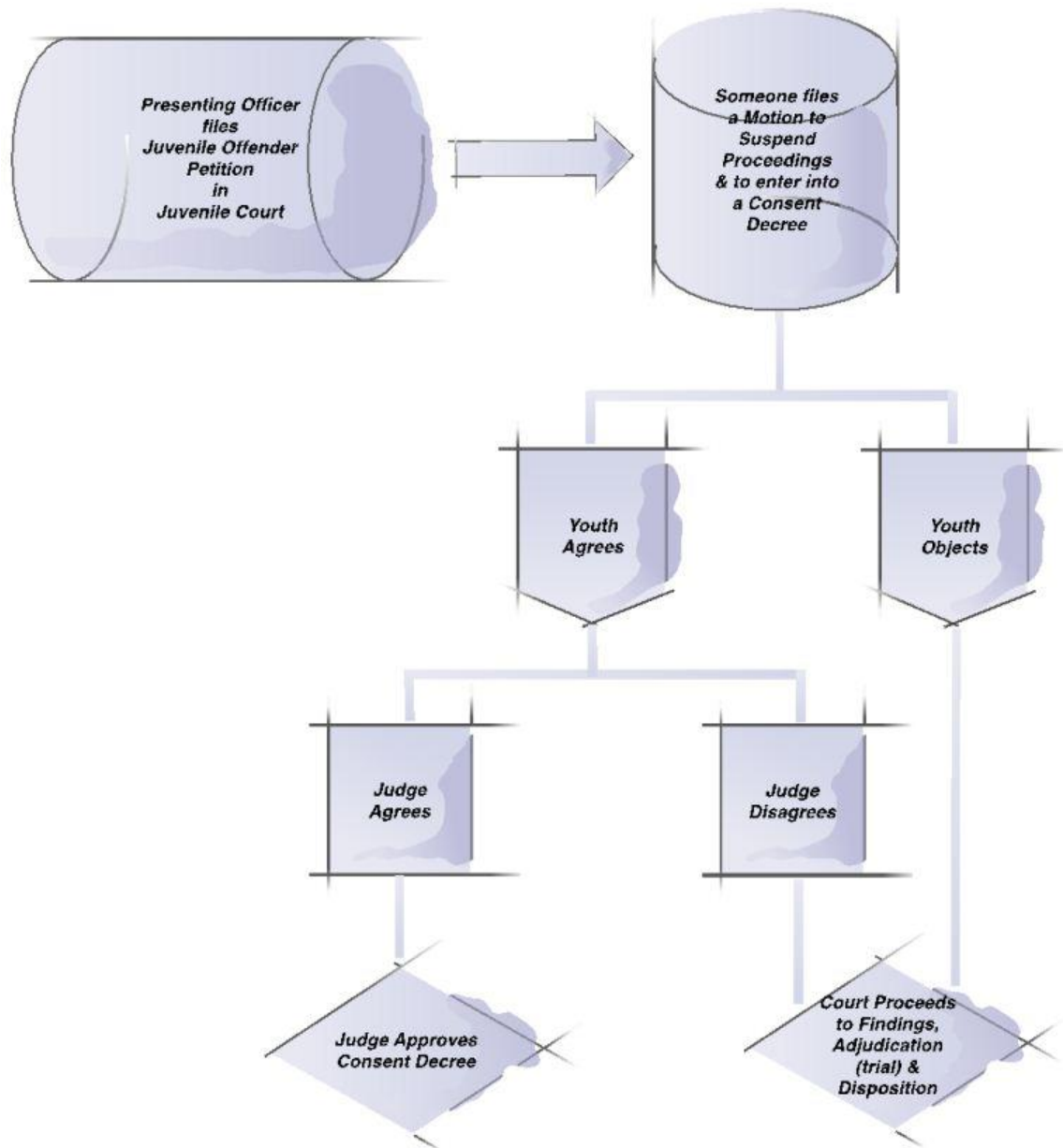
CHAPTER 17

PRESENTING OFFICER/PROSECUTOR AND CONSENT DECREES

[17.1] OVERVIEW

Under the NIJC Tribal Code, there is a second opportunity, after a petition has been filed in juvenile court, for a youth and his or her family to enter into a conditioned agreement for services and/or treatment. This type of agreement is called a “consent decree.” Under the NIJC Model Code at Section 1-11 A., after a petition is filed, but before the judge has “entered a judgment” (issued a court order deciding whether or not the youth has committed a juvenile offense), the youth’s advocate or attorney, or the presenting officer or prosecutor, may file a motion with the court seeking to stop the court proceedings and to have a negotiated consent decree approved by the judge. This would suspend the court proceedings to see if the youth and his or her family can successfully complete requirements of the consent decree. If the youth or his or her family objects to this process, the judge will not approve it and will proceed with the juvenile court process. If the youth and his or her family want to enter into a consent decree, the judge must still approve it before it is effective. Under the NIJC Tribal Code at Section 1-11 C, a consent decree remains in force for six months. The juvenile counselor and/or the youth and his or her family may request an extension for another six months for additional services and/or treatment. If the youth and his or her family fail to fulfill the terms of the consent decree by the deadline, the presenting officer or prosecutor may file a petition to revoke the consent decree and to proceed on the original petition in juvenile court. If the youth and his or her family successfully meet the terms of the consent decree, the original petition must be dismissed with prejudice (meaning that it cannot be refiled later for the same underlying alleged offense). See NIJC Tribal Code Section 1-11 F.

Section 1-11 Consent Decree
National Indian Justice Center Tribal Juvenile Justice Code



[17.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.408 Consent Decree.

(1) At any time after the filing of a juvenile offender petition, the Court may, on motion of the prosecutor or that of counsel for the child, suspend the proceedings and continue the child under supervision in his own home under terms and conditions negotiated with the juvenile probation officer and agreed to by all the parties affected. The Court's order continuing the child under supervision pursuant to this section shall be known as a consent decree.

(2) A consent decree shall remain in force for six (6) months unless the child is discharged sooner by the juvenile probation officer. Prior to the expiration of the six (6) months period, and upon the application of the juvenile probation officer or any other agency supervising the child under a consent decree, the Court may extend the decree for an additional six (6) months in the absence of objection to extension by the child. If the child objects to the extension, the Court shall hold a hearing and make a determination on the issue of extension.

(3) [Reserved]

(4) If, either prior to a discharge by the juvenile probation officer or expiration of the consent decree, the child fails to fulfill the terms of the decree, the prosecutor may file a petition to revoke the consent decree. Proceedings on the petition shall be conducted according to '36.410 of this Chapter. If the child is found to have violated the terms of the consent decree, the Court may:

(a) Extend the period of the consent decree.

(b) Make any other disposition which would have been appropriate in the original proceeding.

(5) If, either prior to discharge or expiration of the consent decree, a new juvenile offender complaint is filed against the child, the prosecutor may:

(a) File a petition to revoke the consent decree in accordance with subsection (4) of this Chapter.

(b) File a petition on the basis of the new complaint which has been filed against the child.

36.409 Dismissal of Petition.

A child who is discharged by or who completes a period under supervision without reinstatement of the original juvenile offense petition shall not again be proceeded against in any court for the same offense alleged in the petition or an offense based upon the same conduct, and the original petition shall be dismissed with prejudice. Nothing in this section precludes a civil suit against the child for damages arising from this conduct.

36.410 Preliminary Hearing

(1) The Court shall conduct a preliminary hearing within fourteen (14) days of the date of filing the petition or in cases of alternative sentencing within fourteen (14) days of the filing of the petition to revoke a consent decree.

(2) The Court shall read the allegations of the petition in open Court unless waived and shall advise the child and parents of the rights in Section 36.402. After advising the child and parents of the rights, the Court shall allow the child an opportunity to deny or admit the allegations and make a statement of explanation.

(3) If the child admits the allegations, the Court may proceed directly to disposition pursuant to Section 36.413.

NIJC Tribal Juvenile Justice Code

1-11 JUVENILE OFFENDER—CONSENT DECREE

1-11 A. Availability of Consent Decree

At any time after the filing of a “juvenile offender” petition, and before the entry of a judgment, the court may, on motion of the juvenile presenter or that of counsel for the child, suspend the proceedings and continue the child under supervision in his own home under terms and conditions negotiated with the juvenile counselor and agreed to by all the parties affected. The court’s order continuing the child under supervision under this section shall be known as a “consent decree.”

1-11 B. Objection to Consent Decree

If the child objects to a consent decree, the court shall proceed to findings, adjudication, and disposition of the case. If the child does not object, but an objection is made by the juvenile presenter after consultation with the juvenile counselor, the court shall, after considering the objections and the reasons given, proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

1-11 E. New Juvenile Offense Complaint

If, either prior to discharge or expiration of the consent decree, a new “juvenile offender” complaint is filed against the child and the juvenile counselor has conducted a preliminary inquiry and authorized the filing of a petition upon a finding that informal adjustment is not in the best interest of the child and public, the juvenile presenter may:

1. file a petition to revoke the consent decree in accordance with the section 1-11D of this code; or
2. file a petition on the basis of the new complaint which has been filed against the child.

[17.3] TRIBAL CODE COMMENTARY

The Sault Ste. Marie statute after Section 36.408 (1) and before Section 36.408 (2) omits the paragraph (Section 1-11 B of the NIJC Model Code):

If the child objects to a consent decree, the court shall proceed to findings, adjudication, and disposition of the case. If the child does not object, but an objection is made by the juvenile presenter after consultation with the juvenile counselor, the court shall, after considering the objections and the reasons given, proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

The NIJC Model Code provision at Section 1-11 B. provides for the youth and/or the presenting officer or prosecutor to object to the proposed consent decree. Under, Section 1-11 B, if the youth objects, the matter must proceed to findings, adjudication, and disposition. Under Section 1-11 B, if the presenting officer or prosecutor objects, the final decision is left to the judge. This NIJC Model Code provision may be undesirable if the tribe wants the judge to use his or her discretion to decide whether to dismiss a petition even if a youth will not agree to a consent decree, and the judge would still be using his or her discretion to decide whether to approve a consent decree even absent the language regarding the objection of a presenting officer or prosecutor.

The NIJC Model Code at Section 1-11 E. states:

If either, prior to discharge or expiration of the consent decree, a new “juvenile offender” complaint is filed against the *child and the juvenile counselor has conducted a preliminary inquiry and authorized the filing of a petition upon a finding that informal adjustment is not in the best interest of the child and public*, the juvenile presenter may: 1. file a petition to revoke the consent decree in accordance with the section 1-11 D of this code; or 2. file a petition on the basis of the new complaint which has been filed against the child.

The Sault Ste. Marie statute at Section 36.408 (4) omits the language: “and the juvenile counselor has conducted a preliminary inquiry and authorized the filing of a petition upon a finding that informal adjustment is not in the best interest of the child and public” from the NIJC Model Code at Section 1-11 E. The Sault Ste. Marie statute removes the requirement that would handicap the presenting officer or prosecutor in seeking to revoke an original consent decree. Under the NIJC Model Code language, a presenting officer or prosecutor would not be authorized to seek to revoke the consent decree for the first offense before and unless a juvenile counselor decided to recommend the filing of a petition in juvenile court for a second offense. The Sault Ste. Marie provision gives presenting officers and prosecutors more discretion to revoke an original consent decree given a subsequent new offense. However, it definitely prejudices the youth and his or her family by taking away their existing chance to succeed in their services and treatment. In deciding which approach to follow, a tribe should

consider what entity in their system would be in the best position to make case-by-case decisions about whether a youth and his or her family can succeed in a given case plan—the juvenile counselor/probation officer, or the presenting officer/prosecutor?

The Sault Ste. Marie statute at Section 36.410 provides for a preliminary hearing for the purpose of revoking consent decrees and gives the youth an opportunity to deny or admit to the allegations of the petition and to explain anything they would like to explain. The preliminary hearing functions like an arraignment in a criminal proceeding where a criminal defendant is given a chance to plead and where other preliminary matters are handled prior to a trial.

[17.4] EXERCISES

The following exercises are meant to guide you in developing the consent decree sections of the tribal juvenile code.

Exercises

- Find and examine your juvenile code's provisions governing the "consent decrees," if any.
 - Who is authorized to file petitions/motions for consent decrees in the juvenile court?
 - What services and/or programs are available to youth through the consent decree?
 - What are the requirements for granting a consent decree?
 - What happens to the youth if the judge will not grant a consent decree?
 - What happens if a consent decree is not successfully completed or violated in some way by the youth?
- Make a list of the pros and cons of having a consent decree process in your juvenile justice system.

Read and Discuss*

- ***When do consent decrees work? For what types of youth with what types of problems?***
- ***Does the use of the consent decree really depend upon what services and programs are available?***
- ***How do we assure that consent decrees will be made available to youth and their families in a way that is fair and reasoned?***

Montana findings:

- Cases involving American Indian juveniles were 50 percent to 80 percent less likely to be resolved through a consent decree after petition for adjudication.
- Cases were more likely to result in consent decrees when the juvenile was a school dropout and where the current offense was a felony offense that was something other than an offense against property.
- Consent decree outcomes were less likely when the cases involved male juveniles, juveniles with a history of mental illness, and in cases in which the current offense was a drug offense.

*Taken from Report: "Assessing the Mechanisms that Contribute to Disproportionate Minority Contact in Montana's Juvenile Justice Systems," December 2012, Social Science Research Laboratory University of Montana, Missoula.
<http://mbcc.mt.gov/data/SAC/RAI/DMCAssessRep.pdf>.

CHAPTER 18

ADJUDICATIONS IN JUVENILE PROCEEDINGS

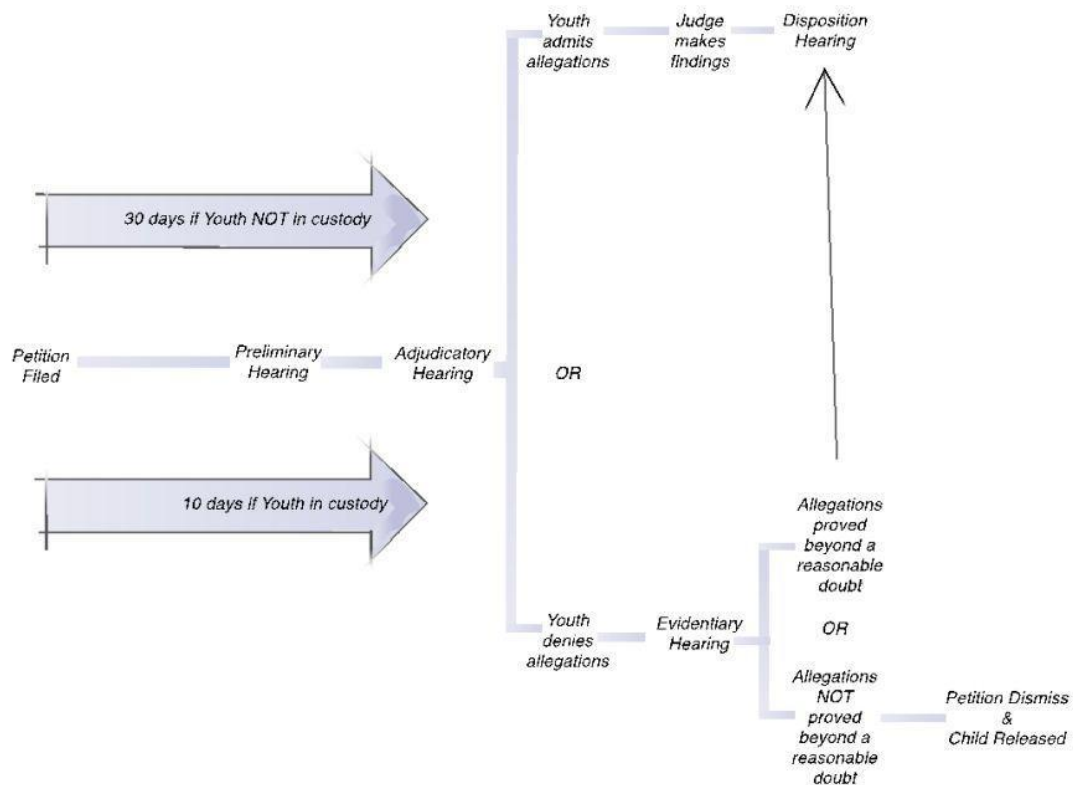
[18.1] OVERVIEW

Under the NIJC Tribal Code, Section 1-12, the purpose of the adjudicatory hearing is to determine whether a youth has committed a “juvenile offense.” The proceedings are closed to the general public. The timing requirements vary depending upon whether the youth has been taken into custody. If the youth is in custody, the adjudicatory hearing must be held within ten days of the filing of the petition. Otherwise, the hearing must be held within thirty days of the filing of the petition.

If the youth admits to the allegations in the petition the judge must make a record of his or her findings and schedule a disposition hearing. Alternatively, if the judge finds on the basis of proof beyond a reasonable doubt that the allegations contained in the petition are true, the judge must make a record of his or her findings and schedule a disposition hearing.

In adjudicatory hearings the judge determines whether the youth is to continue in an out-of-home placement pending disposition. If the judge finds that the allegations in the petition have not been established beyond a reasonable doubt, he or she dismisses the petition and releases the youth. The U.S. Supreme Court held in *In re Winship*, 397 U.S. 358 (1970), that when a state undertakes to prove a child delinquent for committing a criminal act, it must do so beyond a reasonable doubt.

Section 1-12 Adjudication Proceedings
National Indian Justice Center Tribal Juvenile Justice Code



[18.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.411 Adjudication Proceedings.

(1) Hearings on juvenile offender petitions shall be conducted by the Juvenile Division separate from other proceedings. The Court shall conduct the adjudicatory hearing for the sole purpose of determining whether the child has committed a juvenile offense. At the adjudicatory hearing, the child and the child's parent, guardian, or custodian shall have the applicable rights listed in '36.402 of this Chapter.

(2) If the child remains in custody, the adjudicatory hearing shall be held within fourteen (14) days after the preliminary hearing. If the child is released from custody or was not taken into custody, then the adjudicatory hearing shall be held within thirty (30) days after the preliminary hearing by the Juvenile Division.

(3) Notice of the adjudicatory hearing shall be given to the child and the child's parent, guardian or custodian, the child's counsel and any other person the Court deems necessary for the hearing at least seven (7) days prior to the hearing pursuant to '36.407.

(4) If the allegations in the juvenile offender petition are denied, the Juvenile Division shall set a date to hear evidence on the petition.

(5) If the child admits the allegations of the petition, the Juvenile Division shall consider disposition only after a finding that:

- a. The child fully understands his rights pursuant to '36.402, and fully understands the consequences of his admission.
- b. The child voluntarily, intelligently and knowingly admits all facts necessary to constitute a basis for Juvenile Division action.
- c. The child has not, in his statements on the allegations, set forth facts, which if found to be true, would be a defense to the allegations.

(6) If the Court finds that the child has validly admitted the allegations contained in the petition, the Court shall make and record its findings and schedule a disposition hearing in accordance with '36.412 of this Chapter. Additionally, the Court shall specify in writing whether the child is to be continued in an out of the home placement pending the disposition hearing.

(7) If the Court finds on the basis of proof beyond a reasonable doubt that the allegations contained in the petition are true, the Court shall make and record its findings and schedule a disposition hearing in accordance with '36.402 of this Chapter. Additionally, the Court shall specify in writing whether the child is to be continued in an out of home placement pending the disposition hearing.

(8) If the Court finds that the allegations on the juvenile offender petition have not been established beyond a reasonable doubt, it shall dismiss the petition and order the child released from any detention imposed in connection with the proceeding.

NIJC Tribal Juvenile Justice Code

1-12 Juvenile Offender—Adjudication Proceedings

1-12 A. Purpose and Conduct of Adjudicatory Hearing

Hearings on “juvenile offender” petitions shall be conducted by the juvenile court separate from other proceedings. The court shall conduct the adjudicatory hearing for the sole purpose of determining whether the child has committed a “juvenile offense.” At the adjudicatory hearing, the child and the child’s parent, guardian, or custodian shall have the applicable rights listed in chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.

1-12 B. Time Limitations on Adjudicatory Hearings

If the child remains in custody, the adjudicatory hearing shall be held within ten (10) days of receipt of the “juvenile offender” petition by the juvenile court. If the child is released from custody or was not taken into custody, then the adjudicatory hearing shall be held within thirty (30) days of receipt of the “juvenile offender” petition by the juvenile court.

1-12 C. Notice of Hearing

Notice of the adjudicatory hearing shall be given to the child and the child’s parent, guardian or custodian, the child’s counsel and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10F and 1-10G of this code.

[18.3] TRIBAL CODE COMMENTARY

The Sault Ste. Marie statute at Section 36.411(1) omits the language from the NIJC Model Code, Section 1-12 A, which excludes the public from the adjudicatory hearing: “The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.” The literature on adolescent development recommends that these proceedings be closed to the public to avoid further stigmatizing youth and causing them present and future harm.

The Sault Ste. Marie statute at Section 36.411(2) increases the number of days for the holding of an adjudicatory hearing if a youth is in custody: “If the child remains in custody, the adjudicatory hearing shall be held within fourteen (14) days after the preliminary hearing.” Compare the Section 1-12 B from the NIJC Model Code: “If the child remains in custody, the adjudicatory hearing shall be held within ten (10) days of receipt of the ‘juvenile offender’ petition by the juvenile court.” The Sault Ste. Marie statute contains a “preliminary hearing” stage not included in the NIJC Model Code. Preliminary hearings are a necessary part of any court process. Although they were not provided for under the NIJC Model Code, it would still be possible to use them but they would have to take place before the adjudicatory hearing and within the tight time frames of the code. This likely explains the increase in the time limit under the Sault Ste. Marie statute.

The Sault Ste. Marie statute at Section 36.411 (3) increases the number of days for providing notice of the adjudicatory hearing: “Notice of the adjudicatory hearing shall be given to the child and the child’s parent, guardian, or custodian, the child’s counsel and any other person the Court deems necessary for the hearing at least seven (7) days prior to the hearing pursuant to ‘36.407.’” Compare the NIJC Model Code provision at Section 1-12 C: “Notice of the adjudicatory hearing shall be given . . . at least five (5) days prior to the hearing. . . .” The Sault Ste. Marie provision is more protective of the youth’s rights in the sense that it provides two additional days of notice and thus preparation for the hearing.

[18.4] EXERCISES

The following exercises are meant to guide you in developing the adjudication sections of the tribal juvenile code.

Exercises

- Find and examine your juvenile code provisions governing “hearings” and/or “adjudications” – How soon after the filing of petition must your juvenile judge hold a hearing?
- What “findings” is the judge required to make (“juvenile delinquent,” “juvenile offender,” “status offender,” “family-in-need-of-services,” etc.)?
- What “standard of proof” is required to prove that a youth is a “juvenile delinquent” or “juvenile offender,” etc. (e.g., “proof beyond a reasonable doubt”?)

Read and Discuss*

When do you think that a trial (adjudication) is necessary and what protections should youth have?

Facts and Case Summary: In re Gault 387 U.S. 1 (1967)

Gerald (“Jerry”) Gault was a fifteen-year-old accused of making an obscene telephone call to a neighbor, Mrs. Cook, on June 8, 1964. After Mrs. Cook filed a complaint, Gault and a friend, Ronald Lewis, were arrested and taken to the Children’s Detention Home. Gault was on probation when he was arrested, after being in the company of another boy who had stolen a wallet from a woman’s purse.

At the time of the arrest related to the phone call, Gault’s parents were at work. The arresting officer left no notice for them and did not make an effort to inform them of their son’s arrest. When Gault’s mother did not find Gault at home, she sent his older brother looking for him. They eventually learned of Gault’s arrest from the family of Ronald Lewis. When Mrs. Gault arrived at the Detention Home, she was told that a hearing was scheduled in juvenile court the following day.

The arresting officer filed a petition with the court on the same day of Gault’s initial court hearing. The petition was not served on Gault or his parents. In fact, they did not see the petition until more than two months later, on August 17, 1964, the day of Gerald’s *habeas corpus* hearing. The June 9 hearing was informal. Not only was Mrs. Cook not present, but no transcript or recording was made, and no one was sworn in prior to testifying. Gault was questioned by the judge and there are conflicting accounts as to what, if anything, Gault admitted. After the hearing, Gault was taken back to the Detention Home. He was detained for another two or three days before being released. When Gault was released, his parents were notified that another hearing was scheduled for June 15, 1964.

Mrs. Cook was again not present for the June 15th hearing, despite Mrs. Gault’s request that she be there “so she could see which boy that done the talking, the dirty talking over the phone.” Again, no record was made and there were conflicting accounts regarding any admissions by Gault. At this hearing, the probation officers filed a report listing the charge as lewd phone calls. An adult charged with the same crime would have received a maximum sentence of a \$50 fine and two months in jail. The report was not disclosed to Gault or his parents. At the conclusion of the hearing, the judge committed Gault to juvenile detention for six years, until he turned 21.

Gault’s parents filed a petition for a writ of *habeas corpus*, which was dismissed by both the Superior Court of Arizona and the Arizona Supreme Court. The Gaults next sought relief in the Supreme Court of the United States. The Court agreed to hear the case to determine the procedural due process rights of a juvenile criminal defendant.

** Taken from the United States Courts website maintained by the Administrative Office of the U.S. Courts on behalf of the Federal Judiciary, FACTS AND CASE SUMMARY: IN RE GAULT. Go to <http://www.uscourts.gov/educational-resources/get-involved/constitution-activities/sixth-amendment/right-counsel/facts-case-summary-gault.aspx>*

CHAPTER 19

PREDISPOSITION STUDIES IN JUVENILE PROCEEDINGS

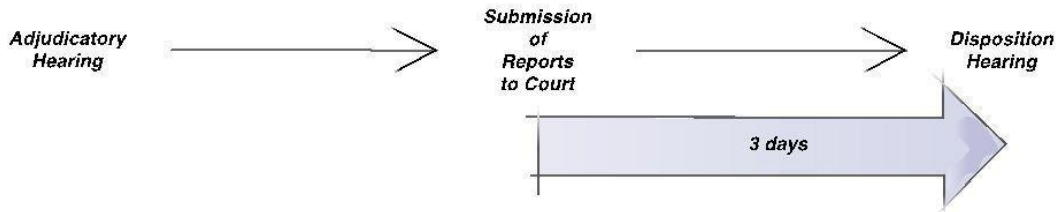
[19.1] OVERVIEW

In the state systems, after a determination in an adjudicatory hearing that the allegations in the petition are true and that a “wardship” is necessary, a dispositional hearing is set to determine the final disposition of the case.¹⁶ When a youth is found to be a “ward of the court” it means that the court, as an agency of the state, has found it necessary to act in place of the youth’s parents (*in loco parentis*). The decisions normally made by the parents are then made by a representative of the court, usually the juvenile probation officer in consultation with the juvenile court judge. States vary as to whether the dispositional hearing must be separate from adjudicatory hearings. In some states the two hearings are separate because different procedures and rights are involved (criminal versus civil standards).

Between the adjudicatory hearing and the dispositional hearing, the probation officers obtain further information to assist the judge in deciding the final disposition of the case. These are called “social background investigations” and “individualized justice” is the goal. The results of these investigations, including interviews with people in the community, are put in a report for the judge. The “probative value” of this information, or its value as proof, might not be as reliable, and in the state systems, it can be challenged in the dispositional hearing. As a result of the Kent decision (*Kent v. United States*, 1966), the youth, through his or her attorney, has the right to review the contents of a report containing the results of a social background investigation in certain hearings because there is no irrefutable presumption of accuracy in these reports. In the state systems, this right has been extended to dispositional hearings.

¹⁶ Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

Sections 1-13 Predisposition Studies
National Indian Justice Center Tribal Juvenile Justice Code



Under the NIJC Model Code, at Section 1-13, the judge directs the juvenile counselor to prepare and draft a “predisposition study and report.” The report must cover information about the child, his or her family, his or her environment, and “any other matter” relevant to his or her treatment or “other appropriate disposition of the case.” The report must also contain a plan for the child aimed at resolving the problems identified in the petition.

The judge may also order medical assessments, testing by psychiatrist, psychologist, or psychometrician, and/or an examination of the child and/or his or her parent(s) or custodian(s), where they consent, by a physician, psychiatrist, or psychologist. Evaluations, assessments, and dispositional reports must be submitted to the juvenile court and the parties no later than three days before the scheduled hearing date. A psychometrician is a person, for example a clinical psychologist, who is skilled in the administration and interpretation of objective psychological tests.

[19.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.412 Predisposition Studies: Reports and Examinations.

(1) The Court may direct the juvenile probation officer to prepare a written disposition study and report for the Court concerning the child, the child's family, environment, and any other matter relevant to need for treatment or other appropriate disposition of the case when:

- a. The child has been adjudicated as a juvenile offender.
- b. A notice of intent to admit the allegations of the petition has been filed.
- c. Upon request of the Juvenile Division.

(2) The report shall contain a specific plan for the child, aimed at resolving the problems presented in the petition. The report shall contain a detailed explanation showing the necessity for the proposed plan of disposition and the benefits to the child under the proposed plan. Preferences shall be given to the dispositional alternatives which are least restrictive of the child's freedom and are consistent with the interests of the community.

(3) The Juvenile Division may order a medical assessment of a child arrested or detained for a juvenile offense relating to or involving alcohol or substance abuse to determine the mental or physical state of the child so that appropriate steps can be taken to protect the child's health and well-being.

(4) Where there are indications that the child may be emotionally disturbed or developmentally disabled, the Court, on a motion by the prosecutor or that of counsel for the child, may order the child to be tested by a qualified psychiatrist, psychologist or licensed psychometrician prior to a hearing on the merits of the petition. An examination made prior to the hearing, or as part of the predisposition study and report, shall be conducted on an outpatient basis unless the Court finds that placement in a hospital or other appropriate facility is necessary.

(5) The Court may order an examination of a child adjudicated as a juvenile offender by a physician, psychiatrist, or psychologist. The Court may also, following the adjudicatory hearing, order the examination by a physician, psychiatrist, or psychologist of a parent or custodian who gives his consent and whose ability to care for or supervise a child is an issue before the Court at the dispositional hearing.

(6) The Court may order that a child adjudicated as a juvenile offender be transferred to an appropriate facility for a period of not more than sixty (60) days for purposes of diagnosis with direction that the Court be given a written report at the end of that period indicating the disposition which appears most suitable.

(7) Evaluations, assessments, dispositional reports and other material to be considered by the Court in a juvenile hearing shall be submitted to the Court and to the parties no later than three (3) days before the scheduled hearing date. A declaration including reasons why a report has

not been completed shall be filed with the Court no later than three (3) days before the scheduled hearing date if the report will not be submitted before the deadline. The Court may in its discretion dismiss a petition if the necessary reports, evaluations, or other materials have not been submitted in a timely manner.

NIJC Tribal Juvenile Justice Code

1-13 Juvenile Offender—Predisposition Studies: Reports and Examinations

1-13 A. Predisposition Study and Report

The court shall direct the juvenile counselor to prepare a written predisposition study and report for the court concerning the child, the child's family, environment, and any other matter relevant to need for treatment or other appropriate disposition of the case when:

1. the child has been adjudicated as a "juvenile offender"; or
2. a notice of intent to admit the allegations of the petition has been filed.

[19.3] TRIBAL CODE COMMENTARY

The Sault Ste. Marie provisions and the NIJC Model Code provisions are nearly identical. The one significant difference is the Sault Ste. Marie Tribe's addition, at Section 36.412, that the judge may order a predisposition study and report even when a child is not admitting to, or has not been adjudged, a "juvenile offender":

- (1) The Court may direct the juvenile probation officer to prepare a written disposition study and report for the Court concerning the child, the child's family, environment, and any other matter relevant to need for treatment or other appropriate disposition of the case when:
 - a. The child has been adjudicated as a juvenile offender.
 - b. A notice of intent to admit the allegations of the petition has been filed.
 - c. Upon request of the Juvenile Division.

This addition gives the juvenile court judge the discretion to order a predisposition study and report at any point in the process, regardless of whether the youth will admit to, or be proven to be, a juvenile offender. The upside is increased power in the judge to look out for the youth's needs at any point in the process. The downside is that the judge now has the power to, in a sense, snoop around in the youth's affairs before he or she has admitted to committing, or is shown to have committed, a juvenile offense.

[19.4] EXERCISES

The following exercises are meant to guide you in writing the predisposition studies and reports section of the tribal juvenile code..

Exercises

- Find and examine your juvenile code's provision for drafting studies or reports prior to a [disposition] hearing.
 - Who is responsible for doing this?
 - What information is this person supposed to get?
 - Where is this person supposed to get his or her information?
 - Do you think this information is reliable?
 - What would make it more reliable?

Read and Discuss*

Should predisposition reports be drafted “in the best interests of the child”?

Should they be relied upon for determining guilt or only for determining disposition (treatment, placement, punishment, reparations)?

“Once a youth is adjudicated a delinquent youth or a status offender, the court decides the most appropriate sanction—referred to as formal disposition. Disposition is similar to sentencing in adult courts. Traditionally, disposition has been one of the key decision points at which the court considers ‘the best interests of the child.’ Disposition is imposed at the dispositional hearing, which is separated in time from adjudication hearings. After adjudication, but before the dispositional hearing, a predisposition report is usually written by a probation officer. Authorized by court order and statutory law, the report provides an evaluation of the youth and his or her background and social environment. The predisposition report attempts to provide assessment information to the judge so that disposition can be individualized and directed at rehabilitation. The predisposition report is commonly organized with three major sections: the offense section, a social history, and a summary and recommendation.”

- Offense Section
 - Official version of the offense
 - Commentary re: juvenile’s version of the offense
 - Prior record (including previous arrests, petitions, adjudications, and dispositions)
 - A victim impact statement
- Social History—Observations About . . .
 - The juvenile and his or her family background
 - Educational experiences and achievements
 - Friends
 - Employment
 - Neighborhood context
- Summary and Recommendation (sometimes all the judge reads)
 - Evaluative summary highlighting key findings
 - Recommendation Re: Disposition

*Taken from James W. Burfeind and Dawn Jeglum Bartusch, *Juvenile Delinquency: An Integrated Approach*, 2nd ed. (2011).

CHAPTER 20

DISPOSITION IN JUVENILE PROCEEDINGS

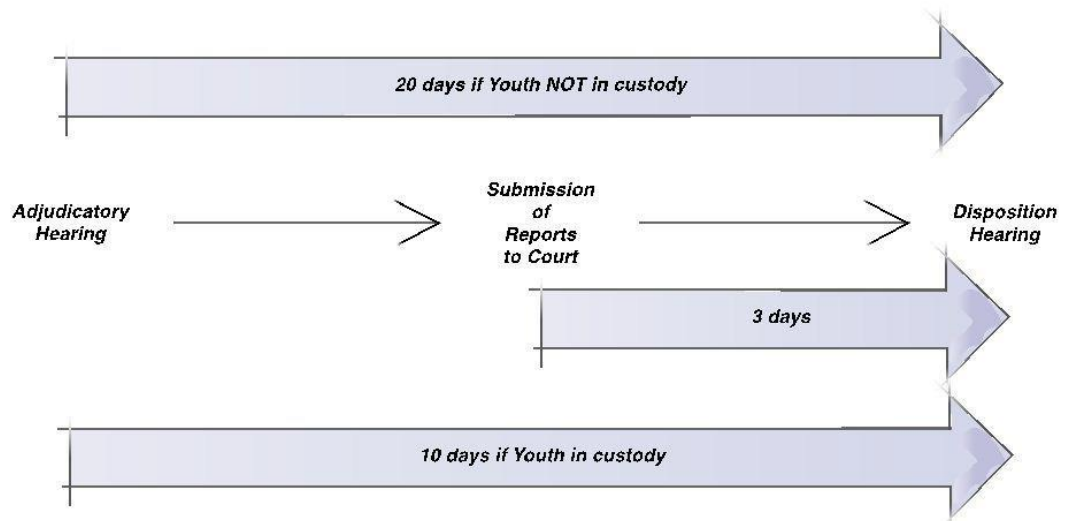
[20.1] OVERVIEW

Under the NIJC Model Code, a disposition hearing must be held within ten days of the adjudicatory hearing if the youth remains in custody. Otherwise, the disposition hearing must be held within twenty days of the adjudicatory hearing. The purpose of the disposition hearing is for the judge to decide the youth's "supervision, care, and rehabilitation" based upon "all relevant and material evidence," including the predisposition reports or other ordered reports or studies. The judge must also consider any alternative predisposition reports or recommendations provided by the youth or his or her advocate or attorney.

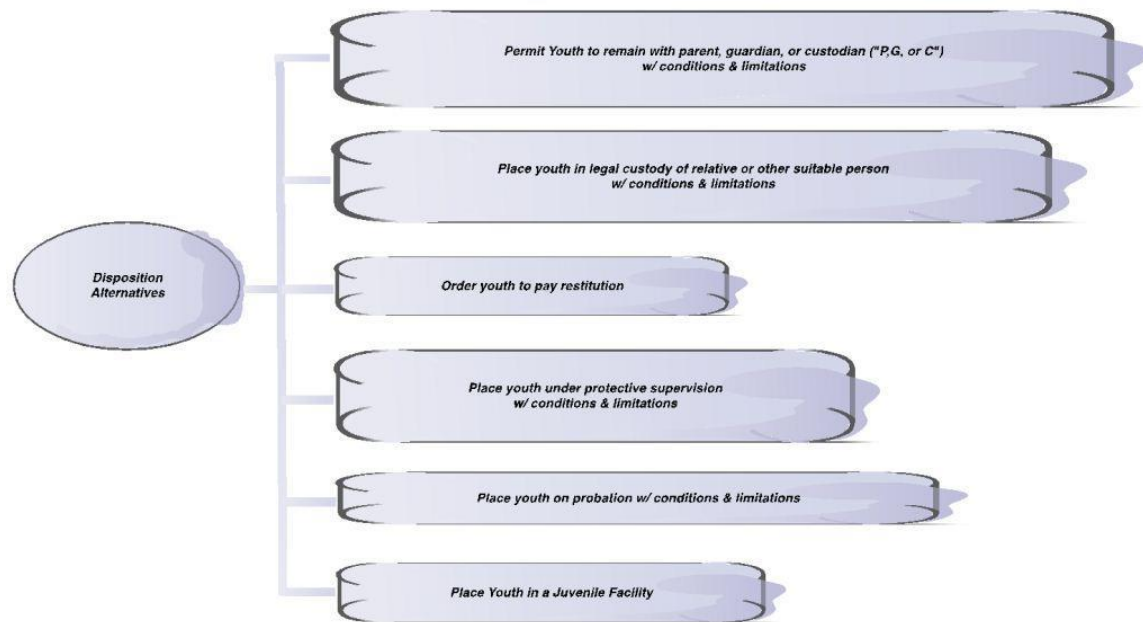
The disposition hearing is separate from the adjudicatory hearing. It is closed to the public. The youth and his parent(s), guardian(s) or custodian(s) are given the rights listed under Chapter 1-7 of the NIJC Model Code.

Today there are many different kinds of community treatment programs and youth guidance centers. As a result, contemporary dispositions contain conditions for participation and completion of these programs. The dispositions of "probation" or "suspended sentence" may often require compulsory attendance at such a community-based treatment or rehabilitation program. If the youth violates these conditions, it may result in a revocation of probation or the unsuspending of his or her sentence. Most states specify a maximum amount of time for confining a youth. All generally terminate the effect of juvenile orders when they reach the age of majority. This results in discharging the youth from further obligation and control.

Sections 1-13 & 1-14 Predisposition & Disposition
National Indian Justice Center Tribal Juvenile Justice Code



Section 1-14 E. Disposition Alternatives
National Indian Justice Center Tribal Juvenile Justice Code



Under the NIJC’s Tribal Juvenile Justice Code at Section 1-14 E, where a judge finds that a youth is a “juvenile offender,” he or she may determine how the youth will be supervised, cared for, and/or rehabilitated. The provision sets out six disposition alternatives: allowing a youth to remain with his or her parents (or guardian or custodian), placing the youth in the legal custody of a relative (or “other suitable person”), requiring that the youth pay restitution to anyone harmed, placing the youth under “protective supervision” (this means that the youth is allowed to remain with his or her parents, relative, or other suitable person, but that the court and a health or social services agency will be monitoring and providing services), placing the youth on probation, or placing the youth in a juvenile facility. All of these options are likely to be subject to specific conditions and limitations set by the judge and included in the court order.

[20.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribal Code

36.413 Disposition Proceedings.

(1) The Court shall conduct the disposition hearing to determine how to resolve a case after it has been determined at the adjudicatory hearing that the child has committed a specific juvenile offense. The Court shall make and record its dispositional order. At the disposition hearing, the child and the child's parent, guardian, or custodian shall have the applicable rights listed in '36.402 of this Chapter.

(2) If the child remains in custody, the dispositional hearing shall be held within thirty (30) days after the adjudicatory hearing. If the child is released from custody or was not taken into custody, then the disposition hearing shall be held within sixty (60) days after the adjudicatory hearing.

(3) Notice of the disposition hearing shall be given to the child and the child's parent, guardian, or custodian, the child's counsel and any other person the Court deems necessary for the hearing at least seven (7) days prior to the hearing in accordance with '36.407 of this Chapter.

(4) In the disposition hearing, the Court may consider all relevant and material evidence determining the questions presented, including oral and written reports, and may rely on such evidence to the extent of its probative value even though not otherwise competent. The Court shall consider any predisposition report, physician's report, or social study it may have ordered and afford the child, the child's parent, guardian, or custodian and the child's counsel an opportunity to controvert the factual contents and conclusions of the report(s). The Court shall also consider the alternative predisposition report or recommendations prepared by the child or the child's counsel, if any.

(5) If a child is found by the Court to be a juvenile offender, the Court may make and record any of the following orders of disposition for the child's supervision, care and rehabilitation:

- a. Permit the child to remain with his parent, guardian, or custodian, subject to such conditions and limitations as the Court may prescribe.
- b. Place the child in the legal custody of a relative or other suitable person, subject to such conditions and limitations as the Court may prescribe.
- c. Order the child to pay restitution (as defined in '36.329 of this Chapter).
- d. Place the child under protective supervision (as defined in '36.328 of this Chapter) under such conditions and limitations as the Court may prescribe.
- e. Place the child on probation (as defined in '36.327 of this Chapter) under such conditions and limitations as the Court may prescribe.

(f) Place the child in a juvenile facility designated by the Court, including alcohol or substance abuse, emergency shelter or halfway house, emergency foster home, foster home, group home, shelter home, or secure juvenile detention facility.

36.414 Review, Modification, Revocation, Extension, or Termination of Dispositional Orders.

(1) Dispositional orders are to be reviewed at the Court's discretion at least once every six (6) months.

(2) The Court may hold a hearing to modify, revoke or extend a disposition order at any time upon the motion of:

- a. The child.
- b. The child's parents, guardian, or custodian.
- c. The child's counsel.
- d. The juvenile probation officer.
- e. The prosecutor.
- f. The institution, agency, or person vested with legal custody of the child or responsibility for protective supervision.
- g. The Court on its own motion.

(3) A hearing to modify, revoke or extend the disposition order shall be conducted according to '36.412.

(4) When the child reaches seventeen (17) years of age, all disposition orders shall automatically terminate unless the original disposition order was made within one (1) year of the child's seventeenth (17th) birthday or after the child had reached seventeen (17) years of age, in which case the disposition order may not continue for more than one (1) year. The records concerning the child shall be destroyed according to '36.*03 [*sic*] of this Chapter.

36.415 Probation Violation Hearings.

(1) If a juvenile offender is placed on probation, the Court or the juvenile probation officer may prescribe limitations on the juvenile. This may include but is not limited to house arrest and curfews as well as community service activities.

(2) If the juvenile fails to comply with the probation requirements or commits subsequent juvenile offenses or juvenile status offenses, the Court may conduct a probation violation hearing separate from a disposition review hearing pursuant to '36.413.

(3) The Court Clerk shall issue a notice of hearing to the juvenile. The notice shall include a copy of the probation violation petition, and a notice that the probation violation hearing will occur and that the juvenile will need to have any and all witnesses at the Court on that day. The juvenile may contact the Court Clerk for issuance of any subpoenas necessary.

(4) The juvenile probation officer shall file a petition alleging that the juvenile has violated the conditions of the probation. The petition shall include all relevant facts regarding the violation including any dates.

(5) At the probation violation hearing, the Court may take any relevant testimony from the juvenile probation officer and the juvenile or the juvenile's parents, guardian, or custodian or anyone else the Court deems appropriate.

(6) If the allegations in the probation violation petition are sustained by a preponderance of the evidence, the Court may order additional probation requirements or any other disposition that the Court is permitted to order pursuant to '36.412.

NIJC Tribal Juvenile Justice Code

1-14 Juvenile Offender—Disposition Proceedings

1-15 Juvenile Offender—Review, Modification, Revocation, Extension, or Termination of Dispositional Orders

1-14 A. Purpose and Conduct of Disposition Hearing

Disposition hearings shall be conducted by the juvenile court separate from other proceedings. The court shall conduct the disposition hearing to determine how to resolve a case after it has been determined at the adjudicatory hearing that the child has committed a specific “juvenile offense.” The court shall make and record its dispositional order in accordance with sections 1-14E and 1-15 of this code. At the disposition hearing, the child and the child’s parent, guardian, or custodian shall have the applicable rights listed in chapter 1-7 of this code. The public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and persons requested by the parties shall be admitted.

1-14 B. Time Limitations on Disposition Hearings

If the child remains in custody, the disposition hearing shall be held within ten (10) days after the adjudicatory hearing. If the child is released from custody or was not taken into custody, then the disposition hearing shall be held within twenty (20) days after the adjudicatory hearing.

1-14 C. Notice of Disposition Hearing

Notice of the disposition hearing shall be given to the child and the child’s parent, guardian, or custodian, the child’s counsel, and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10F and 1-10G of this code.

1-15 C. Hearing to Modify, Revoke, or Extend Disposition Order

A hearing to modify, revoke, or extend the disposition order shall be conducted according to sections 1-14A, 1-14C, 1-14D, and 1-14E of this code.

1-15 D. Automatic Termination of Disposition Order

When the child reaches eighteen (18) years of age, all disposition orders shall automatically terminate, unless the original disposition order was made within one (1) year of the child’s eighteenth (18th) birthday or after the child had reached eighteen (18) years of age, in which case the disposition order may not continue for more than one (1) year. The records concerning the child shall be destroyed according to section 1-20C of this code.

Leech Lake Band of Ojibwe Judicial Code**Title 4: Juvenile Justice Code****Section 4-13 E. Outcome of Disposition Hearing**

If a child is found by the court to be a “juvenile offender,” the court may impose such conditions as reflective of the traditions and customs of the Band and which are reasonably designed to achieve the purpose and intent of this code. The conditions the court may impose for the child’s supervision, care, and rehabilitation include but are not limited to the following:

1. permit the child to remain with parent, guardian, or custodian, subject to such conditions and limitations as the court may prescribe;

2. restrict the child to his or her residence until further order of the court except as specifically provided in the order;
3. to regularly attend school and maintain passing grades of “C” or better in all courses;
4. require the child seek and/or undergo counseling and treatment, including inpatient treatment, as may be recommended in any chemical dependency, psychiatric or psychological evaluation ordered by the court;
5. place the child in the physical custody of a relative or other suitable person, subject to the conditions and limitations as the court may prescribe;
6. order the child to pay restitution;
7. place the child under protective supervision under such conditions and limitations as the court may prescribe;
8. place the child on probation under such conditions and limitations as the court may prescribe;
9. require the child to pay up to \$100 dollar fine for the first violation and no more than \$200 dollar fine for any subsequent violation;
10. require the child perform community service in such an amount and of such a nature as the court deems appropriate for the minor’s age, circumstances, and conduct;
11. require the child to refrain from associating with named individuals, if any, found by the court to be detrimental to the minor’s ability to comply with its orders;
12. require the child abstain from the use and possession of alcohol, drugs, inhalants, and prohibited use of tobacco and over-the-counter medication;
13. require the child obey all tribal ordinances and all federal, state, and local laws;
14. require the child to apologize in writing or in a traditional manner or ceremony to any persons who have been victimized by the minor’s conduct; including family members, Band officials, and/or community at large;
15. place the child in a juvenile facility designated by the court, including alcohol or substance abuse emergency shelter or halfway house, emergency foster home, foster home, group home, shelter home, or secure juvenile detention facility;
16. referral of the child and his parents, guardian, or custodian to an appropriate social services agency for participation in counseling or other treatment program as ordered by the court;

17. require any family members including the minor's parent(s), guardian, or custodian, that reside with or are in regular contact with the "juvenile offender" to fully cooperate with the Juvenile Service Coordinator, treatment providers, counselors, educators, or other service providers who are engaged in implementing the conditions of probation;

18. require any family members that reside with or are in regular contact with the "juvenile offender" undergo random urinalysis, chemical and psychological assessment, parenting classes, attend counseling sessions, and any other services the court deems are in the child's best interest;

19. require the Juvenile Service Coordinator to staff the case with Leech Lake Child Welfare child protection team; [and/or]

20. Order any other services the court deems in the child's best interest.

Eastern Band of Cherokee Indians

PART II—CODE OF ORDINANCES

Chapter 7A—JUVENILE CODE

ARTICLE V. LAW ENFORCEMENT PROCEDURES IN DELINQUENCY PROCEEDINGS

Sec. 7A-53. Dispositional alternatives for delinquent juvenile.

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives:

(1) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

- a. Require that a juvenile be supervised in the juvenile's own home by the Eastern Band of Cherokee Indians Juvenile Services, a court counselor, or other personnel may be available to the parent, guardian, or custodian or the juvenile as the judge may specify; or
- b. Place the juvenile in the custody of a parent, guardian, custodian, relative, agency offering placement services, or some other suitable person; or
- c. Place the juvenile in the custody of the Eastern Band of Cherokee Indians Juvenile Services.

(2) Excuse the juvenile from compliance with the compulsory school attendance law when the court finds that suitable alternative plans can be arranged by the family through other community resources for one of the following:

- a. An education related to the needs or abilities of the juvenile including vocational education or special education;
- b. A suitable plan of supervision or placement; or
- c. Some other plan that the court finds to be in the best interests of the juvenile.

(3) Order the juvenile to cooperate with a community-based program, an intensive substance abuse treatment program, or a residential or nonresidential treatment program. Participation in the programs shall not exceed 12 months.

(4) Require restitution, full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The court may

determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the court shall not require the juvenile to make immediate restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.

(5) Impose a fine related to the seriousness of the juvenile's offense. If the juvenile has the ability to pay the fine, it shall not exceed the maximum fine for the offense if committed by an adult.

(6) Order the juvenile to perform up to 100 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of the work and the number of hours required. The work shall be related to the seriousness of the juvenile's offense and in no event may the obligation to work exceed 12 months.

(7) Order the juvenile to participate in the victim-offender reconciliation/mediation program.

(8) Place the juvenile on probation under the supervision of a court counselor and impose any combination of the following conditions:

- a. That the juvenile remain on good behavior;
- b. That the juvenile shall not violate any laws;
- c. That the juvenile not violate any reasonable and lawful rules of a parent, guardian, or custodian;
- d. That the juvenile attend school regularly;
- e. That the juvenile maintain passing grades in up to four courses during each grading period and meet with the court counselor and a representative of the school to make a plan for how to maintain those passing grades;
- f. That the juvenile not associate with specified persons or be in specified places;
- g. That the juvenile refrain from use or possession of any alcoholic beverage or controlled substance as described in section 14-25.2 of the Cherokee Code;
- h. That the juvenile abide by a prescribed curfew;
- i. That the juvenile submit to a warrantless search at reasonable times;
- j. That the juvenile submit to substance abuse monitoring and treatment;
- k. That the juvenile cooperate with electronic monitoring;
- l. That the juvenile participate in a life skills or an educational skills program;
- m. That the juvenile possess no firearm, explosive device, or other deadly weapon;
- n. That the juvenile report to a court counselor as often as required by the court counselor;
- o. That the juvenile make specified financial restitution or pay a fine;
- p. That the juvenile be employed regularly if not attending school; and
- q. That the juvenile satisfy any other condition determined appropriate by the court

(9) Prohibit the juvenile from operating a motor vehicle for as long as the court retains jurisdiction over the juvenile or for any shorter period of time;

(10) Impose a curfew upon the juvenile;

(11) Order that the juvenile not associate with specified persons or be in specified places;

- (12) Impose confinement on an intermittent basis in an approved detention facility. Confinement shall be limited to not more than five 24-hour periods, the timing of which is determined by the court in its discretion.
- (13) Order that the juvenile be confined in an approved juvenile detention facility for a term of up to 14 24-hour periods, which confinement shall not be imposed consecutively with intermittent confinement pursuant to subsection (12) of this section at the same dispositional hearing. The timing of this confinement shall be determined by the court in its discretion.
- (14) Order the juvenile to cooperate with placement in a wilderness program.
- (15) Order the juvenile to cooperate with placement in a residential treatment facility, an intensive nonresidential treatment program, an intensive substance abuse program, or in a group home, including but not limited to the Cherokee Children's Home.
- (16) Order the juvenile to cooperate with a supervised day program requiring the juvenile to be present at a specified place for all or part of every day or of certain days. The court also may require the juvenile to comply with any other reasonable conditions specified in the dispositional order that are designed to facilitate supervision.
- (17) Order the juvenile to participate in a regimented training program.
- (18) Order the juvenile to be placed on house arrest.
- (19) Suspend imposition of a more severe, statutorily permissible disposition with the provision that the juvenile meet certain conditions agreed to by the juvenile and specified in the dispositional order. The conditions shall not exceed the allowable dispositions for the level under which disposition is being imposed.
- (20) Order the residential placement of a juvenile in a multipurpose group home.
- (21) Place the juvenile in a training school for a period of not less than six months.
- (Ord. No. 289, 7-17-00)

CHOCTAW YOUTH CODE

TITLE XI

§11-3-28 Dispositional Alternatives

- (1) If a minor has been adjudged a juvenile offender, the Youth Court may make the following dispositions:
- (a) place the minor on probation subject to conditions set by the Youth Court;
 - (b) upon consent of all parties, transfer disposition to a Court-approved alternative disposition forum such as Choctaw Teen Court subject to the terms and conditions of said alternative disposition which shall be approved by the Youth Court; or
 - (c) place the minor in an institution or facility for detention, or in the care of an agency designated by the Youth Court.
- (2) The dispositional orders are to be in effect for the time limit set by the Youth Court, but no order shall continue after the minor reaches the age of twenty-one (21) years of age.
- (3) The dispositional orders are to be reviewed at the Youth Court's discretion, but at least once every six (6) months.

[20.3] TRIBAL CODE COMMENTARY

The Sault Ste. Marie statute at Section 36.413 (1) omits the following language from the NIJC Model Code at Section 1-14 A.:

“Disposition hearings shall be conducted by the juvenile court separate from other proceedings. The court shall conduct the disposition hearing to determine how to resolve a case after it has been determined at the adjudicatory hearing that the child has committed a specific ‘juvenile offense.’”

In the state systems there is a “bifurcated” hearing process, meaning that they do not hold the adjudicatory hearing and the disposition hearing in the same hearing. This is because there are different evidentiary rules applicable to each type of hearing. In an adjudicatory hearing only evidence bearing on “guilt” of the allegations contained in the petition is allowed, while at the disposition hearing, the judge may look at the totality of the youth’s circumstances. The danger in conflating the two hearings is that the judge may consider irrelevant but prejudicial information in determining guilt for a particular alleged act (e.g., information about a youth’s friends or the youth’s general home circumstances and/or conduct).

The Sault Ste. Marie statute at Section 36.413 (1) states: “The Court shall make and record its dispositional order.” It then omits the following language from the NIJC Model Code at Section 1-14 A.: “The court shall make and record its dispositional order *in accordance with sections 1-14E and 1-15 of this code.*” Section 1-14E of the NIJC Model Code specifies six dispositional alternatives. Section 1-15 of the NIJC Model Code specifies the requirements for reviewing, modifying, revoking, and/or extending disposition orders. The Sault Ste. Marie omission may be insignificant with respect to the NIJC Section 1-14 E in that the omission does not have a different legal effect where the NIJC Section 1-14 E is discretionary for a judge in any case. However, there are mandatory requirements under NIJC Section 1-15, such as the requirement that dispositional orders be reviewed once every six months or that disposition orders must automatically terminate at certain points. It appears that Sault Ste. Marie was attempting to give the judge more discretion in selecting dispositional alternatives and in the review, modification, revocation, extension, and/or automatic termination of disposition orders. This could undermine certain protections in the NIJC Model Code provided for youth and their families.

The Sault Ste. Marie statute at Section 36.413 (1) omits the following highlighted language from the NIJC Model Code at Section 1-14 A.:

“At the disposition hearing, the child and the child’s parent, guardian or custodian shall have the applicable rights listed in chapter 1-7 of this code. The public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and persons requested by the parties shall be admitted.”

The Sault Ste. Marie omission makes dispositional hearings open to the public. Scholars conducting research on adolescents recommend that juvenile proceedings remain closed to the public to avoid stigmatization and present and future harm to youth.

The Sault Ste. Marie statute at Section 36.413 (2) modifies the following highlighted language:

(2) If the child remains in custody, the dispositional hearing shall be held within *thirty (30) days* after the adjudicatory hearing. If the child is released from custody or was not taken into custody, then the disposition hearing shall be held within *sixty (60) days* after the adjudicatory hearing.

Compare the NIJC Model Code at Section 1-14 B:

If the child remains in custody, the disposition hearing shall be held within *ten (10) days* after the adjudicatory hearing. If the child is released from custody or was not taken into custody, then the disposition hearing shall be held within *twenty (20) days* after the adjudicatory hearing.

The Sault Ste. Marie provision increases the time limit for the holding of a dispositional hearing where a youth remains in custody (from 10 days to 30 days), and where a youth is not in custody (from 20 to 60 days). This gives the tribal court, its juvenile counselor, and other service providers more time to conduct investigations, reviews, evaluations, examinations, and assessments and to produce written recommendations to the judge. However, it also infringes upon the rights of the youth and his or her family by potentially extending the period of custody for up to twenty more days or simply delaying “sentencing” for up to forty more days. There is a delicate balance between the needs of the system and the needs and rights of youth and their families. The NIJC Model Code provisions tend to default to the needs and rights of youth and their families. However, the timing of required process needs to be tailored to the realities of the tribal system—where the leadership, policy, and law of the system are accountable and responsive to those served.

The Sault Ste. Marie statute at Section 36.414 (4) modifies the following highlighted language:

(4) When the child reaches *seventeen (17) years* of age, all disposition orders shall automatically terminate unless the original disposition order was made within one (1) year of the child’s *seventeenth (17th)* birthday or after the child had reached *seventeen (17) years* of age, in which case the disposition order may not continue for more than one (1) year.

Compare the NIJC Model Code provision at Section 1-15 D.:

When the child reaches eighteen (18) years of age, all disposition orders shall automatically terminate, unless the original disposition order was made within one (1) year of the child’s eighteenth (18th) birthday or after the child had

reached eighteen(18) years of age, in which case the disposition order may not continue for more than one (1) year.

The Sault Ste. Marie provision reduces the age from eighteen to seventeen for when disposition orders must automatically terminate. The Sault Ste. Marie Juvenile Court is empowered to exercise juvenile court jurisdiction only over those who may commit juvenile offenses before their seventeenth birthday. By contrast the NIJC Model Code creates a juvenile court that may exercise jurisdiction over a youth who may commit a juvenile offense before their eighteenth birthday. The NIJC Model Code also provides for extensions of juvenile court jurisdiction beyond a youth's eighteenth under certain circumstances (e.g., where a youth's disposition order was made within a year of or after his eighteenth birthday). Scholars and researchers studying adolescents argue that the brain is not fully developed until closer to age twenty-five. They advocate for an extension of juvenile court jurisdiction even beyond age eighteen where the circumstances warrant it.

The Sault Ste. Marie statute at Section 36.415 establishes a process for probation hearings and placing youth on probation. Potential outcomes include house arrest and curfew, among other conditions and limitations. Grounds for probation revocation must be proven by a preponderance of the evidence.

Many tribes use probation as the primary dispositional alternative for juvenile offenders. In the state systems probation is the most frequent disposition for juvenile offenders. With probation, a youth is released with the understanding that freedom is conditioned on continuing good behavior and compliance with the terms of probation. Violations of probation may result in a probation revocation and the imposition or execution of the original sentence. The terms of probation are approved and ordered by the judge and may take the form of agreeing to:

- Obey all laws
- Regularly attend school
- Do not associate with delinquents or criminals
- Stay within the jurisdiction
- Regularly report to probation officer for counseling and supervision
- Curfews
- Alcohol and drug testing
- Counseling
- Community service
- Restorative justice (restitution, letters of apology, victim impact panels/classes, community service, victim/offender conferencing, community panels, restorative justice peer juries, restorative group conferencing, circle sentencing, etc.)

In the state systems the terms of probation must be reasonable and relevant to the offense for which probation was ordered (see, e.g., *People v. Dominguez* [1967] [condition that female not become pregnant not relevant to offense of robbery]).

[20.4] EXERCISES

The following exercises are meant to guide you in developing the dispositions sections of the tribal juvenile code.

Exercises

- Find and examine your juvenile code's provisions setting out possible "dispositions" – make a list of the possible outcomes for youth under your juvenile code

Examples from other codes ...

- Youth to remain with parent, guardian, or custodian with conditions & limitations
- Youth placed with relative or other person with conditions & limitations
- Youth placed in respite care (temporary out-of-home placement with youth and family services & programming)
- Youth placed in shelter care (e.g., foster care)
- Youth & family referred to services (e.g., counseling/groups/classes, screening & assessment for physical & mental health services, & substance use/abuse & treatment services, etc.
- Youth placed on probation with conditions & limitations
- Youth ordered to pay restitution
- Youth ordered to participate in victim-offender mediation, "circle process," or "sentencing circles"
- Youth [& family] ordered to participate in family mediation or "peacemaking"
- Youth ordered to be placed in a residential treatment facility
- Youth ordered to be placed in a juvenile facility or secure juvenile detention facility
- Youth ordered to participate in a therapeutic docket (e.g., wellness [drug] court)
- Youth ordered to participate in a community-based program (e.g., a cultural program, mentoring programs, and/or teen court, etc.)

Make a list of other disposition options and/or diversion programs you wish to develop and include in your juvenile justice system

Read and Discuss

What disposition options are available locally and nonlocally?

The Boys Town Model* (the “Boys Town Integrated Continuum of Care”):

- Residential Treatment Center
 - A medically directed program in a secure environment for children with psychiatric disorders.
- Intervention and Assessment Services
 - Thirty-day program providing care for abused, neglected, runaway, and delinquent youth by removing them from dangerous situations, assessing their needs, and beginning to work toward family reunification or other permanent care.
- Family Home Program
 - Provides a family for children ages ten to eighteen. Six to eight boys or girls, many with serious emotional and behavioral problems, live in each single-family home with a married couple called Family Teachers. Children learn social skills, attend school, participate in extracurricular activities, and take part in daily chores and activities.
- Foster Family Services
 - Foster parents, trained and supported by Boys Town, who open up their homes in the community to children who need a safe place to live. The length of stay varies depending on the child’s needs. Foster parents work to reunify children with their parents or other caregivers, whenever possible.
- In-Home Family Services
 - The goal is to keep children in their home or to help them reunite with their family whenever possible. On call Family Consultants teach families how to handle issues after they arise and how to prevent them from becoming more disruptive.
- Community Support Services
 - A wide variety of resources that can help children and families learn how to help themselves, or receive specialized care, or educational assistance.

*Taken from Boys Town at www.boystown.org.

CHAPTER 21

STATUS OFFENSES/FAMILY IN NEED OF SERVICES (FINS): NONDELINQUENCY PROCEEDINGS GENERAL

[21.1] OVERVIEW

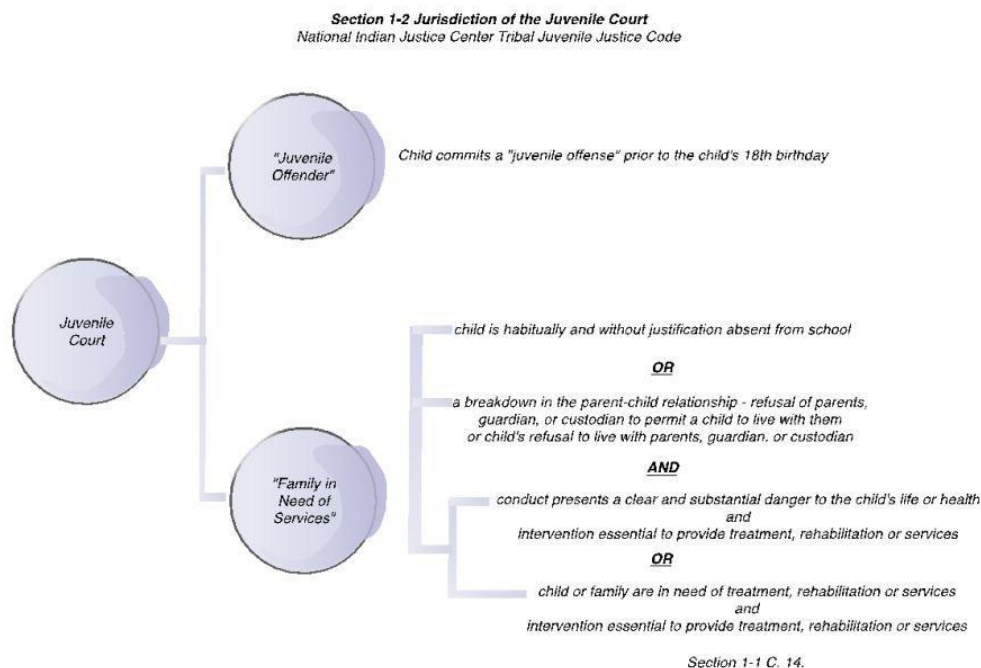
The states' Uniform Juvenile Court Act at Section 2(4) creates a category called "unruly child" that is distinct from a youth committing a delinquent act.¹⁷ The unruly child category includes a youth who is engaged in activities that are noncriminal or one in which youth violations of the law (curfew violations, running away, etc.) are committed. These activities are also known as status offenses or activities that are only considered offenses because of the young age of the youth. If an adult engaged in the same act it would not be a crime.

There was a time when many states included status offenses in the delinquent behavior category. This resulted in youth being labeled delinquent and being subject to incarceration in secure juvenile detention facilities. The Uniform Juvenile Court Act recognized that an unruly child may need the assistance of the juvenile court but that this child should not be included in the delinquent category. Section 32 prohibits the placement of an "unruly child" in a juvenile detention facility unless the juvenile court finds that the youth is not amenable to treatment or rehabilitation. Today, most states separate status offenses from delinquent acts and place them in a nondelinquent category called "in-need-of-supervision," or some variant of this. This is important because the separation of the nonserious violator is often a youth who has a troubled home life (often due to neglect, a lack a parental supervision, and/or where the youth has experienced a family crisis) but who is not necessarily someone with criminal tendencies. The juvenile court may then treat this youth differently, by supervising and assisting without labeling the youth delinquent or subjecting him or her to the same harsh procedural requirements (e.g., criminal standards of proof) or dispositions (such as secure detention). Under Section 1-2 of the NIJC Model Code, the juvenile court has "exclusive and original jurisdiction" over all proceedings where an "Indian child residing in or domiciled on the reservation" is alleged to be a "juvenile offender" and where the child's family is alleged to be "in-need-of-services," (a.k.a., FINS). Under Section 1-1 C. (22) a "juvenile offender" is defined as a youth who commits a juvenile offense prior to his or her eighteenth birthday. A "juvenile offense" is defined as a criminal violation of the Law and Order Code committed by a person who was under the age of eighteen at the time the offense was committed (Section 1-1 C. (23)). Contrast this category with the FINS category. A FINS is defined as

- a family whose child has been habitually and without justification absent from school,
- where there has been a breakdown in the parent-child relationship such that they will not live together, and there is a clear and substantial danger to the child, or
- the child or his family is in need of treatment or rehabilitation (Section 1-1 C. (14)).

¹⁷ Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

These are essentially status offenses.

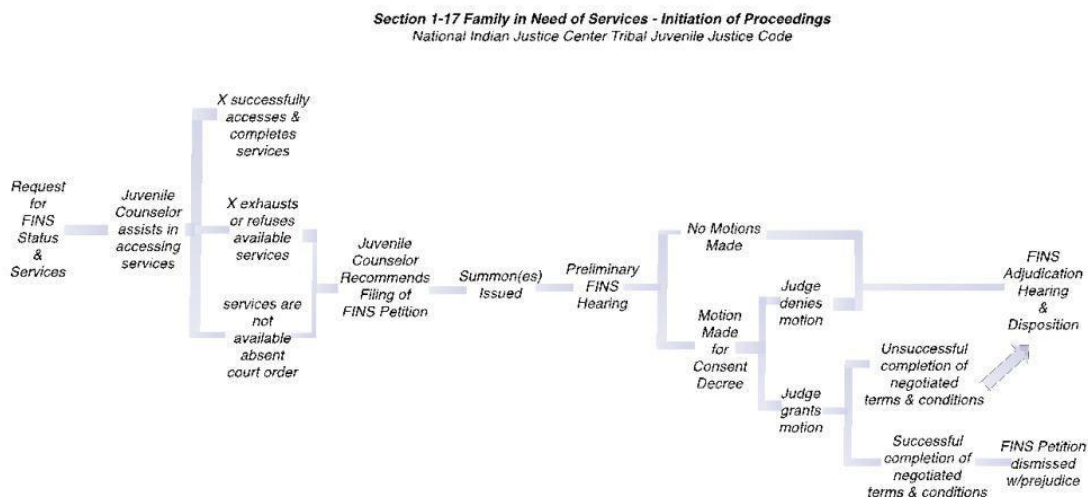


Under the NIJC Model Code, the process for handling FINS cases mirrors the process for handling juvenile offenses with some key differences. A request for services may be submitted by the youth; his or her parent, guardian, or custodian; a social services worker; or the juvenile counselor. The juvenile counselor is then responsible for assisting the family in accessing services.

A formal FINS petition may be filed with the juvenile court if necessary. It may be necessary to obtain a court order to access certain types of services and/or treatment. After a petition has been filed, the juvenile presenter or prosecutor may enter into a consent decree or an agreement with the youth and his or her family to suspend the court proceedings to give the youth and the family time to successfully complete certain services or programs. If successful, the petition may be dismissed. If unsuccessful, the juvenile court process resumes and a hearing is scheduled.

The purpose of the FINS adjudicatory hearing is for the judge to determine whether there is "clear and convincing evidence" that the family is a "family-in-need-of-services." If there is sufficient evidence to decide that this is the case, a disposition hearing is scheduled. The purpose of a FINS disposition hearing is for the judge to determine the placement, services, supervision, and/or legal custody of the youth and to refer or order services, and so forth for the family. Placement of a FINS youth in a "juvenile shelter care facility" is permitted but cannot exceed thirty days. A "juvenile shelter care facility" is defined as "any juvenile facility, other than a school, that cares for juveniles or restricts their movement," including an alcohol or substance abuse emergency shelter, halfway house, foster home, emergency foster home, group home, and shelter home. The NIJC Model Code prohibits the confinement of a FINS youth

in “an institution established for . . . juvenile offenders” or “a penal institution . . . used for the execution of sentences of persons convicted of crimes.”



Under the NIJC Model Code, in order for a formal FINS petition to be granted by a judge, the petitioner must allege either that there is a breakdown in the parent-child relationship or that there are school absences. In the case of a breakdown in the parent-child relationship, the petitioner must allege that the family is a FINS; that the petitioner has exhausted or the youth/family has refused appropriate and available services; the youth/family have participated in counseling or refused to participate in counseling; the youth has been placed in the home of a relative or the youth has refused to be so placed; the youth has sought assistance at a juvenile shelter care facility or has refused such assistance; and the youth has been placed in a foster home or refused such placement.

**Section 1-17 H. Petition -
Additional Required Allegations for Breakdown in the Parent-Child Relationship**
National Indian Justice Center Tribal Juvenile Justice Code



*the family is a "Family in Need of Services"

*they have participated in counseling or refuse to do so

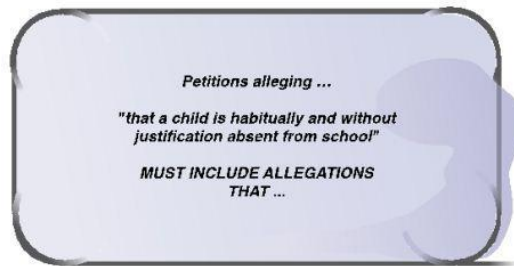
*the child has been placed with a relative or refused to be placed there

*the child sought assistance at a Juvenile Shelter Care Facility or refused such assistance

AND

*the child has been placed in a foster home or refused such placement

**Section 1-17 G. Petition -
Additional Required Allegations for School Absence
National Indian Justice Center Tribal Juvenile Justice Code**



**the family is a "Family in Need of Services"*

**the school has held a meeting with the family or they have refused to attend*

**the school provided an opportunity for counseling or an opportunity to enroll in an
alternative educational program*

**the school conducted a review of the child's educational status (testing including
medical, psychological, and/or educational) and steps have been taken to overcome
learning problems*

**a social worker has conducted an investigation to determine if there are social problems
and action has been taken*

AND

**the school has sought assistance from agencies and resources or has referred the
matter to a local social services agency*

Under the NIJC Model Code, in order for a formal FINS petition to be granted by a judge, the petitioner must allege either that there is a breakdown in the parent-child relationship or that there are school absences. In the case of alleged school absences (that are “habitual and unjustifiable”), the petitioner must allege that the family is a FINS, and a school official must file a declaration including the following allegations:

1. The school held a meeting to discuss the absences and the parent, guardian, or custodian refused to attend;
2. The school provided an opportunity for counseling or an opportunity to enroll in an alternative education program (if available);
3. The school has reviewed the child’s status to determine whether learning problems exists and steps have been taken to overcome them;
4. A social worker has conducted an investigation to determine whether social problems may be a cause and if they are, appropriate action is taken; and
5. The school has sought assistance from appropriate agencies or has referred the matter to a social services agency for coordinating agencies and resources.

[21.2] TRIBAL CODE EXAMPLES

NIJC Tribal Juvenile Justice Code

Chapter 1-16 Family In Need of Services

1-16 FAMILY IN NEED OF SERVICES—INTERIM CARE

1-16 A. Limitation on Taking into Custody

No child whose family is the subject of a proceeding alleging that the family is “in need of services” (as defined in section 1-1C of this code) may be taken into custody unless such taking into custody is in accordance with provision for “interim care” (as defined in section 1-1C of this code) set forth in sections 1-16A through 1-16J of this code.

1-16 B. Interim Care without Court Order

A child may be taken into interim care by a law enforcement officer without order of the court only when:

1. the officer has reasonable grounds to believe that the child is in circumstances which constitute a substantial danger to the child’s physical safety; or
2. an agency legally charged with the supervision of the child has notified a law enforcement agency that the child has run away from a placement ordered by the court under chapter 1-19 of this code.

1-16 C. Procedure for Interim Care

A law enforcement official taking a child into custody under the interim care provisions of this code shall immediately:

1. inform the child of the reasons for the custody;
2. contact the juvenile counselor who shall designate placement of the child in an appropriate juvenile shelter care facility as designated by the court;
3. take the child to the placement specified by the juvenile counselor, or in the event of the unavailability of a juvenile counselor, to an appropriate juvenile shelter care facility as designated by the court; and,
4. inform the child's family in accordance with section 1-16D of this code.

1-16 D. Notification of Family

The law enforcement officer or the juvenile counselor shall immediately notify the child’s parent, guardian, or custodian of the child’s whereabouts, the reasons for taking the child into custody, and the name and telephone number of the juvenile counselor who has been contacted. Efforts to notify the child’s parent, guardian, or custodian shall include telephone and personal contacts at the home or place of employment or other locations where the person is known to frequent with regularity. If notification cannot be provided to the child’s parent, guardian, or custodian, the notice shall be given to a member of the extended family of the parent, guardian, or custodian and to the child’s extended family.

1-16 E. Time Limitation on Interim Care

Under no circumstances shall any child taken into interim care under section 1-16B of this code be held involuntarily for more than forty-eight (48) hours.

1-16 F. Restrictions on Placement

A child taken into interim care shall not be placed in a jail or other facility intended or used for the incarceration of adults charged or convicted of criminal offenses. If a child taken into interim care is placed in a facility used for the detention of “juvenile offenders” or alleged “juvenile offenders,” he must be detained in a room separate from the “juvenile offenders” or alleged “juvenile offenders.”

1-16 G. Restriction on Transportation

A child taken into interim care shall not be placed or transported in any police or other vehicle which at the same time contains an adult under arrest, unless this section cannot be complied with due to circumstances in which any delay in transporting the child to an appropriate juvenile shelter care facility would be likely to result in substantial danger to the child’s physical safety. Said circumstances shall be described in writing to the supervisor of the driver of the vehicle within forty-eight (48) hours after any transportation of a child with an adult under arrest.

1-16 H. Voluntary Services

The juvenile counselor shall offer and encourage the child and the child’s family, guardian, or custodian to voluntarily accept social services.

1-16 I. Voluntary Return Home

If a child has been taken into interim care under the provisions of section 1-16B of this code and the child’s parent, guardian, or custodian agree to the child’s return home, the child shall be returned home as soon as practicable by the child’s parent, guardian, or custodian or as arranged by the juvenile counselor.

1-16 J. Shelter and Family Services Needs Assessment

If the child refuses to return home and if no other living arrangements agreeable to the child and to the child’s parent, guardian, or custodian can be made, a juvenile counselor shall offer the child shelter in an appropriate juvenile shelter care facility as designated by the court which is located as close as possible to the residence of the child’s parent, guardian, or custodian. The juvenile counselor also shall refer the child and his family to an appropriate social services agency for a family services needs assessment.

1-17 FAMILY IN NEED OF SERVICES—INITIATION OF PROCEEDINGS**1-17 A. Who May Submit Requests**

Requests stating that a family is “in need of services” may be submitted by the child; the child’s parent, guardian, or custodian; an appropriate social services agency; and/or the juvenile counselor. A request stating that a child is habitually and without justification absent from school may also be submitted by an authorized representative of a local school board or

governing authority of a private school but only if the request is accompanied by a declaration in which the authorized representative swears that the school has complied with each of the steps set forth in section 1-17G of this code.

1-17 B. Referral of Requests to Juvenile Counselor

Requests stating that a family is “in need of services” shall be referred to the juvenile counselor, who shall assist either a child or a child’s parent, guardian, or custodian in obtaining appropriate and available services as well as assisting in any subsequent filing of a petition alleging that the family is “in need of services.”

1-17 C. Withdrawal of Request

A request stating that a family is “in need of services” may be withdrawn by the party submitting the request at any time prior to the adjudication of any petition filed in the proceedings.

1-17 D. Authorization to File Petition

A petition alleging that a family is “in need of services” shall not be filed unless the juvenile presenter has determined and endorsed upon the petition that the filing of the petition is in the best interest of the child and his family.

1-17 E. Petition—Required Signatures

A petition alleging that a family is “in need of services” shall be signed by both the juvenile presenter and the party submitting the request as authorized in section 1-17A of this code.

1-17 F. Petition—Form and Contents

A petition alleging that a family is “in need of services” shall be entitled, “In the Matter of the Family of ___, a child,” and shall set forth with specificity:

1. the name, birth date, and residence address of the child and whether the child is the complainant or respondent in the proceedings;
2. the name and residence address of the parents, guardian, or custodian of the child and whether the parents, guardian, or custodian are the complainant or respondent in the proceedings;
3. that the family is a “family in need of services” as defined in section 1-1C of this code;

1-17 H. Petition—Additional Required Allegations for Breakdown in the Parent-Child Relationship

In addition to the allegations required under section 1-17F of this code, a petition alleging that there is a breakdown in the parent-child relationship shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

1. the child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;
2. the child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative;

3. the child has sought assistance at an appropriate juvenile shelter care facility for runaways or the child has refused assistance from such a facility; and
4. the child has been placed in a foster home or the child has refused placement in a foster home.

1-17 I. Summons in a Family in Need of Services Proceeding

After a petition alleging that a family is “in need of services” has been filed, summonses shall be issued directed to the child, the child’s parent, guardian, or custodian, their counsel and to such other persons as the court considers proper or necessary parties. The content and service of the summons shall be in accordance with sections 1-10F and 1-10G of this code.

1-18 FAMILY IN NEED OF SERVICES—CONSENT DECREE

1-18 A. Availability of Consent Decree

At any time after the filing of a petition alleging that a family is “in need of services,” and before the entry of a judgment, the court may, on motion of the juvenile presenter or that of the child, his parents, guardian, or custodian, or their counsel, suspend the proceedings and continue the family under supervision under terms and conditions negotiated with juvenile counselor and agreed to by all the parties affected. The court’s order continuing the family under supervision under this section shall be known as a “consent decree.”

1-18 B. Objection to Consent Decree

If the child or his parents, guardian, or custodian object to a consent decree, the court shall proceed to findings, adjudication, and disposition of the case.

1-18 C. Court Determination of Appropriateness

If the child or his parents, guardian, or custodian do not object, the court shall proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

1-18 D. Duration of Consent Decree

A consent decree shall remain in force for six months unless the family is discharged sooner by the juvenile counselor. Prior to the expiration of the six months period, and upon the application of the juvenile counselor or any other agency supervising the family under a consent decree, the court may extend the decree for an additional six months in the absence of objection to extension by the child or his parents, guardian, or custodian. If the child or his parents, guardian, or custodian object to the extension the court shall hold a hearing and make a determination on the issue of extension.

1-18 E. Failure to Fulfill Terms and Conditions

If, either prior to discharge by the juvenile counselor or expiration of the consent decree, the child or his parents, guardian, or custodian fail to fulfill the express terms and conditions of the consent decree, the petition under which the family was continued under supervision may be reinstated in the discretion of the juvenile presenter in consultation with the juvenile

counselor. In this event, the proceeding on the petition shall be continued to conclusion as if the consent decree had never been entered.

1-18 F. Dismissal of Petition

After a family is discharged by the juvenile counselor or completes a period under supervision without reinstatement of the petition alleging that the family is in need of services, the petition shall be dismissed with prejudice.

1-19 FAMILY IN NEED OF SERVICES—HEARINGS AND DISPOSITION

1-19 A. Conduct of Hearings

“Family in need of services” hearings shall be conducted by the juvenile court separate from other proceedings. At all hearings, the child and the child’s family, guardian, or custodian shall have the applicable rights listed in chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.

1-19 B. Notice of Hearings

Notice of all “family in need of services” hearings shall be given to the child, the child’s parent, guardian, or custodian, their counsel, and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10F and 1-10G of this code.

1-19 C. Adjudicatory Hearing

The court, after hearing all of the evidence bearing on the allegations contained in the petition, shall make and record its findings as to whether the family is a “family in need of services.” If the court finds on the basis of clear and convincing evidence that the family is a “family in need of services,” the court may proceed immediately or at a postponed hearing to make disposition of the case. If the court does not find that the family is a “family in need of services” it shall dismiss the petition.

1-19 E. Disposition Hearing

In that part of the hearing on dispositional issues all relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value even though not competent had it been offered during the part of the hearings on adjudicatory issues. The court shall consider any predisposition report, physician's report or social study it may have ordered and afford the child, the child’s parent, guardian, or custodian and the child’s counsel an opportunity to controvert the factual contents and conclusions of the report(s). The court shall also consider the alternative predisposition report or recommendations prepared by the child or the child’s counsel if any.

1-19 F. Disposition Alternatives

If the court finds that a family is a “family in need of services,” the court may make and record any of the following orders of disposition, giving due weight to the need to preserve the unity of the family whenever possible:

1. permit the child to remain with his parents, guardian, or custodian subject to those conditions and limitations the court may prescribe, including the protective supervision (as defined in section 1-1C of this code) of the child by a local social services agency;
2. referral of the child and his parents, guardian, or custodian to an appropriate social services agency for participation in counseling or other treatment program as ordered by the court;
3. transfer legal custody of the child to any of the following if the family is found to be a “family in need of services” due to a breakdown in the parent-child relationship:
 - (a) a relative or other individual who, after study by the juvenile counselor or other agency designated by the court, is found by the court to be qualified to receive and care for the child, or;
 - (b) an appropriate agency for placement of the child in an appropriate juvenile shelter care facility (as defined in section 1-1C of this code) for a period not to exceed thirty (30) days; with simultaneous directed referral of the family to a social services agency for counseling and/or other social assistance. A child may be placed under this section for an additional period not to exceed ninety (90) days after a hearing to determine the necessity of an additional placement.

1-19 G. Restriction on Dispositional Placements

The child shall not be confined in an institution established for the care and rehabilitation of “juvenile offenders” unless a child whose family is found to be “in need of services” is also found to be a “juvenile offender.” Under no circumstances shall a child whose family is found to be “in need of services” be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crimes.

1-19 I. Termination of Disposition Order

Any disposition order concerning a “family in need of services” shall remain in force for a period not to exceed six (6) months. The disposition order concerning a child whose family is found to be “in need of services” shall also automatically terminate when the child reaches his eighteenth (18th) birthday or is legally emancipated by the court.

[21.3] TRIBAL CODE COMMENTARY

See Chapters 22 and 24 through 27 for detailed tribal code commentary on the separate topics of FINS interim care, FINS referral to juvenile counselor, FINS breakdown in parent-child relationship, FINS consent decrees, and FINS dispositions.

[21.4] EXERCISES

The following exercises are meant to guide you in developing the general “family-in-need-of-services” (FINS) sections of the tribal juvenile code.

Exercises

- Find and examine your juvenile code’s provisions governing “family-in-need-of-services” (FINS) or a comparable designation.
 - First determine whether these provisions govern child abuse/neglect or juvenile delinquency/status offenses - if child abuse/neglect, you may be in the wrong code
- Make a list of the types of [mis]conduct and/or circumstances that constitute a “family-in-need-of-services” or “status offense”
 - Truancy?
 - Curfew violations?
 - Running Away
 - Incurigibility?
 - Substance use?
 - Other?
- Check the “disposition” provisions of your juvenile code – do they apply the same disposition alternatives to FINS youth and status offenders as they do to juvenile delinquents/offenders?
- Are your FINS youth/status offenders subject to secure juvenile detention?

Read and Discuss*

Do your tribal laws require that tribal and/or other agencies provide certain services to youth and their families before petitions may be filed in court?

What types of services would be critical?

The experience of the states and New York's innovative approach:

- The states have a long history of detaining status offenders, for example, placing chronically truant or runaway youth in secure detention facilities
- Several states have enacted "children in need of services" ("CHINS") type processes to replace the status offender label and to create new social services or probation services for youth
- Today juvenile offenses laws vary greatly from JINS (Juveniles In Need of Supervision), CINA (Child In Need of Assistance), FINS, etc.
- New York's approach is to provide services first:
 - Early assessment of New York's approach indicates that such programs can result in fewer youth becoming court involved and more youth remaining at home
 - The New York statute requires state agencies to focus on family services first for "persons in need of supervision" ("PINS")
 - The New York courts cannot accept a PINS petition unless the petitioner has already participated in family services
 - The statute requires that state agencies document their efforts to enroll youth and their families in appropriate, individualized community services which must include . . .
 - Providing families with information on local services that will alleviate the need to file a petition (short-term respite care, family crisis counseling, and dispute resolution programs, etc.)
 - Holding at least one conference with the youth and the family to discuss alternatives to filing a petition
 - Assessing whether the youth would benefit from residential respite care
 - Recording and analyzing whether diversion services are needed and whether they should be offered on an ongoing basis
 - A petition can be filed only if the agency indicates that it has terminated diversion services because there was not substantial likelihood that the youth or his or her family will benefit from further attempts

*Taken from *Juvenile Status Offenses: Treatment and Early Intervention* by Jessica R. Kendall, Technical Assistance Bulletin No. 29, American Bar Association.

CHAPTER 22

NONDELINQUENCY PROCEEDINGS—FINS Interim Care

[22.1] OVERVIEW

Interim care in the state systems has to do with preadjudication or pretrial detention.¹⁸ In the state systems there has been a long history of detaining both status offenders and juvenile offenders, and sadly even abandoned or maltreated children, in secure juvenile detention facilities, sometimes before a juvenile court has even exercised its jurisdiction over the youth. The NIJC model juvenile code provisions would remedy such practices and prevent harm to status offenders (a.k.a. “FINS eligible youth”) by authorizing taking them into custody only under certain circumstances (where there is a substantial danger to the youth’s physical safety or where they have run away from a placement) and limiting their placement to juvenile shelter care facilities.

¹⁸ Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

[22.2] TRIBAL CODE EXAMPLES

NIJC Tribal Juvenile Justice Code

Chapter 1-16 Family In Need of Services

1-16 FAMILY IN NEED OF SERVICES—INTERIM CARE

1-16 A. Limitation on Taking into Custody

No child whose family is the subject of a proceeding alleging that the family is “in need of services” (as defined in section 1-1C of this code) may be taken into custody unless such taking into custody is in accordance with provision for “interim care” (as defined in section 1-1C of this code) set forth in sections 1-16A through 1-16J of this code.

1-16 B. Interim Care without Court Order

A child may be taken into interim care by a law enforcement officer without order of the court only when:

1. the officer has reasonable grounds to believe that the child is in circumstances which constitute a substantial danger to the child’s physical safety; or
2. an agency legally charged with the supervision of the child has notified a law enforcement agency that the child has run away from a placement ordered by the court under chapter 1-19 of this code.

1-16 C. Procedure for Interim Care

A law enforcement official taking a child into custody under the interim care provisions of this code shall immediately:

1. inform the child of the reasons for the custody;
2. contact the juvenile counselor who shall designate placement of the child in an appropriate juvenile shelter care facility as designated by the court;
3. take the child to the placement specified by the juvenile counselor, or in the event of the unavailability of a juvenile counselor, to an appropriate juvenile shelter care facility as designated by the court; and,
4. inform the child’s family in accordance with section 1-16D of this code.

[22.3] TRIBAL CODE COMMENTARY

Interim Care. The Sault Ste. Marie statute omits the entire “FINS Interim Care” portion of the NIJC Model Code at Subchapter 1-16. This subchapter prohibits taking a FINS youth into custody unless it is for purposes of “interim care” and where a law enforcement officer either has reasonable grounds to believe that the youth is in substantial danger or where an agency has reported that the youth has run away from a placement. In these instances the provisions require that the law enforcement officer tell the youth why he or she is being taken into custody, arrange for placement, and notify the youth’s family. The provisions limit involuntary interim care to forty-eight hours.

A FINS youth in interim care cannot be placed in a jail, and if placed with juvenile offenders, he or she must be detained in a separate room. The youth cannot be transported with adults under arrest. The provisions also specify that the youth and his or her family must be offered social services. Finally, if it is possible, the youth should be returned home, otherwise the juvenile counselor must offer “shelter in an appropriate juvenile shelter care facility . . . which is located as close as possible to the residence. . . .” Sault Ste. Marie’s omission of the interim care provisions suggests that the tribe will permit status offenders to be taken into custody and detained like and with juvenile offenders. This is likely due to insufficient options and resources, but it is not recommended as it does not sufficiently protect mere status offending youth.

[22.4] EXERCISES

The following exercises are meant to guide you in writing the interim care section of the tribal juvenile code. The following exercises are meant to guide you in developing the FINS interim care sections of the tribal juvenile code.

Exercises

- Find and examine your juvenile code's provisions governing interim care (placements for youth before they are brought to a juvenile court hearing) – what are the required placement options and time limits for placement?
- Make a list of actual available, temporary, placement options for youth prior to court hearings in your community.
- In other jurisdictions they have “respite care” placements – temporary out-of-home placements for youth with services and programming for youth and their families – make a list of the pros and cons for a respite care program in your community.

Read and Discuss*

Is our tribe replicating the bad historical practices of states in detaining status offenders (FINS eligible youth) before tribal court hearings take place?

Does the following description of past state practices sound familiar?

“The detention of juveniles prior to adjudication or disposition of their cases represents one of the most serious problems in the administration of juvenile justice. The problem is characterized by the very large numbers of juveniles incarcerated during this stage annually, the harsh conditions under which they are held, the high costs of such detention, and the harmful after-effects detention produces. These difficulties are caused or compounded by profound defects in the system of juvenile justice itself: the inadequacy of the information and the decision-making process that leads to detention, in the delays between arrest and ultimate disposition, and in the lack of visibility and accountability that pervades the process.”

*Taken from *Standards Relating to Interim Status: Re Release, Control, and Detention of Accused Juvenile Offenders between Arrest and Detention*, American Bar Association (1979).

CHAPTER 23

NONDELINQUENCY PROCEEDINGS—Standalone Status Offenses

[23.1] OVERVIEW

In the state systems, state and federal policy makers have sought to distinguish youth who commit status offenses from youth who commit delinquent acts.¹⁹ Status offenses are nondelinquent, noncriminal infractions that would not be offenses if the youth were an adult. They include running away, truancy, alcohol or tobacco possession, curfew violations, and circumstances in which youth are found to be beyond the control of their parent/guardian(s)—often called “ungovernability” or “incorrigibility.” Experts argue that status offenses are symptomatic of underlying personal, familial, community, and systemic issues, and unmet and unaddressed needs. Until the mid-1970s, the state juvenile delinquency systems handled status offenses that subjected youth to the same dispositional and probationary alternatives, including incarceration. However, many became concerned about the short- and long-term effects of detaining and institutionalizing nondelinquent youth. In 1974, Congress encouraged states toward decriminalizing status offenses by enacting the Juvenile Justice and Delinquency Prevention Act (JJDPA). States receiving federal grants under the JJDPA agreed to prohibit the locked placement of youth charged with status offenses and pledged to reform their systems so that these youth and their families would receive family and community-based services. Nevertheless, every year, thousands of youth charged with only status offenses are placed in locked detention. Research has since proven that the secure detention of status offenders is both ineffective and dangerous:

“Research and evidence-based approaches have proven that secure detention of status offenders is ineffective and frequently dangerous. Specifically research has shown that:

- Detention facilities are often ill-equipped to address the underlying causes of status offenses.
- Detention does not serve as a deterrent to subsequent status-offending and/or delinquent behavior.
- Detained youth are often held in overcrowded, understaffed facilities—environments that can breed violence and exacerbate unmet needs.
- Almost 20 percent of detained status offenders and other non-offenders (e.g., youth involved with the child welfare system) are placed in living quarters with youth who have committed murder or manslaughter and 25 percent are placed in units with felony sex offenders.

¹⁹ Characterizations of state juvenile justice system policies and practices taken from the “National Standards for the Care of Youth Charged with Status Offenses,” Coalition for Juvenile Justice SOS Project (2013); and “From Courts to Communities: The Right Response to Truancy, Running Away, and Other Status Offenses,” Annie Salsich and Jennifer Trone, The Vera Institute of Justice, Status Offense Reform Center (2013).

- Placing youth who commit status offenses in locked detention facilities jeopardizes their safety and well-being, and may increase the likelihood of delinquent or criminal behavior.
- Removing youth from their families and communities prohibits them from developing the strong social networks and support systems necessary to transition successfully from adolescence to adulthood.”²⁰

Courts nationwide are overburdened and slow to respond. They are not equipped to assess the underlying circumstances that result in a status offense and judges have few options and the court process is expensive. In the early 2000s state officials began experimenting with alternatives to processing status offenders in family and juvenile courts. A new paradigm emerged connecting families with services in their communities. This approach is grounded in the understanding that families can resolve the problems with guidance and support. Recent studies show responding to kids at home and in their communities is more cost-effective, developmentally appropriate, and more ethical than incarceration when there is no public-safety risk. In 2005 the Connecticut legislature prohibited the use of secure detention for status offenders. That year New York State narrowed the circumstances under which status offenders can be placed in even nonsecure detention facilities. Successful community-based responses have been established in Florida, New York State, Louisiana, and Washington State.²¹

The hallmarks of an effective community-based system include:

- “1. Diversion from court. Keeping kids out of court requires having mechanisms in place that actively steer families away from the juvenile justice system and toward community-based services.
2. An immediate response. Families trying to cope with behaviors that are considered status offenses may need assistance right away from trained professionals who can work with them, often in their home, to de-escalate the situation. In some cases, families also benefit from a cool-down period in which the young person spends a few nights outside the home in a respite center.
3. A triage process. Through careful screening and assessment, the effective systems identify needs and tailor services accordingly. Some families require only brief and minimal intervention—a caring adult to listen and help the family navigate the issues at hand. At the other end of the spectrum are families that need intensive and ongoing support and services to resolve problems.
4. Services that are accessible and effective. Easy access is key. If services are far away, alienating, costly, or otherwise difficult to use, families may opt out before they can

²⁰ “National Standards for the Care of Youth Charged with Status Offenses,” p. 12.

²¹ “From Courts to Communities: The Right Response to Truancy, Running Away, and Other Status Offenses,” pp. 5–6.

meaningfully address their needs. Equally important, local services must engage the entire family, not just the youth, and be proven to work based upon objective evidence.

5. Internal assessment. Regardless of how well new practices are designed and implemented, there are bound to be some that run more smoothly than others, at least at first. Monitoring outcomes and adjusting practices as needed are essential to be effective and also to sustain support for new practices.”²²

Many if not most tribes funnel status offenses through their juvenile justice systems where out-of-home placements and even secure detention are likely results. Most of these systems use a standalone status offense approach, in contrast to a FINS type process. The standalone status offense approach is when a tribe defines a list of status offenses and provides for a civil adjudication in name. However, it is a quasicriminal trial-like process to determine guilt. The process provides a range of dispositions, applied in a probation format, for youth as an alternative to adult criminal sanctions. Proponents of the FINS approach argue that the standalone “status offender” approach unnecessarily labels and stigmatizes youth (e.g., truants and runaways) as “offenders.” They further argue that the status offender approach fails to statutorily require tribal and other agencies to provide critical services to youth and their families before permitting the filing of petitions in tribal court, and it may fail to adequately authorize tribal court jurisdiction and powers over parents and other important family members. However, it would be workable to apply the FINS court process to youth defined to be status offenders so that youth and their families benefit from family targeted and timely therapeutic interventions. This may be particularly important in tribal communities where most families are low income and where access to necessary counseling and mental health treatment may be available only through court order.

Because so many tribes use a standalone status offense approach we include examples in the following text. If used, this approach should be modified to include the FINS type protections and interventions for youth and their families and for court jurisdiction and powers over family members.

²² Id. at p. 5.

[23.2] TRIBAL CODE EXAMPLES

Eastern Band of Cherokee Indians

PART II—CODE OF ORDINANCES

Chapter 7A—JUVENILE CODE

ARTICLE I. IN GENERAL

Sec. 7A-2. Definitions.

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

(t) Undisciplined juvenile shall mean a juvenile who is less than 18 years of age who is unlawfully absent from school; who is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control, who is found in places where it is unlawful for a juvenile to be; who purchases, possesses, consumes, or receives a tobacco product; or who has run away from home.

Native Village of Barrow Tribe Juvenile Delinquency Prevention and Rehabilitation Code

1-2 E. Acts Which May Not Result in Secure Detention

The acts set out in this subsection, when committed by a child, shall be deemed to be delinquent acts that would bring the child within the jurisdiction of the juvenile court pursuant to this Code, but due to the nature of these acts the juvenile court may not order secure detention as a rehabilitative remedy for a juvenile adjudged to have engaged in any of these acts.

1. Possession, Consumption or Being under the Influence of Alcoholic Beverages: Knowingly consuming, possessing, or being under the influence of alcoholic beverages. Provided, however, that it is not a delinquent act for a juvenile to possess or consume alcoholic beverages for bona fide religious purposes based on tenets or teachings of a church or religious body, in a quantity limited to the amount necessary for religious purposes, and dispensed by a person recognized by the church or religious body.

2. Possession or Use of Tobacco: Knowingly possessing or using any cigarettes, cigars, or tobacco in any form. Provided, however, that it is not a delinquent act for a juvenile to possess or use tobacco for bona fide religious purposes based on tenets or teachings of a church or religious body, in a quantity limited to the amount necessary for religious purposes, and dispensed by a person recognized by the church or religious body.

3. Soliciting Supply: Wrongfully and willfully soliciting, inciting, or inducing any person to furnish him with cigarettes, cigars, or tobacco in any form, controlled substances, or alcoholic beverages.

4. Sexual Conduct with a Juvenile: Engaging in sexual conduct with a child. As used in this section, “sexual conduct” means any sexual touching or penetration and any unwanted exposure of genitalia. Provided, however, that “sexual conduct” does not include an act done

for a bona fide medical purpose. Provided, further, that it shall not be considered a delinquent act if the actor is married to the child.

5. Operation of Amusement Devices: Playing or operating any amusement device during school hours.

6. Restricted Places: Entering any public building where alcoholic beverages are sold, distributed, or served when not in the company of a parent or guardian. This provision shall not apply to any restaurant or other facility whose primary business consists of serving food.

7. Pulltab and Bingo Activities: Entering any premises where a pulltab game or bingo activity is being conducted. This section does not apply to premises where the pulltab game or bingo activity is conducted in a separate section of the premises that is secured from viewing and entrance by juveniles.

8. Driving without a License: Operating an automobile, truck or other vehicle that requires licensing without a valid driver's license. The age limits for driving vehicles that require licensing shall comply with State of Alaska requirements.

9. Underage Driving: For a juvenile under the age of twelve (12), driving a snowmachine, a three or four wheeler, or a boat without parental consent.

10. Curfew Violation: Violating the following curfew: A Village curfew for all juveniles shall be in effect during the school year between the hours of 10:00 P.M. and 6:00 A.M. on any evening on which the next day is a school day, and between the hours of midnight and 6:00 A.M. on any evening on which the next day is a Saturday, Sunday, or school holiday. During the summer months, a Village curfew will be in effect for all juveniles starting at midnight and ending at 6:00 A.M. A juvenile is not in violation of curfew if he is:

(a) Accompanied by his or her parent of guardian;

(b) On an errand at the written direction of his or her parent or guardian, without any detour or stop (written direction of his parent must be signed, timed and dated by the parent or guardian and must indicate the specific errand);

(c) Involved in an emergency;

(d) Engaged in, going to or returning from any employment activity, hunting, fishing, trapping, or other activities that are conducted outside the Village, without detour or stop;

(e) On the public right-of-way immediately abutting the juvenile's residence or immediately abutting the residence of a next door neighbor, if the neighbor did not complain to the police department about the juvenile's presence;

(f) Attending, going to, or returning home from, without any detour or stop, an official school, religious, or other recreational or Village activity such as church activities, Village dances, or meetings, supervised by adults and sponsored by the Native Village of Barrow, the City of Barrow, or another similar entity that takes responsibility for the juvenile; or

(g) Exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, or the right of assembly.

[23.3] TRIBAL CODE COMMENTARY

Here we provide two examples of how tribes have handled status offenses. The Eastern Band of Cherokee code establishes what is considered the standard list of status offenses. Specifically, it defines an “undisciplined juvenile” as a juvenile who is “unlawfully absent from school,” “regularly disobedient and beyond disciplinary control,” “found in places where it is unlawful for a juvenile to be,” “who purchases, possesses, consumes, or receives a tobacco product,” or “who has run away from home.” In contrast, the Native Village of Barrow code defines a comprehensive list of “delinquent acts” but singles out a separate list where “the juvenile court may not order secure detention.” These include:

- Possession, consumption, or being under the influence of alcoholic beverages
- Possession or use of tobacco
- Soliciting supply (of cigarettes, cigars, tobacco, controlled substances, or alcoholic beverages)
- Sexual conduct with a juvenile
- Operating an amusement device
- Entering restricted places (public building where alcoholic beverages are sold, distributed, or served)
- Pulltab and Bingo activities
- Driving without a license
- Underage driving
- Curfew violations

In defining status offenses it would be helpful for tribes to work closely with their treatment and youth services professionals to identify and define youth conduct that merits tribal juvenile court intervention for purposes of youth and family habilitation and rehabilitation. Status offenses should be defined with available services in mind to avoid involving youth in the system where remedial services are lacking for their identified need areas.

Of the twenty-five tribal juvenile statutes reviewed, nine contained either a FINS type system or used a list of status offenses as part of their nondelinquency process (the delinquency process deals with juvenile offenses—that would be criminal violations if they were committed by adults). A subset of the twenty-five blends their FINS and status offender categories with their dependent children category (i.e., the court process that deals with maltreated children—those abandoned, abused, and/or neglected). This is not recommended as the purpose and process of these systems are different in important ways. The consolidated list of FINS criteria and status offenses includes the following (see the following table for source):

- Absence from home/“runaway”
- Absence from school/“truancy”
- Curfew violations
- Disobeys parents, guardian, or custodian/“unamenable to parental control”
- Disorderly conduct*

- Endangers morals or health of self or others
- Loitering about games of chance
- Loitering about liquor establishment
- Motor vehicle violations
- Possession/consumption of alcohol
- Possession/consumption of controlled substances*
- Use of inhalants
- Use of over-the-counter-drugs

*Technically a “criminal offense” versus a “status offense” in many tribes’ criminal statutes but singled out for treatment under a FINS or status offense type process in these tribes’ juvenile statutes.

Tribe	FINS Type System	Status Offenses	Citation
Absentee-Shawnee	disobeys parents; absent from home; or absent from school	n/a	Title 2 Juvenile Code, Section 3(h)
Blackfeet	n/a	curfew violation; loitering about games of chance; loitering about retail liquor establishment; possession of alcohol; possession of drugs; truancy; inhaling; motor vehicle violations	Family Code, Chapter 4, Section 19
Leech Lake	n/a	curfew violation; truancy; possession and/or consumption of alcohol and/or controlled substance; possession and/or consumption of tobacco; inhaling; use of over the counter drugs; disorderly conduct; running away	Title 4, Juvenile Justice Code, Section 4-2
Pascua Yaqui	absent from school; curfew violation; runaway		Title 5 Civil Code, Chapter 7 Juveniles, Section 130
Saginaw Chippewa	n/a	absence from school; disobeying parents, etc.; absent from home	Juvenile Code, Chapter 12.2, Section 12.224
Sisseton-Wahpeton Oyate	truant, unamenable to parental control; runaway; habitually deports self to injure or endanger self or others	n/a	Chapter 38 Juvenile Code, Section 38-03- 13
Confederated Tribes of Umatilla	n/a	curfew violations; possession of alcohol; runaways; truancy	Juvenile Code Chapter 6 Juvenile Offenses, Section 6.04

		violations	
Winnebago	disobeys parents, etc.; absent from home; deports self to injure or endanger morals or health of self or others; absent from school	n/a	Title 4 Juvenile Procedure, Article I General Provisions, Section 4-102 (9)
Pueblo of Zuni	n/a	absent from school; disobeys parents, etc., left home	Title IX, Children's Code, Chapter 1 General Provisions, Section 9-1-3 (30)

[23.4] EXERCISES

The following exercises are meant to guide you in writing the status offender section of the tribal juvenile code.

Exercises

- Find and examine your juvenile code's provisions defining "delinquent act," "juvenile offense," "juvenile crime," "status offense," and/or "family-in-need of services," or some variant - list the conduct or misconduct targeted.
- Identify which of these are true "status offenses" (conduct or misconduct that is not criminal and that may only be committed by a minor, e.g., truancy, curfew violations, running away, possession and use of tobacco/inhalants, etc.)?
- Find and examine your juvenile code's "disposition" section - does your juvenile code treat juvenile offenders and status offenders the same?
- Make a list of the status offenses you wish to target.

Points for Discuss*

How should tribes deal with “status offenders”?

In juvenile cases, a “status offense” involves conduct that would not be a crime if it was committed by an adult—in other words, the actions are considered to be a violation of the law only because of the youth’s status as a minor (typically anyone under eighteen years of age).

Types of Status Offenses

The kind of conduct that might constitute a status offense varies by state. The most common status offenses include:

- truancy (skipping school)
- violating a city or county curfew
- underage possession and consumption of alcohol
- underage possession and use of tobacco
- running away, and
- ungovernability (being beyond the control of parents or guardians).

How States Handle Status Offenses

Traditionally, status offenses were handled exclusively through the juvenile justice system. But in the 1960s and 1970s, many states began to view status offense violations as a warning signal that a child needed better supervision or some other type of assistance to avoid future run-ins with the law. This view is grounded in fact—research has linked status offenses to later delinquency.

For the most part, state goals in dealing with status offenses became threefold:

- to preserve families,
- to ensure public safety, and
- to prevent young people from becoming delinquent or committing crimes in the future.

In this vein, the 1974 Federal Juvenile Delinquency Act emphasized “deinstitutionalizing” status offenses. This meant giving prosecutors broad discretion to divert status offense cases away from juvenile court and toward other government agencies that could better provide services to at-risk juveniles. Diverting a case before a delinquency petition was filed also allowed a young person to avoid the delinquent label—some believed that label itself impeded a juvenile’s chances for rehabilitation.

In 1997, only one in five status offense cases were formally processed by the courts, and even fewer status offense cases actually made it to juvenile court in the first place. That’s because law enforcement officers are less likely to refer status offense cases to juvenile court, compared with delinquency cases. Of those status offense cases that do get referred, 94% involve liquor law violations.

Today, most states refer to status offenders as “children or juveniles in need of supervision, services, or care.” A few states designate some status offenders as “dependent” or “neglected children,” and give responsibility for these young people over to state child welfare programs.

States approach status offenses in a number of different ways. In some states, a child who commits a status offense may end up in juvenile court. In other jurisdictions, the state’s child welfare agency is the first to deal with the problem. Some states have increased the use of residential placement for offenders, and others emphasize community-based programs. But, in all states, if informal efforts and programs fail to remedy the problem, the young person will end up in juvenile court.

*Taken from NOLO. Go to <http://www.nolo.com/legal-encyclopedia/juvenile-law-status-offenses-32227.html>.

CHAPTER 24

NONDELINQUENCY PROCEEDINGS—FINS Referral to Juvenile Counselor

[24.1] OVERVIEW

The FINS referral requirement to a juvenile counselor statutorily requires that FINS eligible youth and their families receive appropriate and available services before a FINS petition may be filed in the tribal juvenile court.²³

²³ Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

[24.2] TRIBAL CODE EXAMPLES

NIJC Tribal Juvenile Justice Code

1-17 FAMILY IN NEED OF SERVICES—INITIATION OF PROCEEDINGS

1-17 A. Who May Submit Requests

Requests stating that a family is “in need of services” may be submitted by the child; the child's parent, guardian, or custodian; an appropriate social services agency; and/or the juvenile counselor. A request stating that a child is habitually and without justification absent from school may also be submitted by an authorized representative of a local school board or governing authority of a private school but only if the request is accompanied by a declaration in which the authorized representative swears that the school has complied with each of the steps set forth in section 1-17G of this code.

1-17 B. Referral of Requests to Juvenile Counselor

Requests stating that a family is “in need of services” shall be referred to the juvenile counselor, who shall assist either a child or a child’s parent, guardian, or custodian in obtaining appropriate and available services as well as assisting in any subsequent filing of a petition alleging that the family is “in need of services.”

[24.3] TRIBAL CODE COMMENTARY

Referral of Requests to Juvenile Counselor)—The Sault Ste. Marie statute omits NIJC Model Code Section 1-17 B:

Requests stating that a family is “in need of services” shall be referred to the juvenile counselor, who shall assist either a child or a child’s parent, guardian, or custodian in obtaining appropriate and available services as well as assisting in any subsequent filing of a petition alleging that the family is “in need of services.”

The NIJC Model Code at Section 1-17 mandates that FINS youth be referred to a juvenile counselor who must assist the youth and his or her parents (or guardian or custodian) in accessing needed services. It would appear under the Sault Ste. Marie statute that the juvenile probation officer is not mandated to provide services to an allegedly status offending youth and his or her family short of direction from a court order. Consistent with the evidence-based trend for working with status offenders to divert them from juvenile court process to community-based services whenever possible, the Model Code provision is recommended as it provides an additional diversion point and mandate for a juvenile justice system officer to provide access to services.

[24.4] EXERCISES

The following exercises are meant to guide you in writing the “referral to juvenile counselor” section of the tribal juvenile code.

Exercises

- Find and examine your juvenile code’s provisions governing juvenile counselors and/or juvenile probation officers – does your juvenile code set out a process for their intake and handling of youth? If you can, flow chart it.
- Make a list of the services juvenile counselors and/or juvenile probation officers are required to provide to, or refer for, youth.

Make a list of the services and programs you would like to develop or contract for and make subject to the juvenile counselor’s and/or juvenile probation officer’s intake/referral/supervision process.

Read and Discuss*

Should you be lobbying your tribal councils and Congress to provide funding for comprehensive pre-court services for youth and their families? And/or do you need to reform our existing service array?

Hillsborough County, Florida

Children in Need of Services / Families in Need of Services Program (CINS / FINS)

Goal ...

The goal of both the residential and nonresidential Children in Need of Services / Families in Need of Services (CINS / FINS) Program is to reduce juvenile crime while assisting, supporting, and strengthening the youth and families in Hillsborough County.

Mission ...

The mission of CINS / FINS Program is to provide the highest quality care and treatment for the youth and families we serve every day.

Program Components ...

The Hillsborough County CINS / FINS Program has two components: residential and nonresidential services, designed to help families whose youth exhibit risk factors that make them more susceptible to becoming involved with Juvenile Delinquency or Dependency system.

Youth Served ...

The youth served in the CINS / FINS program are youth that have not been adjudicated delinquent and who have not been adjudicated dependent, but are at risk for adjudication without intervention services. These risk factors include school problems and truancy, family behavioral problems and ungovernability, runaway behaviors or homelessness, poor peer relations, and or the use of drugs and / or alcohol.

(CINS / FINS) Residential Program

- Youth that are experiencing significant issues within the home
- Youth that need a safe place to stay
- A short-term residential respite program which offers a youth an average length stay of 14 days for youth ages 10 to 17
- Youth receive ...
 - individual, group and family counseling
 - milieu services to help youth learn more appropriate behavior and participate in family life without resorting to ungovernable behavior
 - a physical health screening and mental status exam
 - educational support
 - a variety of community overlay services
 - behavioral incentives and recognition opportunities

(CINS / FINS) Non-Residential Program

- Youth and families may also receive help in a community setting
- Trained counselors provide individual and family therapy to youth ages 7 to 17 at sites throughout Hillsborough County with flexible daytime and evening hours
- A nationwide system of Safe Place sites where runaway youth may request services at designated sites throughout Hillsborough County and receive free transportation to the CINS/FINS shelter
- Case Staffing Committee where parents may file a Seven-Day Letter which is a formal document to request their child's case be brought to the attention of a judge

Screening for services is available 24 hours a day for the CINS / FINS Residential Program and Monday through Friday, 8:00 am to 5:00 pm, for the CINS / FINS Non-Residential Program.

**Taken from the Hillsborough County (Florida) Government website. Go to <http://www.hillsboroughcounty.org/index.aspx?NID=1046>*

NONDELINQUENCY PROCEEDINGS—FINS Breakdown in Parent-Child Relationship

[25.1] OVERVIEW

The NIJC Tribal Juvenile Justice Code's FINS provisions include youth conduct that would be labeled as "incorrigible," "unmanageable," "ungovernable," or "unruly," in other jurisdictions.²⁴ The preferred label, "ungovernable" is defined as being beyond the control of parents, guardians, or custodians or being disobedient of parental authority. Ungovernability is a single unifying description for a broad number of delinquent acts. Some argue that the state governments have left the definition intentionally vague in order to have more power over "ungovernable youth." However, it is generally accepted that it is not appropriate to charge every youth who fails to comply with the requests of his or her parent as "ungovernable." Rather it is appropriate to do so when the continued disobedience may cause harm to the youth or another person. Common problems stemming from ungovernability include running away, truancy, or breaking curfew. The juvenile justice system may be able to help a parent whose child continuously exhibits:

- Serious and deliberate threats of physical harm to family members;
- Acts of intimidation toward household members;
- Deliberate injury to home structures, grounds, furnishings, or pets;
- Serious and repeated violations of curfew; and/or
- Refusing to go to school.

Parental conduct demonstrating that a parent does not have the basic tools to deal with misbehavior in a healthy fashion may include:

- A lack of time,
- An authoritative parenting style,
- Abuse, and/or
- Alcohol or drug use within the home.

The NIJC model code provisions reject the "incorrigible" or "ungovernable" language and opt instead to provide FINS jurisdiction over two categories: (1) a child that is "habitually and without justification absent from school," and (2) where there is "a breakdown in the parent-child relationship." The NIJC code at Section 1-1 C.14, defines "Family-in-Need-of-Services" to include, "a family wherein there is allegedly a breakdown in the parent-child relationship based upon the refusal of the parents, guardian, or custodian to permit a child to live with them or based upon the child's refusal to live with his parents, guardian or custodian." However, the code further requires that "the conduct . . . presents a clear and substantial danger to the

²⁴Characterizations of state juvenile justice system process are taken from "Ungovernable/Incorrigible Youth Literature Review," Development Services Group, Inc. (2009).

child's life or health . . . ; or the child and his family are in need of treatment, rehabilitation, or services. . . ." This appears to ensure that FINS petitions will not be filed against youth who are merely "acting like teenagers."

It may be helpful to review Section 3.2 (K) Support for Parents in the overview.

[25.2] TRIBAL CODE EXAMPLES

Sault Ste. Marie Tribe of Chippewa Indians

CHAPTER 36: JUVENILE CODE

SUBCHAPTER V: STATUS OFFENSES

36.501 Status Offenses.

It is a violation of this Chapter for a child to runaway, be incorrigible or commit a violation of subchapters VI, VII, or VIII.

36.502 Initiation of Proceedings.

(5) In addition to the allegations required under subsection (3) of this Chapter, a petition alleging that the child is incorrigible shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

- (a) The child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;
- (b) The child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative.

NIJC Tribal Juvenile Justice Code

1-17 FAMILY IN NEED OF SERVICES—INITIATION OF PROCEEDINGS

1-17 A. Who May Submit Requests

Requests stating that a family is “in need of services” may be submitted by the child; the child's parent, guardian, or custodian; an appropriate social services agency; and/or the juvenile counselor. A request stating that a child is habitually and without justification absent from school may also be submitted by an authorized representative of a local school board or governing authority of a private school but only if the request is accompanied by a declaration in which the authorized representative swears that the school has complied with each of the steps set forth in section 1-17G of this code.

1-17 F. Petition—Form and Contents

A petition alleging that a family is “in need of services” shall be entitled, “In the Matter of the Family of ___, a child,” and shall set forth with specificity:

1. the name, birth date and residence address of the child and whether the child is the complainant or respondent in the proceedings;
2. the name and residence address of the parents, guardian or custodian of the child and whether the parents, guardian or custodian are the complainant or respondent in the proceedings;
3. that the family is a “family in need of services” as defined in section 1-1C of this code;

1-17 H. Petition—Additional Required Allegations for Breakdown in the Parent-Child Relationship

In addition to the allegations required under section 1-17F of this code, a petition alleging that there is a breakdown in the parent-child relationship shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

1. the child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;
2. the child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative;
3. the child has sought assistance at an appropriate juvenile shelter care facility for runaways or the child has refused assistance from such a facility; and
4. the child has been placed in a foster home or the child has refused placement in a foster home.

[25.3] TRIBAL CODE COMMENTARY

The Sault Ste. Marie statute at Section 36.502 (5) reads:

“In addition to the allegations required under subsection (3) of this Chapter, a petition alleging *that the child is incorrigible* shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

(a) The child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;

(b) The child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative.”

Compare NIJC Model Code Section 1-17 H:

In addition to the allegations required under section 1-17F of this code, a petition alleging that *there is a breakdown in the parent-child relationship* shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

1. the child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;

2. the child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative;

3. *the child has sought assistance at an appropriate juvenile shelter care facility for runaways or the child has refused assistance from such a facility; and*

4. *the child has been placed in a foster home or the child has refused placement in a foster home.*

The Sault Ste. Marie statute replaces the NIJC Model Code’s “breakdown in the parent-child relationship” with being “incorrigible,” which it defines at Section 36.301 to mean “a child who is repeatedly disobedient to the reasonable and lawful commands of his or her parents, guardian, or custodian.” The NIJC Model Code does not define a “breakdown in the parent-child relationship” but under its definition of “Family in Need of Services” at Section 1-1 C (14), the juvenile court, under its FINS process, has jurisdiction over:

a family wherein there is allegedly a breakdown in the parent-child relationship based on the refusal of the parents, guardian, or custodian to permit a child to live with them or based on the child’s refusal to live with his parents, guardian, or custodian . . .

Both provisions target conduct resulting in the difficulty of the youth and his or her parents, guardian, or custodian to live together. The NIJC Model Code language redirects blame away

from the youth and looks to the detrimental status—an inability to continue living together. This may be preferred where the targeted behaviors may range from a youth physically abusing his or her parent to refusing to consistently follow a parent imposed curfew, to prolonged verbal fighting between family members. There may not be an easy way to identify bad conduct where there are deeply strained underlying family dynamics.

NIJC Model Code Section 1-17 H also requires additional allegations in petitions that the Sault Ste. Marie statute omits when it comes to status offenders—a required additional allegation that the youth has sought or refused services at a shelter or has been placed or refused placement in a foster home. This “additional allegation” requirement puts the judge on notice of what has been attempted and where the youth is currently placed (or not). It is likely that Sault Ste. Marie, at the time their statute was drafted, lacked a shelter or foster home system.

[25.4] EXERCISES

The following exercises are meant to guide you in writing the FINS “breakdown in the parent-child relationship” section of the tribal juvenile code.

Exercises

- Find and examine your juvenile code’s provisions defining “incorrigible,” “ungovernable,” or any conduct, misconduct, or circumstances where youth and their parents/guardians are not getting along – what conduct/misconduct/circumstances are targeted?
- Find and examine your juvenile code’s provisions defining truancy, curfew violation, running away, possession/use of tobacco and/or inhalants – what conduct/misconduct/circumstances are targeted?
- Make a list of the services that you have that will support youth and families with these problems.
- What ideal list of conduct/misconduct/circumstances should be targeted and what services will you need that you do not have?

Points for Discussion*

How do we fix “ungovernable” youth?

Research on the contributing factors of ungovernable behavior often focuses on , , ,

- the relationship dynamics between a youth and his or her family
 - family is the key factor in the prosocial development of youth
 - family dysfunction is an important influence on future delinquent and antisocial behavior
 - interventions improving family functioning to reduce problem behaviors include . . .
 - family skills training
 - family education
 - family therapy
 - family services
 - family preservation programs
- parental behaviors and practices
 - parents are the most critical factor in the social development of children—the following buffer youth against problem behaviors . . .
 - supportive parent-child relationships
 - positive discipline methods
 - close monitoring and supervision
 - parental advocacy for their children
 - parental pursuit of needed information and support
 - interventions to improve fundamental parenting practices include . . .
 - behavioral parent training
 - parent education
 - parent support groups
 - in-home parent education or parent aid
 - parent involvement in youth groups
- presence of caring, supportive adults in the youth’s life provide youth with someone to relate to and the ability to be in a relationship . . .
 - at risk youth who are involved with at least one caring adult are more likely to withstand the range of negative influences . . .
 - poverty
 - parental addiction
 - family mental illness
 - family discord
 - Mentoring programs reduce risk factors and enhance protective factors that buffer children from risk
 - They provide positive adult contact
 - They enhance healthy beliefs
 - They enhance opportunities for involvement
 - They reinforce appropriate behavior
 - They provide personal connectedness, supervision and guidance, skills training, career or cultural enrichment opportunities, a knowledge of spirituality and values, a sense of self-worth, and goals and hope for the future

*Taken from “Ungovernable/Incorrigible Youth Literature Review,” Development Services Group, Inc. (2009).

CHAPTER 26

NONDELINQUENCY PROCEEDINGS—FINS Consent Decrees

[26.1] OVERVIEW

The NIJC's Tribal Juvenile Justice Code separates the court process for youth who are alleged to have committed juvenile acts from youth and families who are "in need of services." Youth in the latter category are handled under the FINS court process. This process, like the juvenile offense process, includes a consent decree possibility. That is, youth may be diverted from the full court process if they enter into a written agreement, a "consent decree," which is approved by the judge.

Under the NIJC Code FINS Consent Decree process, once a petition alleging that a youth and his or her family is a FINS has been filed, and before the judge has ruled, someone may file a motion to undertake a consent decree. If the judge grants it, it may remain in effect for six months with a possible extension of an additional six months. If the youth and his or her family meet the terms and conditions of the consent decree, the original FINS petition will be dismissed. If the youth and his or her family fail to fulfill the express terms of the consent decree, the FINS petition may be reinstated and proceed through the FINS court process.

[26.2] TRIBAL CODE EXAMPLES

National Indian Justice Center Tribal Juvenile Justice Code

1-18 FAMILY IN NEED OF SERVICES—CONSENT DECREE

1-18 A. Availability of Consent Decree

At any time after the filing of a petition alleging that a family is “in need of services,” and before the entry of a judgment, the court may, on motion of the juvenile presenter or that of the child, his parents, guardian, or custodian, or their counsel, suspend the proceedings and continue the family under supervision under terms and conditions negotiated with juvenile counselor and agreed to by all the parties affected. The court’s order continuing the family under supervision under this section shall be known as a “consent decree.”

1-18 B. Objection to Consent Decree

If the child or his parents, guardian, or custodian object to a consent decree, the court shall proceed to findings, adjudication, and disposition of the case.

1-18 C. Court Determination of Appropriateness

If the child or his parents, guardian, or custodian do not object, the court shall proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

1-18 D. Duration of Consent Decree

A consent decree shall remain in force for six months unless the family is discharged sooner by the juvenile counselor. Prior to the expiration of the six months period, and upon the application of the juvenile counselor or any other agency supervising the family under a consent decree, the court may extend the decree for an additional six months in the absence of objection to extension by the child or his parents, guardian, or custodian. If the child or his parents, guardian, or custodian object to the extension the court shall hold a hearing and make a determination on the issue of extension.

1-18 E. Failure to Fulfill Terms and Conditions

If, either prior to discharge by the juvenile counselor or expiration of the consent decree, the child or his parents, guardian, or custodian fail to fulfill the express terms and conditions of the consent decree, the petition under which the family was continued under supervision may be reinstated in the discretion of the juvenile presenter in consultation with the juvenile counselor. In this event, the proceeding on the petition shall be continued to conclusion as if the consent decree had never been entered.

1-18 F. Dismissal of Petition

After a family is discharged by the juvenile counselor or completes a period under supervision without reinstatement of the petition alleging that the family is in need of services, the petition shall be dismissed with prejudice.

[26.3] TRIBAL CODE COMMENTARY

None of the tribal juvenile codes reviewed contained a consent decree process.

Consent decrees—The Sault Ste. Marie juvenile code, reviewed extensively throughout this resource as an example, omits the consent decree process of the NIJC Model Code found at Subchapter 1-8. Given current research and policy trends, it is best to provide as many diversion points as possible within both the “juvenile offender” and “status offender”/“FINS” processes. The thinking is that allegedly status offending or FINS youth may not be as culpable and/or are not necessarily on a track to criminal offending and thus should not be mixed either with the juvenile offender population or the adult criminal population in order to protect them from harm and to preserve their potential good prospects.

[26.4] EXERCISES

The following exercises are meant to guide you in developing the FINS consent decree sections of the tribal juvenile code.

Exercises

- Find and examine your juvenile code's provisions governing "family-in-need-of services" (FINS) – does it contain a consent decree provision?
 - If yes, what services or programs are required/available via a consent decree?
 - If no, what services or programs would you want to be available to youth before a formal hearing or adjudication via a consent decree?
- Make a list of the pros and cons of using consent decrees for status offenders and "families-in-need-of-services" (FINS) youth to avoid formal hearings or adjudication.

Read and Discuss

What does a judge oversee when a youth agrees to be a party to a consent decree? What should happen when the youth violates it? Who can best advise the judge on what decision the judge should make in your system?

Consent decree review orders contain the following information . . .

- Court Findings
 - Youth is making satisfactory progress in meeting the terms and conditions of the consent decree
 - Youth is making unsatisfactory progress
 - Youth is in violation of the consent decree
 - Youth has satisfied the terms and conditions of the consent decree
- Order(s) to the Youth/Family
 - Youth to remain on the consent decree
 - Consent decree should be extended
 - Consent decree should be modified
 - Youth to be released due to program completion and case closed
 - Consent decree to be revoked and a petition alleging that the youth has committed a juvenile offense reinstated
- Additional Programs and Conditions
 - No change
 - Now programs and conditions
 - Vacate programs and conditions
- Education, Healthcare, and Disability
 - _____ is appointed as the youth's educational decision maker to ensure the stability and appropriateness of his or her education
 - Youth shall undergo the following evaluations, tests, counseling, and treatment: _____
- Shared Responsibility
 - Case management responsibility is to be shared by the following agencies: _____
 - The lead officer and agency are: _____
- Order(s) to the Juvenile Probation Officer
 - The juvenile probation officer is directed to complete the following evaluations and report: _____
- The next scheduled court hearing is: _____

CHAPTER 27

NONDELINQUENCY PROCEEDINGS—FINS Dispositions

[27.1] OVERVIEW

Under the NIJC Model Code FINS parties (status offenders and their families) are subject to more limited disposition alternatives than would be juvenile offenders.²⁵ For example, they are not found to be offenders of any type, they are not subject to secure detention, they are not subject to “probation,” and the court orders are of a more limited duration (e.g., six months maximum). The goal of the FINS process is to identify risky behaviors and/or need areas and to use the tribal court process to intervene to provide services to the youth and his or her family members. The goal is not to adjudicate the guilt of an offender or to punish for an offense. FINS youth (a.k.a. “status offenders”) have not committed any juvenile offenses or crimes and should not be stigmatized as offenders.

²⁵ Characterizations of state juvenile justice system process are taken from Cox et al., *Juvenile Justice*.

[27.2] TRIBAL CODE EXAMPLES

NIJC Tribal Juvenile Justice Code

1-19 FAMILY IN NEED OF SERVICES—HEARINGS AND DISPOSITION

1-19 A. Conduct of Hearings

“Family in need of services” hearings shall be conducted by the juvenile court separate from other proceedings. At all hearings, the child and the child’s family, guardian, or custodian shall have the applicable rights listed in chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.

1-19 B. Notice of Hearings

Notice of all “family in need of services” hearings shall be given to the child, the child’s parent, guardian, or custodian, their counsel, and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10F and 1-10G of this code.

1-19 C. Adjudicatory Hearing

The court, after hearing all of the evidence bearing on the allegations contained in the petition, shall make and record its findings as to whether the family is a “family in need of services.” If the court finds on the basis of clear and convincing evidence that the family is a “family in need of services,” the court may proceed immediately or at a postponed hearing to make disposition of the case. If the court does not find that the family is a “family in need of services” it shall dismiss the petition.

1-19 E. Disposition Hearing

In that part of the hearing on dispositional issues all relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value even though not competent had it been offered during the part of the hearings on adjudicatory issues. The court shall consider any predisposition report, physician’s report or social study it may have ordered and afford the child, the child’s parent, guardian or custodian and the child’s counsel an opportunity to controvert the factual contents and conclusions of the report(s). The court shall also consider the alternative predisposition report or recommendations prepared by the child or the child’s counsel if any.

1-19 F. Disposition Alternatives

If the court finds that a family is a “family in need of services,” the court may make and record any of the following orders of disposition, giving due weight to the need to preserve the unity of the family whenever possible:

1. permit the child to remain with his parents, guardian or custodian subject to those conditions and limitations the court may prescribe, including the protective supervision (as defined in section 1-1C of this code) of the child by a local social services agency;
2. referral of the child and his parents, guardian, or custodian to an appropriate social services agency for participation in counseling or other treatment program as ordered by the court;
3. transfer legal custody of the child to any of the following if the family is found to be a “family in need of services” due to a breakdown in the parent-child relationship:
 - (a) a relative or other individual who, after study by the juvenile counselor or other agency designated by the court, is found by the court to be qualified to receive and care for the child, or;
 - (b) an appropriate agency for placement of the child in an appropriate juvenile shelter care facility (as defined in section 1-1C of this code) for a period not to exceed thirty (30) days; with simultaneous directed referral of the family to a social services agency for counseling and/or other social assistance. A child may be placed under this section for an additional period not to exceed ninety (90) days after a hearing to determine the necessity of an additional placement.

1-19 G. Restriction on Dispositional Placements

The child shall not be confined in an institution established for the care and rehabilitation of “juvenile offenders” unless a child whose family is found to be “in need of services” is also found to be a “juvenile offender.” Under no circumstances shall a child whose family is found to be “in need of services” be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crimes.

1-19 I. Termination of Disposition Order

Any disposition order concerning a “family in need of services” shall remain in force for a period not to exceed six (6) months. The disposition order concerning a child whose family is found to be “in need of services” shall also automatically terminate when the child reaches his eighteenth (18th) birthday or is legally emancipated by the court.

Eastern Band of Cherokee Indians

PART II—CODE OF ORDINANCES

Chapter 7A—JUVENILE CODE

ARTICLE V. LAW ENFORCEMENT PROCEDURES IN DELINQUENCY PROCEEDINGS

Sec. 7A-53A. Dispositional alternatives for undisciplined juveniles.

The following alternatives for disposition shall be available to the court exercising jurisdiction over a juvenile who has been adjudicated undisciplined. The court may combine any of the applicable alternatives when the court finds it to be in the best interests of the juvenile:

(1) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

- a. Require that the juvenile be supervised in the juvenile's own home by a court counselor, or other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, or custodian or the juvenile as the judge may specify; or
- b. Place the juvenile in the custody of a parent, guardian, custodian, relative, residential agency offering placement services, or some other suitable person; or
- c. Place the juvenile in the custody of the Cherokee Children's Home, or other similar type facility.

(2) Place the juvenile under the protective supervision of a court counselor so that the counselor may:

(i) Assist the juvenile in securing social, medical, and educational services; and

(ii) Visit and work with the family as a unit to ensure the juvenile is provided proper supervision and care. This supervision may be issued for a period of up to three months, with an extension of an additional three months in the discretion of the court. In addition, the court may impose any combination of the following conditions which may relate to the needs of the juvenile, including:

- a. That the juvenile remain on good behavior and not violate any laws;
- b. That the juvenile attend school regularly;
- c. That the juvenile maintain passing grades in up to four courses during each grading period and meet with the court counselor and a representative of the school to make a plan for how to maintain those passing grades;
- d. That the juvenile not associate with specified persons or be in specified places;
- e. That the juvenile abide by a prescribed curfew;
- f. That the juvenile report to a court counselor as often as required by the court counselor;
- g. That the juvenile be employed regularly if not attending school; and

h. That the juvenile satisfy any other conditions determined appropriate by the court.

(3) Excuse the juvenile from compliance with the compulsory school attendance law when the court finds that suitable alternative plans can be arranged by the family through other community resources for one of the following:

- a. An education related to the needs or abilities of the juvenile including vocational education or special education;
- b. A suitable plan of supervision or placement; or
- c. Some other plan that the court finds to be in the best interests of the juvenile.

[27.3] TRIBAL CODE COMMENTARY

The NIJC Model Code at Section 1-19 F sets out the disposition alternatives for FINS youth and their families. Specifically, the provision focuses on placing the youth, on the provision of social, counseling, and treatment services, and “those conditions and limitations the court may prescribe.” The FINS court orders are only effective for up to six months and placement orders “in an appropriate juvenile shelter care facility” are limited to a maximum of 120 days. All FINS orders terminate automatically when the youth reaches the age of eighteen.

Contrast the NIJC Model Code provisions with the dispositional alternatives of the Eastern Band of Cherokee which defines its status offenders as “a juvenile adjudicated undisciplined.” Similar to the FINS process, it includes placement provisions (supervision in own home, in custody of parent, guardian, custodian, relative, “other suitable person,” residential agency, and facilities including the option of placing youth in the Cherokee Children’s Home). The Eastern Band of Cherokee code also includes a provision whereby a youth is placed under the protective supervision of a “court counselor” who assists the youth and family with social, medical, and educational services and who visits the family to assist the family in providing proper supervision and care. The maximum duration for such supervision is six months. Finally, the court may set conditions for the youth and his or her family members. These may include:

- Good behavior
- School attendance
- Maintaining passing grades
- Not associate with specified persons/places
- Curfew
- Employment if not attending school
- Any other conditions

The Eastern Band of Cherokee Code modifies the FINS process to hardwire in existing tribal services and positions, such as the Cherokee Children’s Home and the court counselor. Having such tribal services/positions targeted to assisting tribal youth who are involved with the tribal court is ideal.

[27.4] EXERCISES

The following exercises are meant to guide you in developing the FINS dispositions sections of the tribal juvenile code.

Exercises

- Find and examine your juvenile code's provisions governing "family-in-need-of-services" (FINS) / status offenders – does your juvenile code have separate disposition provisions for FINS youth or status offenders than it does for juvenile delinquents/offenders?
 - Are FINS youth/status offenders subject to being put in secure juvenile detention facilities?
- Make a list of the pros and cons of mixing FINS youth/status offenders with juvenile delinquents/offenders in a juvenile facility (whether a secure detention facility or just a group home).
- Make a list of the placement/detention options for FINS youth/status offenders that you would like to develop or contract for in your community.

Read and Discuss*

Should status offenders be put in secure detention facilities?

"Status offenders do not require secure detention to ensure their compliance with court orders or to protect public safety. However, recent data indicate that one-third of all youth held in juvenile detention centers are detained for status offenses and technical violations of probation (Arthur, 2001). Detaining youth in facilities prior to adjudication should be an option of last resort only for serious, violent, and chronic offenders and for those who repeatedly fail to appear for scheduled court dates. Secure detention and confinement are almost never appropriate for status offenders and certain other small groups of offenders—those who are very young, vulnerable, first-time offenders; those charged with non-serious offenses; and those with active, involved parents or strong community-based support systems. . . . The public's heightened concern about crime and the increased emphasis on juvenile accountability in the past two decades may have further contributed to the juvenile justice system's reliance on secure detention and confinement for most juvenile offenders. Clearly, quality and accessible community-based alternatives must exist to enable the judicious use of expensive detention and confinement programs to meet the needs of both the juvenile offender and the community."

*Taken from James Austin, Kelly Dedel Johnson, and Ronald Weitzer, "Alternatives to the Secure Detention and Confinement of Juvenile Offenders," OJJDP Juvenile Justice Bulletin (September 2005).

CHAPTER 28

NONDELINQUENCY PROCEEDINGS—Truancy Provisions

[28.1] OVERVIEW

In the state systems the juvenile courts have been handling truancy since the 1960s.²⁶ Today, truancy has become a substantial driver of status offense cases: “In 2010, truancy cases constituted 36 percent (nearly 50,000) of the estimated 137,000 petitioned status offense cases across the country.”²⁷ Truancy stems from a student’s absence from school, as opposed to misconduct. The trigger for a finding of truancy is some set number of unexcused absences that vary state by state (can be anywhere from three to fifteen absences).

However, there is now a movement to use alternatives for arrest, court processing, and detention. State policy makers are seeing an unacceptable number of youth locked up for nonviolent, minor offenses. These include the “status offenses”—acts that are only considered criminal if committed by a juvenile (e.g., running away, truancy, curfew law violations, ungovernability or incorrigibility, and underage drinking violations). Research has shown a significant link between juvenile incarceration and negative outcomes for youth including increased risk of academic failure, dropping out of school, and future involvement in the juvenile and adult criminal justice systems.

Currently, juvenile justice leaders and practitioners are working with school administrators to shift the responsibility for addressing minor student misconduct away from the juvenile justice system and back to the school’s disciplinary systems. This includes launching school-justice partnerships to convene discussions about collaborative solutions to overreferrals of cases involving minor student offenses to the courts.

Some state and local governments have established guidelines to help distinguish between offenses that do and do not merit referral to juvenile court. In cases in which school administrators must determine whether a student poses a serious safety threat to others, they may carry out a threat assessment.²⁸ Some court officials have developed written agreements describing steps that must precede a school-based referral to the juvenile court.²⁹ In some states policy makers have changed the laws to restrict school-based referrals by limiting youth’s eligibility criteria (e.g., raising the age limit for youth who may be subject to court jurisdiction

²⁶Characterizations of state truancy policy and laws are taken from “The School Discipline Consensus Report: Strategies in the Field to Keep Students Engaged in School and Out of the Juvenile Justice System,” Justice Center, The Council of State Governments (2014).

²⁷ Id. at p. 271.

²⁸ E.g., Virginia Model for Student Threat Assessment (MSTA).

²⁹ Clayton County Juvenile Justice Collaborative Cooperative Agreement, Clayton County, GA, <http://thecollaborative.uncc.edu/sites/thecollaborative.uncc.edu/files/media/files/Clayton%20County%20GA%20School%20Referral%20Cooperative%20Agreement%20copy.pdf>.

for particular conduct).³⁰ Others have created more stringent statutory thresholds for invoking juvenile justice action for first offenders—for example, the law dictates that to refer a youth to juvenile court for a truancy offense, it must be his or her third charge of misconduct, and there must be evidence that each prior instance was met with a graduated school response.³¹

A large portion of school-based cases that come to juvenile courts involve truancy. Research suggests that sanction based interventions are not effective, such as locating youth and getting them back to school with law enforcement, formal court processing, or school disciplinary measures. Instead a more effective intervention is to address the source of truant behavior with a multiagency response targeting the underlying unmet student and family needs (e.g., academic difficulty, family stress, and substance abuse). These interventions would include parent/guardian involvement, a continuum of supports and services, collaboration with community resources (including law enforcement, mental health services, mentoring, and social services), school administrative support, a commitment to keeping youth in the mainstream classroom, and ongoing evaluation. See for example, the Stark County (OH) Truancy Mediation Program³² and the Jefferson County (KY) Truancy Diversion Program.³³

Juvenile courts and justice agencies should create alternative pathways and programs for students referred to the courts by establishing policies and partnerships. These alternatives should include rehabilitative supports and intervention without formal court involvement or confinement whenever possible. There are multiple points at which a student may be diverted from juvenile justice system processing, for example, from the point of referral (contact with school administrator) or point of arrest (contact with police). At these points the administrator or police office should have discretion to offer alternatives to arrest such as diversion to an alternative court (e.g., teen court, wellness court) or to a school, court, or community-based treatment or other program. See, for example, Florida's "civil citation" alternative,³⁴ Tennessee's SHAPE program (a multisystem approach that offers mentoring, tutoring, counseling, community service, victim restitution support, and other individualized services),³⁵ Montgomery County Teen Court (eligible participants agree to have their case heard by a volunteer judge and a jury of their peers—a jury made up of high school student volunteers).³⁶

Some of the tribal juvenile laws reviewed included the now disfavored sanction-based approach—using the juvenile court system to process truant youth. Others did not address truancy at all. See the tribal example in the following text.

³⁰ See Texas Senator Whitmire's bill, S.B. 1114, 83d Legi. Sess. (Tx 1114).

³¹ South Carolina's Truancy Law, State Board Regulation 43-274.

³² Stark County, Ohio Diversion Program, starkcountyohio.gov.

³³ J. L. Byer, and J. Kuhn, "A Model Response to Truancy Prevention: The Louisville Truancy Court Diversion Project," *Juvenile and Family Court Journal* 54, no. 1 (2003): 59–67.

³⁴ FLA. STAT. §1006.13 and FLA. STAT. §985.12.

³⁵ Shelby County Schools SHAPE MOU at http://www.neglected-delinquent.org/sites/default/files/20101122_SHAPEMOU.pdf.

³⁶ Montgomery County (MD) Teen Court at montgomerycountymd.gov/sao/other/TeenCourt.html and mdtca.org/mdtca-members/Montgomery-county-teen-court/.

[28.2] TRIBAL AND STATE CODE/MOU EXAMPLES

Sault Ste. Marie Tribal Code

SUBCHAPTER VI: COMPULSORY SCHOOL ATTENDANCE

36.601 School Enrollment Requirement.

Except as excused under the state compulsory attendance law, any person having control [of] a tribal child living on the tribal lands shall enroll the child in school.

36.602 Requirement to Attend School.

Except as excused under the state compulsory attendance law, or under a school policy governing school attendance, any person having control of a tribal child living on the tribal lands age six (6) or older shall cause the child to attend the school in which the child is or should be enrolled.

36.603 Truancy Prohibited.

Truancy by a tribal child living on the tribal lands is prohibited.

36.604 Enforcement Officers.

(1) Any Tribal Law Enforcement Officer or school attendance officer may enforce the provisions of this subchapter.

(2) Any person authorized to enforce the provisions of this subchapter may stop and question any person upon reasonable belief that the person has violated this subchapter.

(3) If, during school hours, a person authorized to enforce this subchapter has probable cause to believe that a tribal child is truant, the person shall take the child into custody and transport the child to school and deliver the child to school authorities.

36.605 Cooperation with School.

Each school is encouraged and authorized to contact the Tribal Law Enforcement Department on a daily basis and provide the names, ages and custodial information regarding truant tribal children for that day.

36.606 Enforcement Procedure.

The Juvenile Division shall have jurisdiction over cases brought to enforce this subchapter. Proceedings shall be conducted in accordance with the provisions of subchapter V.

Texas Senate Bill 1114 2013–2014 83rd Legislature

SECTION 1. Article 45.058, Code of Criminal Procedure, is amended by adding Subsections (i) and (j) to read as follows:

(i) If a law enforcement officer issues a citation or files a complaint in the manner provided by Article 45.018 for conduct by a child 12 years of age or older that is alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district, the officer shall submit to the court the offense report, a statement by a witness to the alleged conduct, and a statement by a victim of the alleged conduct, if any. An attorney representing

the state may not proceed in a trial of an offense unless the law enforcement officer complied with the requirements of this subsection.

(j) Notwithstanding Subsection (g) or (g-1), a law enforcement officer may not issue a citation or file a complaint in the manner provided by Article 45.018 for conduct by a child younger than 12 years of age that is alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district.

SECTION 2. Section 25.0915, Education Code, is amended by adding Subsection (c) to read as follows:

(c) A court shall dismiss a complaint or referral made by a school district under this section that is not made in compliance with Subsection (b).

Florida Statutes 2014, Title XLVIII, Chapter 1006, §1006.13

1006.13 Policy of zero tolerance for crime and victimization.—

(1) It is the intent of the Legislature to promote a safe and supportive learning environment in schools, to protect students and staff from conduct that poses a serious threat to school safety, and to encourage schools to use alternatives to expulsion or referral to law enforcement agencies by addressing disruptive behavior through restitution, civil citation, teen court, neighborhood restorative justice, or similar programs. The Legislature finds that zero-tolerance policies are not intended to be rigorously applied to petty acts of misconduct and misdemeanors, including, but not limited to, minor fights or disturbances. The Legislature finds that zero-tolerance policies must apply equally to all students regardless of their economic status, race, or disability.

(4)(a) Each district school board shall enter into agreements with the county sheriff's office and local police department specifying guidelines for ensuring that acts that pose a serious threat to school safety, whether committed by a student or adult, are reported to a law enforcement agency.

(b) The agreements must include the role of school resource officers, if applicable, in handling reported incidents, circumstances in which school officials may handle incidents without filing a report with a law enforcement agency, and a procedure for ensuring that school personnel properly report appropriate delinquent acts and crimes.

(c) Zero-tolerance policies do not require the reporting of petty acts of misconduct and misdemeanors to a law enforcement agency, including, but not limited to, disorderly conduct, disrupting a school function, simple assault or battery, affray, theft of less than \$300, trespassing, and vandalism of less than \$1,000.

(8) School districts are encouraged to use alternatives to expulsion or referral to law enforcement agencies unless the use of such alternatives will pose a threat to school safety.

Florida Statutes 2014, Title XLVIII, Chapter 985, §985.12

985.12 Civil citation.—

(1) There is established a juvenile civil citation process for the purpose of providing an efficient and innovative alternative to custody by the Department of Juvenile Justice for children who commit nonserious delinquent acts and to ensure swift and appropriate consequences. The department shall encourage and assist in the implementation and improvement of civil citation programs or other similar diversion programs around the state. The civil citation or similar diversion program shall be established at the local level with the concurrence of the chief judge of the circuit, state attorney, public defender, and the head of each local law enforcement agency involved. The program may be operated by an entity such as a law enforcement agency, the department, a juvenile assessment center, the county or municipality, or some other entity selected by the county or municipality. An entity operating the civil citation or similar diversion program must do so in consultation and agreement with the state attorney and local law enforcement agencies. Under such a juvenile civil citation or similar diversion program, any law enforcement officer, upon making contact with a juvenile who admits having committed a misdemeanor, may issue a civil citation and assess not more than 50 community service hours, and require participation in intervention services as indicated by an assessment of the needs of the juvenile, including family counseling, urinalysis monitoring, and substance abuse and mental health treatment services. A copy of each citation issued under this section shall be provided to the department, and the department shall enter appropriate information into the juvenile offender information system. Only first-time misdemeanor offenders are eligible for the civil citation or similar diversion program. At the conclusion of a juvenile's civil citation or similar diversion program, the agency operating the program shall report the outcome to the department. The issuance of a civil citation is not considered a referral to the department.

(2) The department shall develop guidelines for the civil citation program which include intervention services that are based upon proven civil citation or similar diversion programs within the state.

(3) Upon issuing such citation, the law enforcement officer shall send a copy to the county sheriff, state attorney, the appropriate intake office of the department, or the community service performance monitor designated by the department, the parent or guardian of the child, and the victim.

(4) The child shall report to the community service performance monitor within 7 working days after the date of issuance of the citation. The work assignment shall be accomplished at a rate of not less than 5 hours per week. The monitor shall advise the intake office immediately upon reporting by the child to the monitor, that the child has in fact reported and the expected date upon which completion of the work assignment will be accomplished.

(5) If the child fails to report timely for a work assignment, complete a work assignment, or comply with assigned intervention services within the prescribed time, or if the juvenile commits a subsequent misdemeanor, the law enforcement officer shall issue a report alleging the child has committed a delinquent act, at which point a juvenile probation officer shall

process the original delinquent act as a referral to the department and refer the report to the state attorney for review.

(6) At the time of issuance of the citation by the law enforcement officer, such officer shall advise the child that the child has the option to refuse the citation and to be referred to the intake office of the department. That option may be exercised at any time before completion of the work assignment.

Clayton County Juvenile Justice Collaborative Cooperative Agreement³⁷

I. Purpose of Agreement

This agreement is entered into between the [Juvenile Court], [Public School System], [Police Departments], [Department of Family and Children Services], [District Attorney], [Behavioral Health Services], and the [Department of Juvenile Justice] for the purpose of establishing a cooperative relationship between community agencies (hereinafter referred to as the Parties) involved in the handling of juveniles who are alleged to have committed a delinquent act on school premises. The Parties acknowledge that certain misdemeanor delinquent acts defined herein as the focused acts can be handled by the School System in conjunction with other Parties without the filing of a complaint in the Court. The Parties acknowledge that the commission of these focused acts does not require the finding that a student is a delinquent child and therefore not in need of treatment or supervision. The parties acknowledge that the law requires the Court to make a preliminary determination that a petition be certified in the best interest of the child and the community before it can be filed with the Court. The Parties acknowledge that the Court has the authority to give counsel and advice to a juvenile without the filing of a petition and to delegate such authority to public or private agencies.

The Parties acknowledge that the law expressly prohibits the detention of a student for punishment, treatment, [to] satisfy the demands of the victim, police or the community, [to] allow parents to avoid their legal responsibility, [to] provide more convenient administrative access to the child, and to facilitate further interrogation or investigation. The law allows for the detention of a student who is a flight risk, presents a risk of serious bodily injury, or requests detention for protection from imminent harm.

The Parties acknowledge and agree that decisions affecting the filing of a complaint against a student and whether to place restraints on a student and place a student in secure detention should not be taken lightly, and that a cooperative agreement delineating the responsibilities of each party when involved in making a decision to place restraints on a student and to file a complaint alleging the child is a delinquent child would promote the best interest of the student and the community.

³⁷ Internal citations to state statutes omitted.

The Parties acknowledge and agree that this Agreement is a cooperative effort among the public agencies named herein to establish guidelines for the handling of school related delinquent acts against public order which are defined herein as the focused acts. The Parties further acknowledge and agree that the guidelines contained herein are intended to establish uniformity in the handling of [a] student who has committed one of the focused acts as defined herein while simultaneously ensuring that each case is addressed on a case-by-case basis to promote a response proportional to the various and differing factors affecting each student's case. The parties acknowledge and agree that the manner in which each case or incident is handled by [School Resource Officers (SRO)], school administrator, and/or the Juvenile Court is dependent upon the many factors unique to each child that includes, but is not limited to, the child's background, present circumstances, disciplinary record, academic record, general demeanor and disposition toward others, mental health status, and other factors. Therefore the parties acknowledge that students involved in the same incident or similar incidents may receive different and varying responses depending on the factors and needs of each student.

Finally, the Parties acknowledge that a Cooperative Agreement has previously been entered into by the [Juvenile Court], [Department of Juvenile Justice], [Department of Family and Children Services], and [Behavioral Health Services] to coordinate intake services to ensure that children who do not present a high risk to re-offend are not detained using a Detention Screening Instrument (DSI) and that children presenting a low to medium risk are returned home or appropriately placed in a non-secured or staff-secured setting. The Parties acknowledge that the prior Agreement remains in full force and effect and is interrelated to this Agreement as part of the Juvenile Detention Alternative Initiative and Collaborative of Clayton, County, Georgia.

II. Definitions

As used in this Agreement, the term:

A. "Student" means a child under the age of 17 years.

B. "Juvenile" means a child under the age of 17 years, which term is used interchangeably with "Student."

....

D. "Intake" means the division of the Juvenile Court responsible for making [and] reviewing complaints to determine which complaints may be handled informally and by diversion, which complaints may be forwarded to the District Attorney's Office for a petition to be drawn, and which juveniles should be detained in the [Regional Youth Detention Center], or placed at another location, or returned home.

E. "Detention Screening Instrument" or known also as "DSI" means a risk assessment instrument used by Intake to determine if the juvenile should be detained or released. The DSI

measures risk according to the juvenile's present offense, prior offenses, prior runaways or escapes, and the juvenile's current legal status such as probation, commitment, etc.

F. "Detention Assessment Questionnaire" or known also as "DAQ" means a document use[d] to determine if the juvenile presents any mental health disorders, aggravating circumstances, or mitigating circumstances. The DAQ assists Intake in making a final decision regarding detention or release.

....

J. "Bully" is a student who has three (3) times in a school year willfully attempted or threatened to inflict injury on another person, when accompanied by an apparent present ability to do so or has intentionally displayed force such as would give the victim reason to fear or expect immediate bodily harm.

K. "Focused Acts" are misdemeanor type delinquent acts involving offenses against public order including affray [a noisy fight between two or more people in a public place], disrupting public school, disorderly conduct, obstruction of police (limited to acts of truancy where a student fails to obey and officer's command to stop or not leave campus), and criminal trespass (not involving damage to property).

III. Terms of Agreement

A. Warning Notice and Referral Prerequisite to Complaint in Cases Where a Student has Committed a Focused Act

Misdemeanor type delinquent acts involving offenses against public order including affray, disrupting public school, disorderly conduct, obstruction of police (limited to acts of truancy where a student fails to obey an officer's command to stop or not leave campus), and criminal trespass (not involving damage to property) shall not result in the filing of a complaint alleging delinquency unless the student has committed his or her third or subsequent similar offense during the school year and the Principal or designee has reviewed the behavior plan with the appropriate school and/or system personnel to determine appropriate action. In accordance with O.C.G.A. §20-2-735, the school system's Student Codes of Conduct will be the reference documents of record. The Parties agree that the response to the commission of a focused act by a student should be determined using a system of graduated sanctions, disciplinary methods, and/or educational programming before a complaint is filed with the Juvenile Court. The parties agree that a student who commits one of the focused acts must receive a Warning Notice and a subsequent referral to the School Conflict Diversion Program before a complaint may be filed in the Juvenile Court. An SRO shall not serve a Warning Notice or make a referral to the School Conflict Diversion Program without first consulting with his or her supervisor if the standard operating procedures of the SRO Program of which the SRO belongs requires consultation.

1. First Offense. A student who commits one of the focused acts may receive a Warning Notice that his or her behavior is a violation of the criminal code and school policy, and that further similar conduct will result in a referral to the Juvenile Court to attend a diversion program. The SRO shall have the discretion not to issue a Warning Notice and in the alternative may admonish and counsel or take no action.

2. Referral to School Conflict Diversion Program. Upon the commission of a second or subsequent focused act in that or a subsequent school year, the student may be referred to Intake to require the student and parent to attend the School Conflict Diversion Program, Mediation Program, or other program sponsored by the Court. However, a student who has committed a second “bullying” act shall be referred to the School Conflict Diversion Program to receive law related education and conflict resolution programming, and may also be required to participate in the mediation program sponsored by the Court for the purpose of resolving the issues giving rise to the acts of aggression and to hold the student accountable to the victim(s). Intake shall make contact with the parent of the child within ten (10) business days of receipt of the notice from the [SRO] or the school to schedule the parent and child to attend the School Conflict Diversion Program, or other program of the Court appropriate to address the student’s conduct. Intake shall forward to the school where the child attends a confirmation of the child’s successful participation in the diversion program. A child’s failure to attend shall be reported to the [SRO] to determine if a complaint should be filed or other disciplinary action taken against the child.

3. Complaint. A student receiving his or her third or subsequent delinquent offense against public order may be referred to the Court by the filing of a complaint. If the student has attended a diversion program sponsored by the Court in that year or any previous school year and the student has committed a similar focused act, the student may receive a Warning Notice warning that the next similar act against the public order may result in a complaint filed with the juvenile court. A student having committed his or her third “bullying” act shall be referred to the Juvenile Court on a juvenile complaint and the Court shall certify said petition provided probable cause exists and if adjudicated shall proceed to determine if said student is delinquent and in need of supervision. The school system shall proceed to bring the student before a tribunal hearing and if found to have committed acts of bullying shall in the least, with consideration given to special education laws expel said child from the school and place in an alternative educational setting, unless expulsion from the school system is warranted. All acts of bullying shall be reported by school personnel and addressed immediately to protect the victims of said acts of bullying.

....

C. Treatment of Elementary Age Students

Any situation involving violence to the extent that others are placed at risk of serious bodily injury shall constitute an emergency and warrant immediate action by police to protect others and maintain school safety. O.C.G.A. §15-11-150 et seq. sets forth procedures for determining if

a juvenile is incompetent [and] also provides for a mechanism for the development and implementation of a competency plan for treatment, habilitation, support, [and] supervision for any juvenile who is determined not to be mentally competent to participate in an adjudication or disposition hearing. Generally, juveniles of elementary age do not possess the requisite knowledge of the nature of court proceedings and the role of the various players in the courtroom to assist his or her defense attorney and/or grasp the seriousness of juvenile proceedings, including what may happen to them at the disposition of the case. The parties acknowledge that the Court will make diligent efforts to avoid the detention of juveniles who may be mentally incompetent upon reasonable suspicion, unless they pose a high risk of serious bodily injury to others. Furthermore, it is a fundamental best practice of detention decision making to prohibit the intermingling of elementary age juveniles from adolescent youth and to treat elementary age students according to their age and level of development. Furthermore, the parties acknowledge that the commission of a delinquent act does not necessitate the treatment of the child as a delinquent, especially elementary age juveniles in whom other interventions may be made available within the school and/or other agencies to adequately respond to and address the delinquent act allegedly committed by the juvenile. The Court shall make its diversion, intervention, and prevention programs available to the juvenile without the filing of a complaint upon a referral from the school social worker. Intake shall respond to any and all referrals made by elementary school staff within 24 hours of receipt of the referral. Any delay shall be communicated to the official making the referral within 24 hours with an explanation for the delay. Intake shall respond no later than 72 hours or the matter shall be referred to the Intake Supervisor or the Chief Probation Officer. In the event an elementary age student is taken into custody and removed from the school environment for the safety of others, the decision to detain said child shall be made by the Intake Officer pursuant to law. The parties acknowledge that taking a child into protective custody is not a detention decision, which is a decision solely reserved for a juvenile judge or his or her intake officer and therefore requiring law enforcement to immediately contact the Court to determine if the child should be detained or released and under what conditions, if any, if so released.

....

[28.3] TRIBAL AND STATE CODE/MOU COMMENTARY

Truants Processed in Tribal Juvenile Court (FINS-type Process). The Sault Ste. Marie statute contains a subchapter making school attendance compulsory and prohibiting truancy. Under the Sault Ste. Marie statute at Section 36.501 it is “a violation of this Chapter for a child to . . . commit a violation of subchapter . . . VI.” Subchapter VI at Section 36.603 prohibits truancy: “Truancy by a tribal child living on the tribal lands is prohibited.” The Sault Ste. Marie statute at Section 36.502 (1) further adopts the NIJC Model Code requirements for making a request or filing a petition with the Juvenile Court:

“Requests stating that a *juvenile has committed a status offense* pursuant to this subchapter may be submitted. . . . A request stating that a child is habitually and without justification absent from school may also be submitted by an authorized representative of a local school board or governing authority of a private school.”

Section 36.606 brings truancy within the status offense jurisdiction of the Juvenile Court (as opposed to the “juvenile offender” jurisdiction): “The Juvenile Division shall have jurisdiction over cases brought to enforce this subchapter. Proceedings shall be conducted in accordance with the provisions of subchapter V.” Subchapter V, entitled “Status Offenses,” sets out the court process of youth alleged to be status offenders.

Children under 12/Conduct on School Property—Complaints Barred from Processing in Juvenile Court. The state of Texas, under its amended Code of Criminal Procedure and Education Code, has prohibited the juvenile court processing of complaints filed against youth under twelve where the conduct is alleged to have occurred on school property:

“. . . a law enforcement officer may not issue a citation or file a complaint . . . for conduct by a child younger than 12 years of age that is alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district.”

“A court shall dismiss a complaint or referral made by a school district . . . that is not made in compliance with [this section].”

School Zero-Tolerance Policies Do Not Include “Petty Acts of Misconduct.” The State of Florida has amended its zero tolerance for crime policy to not require the reporting of petty acts of misconduct and misdemeanors to law enforcement agencies, and to encourage schools to use alternatives to address disruptive behavior such as restitution, civil citation, teen court, and restorative justice programs. See Section 1006.13 above.

Use of “Juvenile Civil Citation Process.” The state of Florida has also established a “civil citation process” that functions somewhat like a traffic ticket for youth. The program may be operated by a selected agency in coordination with the state attorney and local law enforcement

agencies. Under this process law enforcement officers are empowered to issue citations to first-time misdemeanor offenders. The youth must admit to committing the misdemeanor and will be assessed up to fifty community service hours and be required to participate in intervention services as indicated by an assessment (including family counseling, urinalysis monitoring, and substance abuse and mental health treatment services). Copies of the citation are forwarded to the Juvenile Department. If the youth fails to report for an assignment, complete an assignment, or comply with intervention services, or if he or she commits a subsequent misdemeanor, the law enforcement officer will issue a report that the youth has committed a delinquent act. This report will be forwarded to the state attorney for the possible filing of a juvenile delinquency petition with the juvenile court. See Section 985.12 in the preceding text.

Use of “Juvenile Justice Collaborative Agreement.” The Clayton County Juvenile Justice Collaborative Cooperative Agreement is an agreement among that county’s juvenile court, public school system, police departments, department of family and children services, district attorney, behavioral health services, and its department of juvenile justice. The agreement governs how youth who are alleged to have committed delinquent acts on school premises are handled. The targeted conduct includes what are called “focused acts” including affray (noisy public fights), disrupting public school, disorderly conduct, obstruction of police (truancy and failure to obey law enforcement officer), and criminal trespass (with no property damage). The agreement sets up a warning and referral process for first- and second-time offenders. Students experience a system of graduated sanctions, disciplinary methods, and/or educational programming before a complaint is filed with the juvenile court. This includes possible referral to a school conflict diversion program. See excerpts from the Clayton County Juvenile Justice Collaborative Cooperative Agreement in the preceding text.

[28.4] EXERCISES

The following exercises are meant to guide you in developing the truancy sections of the tribal juvenile code and any interagency or intergovernmental agreements.

Exercises

- Find and examine your juvenile code's provisions governing truancy.
 - How is truancy defined?
 - What school, law enforcement, and/or court process is the youth subject to?
 - If the youth is processed in juvenile court which disposition alternatives is he or she subject to?
 - Are truants prohibited from being processed in juvenile court altogether?
- Make a list of the pros and cons of working with the school to exhaust its disciplinary and intervention process before cases might be allowed to come to the juvenile court.
- Make a list of the pros and cons of establishing a law enforcement civil citation process that diverts youth to a pre-court diversion program (e.g., teen court, etc.)
- Make a list of the services and diversion programs that should be developed and/or contracted for in cooperation with the school and/or the juvenile court for truant youth and their families.

Read and Discuss*

What is “truancy”? Who is at fault? How can you stop it?

Truancy is a symptom of a range of underlying issues. These issues often relate to academic achievement:

- A teenager held back in middle school who sees no point in attending;
- An undiagnosed or mishandled special education need;
- A child who is failing and sees no hope;
- A child who is bullied or sees no social value in attending school;

Or, external barriers may block a child from attending:

- A lack of safe transportation to school or safety at school;
- The need to care for younger children or older relatives;
- Asthma or other medical conditions that have resulted in an extended absence; or
- A school that has not effectively communicated attendance policies and requirements with non-English-speaking parents

Finally, truancy may be a symptom of larger breakdowns in the youth’s family life such as substance abuse, mental illness, or domestic violence.

*Taken from the ABA Article “What Social Science Tells Us about Youth Who Commit Status Offenses: Practice Tips for Attorneys,” by Claire Shubick.

CHAPTER 29

TRAUMA SENSITIVE STATUTORY PROVISIONS

[29.1] OVERVIEW

In 2013 the Indian Law and Order Commission (ILOC) issued a report,³⁸ based upon its own hearings, and based in part upon hearings before the Attorney General's National Task Force on Children Exposed to Violence.³⁹ The ILOC Report found that nationally, Indian youth are vulnerable and traumatized. They experience poverty, low graduation rates, a shorter life expectancy, higher rates of cigarette use, binge drinking, and illegal drug use. They experience high rates of abuse and neglect and are also more likely to be subject to violent victimization. They are more likely to be placed in foster care. They have high rates of early, unexpected, and traumatic death. They have greater exposure to violence and loss and are at greater risk for experiencing trauma. Native women, including young women, experience high rates of sexual assault and domestic violence. Finally, Indian youth are overrepresented in the federal and state juvenile justice systems and receive the most severe dispositions.

The ILOC Report concluded that federal and state justice systems are making matters worse by subjecting Indian country youth to complex and inadequate regimes. The federal system, for example, has no specialized juvenile division tailored to handling juveniles. Very high percentages of tribal youth end up in federal detention but these facilities lack any secondary education services. States also have significant and often disproportionate numbers of Indian country youth with no clear way of tracking them. Finally, at the tribal level, the U.S. attorneys often decline to prosecute juvenile cases leaving tribes with little infrastructure and funding to handle juveniles (e.g., housing, mental health services).

Given a review of publicly available tribal codes, it appears that when tribal courts do handle juvenile matters they lack an array of trauma-sensitive policy and legal approaches, trauma training for juvenile justice system actors, and access to professional services, including psychologists, psychiatrists, and others who are trained in providing the necessary assessments and treatment services.

Symptoms of trauma often include smoking, use of alcohol and/or drugs, and/or running away. Tribal juvenile court judges and justice system personnel may see juvenile offenses or even crimes in this conduct. Parents, teachers, and community members may perceive that youth who have trouble concentrating and learning, who are inactive, overweight, sexually

³⁸“A Roadmap for Making Native America Safer, Report to the President and Congress of the United States,” Indian Law and Order Commission (November 2013). Go to <http://www.aisc.ucla.edu/iloc/> and <http://www.indian.senate.gov/hearing/oversight-hearing-receive-testimony-indian-law-and-order-commission-report-roadmap-making> .

³⁹ Go to <http://www.justice.gov/defendingchildhood/aian.html> and <http://www.justice.gov/defendingchildhood/aian-hearings.html> .

promiscuous, or who are anxious, depressed, or suicidal are the “troubled or bad kids.” What no one may see is that traumatized youth are experiencing numbing and avoidance, have increased anxiety or emotional arousal, have mood and memory problems, are reexperiencing intrusive memories, and may overreact to perceived threats and have trouble discriminating between safe and dangerous situations.⁴⁰

Tribal youth advocates and juvenile justice system reformers make a number of recommendations for protecting and healing traumatized youth. These include the following:

- Provide training for tribal leaders, judges, justice system personnel, and service providers on youth and trauma;
- Mandate tribal court/judicial leadership in developing and coordinating trauma-focused programs;
- Take a hard look at the local provision of mental health services;
- Take a hard look at the local provision of respite care/housing (planned, short-term and time-limited breaks) for youth;
- Be careful not to overlook and foster existing community activities and programs that enhance resilience such as ceremonies, recreation programs, arts, mentorships, and vocational programs;
- Consider developing formal diversion programs such as family conferencing, mediation, wellness court, peacemaking court, teen court, and so forth;
- Consider the establishment of special units and specialists in social services and/or behavioral health departments such as “family advocates” and “family system navigators” who focus on a justice system involved youth with mental health issues;
- Ensure effective treatments for youth, including violent youth, with significant trauma histories;
- Provide training for judges and attorneys to improve justice system interactions with youth and their families who have experienced trauma;
- Reviewing existing court process and practice to reduce potential traumatization or retraumatization (reduce trauma triggers);

⁴⁰ Characterizations of state policies and laws are taken from Jessica Feierman and Lauren Fine, “Trauma and Resilience, a New Look at Legal Advocacy for Youth in the Juvenile Justice and Child Welfare Systems,” Juvenile Center (2014).

- Require that trauma information be used appropriately at various stages in the juvenile and criminal justice systems to support diversion, the use self-defense claims, and as mitigating evidence in transfer, disposition, and sentencing;
- Mandate that tribal judges consider trauma when considering the often-conflicting duties to public safety and the best interests of youth;
- Ensure that trauma is accounted for in competency determinations and assessments regarding the voluntariness of confessions;
- Prohibit transfer of traumatized youth to adult criminal court; if allowed, amend criminal laws/procedures to mitigate sentencing due to trauma;
- Ensure that juvenile court dispositions provide treatment and do not inflict further harm to youth;
- Prohibit the use of “probation conditions” and “contempt orders” for traumatized youth who would likely violate conditions and where such violations would result in secure detention and retraumatization; and
- If traumatized youth are to be placed in secure detention, mandate that the judge consider the availability of mental health treatment in determining placement.

[29.2] STATE AND TRIBAL CODE EXAMPLES—PURPOSES

Wyoming Statute (WY Stat § 14-6-201(c)(ii)(a))

2013 Wyoming Statutes

TITLE 14—CHILDREN

CHAPTER 6—JUVENILES

ARTICLE 2—JUVENILE JUSTICE ACT

14-6-201. Definitions; short title; statement of purpose and interpretation.

(c) This act shall be construed to effectuate the following public purposes:

(ii) Consistent with the best interests of the child and the protection of the public and public safety:

(A) To promote the concept of punishment for criminal acts *while recognizing and distinguishing the behavior of children who have been victimized or have disabilities, such as serious mental illness that requires treatment or children with a cognitive impairment that requires services;*

Eastern Band of Cherokee

PART II—CODE OF ORDINANCES

Chapter 7A—JUVENILE CODE

ARTICLE I. IN GENERAL

Sec. 7A-1. Purpose.

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

(a) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that *juveniles* may remain in their own homes and *may be treated through community-based services* when this approach is consistent with the protection of the public safety;

....

(c) To develop a disposition in each juvenile case that reflects *consideration of the facts, the needs and limitations of the child*, the strengths and weaknesses of the family, and the protection of the public safety.

Hopi Tribe

Ordinance 35 Children's Code

Chapter II General

A. Purpose

It is the purpose of the Hopi Children's Code to:

....

3. *provide for the care, protection, mental and physical development of the children* of the Hopi Tribe;

4. *ensure that a program of supervision, care, and rehabilitation will be available to those children* who come within the provisions of the code;

5. achieve the forgoing purposes in a family environment whenever possible separating the minor from his parents only when no alternative disposition is suitable to the child's welfare or in the tribal interest of public safety;

....

Leech Lake Band of Ojibwe Judicial Code

Title 4: Juvenile Justice Code

4-1 B. Purpose

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

1. To preserve and retain the unity of the family whenever possible and *to provide for the care, protection, and wholesome mental and physical development of children* coming within the provisions of this code;

2. To remove children committing juvenile offenses, the legal consequences of criminal behavior and to *substitute* therefore *a program of supervision, care, and rehabilitation* consistent with the protection of the Leech Lake community;

....

5. To *provide a continuum of services for children and their families* from prevention to residential treatment, with *emphasis* whenever possible *on* prevention, early intervention and *community-based alternatives*;

....

[29.3] STATE AND TRIBAL CODE EXAMPLES—DETERMINING COMPETENCE

Vermont Rule of Family Practice (V.R.F.P. 1(i))

Rule 1. Procedure for Juvenile Delinquency Proceedings 8/12/13

(i) Determination of Competence to Be Subject to Delinquency Proceedings

(1) In general. —The issue of a child's competence to be subject to delinquency proceedings may be raised by motion of any party, or upon the court's own motion, at any stage of the proceedings.

(2) Mental Examination. —*Competence shall be determined through a mental examination* conducted by a psychologist or psychiatrist selected by the court. In addition to the factors ordinarily considered in determining competence in criminal proceedings, the examiner shall consider the following appropriate circumstances of the child:

- (A) The age and developmental maturity of the child;
- (B) *whether the child suffers from mental illness* or a developmental disorder including mental retardation;
- (C) whether the child has any other disability that affects the child's competence; and
- (D) any other factor that affects the child's competence.

The child, or the state shall have the right to obtain an independent examination by an expert.

(3) Report. —The *report of an examination* ordered by the court or obtained by the child or the state is to be *sealed and filed in the juvenile court*, with copies transmitted to counsel and available to the parties for review.

(4) Statements Made in the Course of Examination. —*No statement made in the course of an examination by the child examined*, whether or not the child has consented to, or obtained, the examination, *shall be admitted as evidence* in the delinquency proceedings for the purpose of proving the delinquency alleged *or for the purpose of impeaching the testimony of the child examined*.

(5) Hearing. —The *issue of competence shall be determined by the court after a hearing* at which all parties are entitled to present evidence. The hearing shall be held as soon as practicable after the reports of the examination or examinations are filed.

(6) Determination of Competence. —If the court determines that the child is competent to be subject to delinquency proceedings, the proceeding shall continue without delay.

(7) Determination of Incompetence. —*If the court determines that the child is not competent to be subject to delinquency proceedings, the court shall dismiss the petition without prejudice*; provided that if the child is found incompetent by reason of developmental disabilities or mental retardation; the dismissal may be with prejudice.

[29.4] STATE AND TRIBAL CODE EXAMPLES—JUDICIAL/BRANCH LEADERSHIP

Connecticut Statute (CT Gen Stat § 46b-121k (2013))

2013 Connecticut General Statutes

Title 46b—Family Law

Chapter 815t—Juvenile Matters

Section 46b-121k—Programs, services and facilities for juvenile offenders.

(a)(1) The Judicial Branch shall develop constructive programs for the prevention and reduction of delinquency and crime among juvenile offenders. To develop such programs, the executive director of the Court Support Services Division within the Judicial Branch shall cooperate with other agencies to encourage the establishment of new programs and to provide a continuum of services for juvenile offenders who do not require secure placement, including, but not limited to, juveniles classified pursuant to the risk assessment instrument described in section 46b-121i, as those who may be released with structured supervision and those who may be released without supervision. When appropriate, the Judicial Branch shall coordinate such programs with the Department of Children and Families and the Department of Mental Health and Addiction Services.

(2) The programs shall be tailored to the type of juvenile, including the juvenile's offense history, age, maturity and social development, gender, mental health, alcohol dependency or drug dependency, need for structured supervision and other characteristics, and shall be culturally appropriate, trauma-informed and provided in the least restrictive environment possible in a manner consistent with public safety. The Judicial Branch shall develop programs that provide: (A) Intensive general education, with an individualized remediation plan for each juvenile; (B) appropriate job training and employment opportunities; (C) counseling sessions in anger management and nonviolent conflict resolution; (D) treatment and prevention programs for alcohol dependency and drug dependency; (E) mental health screening, assessment and treatment; (F) sexual offender treatment; and (G) services for families of juveniles.

(b) The Judicial Branch may contract to establish regional secure residential facilities and regional highly supervised residential and nonresidential facilities for juveniles referred by the court. Such facilities shall operate within contracted-for capacity limits. Such facilities shall be exempt from the licensing requirements of section 17a-145.

(c) The Judicial Branch shall collaborate with private residential facilities providing residential programs and with community-based nonresidential postrelease programs.

(d) The Judicial Branch, as part of a publicly bid contract for an alternative incarceration program, may include a requirement that the contractor provide for space necessary for juvenile probation offices and other staff of the Court Support Services Division to perform their duties.

(e) Any program developed by the Judicial Branch that is designed to prevent or reduce delinquency and crime among juvenile offenders shall be gender specific, as necessary, and shall comprehensively address the unique needs of a targeted gender group.

(f) The Judicial Branch shall consult with the Commission on Racial and Ethnic Disparity in the Criminal Justice System established pursuant to section 51-10c to address the needs of minorities in the juvenile justice system.

NIJC Model Juvenile Code

1-5 RELATIONS WITH OTHER AGENCIES

1-5 A. Cooperation and Grants

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

....

1-5 C. Contracts

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

1-5 D. Transfers from Other Courts

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

Leech Lake Band of Ojibwe Judicial Code

Title 4: Juvenile Justice Code

4-4 Relations with Other Agencies

4-4 A. Cooperation and Grants

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

4-4 C. Contracts

The juvenile court may negotiate contracts with tribal, federal, or state agencies and/or departments on behalf of the tribal council for the care and placement of children whose status

is adjudicated by the juvenile court subject to the approval of the tribal council before the expenditure of tribal funds.

4-4 D. Transfers from Other Courts

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

4-4 E. Transfers to Other Courts

The court may transfer any juvenile matter to a state or tribal court of competent jurisdiction for adjudication and/or disposition when the juvenile division has determined such a transfer to be in the best interest of the juvenile, or when the resources available from the Band are insufficient to correct the problem which brought the juvenile before the court.

[29.5] STATE AND TRIBAL CODE EXAMPLES—SPECIAL UNIT; ADVOCATES AND NAVIGATORS

Colorado Statutes (C.R.S. 27-69-101 to C.R.S. 27-69-105)

Colorado Revised Statutes

TITLE 27. BEHAVIORAL HEALTH—MENTAL HEALTH

ARTICLE 69. FAMILY ADVOCACY—MENTAL HEALTH—JUVENILE JUSTICE PROGRAMS

27-69-101 Legislative declaration

(1) The general assembly hereby finds and declares that:

(a) Colorado families and youth have difficulties navigating the mental health, physical health, substance abuse, developmental disabilities, education, juvenile justice, child welfare, and other state and local systems that are compounded when the youth has a mental illness or co-occurring disorder;

(b) Preliminary research demonstrates that family advocates increase family and youth satisfaction, improve family participation, and improve services to help youth and families succeed and achieve positive outcomes. One preliminary study in Colorado found that the wide array of useful characteristics and valued roles performed by family advocates, regardless of where they are located institutionally, provided evidence for continuing and expanding the use of family advocates in systems of care.

(c) Input from families, youth, and state and local community agency representatives in Colorado demonstrates that family advocates help families get the services and support they need and want, help families to better navigate complex state and local systems, improve family and youth outcomes, and help disengaged families and youth to become engaged families and youth;

(d) State and local agencies and systems need to develop more strengths-based, family-centered, individualized, culturally competent, and collaborative approaches that better meet the needs of families and youth;

(e) A family advocate helps state and local agencies and systems adopt more strengths-based-targeted programs, policies, and services to better meet the needs of families and their youth with mental illness or co-occurring disorders and improve outcomes for all, including families, youth, and the agencies they utilize;

(f) There is a need to demonstrate the success of family advocates in helping agencies and systems in Colorado to better meet the needs of families and youth and help state and local agencies strengthen programs.

(2) It is therefore in the state's best interest to establish demonstration programs for system of care family advocates for mental health juvenile justice populations who navigate across mental health, physical health, substance abuse, developmental disabilities, juvenile justice, education, child welfare, and other state and local systems to ensure sustained and thoughtful family participation in the planning processes of the care for their children and youth.

27-69-102 Definitions

As used in this article, unless the context otherwise requires:

(1) "Co-occurring disorders" means disorders that commonly coincide with mental illness and may include, but are not limited to, substance abuse, developmental disabilities, fetal alcohol syndrome, and traumatic brain injury.

(2) "Demonstration programs" means programs that are intended to exemplify and demonstrate evidence of the successful use of family advocates in assisting families and youth with mental illness or co-occurring disorders.

(3) "Division of criminal justice" means the division of criminal justice created in section 24-33.5-502, C.R.S., in the department of public safety.

(4) "Division of mental health" means the unit within the department of human services that is responsible for mental health services.

(5) "Family advocacy coalition" means a coalition of family advocates or family advocacy organizations working to help families and youth with mental health problems, substance abuse, developmental disabilities, and other co-occurring disorders to improve services and outcomes for youth and families and to work with and enhance state and local systems.

(6) "Family advocate" means an individual who has been trained to assist families in accessing and receiving services and support. Family advocates are usually individuals who have raised or cared for children and youth with mental health or co-occurring disorders and have worked with multiple agencies and providers, including mental health, physical health, substance abuse, juvenile justice, developmental disabilities, and other state and local systems of care.

(7) "Legislative oversight committee" means the legislative oversight committee for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems, created in section 18-1.9-103, C.R.S.

(8) "Partnership" means a relationship between a family advocacy organization and another entity whereby the family advocacy organization works directly with another entity for oversight and management of the family advocate and family advocacy demonstration program, and the family advocacy organization employs, supervises, mentors, and provides training to the family advocate.

(9) “System of care” means an integrated network of community-based services and support that is organized to meet the challenges of youth with complex needs, including, but not limited to, the need for substantial services to address areas of developmental, physical, and mental health, substance abuse, child welfare, and education and involvement in or being at risk of involvement with the juvenile justice system. In a system of care, families and youth work in partnership with public and private organizations to build on the strengths of individuals and to address each person’s cultural and linguistic needs so services and support are effective.

(10) “Task force” means the task force for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems in Colorado, created in section 18-1.9-104, C.R.S.

(11) “Unit” means the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse.

27-69-103. Demonstration programs established

There are hereby established demonstration programs for system of care family advocates for mental health juvenile justice populations that shall be implemented and monitored by the division of mental health unit, with input, cooperation, and support from the division of criminal justice, the task force, and family advocacy coalitions.

27-69-104. Program scope—rules

(1) The unit shall promulgate rules and standards, after consultation with family advocacy coalitions and other stakeholders, for family advocacy mental health juvenile justice programs for system-of-care family advocates and family systems navigators for mental health juvenile justice populations. The programs shall:

(a) Focus on youth with mental illness or co-occurring disorders who are involved in or at risk of involvement with the juvenile justice system and be based upon the families’ and youths’ strengths; and

(b) Provide navigation, crisis response, integrated planning, transition services, and diversion from the juvenile justice system for youth with mental illness or co-occurring disorders.

(2) The unit shall provide technical assistance and coordination of family advocacy mental health juvenile justice programs throughout the state that provide system-of-care family advocates and family systems navigators for mental health juvenile justice populations with support to implement and sustain programs that best meet the needs of youth, families, and communities.

(3) Key components of the family advocacy mental health juvenile justice programs for system-of-care family advocates and family systems navigators for mental health juvenile justice populations shall include:

(a) Coordination with the key stakeholders involved in the local community to ensure consistent and effective collaboration. This collaboration may include, but need not be limited to, a family advocacy organization, representatives of the juvenile court, the probation department, the district attorney's office, the public defender's office, a school district, the division of youth corrections within the department of human services, a county department of social or human services, a local community mental health center, and a regional behavioral health organization and may include representatives of a local law enforcement agency, a county public health department, a substance abuse program, a community centered board, a local juvenile services planning committee, and other community partners;

(b) Services to youth with mental illness or co-occurring disorders who are involved in or at risk of involvement with the juvenile justice system and other state and local systems;

(c) Policies concerning the work of family advocates or family systems navigators that include:

- (I) Experience and hiring requirements;
- (II) The provision of appropriate training; and
- (III) A definition of roles and responsibilities; and

(d) Services provided by system-of-care family advocates or family systems navigators for mental health juvenile justice populations, which services shall include:

- (I) Strengths, needs, and cultural assessment;
- (II) Navigation and support services;
- (III) Education programs related to mental illness, co-occurring disorders, youth and family involvement in the system of care, the juvenile justice system, and other relevant systems;
- (IV) Cooperative training programs for family advocates or family systems navigators and for staff, where applicable, of mental health, physical health, substance abuse, developmental disabilities, education, child welfare, juvenile justice, and other state and local systems related to the role and partnership between the family advocates or family systems navigators and the systems that affect youth and their family;
- (V) Integrated crisis response services and crisis and transition planning;
- (VI) Access to diversion and other services to improve outcomes for youth and their families;
- (VII) Other services as determined by the local community; and
- (VIII) Coordination with the local community mental health center.

27-69-105. Evaluation and reporting

(3) As determined by the unit, in consultation with family advocacy programs, each integrated system-of-care family advocacy program for mental health juvenile justice populations shall forward data to the unit, including:

- (a) System utilization outcomes, including, but not limited to, available data on services provided related to mental health, physical health, juvenile justice, developmental disabilities, substance abuse, child welfare, traumatic brain injuries, school services, and co-occurring disorders;
- (b) Youth and family outcomes, related to, but not limited to, mental health, substance abuse, developmental disabilities, juvenile justice, and traumatic brain injury issues;
- (c) Family and youth satisfaction and assessment of family advocates or family systems navigators;
- (d) Process and leadership outcomes, including, but not limited to, measures of partnerships, service processes and practices among partnering agencies, leadership indicators, and shared responses to resources and outcomes; and
- (e) Other outcomes, including, but not limited to, identification of the cost avoidance or cost savings, if any, achieved by the demonstration program, the applicable outcomes achieved, the transition services provided, and the service utilization time frames.

NIJC Model Juvenile Code

1-6 JUVENILE COURT PERSONNEL

1-6 B. Juvenile Counselor/Juvenile Probation Officer

1. Appointment

The court shall appoint juvenile counselor(s) or juvenile probation officer(s) to carry out the duties and responsibilities set forth in this code. The chief judge of the tribal court shall certify annually to the tribal council the number of qualified juvenile counselor(s) or juvenile probation officer(s) needed to carry out the purpose of this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled “juvenile counselors” or “juvenile probation officers” or any other title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

2. Qualifications

The juvenile counselor must have an educational background and/or prior experience in the field of delivering social services to youth.

3. Resource Development

The juvenile court counselor shall identify and develop resources on the reservation, in conjunction with the juvenile court and the tribal council, to enhance each tribal child’s potential as a viable member of the tribal community.

4. Duties:

- (a) Make investigations as provided in this code or as directed by the court;
- (b) Make reports to the court as provided in this code or as directed by the juvenile court;
- (c) Conduct informal adjustments;
- (d) Provide counseling services;

(e) Perform such other duties in connection with the care, custody, or transportation of children as the court may require.

5. Prohibited Duties

The juvenile counselor shall not be employed as or be required to perform the duties of a prosecutor, juvenile presenter, or law enforcement official.

....

1-6 D. Additional Court Personnel

The court may set qualifications and appoint additional juvenile court personnel such as guardians ad litem, court appointed special advocates (CASAs), juvenile advocates, and/or referees whenever the court decides that it is appropriate to do so.

Leech Lake Band of Ojibwe Judicial Code

Title 4: Juvenile Justice Code

4-5 Juvenile Court Personnel

4-5 B. Juvenile Service Coordinator

1. Appointment

The court may appoint Juvenile Service Coordinator(s) to carry out the duties and responsibilities set forth in this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled “juvenile counselors,” “juvenile truancy specialists,” “juvenile caseworkers,” or “juvenile probation officers,” or any other title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

2. Duties

- (a) Make investigations as provided in this code or as directed by the court;
- (b) Make reports to the court as provided in this code or as directed by the juvenile court;
- (c) Conduct informal adjustments;
- (d) Provide referrals for counseling services;
- (e) Perform such other duties in connection with the care, custody or transportation of children as the court may require.

3. Prohibited Duties

The Juvenile Service Coordinator shall not be employed as or be required to perform the duties of a prosecutor, juvenile prosecutor, or law enforcement official.

4-5 C. Additional Court Personnel

The court may set qualifications and appoint additional juvenile court personnel such as guardian ad litem, court appointed special advocates (CASAs), juvenile advocates, and/or referees whenever the court decides that it is appropriate to do so.

[29.6] STATE AND TRIBAL CODE EXAMPLES—MITIGATION IN SENTENCING

Kansas Statutes (K.S.A. 21-4626)

Chapter 21: Crimes and Punishments

PART III.—CLASSIFICATION OF CRIMES AND SENTENCING

Article 46: Sentencing

21-4626: Same; mitigating circumstances.

Mitigating circumstances shall include, but are not limited to, the following:

(8) At the time of the crime, the defendant was suffering from posttraumatic stress syndrome caused by violence or abuse by the victim.

[29.7] STATE AND TRIBAL CODE EXAMPLES—SECURE DETENTION

Colorado Statutes (C.R.S. 19-2-508 at (3)(a)(VII)(C)(c)(III)(F))

19-2-508. Detention and Shelter—Hearing—Time Limits—Findings—Review—Confinement with Adult Offenders—Restrictions

(3)(a)(VII)(C)(c)(III)

In determining whether an adult jail is the appropriate place of confinement for the juvenile, the district court shall consider the following factors:

(F) The relative ability of the available adult and juvenile detention facilities to meet the needs of the juvenile, including the juvenile’s need for mental health and educational services;

Hopi Tribe, Children’s Code

Ordinance 35

Chapter I, Definitions

15. Detention: Temporary care in physically restricting facilities.

30. Shelter Care: Temporary care in physically unrestrictive facilities.

Chapter VI, Juvenile Offender

D. Taking Custody

1. Custody: A minor may be taken into custody by a law enforcement officer . . .

3. Arresting Officer’s Options: The arresting officer [may] present the minor to the juvenile intake officer.

E. Intake Custody Decision

When a minor is presented to the juvenile intake officer by the arresting officer, the intake officer may, after an evaluation of the circumstances, place a minor in detention or shelter care . . .

F. Custody Retained

If the minor is not released the following provisions shall apply:

4. Detention Pending Court Hearing: A minor alleged to be a juvenile offender may be detained pending a court hearing, in the following places:

a. a shelter care facility on the Reservation approved by the Tribe and/or Bureau of Indian Affairs;

- b. a detention facility on the Reservation approved by the Court and/or the Bureau of Indian Affairs;
- c. a foster home on the Reservation approved by the Court and/or the Bureau of Indian Affairs.

A minor who is sixteen (16) years of age or older may be detained in a jail or facility used for the detention of adults only if:

- a. a facility as noted above is not available or would not assure adequate supervision of the minor;
- b. detention is in a cell separate and removed from sight and sound of adults;
- c. adequate supervision is provided twenty-four (24) hours a day.

5. Detention Criteria: A minor taken into custody shall not be placed in detention prior to a court's disposition unless:

- a. the act is serious enough to warrant continued detention or shelter care;
- b. there is reasonable cause to believe that the minor will run away and that he will be unavailable for further proceedings and/or commit a serious act causing damage to persons or property;
- c. there is reasonable cause to believe that the minor will commit injury to persons or property of others or commit injury to himself or be subject to injury by others; or
- d. there is reasonable cause to believe the minor has no parent(s), guardian or custodian able or willing to provide adequate supervision and care for him.

[29.8] TRIBAL CODE COMMENTARY

Purposes—Many purpose statements in juvenile statutes mandate that judges weigh the often-competing goals of “the best interests of the child” and “protection of the public safety” in determining how to handle and dispose of juvenile cases, for example, whether to return a youth home with treatment or to send a youth to a secure juvenile detention facility. The Wyoming Statute (WY Stat § 14-6-201(c)(ii)(a)) inserts a third required consideration—judges must recognize any distinctive behavior indicating that a youth has been victimized and whether he or she has a serious mental illness (e.g., depression or posttraumatic stress disorder [PTSD]) that requires treatment. Advocates for traumatized youth argue that traumatized youth require high-quality mental health interventions in a family and/or community setting and warn that secure detention must be avoided to prevent retraumatizing them. The sample tribal statutory language references “the provision of mental development” (Hopi and Leech Lake). The Eastern Band of Cherokee statute allows that “juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety.” Similarly, Leech Lake states that its juvenile system and law is “to provide a continuum of services for children and their families from prevention to residential treatment, with emphasis whenever possible on prevention, early intervention and community-based alternatives.” The Wyoming statutory language is preferable to the tribal statutory language here as it targets trauma victims and requires judges to distinguish and recognize “children who have been victimized or have disabilities, such as serious mental illness that requires treatment.”

Determining Competence—We include the competency provisions of the Vermont Rule of Family Practice (V.R.F.P. 1(i)) here, although, none of the tribal juvenile statutes reviewed included or required a competency determination. The question of competency arises in determining whether a child or youth is competent to proceed in a juvenile delinquency proceeding. For example, a small child of four years old who bites his playmate would be incompetent to proceed in a juvenile delinquency proceeding as he would not be culpable for a bad act or capable of understanding or responding to the proceedings. Likewise, advocates for traumatized youth argue, some youth are too mentally ill to be culpable for the bad act for which they are charged (e.g., they were reacting to a perceived but not actual threat because they had PTSD) and/or they are not capable of understanding or responding to the juvenile justice proceedings (which may be targeted at accountability, restitution, and/or punishment). A tribal juvenile court should have a process and criteria for identifying these youth, dismissing these cases, and redirecting them to the dependency or other appropriate tribal court dockets. The Vermont rule provides that mental examinations be undertaken by court-selected psychologists or psychiatrists and requires the examiner to consider whether the youth suffers from a serious mental illness, among other factors. The rule requires that the report be sealed and filed with the juvenile court and disallows the use of any statements made by the youth as proof of his or her delinquency or for impeachment purposes. The rule further requires a competency hearing and dismissal of petitions before the juvenile court where a youth is found to be incompetent. The implications for tribal juvenile statutes are that some youth do not belong in juvenile court as they do not understand right and wrong in the given situation and

will not respond to the accountability, reparations, and/or punishment mechanisms of the system given a current serious mental illness. Tribes adopting a competency screening provision for their delinquency systems should be careful to amend their dependency laws to assume jurisdiction over these youth and their families to provide needed protections, monitoring, services, and treatment.

Judicial Branch/Leadership. The Connecticut statute mandates that the judicial branch, in cooperation with the Department of Children and Families and the Department of Mental Health and Addiction Services, develop prevention and crime-reduction programs for juvenile offenders, including new programs providing a continuum of services. The programs are to be tailored to the juvenile, culturally appropriate, and trauma informed. They must also provide intensive general education with an individualized remediation plan for each juvenile, appropriate job training and employment opportunities, counseling sessions in anger management and nonviolent conflict resolution, treatment and prevention programs for alcohol and drug dependency, mental health screening, assessment and treatment, sex offender treatment, and services for families and juveniles. The judicial branch is also authorized to contract with secure residential facilities and highly supervised residential and nonresidential facilities for juveniles. The judicial branch is also mandated to collaborate with private residential facilities and community-based nonresidential postrelease programs. See the Section 46b-121k of the Connecticut statute in the preceding text.

Contrast the Connecticut statute with the requirements of the NIJC Model Juvenile Code that authorizes the tribal juvenile court to cooperate with any federal, state, tribal, public, or private agency to participate in any diversion, rehabilitation, or training programs and to receive grants. The NIJC provisions also empower the tribal juvenile court to negotiate contracts for the care and placement of children “whose status is adjudicated by the juvenile court.” The Leech Lake provisions are based upon the NIJC Model. The Connecticut approach is preferable in that it designates a “lead agency,” the judicial branch, to develop the necessary programs in coordination with other key agencies.

Special Unit; Advocates and Navigators. The purpose of the Colorado statute at Section 27-69-101 et seq. is to assist youth and families specifically where the youth has a mental illness or co-occurring disorder. The law establishes a mental health unit that will promulgate rules and standards after consultation with a family advocacy coalition and stakeholders, and provide navigation, crisis response, integrated planning, transition services, and diversion from the juvenile justice system for youth with mental illness or co-occurring disorders. The law uses “family advocates” and “family systems navigators” to help youth and their families access and participate in services—to navigate across mental health, physical health, substance abuse, developmental disabilities, juvenile justice, education, child welfare, and other state and local systems.

Contrast the Colorado statute with the NIJC code Section 1-6 describing tribal juvenile court personnel including a court-appointed juvenile counselor or probation officer, guardians ad litem, court-appointed special advocates, juvenile advocates, and/or referees. The Leech Lake

provisions are based upon the NIJC code provisions. The NIJC and Leech Lake provisions contemplate primarily justice system personnel (e.g., intake, monitoring, legal representation, judges) while the Colorado statute adds additional advocates and navigators with specific backgrounds and training in working with mental health problems and co-occurring disorders.

Mitigation in Sentencing. The Kansas statute at Section 21-4626 provides for mitigation in sentencing where there is evidence that a criminal defendant was suffering from PTSD caused by violence or abuse by the victim of the crime. This scheme assumes that a juvenile offender was transferred to adult criminal court, was found guilty, and was sentenced. Youth advocates and juvenile justice system reformers argue that traumatized youth should not be transferred to an adult criminal court for processing, but if they are, their sentences should be mitigated where there is proof of trauma. They argue that such mitigation should be extended to other stress-related disorders as well (beyond PTSD) and that it should not depend on whether the victim of the crime was also the abuser of the youth.

Secure Detention. The Colorado statute at Section 19-2-508 requires a juvenile court judge to consider the juvenile's need for mental health and educational services when determining what detention facility to confine a juvenile in. Youth advocates and juvenile justice system reformers argue that traumatized youth should never be put in either a juvenile or adult secure detention facility (jail). However, should this be possible, that the judge be required to consider the youth's trauma and mental health needs in selecting a facility.

Note that many tribes, similar to the Hopi Ordinance 35 provisions, authorize the tribal juvenile intake officers and judges to place juveniles in secure detention, and even adult jail (for certain age ranges), pending adjudication and as a disposition alternative. This raises serious due process and potential traumatization and retraumatization concerns where youth are detained under dangerous conditions and for long periods of time awaiting adjudication or postdisposition. Out of the tribal juvenile codes reviewed, none made the choice of a secure detention facility conditional on the availability of mental health or trauma-sensitive services.

[29.9] EXERCISES

The following exercises are meant to guide you in developing the trauma sensitive sections of the tribal juvenile code.

Exercises

- Find and examine your juvenile code's provisions governing mental health screening, assessment and treatment – what agencies or entities are responsible for undertaking these activities? What are the timing requirements?
- Make a list of what is working well and what is not.
- If you were to reform your juvenile justice system, what tribal entity or agency should be empowered and mandated to be the lead agency to establish coordinated programs for traumatized, potentially court involved youth and their families?
- Are you interested in adopting any of the following policy/law approaches?
 - Does your tribal system designate a lead agency for working with court-involved youth with mental health problems and their families?
 - Do your laws and policies provide for special units, family advocates, and/or navigators to assist traumatized youth and their families?
 - Does your juvenile code require your juvenile judge to consider trauma as well as the protection of the child and public safety in exercising juvenile court jurisdiction over youth?
 - Does your juvenile code require your juvenile judge to determine whether a traumatized youth is competent to proceed within the juvenile justice system?
 - Does your juvenile code require that information about a youth's trauma be used appropriately (not for findings of guilt or to order secure detention) and to support diversion, the use of self-defense claims, and as mitigating evidence in transfer, disposition, and sentencing?
 - Does your juvenile code avoid the use of probation conditions and contempt orders that in effect funnel traumatized youth into secure detention facilities?
 - Does your juvenile code require your juvenile judge to consider trauma and the availability of mental health services in ordering youth to secure detention facilities?
 - Does your juvenile code prohibit the transfer of traumatized youth to adult criminal court?
 - If not, does your criminal code require the sentencing judge to factor in the existence of trauma in determining criminal sentences?

Read and Discuss*

Can evidence-based mental health and therapeutic services be culturally adapted to provide effective and appropriate treatment for American Indian (AI) and Alaska Native (AN) youth and their families?

Needs of Youth

- The AI/AN population is especially susceptible to mental health difficulties
- Average annual violent crime rate among AI/AN people over 12 years of age is approximately 2.5 times the national rate
- There is approximately one substantiated report of violent crime per year for every 30 Native children
- Average life expectancy among AI/AN people is lower than the non-Indian population
- Nearly half the AI/AN population is comprised of minors who need care, guidance, and support
- The prevalence of post traumatic stress disorder (PTSD) is substantially higher among AI/AN persons than in the general community (22% vs. 8%)
- AI/AN persons are more vulnerable to PTSD given exposure to traumatic events coupled with the overarching cultural, historical, and intergenerational traumas
- People who have traumatic experiences and develop PTSD are at risk for other negative mental health outcomes
- Rates of substance abuse disorders, mental health disorders, particularly depression, are elevated among AI/AN peoples

Culturally Adapting Evidence-Based Treatments

- Many AI/AN individuals, to survive, have developed coping strategies that leave them ill-equipped to deal with ongoing trauma, stress, and hardship
- Many AI/AN people are distrustful and reluctant to consider professional mental health services
- Therapeutic services offered in the past have often proven ineffective and inappropriate for AI/AN populations

There is a need to . . .

- Develop, refine, disseminate, and evaluate culturally relevant trauma intervention models for use with children in Indian country
- Culturally adapt interventions from existing evidence-based treatments
- Identify traditional healing practices, activities, and ceremonies that are used therapeutically to provide instructions about relationships and parenting

The process of adaptation includes . . .

- Identifying the core concepts within existing evidence-based treatments
- Identifying Native traditional teachings and concepts relevant to trauma therapy—parenting, nurturing, therapeutic practice, ways of teaching and learning, cultural worldviews used to explain individual behavior
- Using a process of ongoing and open dialogue
- Working with diverse group of Native cultural consultants
- Creating intervention and training materials and implementation support strategies and protocols

Culturally Adapted Evidence-Based Treatments

- The following interventions have been developed by the Indian Country Child Trauma Center at the University of Oklahoma Health Sciences Center and build upon common and tribal-specific cultural elements to provide culturally relevant therapeutic approaches that also respect the substantial individual variability in cultural identity among AI/AN people:
- Honor Children, Making Relatives—based upon Parent Child Interaction Therapy, clinical application of parenting techniques in a traditional framework, emphasizing honor, respect, extended family, instruction, modeling, and teachings
- Honoring Children, Respectful Ways—congruent with evidence-based group treatment for children with sexual behavioral problems, designed to honor children and promote their self-respect while also promoting respect for others, elders, and all living things
- Honoring Children, Honoring the Future—based on the American Indian Life Skills Development Curriculum, an evidence-based suicide prevention program, uses risk and protective factors specific to AI/AN youth as the basis for its prevention strategies, the curriculum is designed for middle and high school students and teaches communication, problem solving, depression and stress management, anger regulation, and goal setting, special attention is paid to AI/AN worldviews, communication styles and forms of recognition
- Honoring Children, Mending the Circle—based upon Trauma-Focused Cognitive-Behavioral Therapy, applies cognitive behavioral techniques to support the healing process of trauma in children, grounded in a traditional framework that supports the AI/AN belief in spiritual renewal leading to healing and recovery, practices about behavior, health, healing, humor, and children

*Taken from Delores Subia Bigfoot and Janie Braden, "Adapting Evidence-Based Treatments for Use with American Indian and Native Alaskan Children and Youth," *Focal Point* 21, no. 1, pp. 19–22 Research, Policy, and Practice in Children's Mental Health (Winter 2007), Research and Training Center on Family support and Children's Mental Health.

CHAPTER 30

INTEGRATING CULTURE, CUSTOMS, TRADITIONS, AND GENERALLY ACCEPTED PRACTICES

[30.1] OVERVIEW

“Tribal leaders, legislators, and judges today repeatedly face the task of identifying custom and factoring it into their policymaking. They must also consider when and how to incorporate custom into tribal legislation and into the written decisions of the tribal court. There are important questions concerning the transparency of the respective processes (the decision-making processes of the executive, legislative, or adjudicative branches), the reliability of the sources and characterizations of custom, and the relevancy and applicability of custom to the problems or disputes being addressed.”⁴¹

Working with culture, customs, traditions, and generally accepted practices (“CCTGAPs”) in both the drafting of tribal laws and in the application of those laws by the tribal courts and justice system personnel can be challenging. Some critics argue that such undertakings romanticize tribal governance and law and/or that they will result in the application of old, out-of-date, or simply wrong principles. Others argue that custom and tradition are too hard to work with or that they are inefficient or lack the status of being “legal.” However, these criticisms are based in a misunderstanding of both the purpose of these undertakings and the nature of custom and tradition.

Many tribal governments today are under a legal duty under their own written laws to identify, respect, and at least to consider the incorporation of persisting legal norms (also known as “culture, customs, traditions, and/or generally accepted practices”) arising from local (often traditional) groups within their communities. These “legal norms” are original, naturally arising law—the glue that has kept and continues to keep people in Native communities together. Tribal governments then, are also under a duty to ensure that their legal institutions and laws reflect principles that seem just or fair to their people in the given tribal culture. This includes a duty to reform to keep in step with the changing values and expectations of Native community members.

Unfortunately, many, if not most tribes today have inherited “boilerplate law” drafted by non-Natives, usually U.S. government officials, based on Western models but then often modified in curious ways by bureaucratic fiat. Recognition of this fact by Native legal scholars has resulted in cries for the reform of tribal constitutions, codes, rules, and in the tribal common law. As one Native scholar has put it:

⁴¹ Pat Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking,” 32 *AM. INDIAN L. REV.*, 319, 329 (2207-2008).

*[W]e are at an opportune moment to critically appraise our systems and evaluate them using native ideals and taking into consideration the native world view. It is the particular responsibility of native lawyers, practitioners, professionals, and advocates working with tribal justice systems to assess the current situation of tribal courts and to determine the future course. . . .*⁴²

This chapter seeks to inform a critical appraisal of existing tribal children's and juvenile law (a.k.a. "codes"), to spur an evaluation of Western-influenced statutory provisions, and to prompt Native communities to explore their local values and ways in the reconceptualization and reform of their children's and juvenile law(s).

There are three important considerations to keep in mind in making written custom law: (1) Many Native people are horrified at the prospects of having their customs and traditions put into writing so it will be critical to explain why this is needed, how it will work, and to include them in crafting the laws. This can be accomplished by establishing a custom documenting committee working parallel to your law drafting committee; (2) In considering custom law, both committees and judges must consider the reliability of the sources and characterizations of custom, and the relevancy and applicability of the defined custom to the problems or disputes being addressed; and (3) Most tribal legal scholars argue that the choice of enforcement of customs should be left up to tribal judges, who deal with real parties in real time with live issues, rather than to law makers, as legislation tends to freeze custom in time and law makers cannot predict or provide rules for all future variations of an issue or problem. Nevertheless there are some procedural and substantive matters that are well suited and necessary to be legislated (see the list in following text).

Key statutory provisions for working with CCTGAP in a juvenile justice context include:

- setting out the values and purposes of the law;
- defining youth and family bills of rights, duties, and obligations;
- mandating the choice of law to be applied by the juvenile court;
- creating a process for finding CCTGAP;
- creating requirements for juvenile judges applying CCTGAP in court;
- providing notice and participation rights in juvenile court for extended family members;
- mandating cultural education for justice and treatment system personnel;
- defining and authorizing traditional placements, guardianships, and adoptions;

⁴²Christine Zuni, "Strengthening What Remains," 7 *Kan. J.L. and Pub. Pol'y* 17 (Winter 1997).

- creating a diversion process to traditional authorities/entities, healers, mentors, and activities; and
- defining CCTGAP restitution and reconciliation.

Reviewing CCTGAP while working through Chapter 2 Preliminary Choices to Guide Code Development may be helpful.

[30.2] TRIBAL CODE EXAMPLES—Values and Purpose

Hopi Tribe

Ordinance 35 Hopi Children's Code

Chapter II

A. Purpose

It is the purpose of the Hopi Children's Code to:

1. preserve the unity of the family;
2. provide for the full consideration of religious and traditional preferences and practices of families during the disposition of a matter;
3. provide for the care, protection, mental and physical development of the children of the Hopi Tribe;

....

Native Village of Barrow Iñupiat Traditional Government

Tribal Children's Code

4-1 GENERAL PROVISIONS

4-1-1 B. Purpose and Construction

The Native Village of Barrow Iñupiat Traditional Government ("NVB Tribe" or "Tribe") hereby establishes the following procedures to protect the best interests of children, and the future of the Tribe and its customs and culture, as authorized by the Constitution of the NVB Tribe. All provisions of this Code shall be liberally construed in order to give effect to the following purposes with regard to child welfare:

1. Protect the best interests of children, prevent the unwarranted breakup of families, maintain the connection of children to their families, their community and the Tribe, and promote the stability and security of the Tribe by establishing tribal standards for the conduct of legal proceedings involving children;

....

3. Provide child welfare services to children and families that are in accord with the laws, traditions, and cultural values of the Tribe; and

4. Preserve the opportunity for children to learn about their culture and heritage, and to become productive adult members of the NVB Tribe community, by experiencing their culture on an ongoing basis.

OGLALA SIOUX TRIBE

CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPÉ (CHILD AND FAMILY CODE)

PART A GENERAL AND DEPENDENCY PROVISIONS

SECTION 401.4—PURPOSE AND CONSTRUCTION

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

(1) To provide for the welfare, care, and protection of the children and families within the jurisdiction of the Oglala Sioux Tribe;

(2) To preserve the unity of the tiwahe and tiospaye, separating the child from his or her parents, tiwahe and/or tiospaye, only when necessary;

(3) To take such actions that will best serve the spiritual, emotional, mental, and physical welfare of the child;

....

(5) To secure the rights and ensure fairness to the children, parents, guardians, custodians, and other parties who come before the OST Children and Family Court under the provisions of this Code;

....

(7) To recognize and reinforce the tribal customs and traditions of the Oglala Lakota Oyate regarding child-rearing;

(8) To preserve and strengthen children's cultural and ethnic identities; and

(9) To provide services and cultural support to children and families to strengthen and rebuild the Oglala Lakota Nation.

SECTION 402.2—LENA TUWEPI HE/HWO (TRADITIONAL LAKOTA DEFINITIONS)

(1) Oyate ("people"): The Lakota People.

(2) Tiospaye ("extended family"): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.

(3) Tiwahe ("family"): A family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.

(4) Wakanyeja ("child"): A sacred gift from Tunkasila, or Wakan Tanka (the Great Spirit) conceived by the union of a man and a woman. Spirits conduct ceremonies in Nagiyata (the spirit world) to prepare for the child's entry into earth. Children are given a vision or role for their life on earth. Children are pure and have special powers until around the age of puberty.

SECTION 402.3—WASICU WOIWANKE (GENERAL DEFINITIONS)

(33) Extended Family Member: An adult relative of a child who has not been deemed by a court of competent jurisdiction to be a danger to the child, including:

- (A) The paternal and maternal grandfather and grandmother;
- (B) Siblings of the grandparents;
- (C) Father and mother;
- (D) Paternal and maternal uncle and aunt;
- (E) Brother and sister;
- (F) The spouses of persons listed in (A) through (E);
- (G) Any adult person legally adopted in (A) through (E); and
- (F) Any adult member of the child's tiospaye, or other adult person adopted by the child's tiospaye as a relative through a formal ceremony.

SECTION 402.1—WOTAKUYE (DEFINITIONS OF LAKOTA KINSHIP)

(a) Background, Tiospaye, and Tiwahe

(1) The root of Lakota social structure is the tiospaye—extended family. Tiospaye are comprised of tiwahe, immediate families, as well as individuals adopted through formal ceremony. Equality is a prevailing principle of tiospaye life. Responsibilities are dispersed throughout the tiospaye and no one is above the laws. Social classes do not exist and leaders maintain prominence only insofar as they carry out the wishes of the people. Historically, tiospaye were self sufficient and life revolved around them. However, Federal policies and initiatives that accompanied reservation life promoted the assimilation of the Lakota into mainstream Anglo-American culture and have led to a loss of some of the strengths of the tiospaye lifestyle.

(2) Among the strengths of traditional tiospaye life and the strong emphasis on kinship was that children never really became orphans. Upon birth, they had many mothers, fathers, brothers, and sisters. Thus, even though children might lose their natural parents, relatives stepped forward and assumed parental responsibilities. Furthermore, kinship customs minimized violence, conflicts, and disputes within the tiospaye. Few individuals would consider causing trouble among the people, knowing of the consequences they would face from disrespecting relatives. Kinship customs in the historical tiospaye, with few exceptions, promoted a peaceful and harmonious life.

....

(c) Elders

(1) The first important consideration in traditional kinship is age. We often hear of, "respect your elders." Elders hold a special place and status in traditional Lakota society. They are revered for their knowledge and wisdom, which they have acquired through lifelong

experiences and learning. They are looked upon as the foundation of tiospaye life because they provide the guidance and direction needed by the people to endure from generation to generation.

(2) Children are taught at an early age to respect their elders. They are also taught to know and to help their relatives. These teachings have a practical application of precluding intermarriages, but are mainly in keeping with the natural laws of respect and generosity. Elders are teachers and counselors in traditional Lakota life. Children are often sent to them for Wowahokunkiye, lecturing or teaching. This is done particularly when children misbehave or need help. Elders are also called upon to mediate disputes and to help keep peace and harmony within the tiospaye.

(3) In interactions among tiospaye members, preference is always given to elders. For example, in asking for assistance from a tiwahe or tiospaye, we ordinarily work through the eldest members. We may ask the younger people, but, in most cases, they would need to confer with the elders anyway before our request is either granted or denied. Furthermore, in gatherings, such as meetings, preference is always given to the eldest individuals present.

(4) They are called upon for the wocekiye (prayer) and woiyaksape (words of wisdom) which always come first in a meeting. Elders always speak first, eat before others, and are made to feel comfortable until the gathering is concluded. If younger people are going to precede elders in any way, such as in speaking, it must be done with the permission or acknowledgment of the elders. In traditional Lakota society, we always give preference to individuals who are older than we are regardless of our relationship to them.

(d) Addressing Relatives

Males and females use different terms in some cases to refer to the same relative. For example, a male and female have a cousin named Jake. The male would refer to him as Tahansi or Tahansi Jake. The female would refer to him as Sicesi or Sicesi Jake. We must distinguish between male and female kinship terms in referring to our relatives. Otherwise, we might embarrass ourselves and our relatives by using a term reserved for the opposite gender. This is one of the reasons we are taught at an early age to know our relatives. We need to know them in order to refer to them and to address them in the proper way. By using the proper kinship terms in addressing our relatives, we command a great deal of respect from them. Children and young people who address their relatives by the appropriate kinship terms are admired because they reflect a proper upbringing.

(e) Making Relatives

(1) Tiospaye kinship also goes beyond bloodlines. Individuals are adopted into tiospaye through formal ceremony. Waliyacin means the prelude to the making of relatives; it means that individuals and their families make a commitment to being related which begins the necessary preparations for formal ceremony. The ceremony for making relatives is Hunkapi; individuals

may also choose, however, to make relatives through a pipe ceremony and/or gift giving. Women who make relatives, such as taking on a sister, call the ceremony SaWicayapi. Ceremonies for making relatives are purposeful and elaborate. Spirituality is at the root of making relatives; individuals commit themselves before their tiwahe and tiospaye, and before Wakan Tanka, to be related from that time on.

(2) In the case of children, the making of relatives is a way for adults to provide a home for orphans, or children who have been abandoned. A father takes on a new son, or a mother a new daughter through formal ceremony. Once parents adopt children in this way, they treat them as they do their own children. Moreover, they acquire all the rights of kinship afforded other children in the tiospaye.

[30.3] TRIBAL CODE EXAMPLES—Rights, Duties, and Obligations

Native Village of Barrow Iñupiat Traditional Government

Tribal Children's Code

4-3 RESPONSIBILITIES AND RIGHTS REGARDING CHILDREN

4-3-1 RIGHTS OF CHILDREN

4-3-1 A. Right to Life

A child has an inherent right to life, survival, and development, and the right to a standard of living adequate to the child's physical, mental, spiritual, moral, and social development and reflective of the traditions and cultural values of that child's people. This right includes the right to nutrition, clothing, shelter, nurturing, and appropriate discipline.

4-3-1 B. Right to Identity

A child has the right from birth to acquire and form an identity, including name, tribal affiliation, language, and cultural heritage. A child has the right to learn about and preserve his identity throughout his life, including the right to maintain ties to his birth parents, his extended family, and his village. A child has the right to learn about and benefit from tribal history, culture, language, spiritual traditions, and philosophy.

4-3-1 C. Right to Protection

A child has the right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, extended family members, or any other custodian. A child has the right to be free from torture or other cruel, inhuman, or degrading treatment or punishment. A child has the right not to face capital punishment or life imprisonment without possibility of release.

4-3-1 D. Right to Health

A child has the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Mentally or physically disabled children have the right to enjoy a full and decent life in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community. All children have the right to periodic review of any medical or mental health treatment.

4-3-1 E. Right to Family

A child has the right not to be separated from his parents forcibly or against his will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interest of the child. In case such separation is necessary, a child shall

have the right wherever possible not to be separated from other members of his immediate and extended family.

A child temporarily or permanently deprived of his family environment shall be entitled to special protection and assistance provided by the Tribe, which shall strive to ensure continuity in the child's upbringing and the maintenance of ethnic, cultural, religious, and linguistic heritage.

4-3-1 F. Right to Education

A child has the right to education, including academic, physical, and cultural teachings, and training on how to safely undertake subsistence activities and other potentially dangerous work.

4-3-1 G. Right to be Heard

A child who is capable of forming his own views has the right to express those views freely in all matters, including judicial proceedings, affecting that child and those views shall be given due weight in accordance with the age and maturity of the child.

4-3-1 H. Right to Due Process

A child has the right not to be deprived of his liberty unlawfully or arbitrarily. Every child deprived of liberty shall have the right to challenge the deprivation of liberty and the right to appropriate judicial review. A child shall at all times be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of a person of his age.

4-3-3 RESPONSIBILITIES AND RIGHTS OF EXTENDED FAMILY MEMBERS

4-3-3 A. Common Responsibility for Children

Extended family members have secondary, common responsibility for the upbringing and development of children in their family. This includes ensuring each child's inherent right to life, survival, and development and to a standard of living adequate to the child's healthy physical, mental, spiritual, moral, and social development and reflective of the traditions and cultural values of that child's people. The best interests of the child shall be their basic concern.

4-3-3 B. Responsibility to Foster Identity

Extended family members are responsible for helping children acquire and form identities, including name, tribal affiliation, language, and cultural heritage.

4-3-3 C. Responsibility to Nurture and Discipline

Extended family members are secondarily responsible for nurturing children and for administering appropriate discipline to children.

4-3-3 D. Responsibility for Protection

Extended family members are responsible for helping to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, torture, or other cruel, inhuman, or degrading treatment or punishment.

4-3-3 E. Responsibility to Assist

Extended family members have a responsibility to intervene or assist when necessary to protect a child's rights and well-being, and to ensure the continuity of the child's upbringing and the maintenance of the child's ethnic, cultural, religious, and linguistic heritage.

OGLALA SIOUX TRIBE

CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPÉ (CHILD AND FAMILY CODE)

PART A GENERAL AND DEPENDENCY PROVISIONS

SECTION 403—CHILDREN'S AND FAMILY RIGHTS

§403.1 WAKANYEJA TA WOWASAKE (TRADITIONAL CHILDREN'S RIGHTS)

(a) All children have the rights set out in subsection (b), and all decisions concerning children shall be made in consideration and furtherance of these rights. By definition, these rights are in the best interests of the children.

(b) All children have a right to:

- (1) a mother (Ina);
- (2) a father (Ate);
- (3) identify with the traditional way of life (Lakolwicoh'an);
- (4) learn and speak his or her language (Lakollyapi);
- (5) a family (Tiwahlenatiospaye);
- (6) know their relatives (Wotakuye);
- (7) know the traditional laws, customs, and ceremonies of the people; and
- (8) live according to and to practice the traditional laws, customs, and ceremonies that govern the people.

§403.2 TIWAHE NA TIOSPAYE TA WOWASAKE (TRADITIONAL FAMILY RIGHTS)

(a) Largely because of their primary role in taking care of the children, tiwahe and tiospaye groups also have certain rights as set out in subsection (b). By definition, these rights are in the

best interests of the tiwahe and tiospaye, and in turn they are therefore in the best interests of the children for whom the groups care.

(b) Tiwahe and tiospaye have a right, and corresponding responsibilities, to:

- (1) Wicozani—to make choices and decisions to live a healthy and prosperous life according to the traditional laws, customs, and ceremonies;
- (2) Igluhapi—to make choices and decisions to establish economic, political, educational and cultural self sufficiency, and to maintain privacy according to the traditional laws, customs, and ceremonies;
- (3) Wooke Gluhapi—to live and function according to the traditional laws, customs, and ceremonies; and to protect and nurture such laws, customs and ceremonies;
- (4) Woitanca—to select and designate leaders to serve the people and to promote the common good according to the traditional laws, customs, and ceremonies; and
- (5) Woilake—to select and designate such official officers and workers as the tiospaye deem necessary to serve the people and to promote the common good according to the traditional laws, customs, and ceremonies.

SECTION 401.5—OYATE TA WOOPÉ-TRADITIONAL LAWS TO GOVERN DECISIONS EFFECTING CHILDREN

(a) This Code reincorporates familial practices retained, sometimes even unknowingly, by our people. We have retained many traditional practices in spite of a history of attempts to outlaw or prevent the practice of our culture. These practices are rooted in our history and our language, and they arose naturally over a long period of time or as gifts from Wakan Tanka to aid in harmonious living with each other and our natural world.

(b) The following traditional laws shall be considered and reinforced where the future of a child is decided or influenced, including in processes governed by this Code. Approximate English translations are provided, but the Lakota terms shall govern:

(1) Wocekiye (“faithfulness”)—To believe in and pray to Tunkasila, or Wakan Tanka—the Great Spirit—as the supreme being and power, and as the creator of all that is. Wakan Tanka gave the people seven sacred ceremonies as means of cleansing themselves and seeking guidance and direction from the Great Spirit. The ceremonies, in the order they were given to the people, are: (i) Inipi (purification); (ii) Hanbleceyapi (seeking a vision); (iii) Wiwangwacipi (Sun dance); (iv) Hunkapi (making of relatives); (v) Nagi Gluhapi (keeping of the spirit); (vi) Isnati Awicalowanpi (womanhood ceremony); (vii) Tapa Wankayeyapi (throwing of the ball).

(2) Wowacinksape (“wisdom”)—To be sound in mind and to acquire the knowledge necessary to make proper and effective decisions for the well-being of the people.

(3) Wonagiksape (“spirituality”)—To be sound in spirit and to live according to the laws, direction, and guidance of Tunkasila.

(4) Wowacintanka (“fortitude”)—To exercise self control and discipline and to have the strength of mind to endure pain and adversity.

(5) Wowaunsila (“generosity”)—To look after the well-being of others, and to share one’s knowledge and materials so that others may prosper.

(6) Wawoyuonihan (“respect”)—To respect oneself and the rights, beliefs, and decisions of others.

(7) Wowahokunkiye (“guidance and counseling”)—To advise, counsel, and guide others in the proper ways and beliefs of the people, especially the youth.

[30.4] TRIBAL CODE EXAMPLES—Choice of Law

Hopi Tribe

Hopi Resolution H-12-76

Section 2. Precedential Authority for Trial Courts

(a) The Courts of the Hopi Tribe, in deciding matters of both substance and procedure, in cases otherwise properly before the Courts of the Hopi Tribe, shall look to and give weight as precedent to, the following:

- (1) The Hopi Constitution and Bylaws;
- (2) Ordinances of the Hopi Tribal Council;
- (3) Resolutions of the Hopi Tribal Council;
- (4) Customs, traditions and culture of the Hopi Tribe;
- (5) Laws, rules and regulations of the Federal Government and cases interpreting such. Such laws, rules and regulations may, in circumstances dictated by the Supremacy Clause of the U.S. Constitution, be required to take a higher order or precedence.
- (6) The laws and rules, and cases interpreting such laws and rules, of the State of Arizona. This provision shall not be deemed to be an adoption of such laws or rules as the law of the Hopi Tribe nor as a grant or cession of any right, power or authority by the Hopi Tribe to the State of Arizona.

(7) The Common law

(b) The Courts of the Hopi Tribe shall not recognize nor apply any federal, state, or common law rule or procedure which is inconsistent with either the spirit or the letter of either the Hopi custom, traditions, or culture of the Hopi Tribe, unless otherwise required, in the case of federal law, by the Supremacy Clause of the U.S. Constitution.

Stockbridge-Munsee Tribe

Chapter 1 Tribal Court Code

Section 1.3 Purpose and Construction

(B) Construction.

This code is exempted from the rule of strict construction. It shall be read and understood in a manner that gives full effect to the purposes for which it is enacted. Whenever there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling and where appropriate may be used based on the written or oral testimony of a qualified tribal elder, historian, or other representative.

Native Village of Barrow Iñupiat Traditional Government

Tribal Judicial Code

3-11 ORDER OF AUTHORITY

3-11 A. Mandatory Authorities

The Tribal Court, in deciding matters of both substance and procedure, in cases otherwise properly before the Tribal Court, shall look to and give weight as precedent to the following mandatory authorities in the following order:

1. The Constitution and Bylaws of the NVB Tribe;
2. Agreements with other tribes entered into by the NVB Tribal Council;
3. Statutes of the NVB Tribe;
4. Resolutions of the NVB Tribe;
5. Common law of the NVB Tribal Court; and
6. Customs and traditions of the NVB Tribe.

3-11 B. Persuasive Authorities

If an issue cannot be resolved by reliance on the above authorities, the Tribal Court may look to the following foreign sources of law as persuasive authority only (in no particular order):

1. Federal laws and regulations applicable to or affecting Iñupiat people;
2. Federal common law;
3. Statutory and common law of other tribes;
4. International law;
5. Common law of the State of Alaska;
6. Common law of other states.

3-8 E. Conflict of Law Notices

Any time a Tribal Court judge finds that an inter-tribal agreement, statute, or resolution of the NVB Tribe contravenes the customs or traditions of the NVB Tribe, that judge shall issue a written notice of the conflict to the Tribal Council and shall ensure that a copy of the relevant opinion accompanies such notice.

[30.5] TRIBAL CODE EXAMPLES—Process for Finding CCTGAP

Native Village of Barrow Iñupiat Traditional Government

Tribal Judicial Code

3-5 TRIAL COURT

3-5 C. Judicial Notice of Custom

The court may take judicial notice of Iñupiat custom or tradition only if the court finds the custom or tradition to be generally known and accepted within the NVB Tribal community. Parties need not plead and prove the existence of a custom when the court has taken judicial notice of it. The taking of judicial notice shall not dispense with a required showing of relevancy.

3-5 D. Notice and Pleading of Custom

A party who intends to raise an issue of Iñupiat custom or tradition shall give notice to the other party and the court through its pleading or other reasonable written notice as soon as its relevance becomes apparent. The proponent of custom or tradition must then plead it to the court with sufficient proof to establish by a preponderance of the evidence that the custom or tradition exists and that it is relevant to the issue before the court. The relevancy of Iñupiat custom or tradition as to any legal matter shall not be presumed.

3-5 E. Certification of Custom Questions

If the judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the court shall certify that question to the Elders Council.

3-5 F. Right of Parties to Petition for Recertification

Where a question of custom or tradition law has been decided in a previous case, any party may petition the court to recertify that question to the Elders Council under the facts of the new case.

3-7 ELDERS COUNCIL

3-7 A. Establishment of Elders Council

An Elders Council is hereby established to resolve questions or disputes about the customs and traditions of the Iñupiat. The Elders Council shall decide such questions only when certified to them by a Tribal Court judge pursuant to Section 3-5 E or 3-5 F of this Code. Questions about customs or traditions shall be reviewed by the Elders Council de novo. The Elders Council shall not decide questions of fact or relevancy.

3-7 B. Composition

The Elders Council shall be comprised of three (3) elders appointed by the Tribal Council.

3-7 C. Written Findings

The Elders Council shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Trial Court and a second copy shall be maintained in a file for future reference by the Elders Council.

3-7 D. Effect of Decision

A decision of the Elders Council shall not be binding as precedent until it is incorporated into an opinion of the Tribal Court.

3-7 E. Custom Law Treatises

The Elders Council shall engage in ongoing documentation of custom and tradition in the following areas and in any other areas deemed necessary and funded by Tribal Council:

1. How boys and girls are raised;
2. How property is distributed, transferred, and inherited; and
3. Roles and duties in marriage.

This documentation shall be preserved in a searchable video archive, where possible and funded by Tribal Council, or on audio tapes and video tapes, and in written transcripts.

OGLALA SIOUX TRIBE

CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE)

PART A GENERAL AND DEPENDENCY PROVISIONS

SECTION 412.1—BACKGROUND, NAME, PURPOSE

(a) Background

(2) The Tiospaye Nawicakicijinpi, Tiospaye Advisory Council, is hereby established to ensure that these concepts, protocols, and definitions are properly understood, enforced, and interpreted. The Advisory Council shall consist of Oglala tribal members who have demonstrated knowledge of all aspects of traditional Lakota life—language, history, culture, philosophy, and spirituality.

....

(c) Purposes

(2) The Advisory Council also shall be empowered to issue official opinions on decisions of the Children and Family Court if the Council feels that such decisions are inconsistent with the

provisions of the Child and Family Code. Such opinions shall be submitted to the Chief Judge of the Tribal Court, the Supreme Court, and to the members of the Judiciary Committee. The following purposes delineate the work of the Advisory Council:

- (A) To promote, sustain, and support the Child and Family Code, Wakanyejana Tiwahe Ta Woose, and all provisions thereof;
- (B) To answer certified questions from the Children and Family Court judge;
- (C) To promote, sustain, and support a Lakota perspective in all aspects of enforcing and interpreting the Child and Family Code, Wakanyeya Na Tiwahe Ta Woose, and all provisions thereof;
- (D) To advise and counsel judges, attorneys, and other advocates involved in child and family issues on matters pertaining to the enforcement and interpretation of the Child and Family Code, particularly with respect to the Lakota concepts, protocols, and definitions contained in the Code;
-
- (F) To serve as intermediaries and/or interpreters in any and all matters arising of the enforcement and interpretation of the Child and Family Code, upon the request of court personnel, other program personnel involved in child and family issues, tiwahe, or tiospaye;

§412.2 QUESTIONS CERTIFIED FROM CHILDREN AND FAMILY COURT

- (a) If the Children and Family Court judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the judge shall certify that question to the Tiospaye Nawicakicijinpi, Tiospaye Advisory Council.
- (b) The Tiospaye Advisory Council shall resolve questions or disputes about the customs and traditions certified to them by a Children and Family Court judge. Questions about customs or traditions shall be reviewed by the Tiospaye Advisory Council de novo. The Council shall not decide questions of fact or relevancy.
- (c) The Tiospaye Advisory Council shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Children and Family Court for use in its proceedings and a second copy shall be maintained in a file for future reference by the Council.
- (d) A decision of the Tiospaye Advisory Council shall not be binding as precedent until it is incorporated into an order of the Children and Family Court.

§412.3 ONGOING COMPILATION OF CUSTOM LAW TREATISES

The Tiospaye Advisory Council shall engage in ongoing documentation of custom and tradition in the following areas and in any other areas deemed necessary and funded by Tribal Council:

1. How boys and girls are raised;
2. How property is distributed, transferred, and inherited; and
3. Roles and duties in marriage.

This documentation shall be preserved in a searchable archive, where possible and funded by Tribal Council, or on audio or video tapes or in some other digital form, and in written transcripts.

[30.6] TRIBAL CODE EXAMPLES—Notice and Participation Rights for Extended Family

OGLALA SIOUX TRIBE

CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPÉ (CHILD AND FAMILY CODE)

PART A GENERAL AND DEPENDENCY PROVISIONS

SECTION 408.8—RIGHTS OF THE PARTIES TO PROCEEDINGS—CHILDREN'S RIGHTS

In addition to rights defined in Section 403.1, explaining Wakanyeja Ta Wowasake, a child involved in [a] Child in Need of Care case shall have a right to each of the following:

- (3) To have tiwahe and tiospaye members present at all stages of the proceedings;
- (4) To have tiwahe and tiospaye members speak on the child's behalf if the child so requests;

SECTION 402.2—LENA TUWEPI HE/HWO (TRADITIONAL LAKOTA DEFINITIONS)

(2) Tiospaye ("extended family"): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.

(3) Tiwahe ("family"): A family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.

SECTION 402.3—WASICU WOIWANKE (GENERAL DEFINITIONS)

(33) Extended Family Member: An adult relative of a child who has not been deemed by a court of competent jurisdiction to be a danger to the child, including:

- (A) The paternal and maternal grandfather and grandmother;
- (B) Siblings of the grandparents;
- (C) Father and mother;
- (D) Paternal and maternal uncle and aunt;
- (E) Brother and sister;
- (F) The spouses of persons listed in (A) through (E);
- (G) Any adult person legally adopted in (A) through (E); and
- (F) Any adult member of the child's tiospaye, or other adult person adopted by the child's tiospaye as a relative through a formal ceremony.

SECTION 406.8—EMERGENCY REMOVAL OF CHILD—NOTICE TO PARENT, GUARDIAN OR CUSTODIAN, AND TIOSPAYE

The LOWO Division of Child Protective Services shall make all reasonable efforts to notify the parents, guardian or custodian, as soon as possible and not later than twelve (12) hours after the removal of the child from the home. Reasonable efforts shall include personal, telephone, and written contacts at the residence, place of employment, or other location where the parents, guardian or custodian are known to frequent with regularity. Notice shall also be given to the child's Tiospaye Interpreter(s).

SECTION 408.1—STATEMENT OF PURPOSE OF SECTION [ADJUDICATION AND DISPOSITION]

(c) The Children and Family Court shall direct the Clerk of the Tribal Court to provide notice of all hearings under Section 408 to the appropriate Tiospaye Interpreter(s) who in turn shall be responsible for notifying the appropriate members of a child's and the child's parent(s)' guardian's, or custodian's Tiospaye. Notice under this paragraph does not relieve the LOWO Division of Child Protective Services from its own notice or collaboration requirements with Tiospaye Interpreters under other provisions of this Code.

Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code

4-3-3 RESPONSIBILITIES AND RIGHTS OF EXTENDED FAMILY MEMBERS

4-3-3 F. Right to Notice

Any member of a child's extended family currently residing in the Native Village of Barrow has the right to be timely noticed by the court of any judicial or other proceeding involving that child.

4-3-3 G. Right to be Heard

Any member of a child's extended family who comes forward in a timely manner has the right to be heard in any judicial or other proceeding involving that child.

....

4-3-3 I. Right to Request a Family Conference

Any member of a child's extended family has the right to request a family conference pursuant to Subchapter 4-5-2 of this Code.

Section 4-2 Definitions

15. Extended Family Member: Any adult sibling, grandparent, aunt, uncle, great aunt, great uncle, or cousin of the child, including adoptive adult siblings, grandparents, aunts, uncles, great aunts, great uncles, and cousins. Extended family members have certain rights and responsibilities with respect to children.

[30.7] TRIBAL CODE EXAMPLES—Cultural Education for Personnel

OGLALA SIOUX TRIBE

CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE)

PART A GENERAL AND DEPENDENCY PROVISIONS

SECTION 416—COMPLIANCE OF LOWO OFFICE, DIVISIONS AND COLLABORATING ORGANIZATIONS

§416.1 BACKGROUND AND PURPOSE

(a) It is common knowledge that service providers for children and families on the Pine Ridge Reservation operate for the most part on Western European methods and concepts. This is happening despite the fact that many of the Oglala Lakota tiospaye have been reviving their traditions and customs, and have called for culturally based programs and services. The passage of the Child and Family Code, Wakanyeja Na Tiwahe Ta Woope, which is based on traditional Lakota knowledge, necessitates that service providers now honor the vision of the tiospaye. It is imperative that service providers and their employees and representatives have a sufficient understanding of the traditional Lakota concepts, protocols, and definitions that are contained in this Code.

(b) Requirements for compliance are hereby established in this Code to ensure that these concepts, protocols, and definitions are properly understood, enforced, interpreted, and followed in the delivery of services to children and families.

§416.2 APPLICABILITY

The requirements for compliance as defined in this section shall apply to any program, office, agency, association, or entity operating on the Pine Ridge Reservation whose business is to enforce, interpret, apply, or comply with the provisions of this Code. The requirements also apply to any program, office, agency, association, or entity operating on the Pine Ridge Reservation that, by the nature of the services they provide, could cause children and families to be subjected to the provisions of this Code. Programs, offices, agencies, associations, or entities shall be held accountable for the requirements of this section if their mission, purposes, services, or identities can be tied to any of the following areas:

- (1) Law Enforcement;
- (2) Social/Human Services;
- (3) Child Protection;
- (4) Child Advocacy;
- (5) Child Neglect/Abuse;
- (6) Domestic Violence;
- (7) Education;
- (8) Foster Care;
- (9) Medical Care;

- (10) Mental Health Care;
- (11) Adjudication; or
- (12) Religion/Culture/Spirituality.

§416.3 MEANS OF COMPLIANCE

(a) Programs, offices, agencies, associations, or entities shall be expected to comply with the provisions of this Code as defined in this section by initiating the necessary organizational changes and plans using their own resources and at their own expense. Changes and plans shall be directed at adapting the delivery of services to the Lakota concepts, protocols, and definitions contained in this Code. Changes and plans shall be directed also at providing opportunities for staff, board members, volunteers, consultants, and other institutional representatives to develop sufficient knowledge and understanding of the Lakota concepts, protocols, and definitions contained in this Code.

(b) Among the means by which entities shall be expected to comply are, but not limited to the following:

- (1) Staff training and orientation;
- (2) Board training and orientation;
- (3) Training and orientation for volunteers, consultants, and other representatives of the entities;
- (4) Restructuring;
- (5) Revision of policies and procedures; and
- (7) Revision of statements of mission, philosophy, vision, or purposes.

[30.8] TRIBAL CODE EXAMPLES—Traditional Placements, Guardianships, and Adoptions
Rosebud Tribe

Title 2

§ 2-2-7 Ecagwaya or Traditional Adoption

2-2-7 ECAGWAYA or TRADITIONAL ADOPTION—means according to Tribal custom, the placement of a child by his natural parent(s) with another family but without any Court involvement. After a period of two years in the care of another family, the Court upon petition of the adoptive parents, will recognize that the adoptive parents in a custom or traditional adoption have certain rights over a child even though parental rights of the natural parents have never been terminated. Traditional adoption must be attested to by two reliable witnesses. The Court, in its discretion, on a case-by-case basis, shall resolve any questions that arise over the respective rights of the natural parent(s) and the adoptive parent(s) in a custom adoption. The decision of the Court shall be based on the best interests of the child and on recognition of where the child’s sense of family is. Ecagwaya is to raise or to take in as if the child is a biological child.

Native Village of Barrow Iñupiat Traditional Government
Tribal Children’s Code

4-5-5 IÑUGUUQ [TRADITIONAL ADOPTION]

4-5-5 A. Definition

Iñuguuq, meaning “to raise,” refers to a traditional Iñupiat adoption process in which a child gains, but does not lose, a parent. This procedure shall not terminate the rights of the birth parent.

4-5-5 B. Who May Adopt

Any adult at least ten (10) years older than the child in question may file a petition for Iñuguuq adoption. Where the petitioner has made an agreement with the birth parent, the birth parent shall be made a party to the petition. In the case of married persons maintaining a home together, both spouses shall be petitioners except that, if one of the spouses is the birth parent of the child to be adopted, the birth parent shall not be a party to the petition. A married person legally separated may adopt without the participation of her spouse.

The court shall order the Social Services Department to perform a background check on all prospective adoptive parents in order to ensure the safety of the child, and no person shall be approved as an adoptive parent under this Code if a background check reveals any of the following:

1. Felony conviction for child abuse or neglect;
2. Felony conviction for spousal abuse;
3. Felony conviction for crimes against children, including child pornography;
4. Felony conviction for a crime involving violence, including rape, sexual abuse, or homicide; or

5. Felony conviction of assault, battery, or a drug-related offenses within the last five (5) years.

4-5-5 C. Petition

Proceedings under this Subchapter shall commence when a petition for adoption is filed with the court. A petition for adoption shall contain:

1. A citation to the specific Section of this Code giving the court jurisdiction over the proceedings;
2. The full name, residence, place of birth, date of birth, and sex of the child, with attached documentary proof of the date and place of birth;
3. Documentary proof of the child's membership status in the Tribe, if such proof exists;
4. A written statement by the prospective adoptive parent stating her full name, residence, date and place of birth, occupation, and relationship to the child, with attached documentary proof of marital status, provided this not be interpreted to prohibit single parent adoptions, and tribal membership status;
5. Written statement of consent from all persons whose consent is required by Section 4-5-5 D;
6. A written statement by the birth parent specifying the reasons why the birth parent cannot or does not want to raise the child;
7. An agreement by the prospective adoptive parent of the desire that a relationship of parent and child be established;
8. A full description and statement of value of all property owned, possessed, or held in trust by and for the child;
9. A report by the Social Services Department indicating the results of the home study conducted pursuant to Section 4-5-5 I; and
10. A brief and concise statement of the facts which may aid the court in its determination.

4-5-5 D. Valid Consent Required

In order to be valid, consent must be written and voluntary. Valid consent to Iñuguuq adoption is required of:

1. Each birth or prospective adoptive parent whose parental rights have not been involuntarily terminated, who has not voluntarily relinquished her parental rights, or who has not been declared incompetent;

2. The guardian or custodian, if empowered to consent;
3. The court, if the guardian or custodian is not empowered to consent; and
4. The child, if he or she is over fourteen (14) years of age.

Written consents shall be attached to the petition for adoption. Written consent to an adoption shall be signed and acknowledged before a Notary Public. An interpreter shall be provided if required by the court. The court shall have authority to inquire as to the circumstances behind the signing of a consent under this Section.

4-5-5 E. Purpose of Hearing

The purpose of an Iñuguuq hearing shall be to determine, by examining all persons appearing before the court and all evidence presented, whether the child is suitable for adoption, whether the consent of all parties is valid, whether the adoptive parent is financially, morally, and physically fit to adopt, whether the best interests of the child will be promoted by the adoption, and how best to allocate parental rights and responsibilities between the parents. If the parties have already come to an agreement regarding allocation of parental rights, the court shall review their agreement at the hearing.

....

4-5-5 M. Granting Petition

If the court is satisfied that it is in the best interest of the child to grant the petition, the court may enter a final decree of adoption as follows:

1. In the case of a child who has lived with the adoptive parent for more than one year before the adoption petition was filed, the final decree of adoption shall be entered immediately; and
2. In all other cases, the court shall appoint the potential adoptive parent to be the child's guardian pursuant to Subchapter 4-5-3 and shall allow the child to live with the potential adoptive parent for at least one year; at that time, the court shall request a supplemental report and, if the court determines that the best interest of the child is served, shall enter the final decree of adoption immediately.

....

4-5-5 P. Name and Legal Status of Child

Children adopted under this Subchapter may assume the surname of the persons by whom they are adopted. They shall be entitled to the same rights as natural children of the persons

adopting them. However, Iñuguuq adoption does not confer tribal membership status on adopted children who would not be otherwise eligible. Iñuguuq adoption does not terminate the rights of natural extended family members of the child, unless those rights are specifically terminated by the court.

4-5-5 Q. No Effect on Enrollment, Inheritance, or Shareholder Rights

Iñuguuq adoption shall not affect a child's enrollment status as a member of the Tribe, a child's degree of blood quantum, a child's right to inherit from his or her birth parents, or a child's rights as a shareholder in a Native corporation.

4-5-5 R. Transfer and Reversion of Parental Rights

If the birth parents dies or is otherwise incapacitated, all parental rights shall be transferred to the adoptive parent. If the adoptive parent dies or is otherwise incapacitated, all parental rights shall revert to the birth parent.

4-5-5 S. Denying Petition

If satisfied that the Iñuguuq adoption requested will not be in the best interests of the child, the court shall deny the petition. If necessary, the court may request that the Social Services Department assist in the placement and care of the child.

4-5-5 T. Challenging an Iñuguuq Adoption

Any party whose parental, custodial, or extended family rights are limited or terminated by an Iñuguuq adoption may file a motion for rehearing. A motion for rehearing must be filed within ninety (90) days from when the adoption was granted. Where a motion for rehearing alleges a defect in notice which may affect the validity of the proceedings or questions the validity of consent, and the allegation is supported by evidence, the court shall grant the motion.

4-5-5 U. Withdrawal of Consent

Valid consent cannot be withdrawn after the entry of a final order of adoption. Valid consent may be withdrawn prior to the final order of adoption upon a showing by a preponderance of the evidence that the best interests of the child require the consent to adoption be voided.

[30.9] TRIBAL CODE EXAMPLES—Diversion to Traditional Authorities, Entities, Healers, Mentors, and Activities

OGLALA SIOUX TRIBE

CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPÉ (CHILD AND FAMILY CODE)

PART A GENERAL AND DEPENDENCY PROVISIONS

SECTION 408.13—INFORMAL RESOLUTION

(a) At any time . . . the Children and Family Court may allow, or may require on its own initiative, referral to an informal resolution process.

(b) This process should be considered by the Office of the Attorney General and the LOWO Division of Child Protective Services in those cases where a parent has voluntarily placed a child with the LOWO Division of Child Protective Services because of an expressed inability to provide for the child, not due to the faults or omissions of the parent(s), . . . but there has been a breakdown in the family relationship and intervention is needed.

(c) Upon referral to the informal resolution process, the child and family will be summoned into Children and Family Court to meet informally with the judge, the LOWO Division of Child Protective Services, the Tiospaye Interpreter, appropriate members of the child's extended family and tiospaye, and any other person whose presence is necessary for a full and open discussion of the problems facing child and his or her family. At that meeting the group will attempt to achieve a plan to assure that appropriate intervention is made to prevent future court involvement in the family. The parent(s), guardian, custodian, appropriate extended family and tiospaye members, the child, and the LOWO Division of Child Protective Services, shall sign a plan stipulating what each will do to address the problem or crisis facing the family.

(d) Review hearings shall be held every 90 days and the Children and Family Court will review the plan in an informal manner to assure that progress is being made.

(e) Participation in a plan under this section shall not prevent the Office of the Attorney General from filing a neglect or abuse petition or other legal action.

SECTION 402.2—LENA TUWÉPI HE/HWO (TRADITIONAL LAKOTA DEFINITIONS)

(2) Tiospaye ("extended family"): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.

SECTION 405.2—DESCRIPTION OF TRADITIONAL RESOLUTION OF CHILD AND FAMILY ISSUES

(a) In traditional tiospaye life, children are under constant supervision. Lakota customary law gives adult relatives the right to correct and discipline children, in the absence of the parents. Children are corrected on the spot when they misbehave or commit wrongdoings. Wowahokunkiye is the proper method for correcting and disciplining children. Wowahokunkiye means to advise, counsel, teach, or lecture. When children misbehave or commit a wrongdoing, adults explain to the children what they did wrong, why is it wrong, what they need to do to correct their behavior, and the consequences for continued misbehavior or wrongdoings. Incidences are reported immediately or as soon as possible to the affected parents.

(b) In correcting children through wowahokunkiye, adults evoke all the traditional laws, customs, and ceremonies to remind children and adults about the proper way to live. Verbal abuse, the use of strong or bad language, labeling, or any form of threatening physical contact is prohibited in correcting children through wowahokunkiye. Physical contact is proper only if it is to encourage or nurture (wokigna) such as through hugs or handshakes. Physical contact is also allowed if it is necessary to restrain children who are fighting or who physically attack others. In such cases, restrain means only to hold back or separate and not physical force such as hitting or choking.

(c) Constant supervision and discipline precludes issues from reaching crisis proportions. Issues between children and parents are addressed by the parents' parents (grandparents of the children) or other elders, again through wowahokunkiye. In the absence of the grandparents, the parents' aunts and uncles have the responsibility to mediate the issues. In addressing family issues, individuals directly responsible for mediating the issues have the right to ask for assistance from other individuals in the tiospaye or from individuals from other tiospaye. Given the existence of service agencies today, it would also be proper to ask for assistance from these programs, such as from social workers, legal experts, or guidance counselors. In cases where incidences are reported to service agencies, employees of the services agencies are obligated to follow and exhaust the chain of command and protocols defined in this subsection. Service agencies cannot take arbitrary actions as tiospaye have the right and responsibility to initially attempt to resolve each and every case or situation. If written notification is to be given concerning a child/family issue, all the relatives in the chain of command have to be notified, not just the parents.

....

(e) Spiritual ceremonies and rituals play a significant role in the proper upbringing of children. Adults have the right and responsibility to ensure that young men and women undergo the appropriate ceremonies and rituals at the appropriate times to make sure they grow up in the proper way and to be well—mentally, physically, and spiritually. Rites of passage for young men and women are good preventive medicine for misconduct and inappropriate behavior. Ceremonies also play a significant role in addressing child and family issues, especially in instances where there are mental or physical anguish or abuse. Adults have the right and

responsibility to arrange for the appropriate ceremonies for the affected parties to provide for healing, reconciliation, and correction.

(f) Given the realities of modern-day reservation life, there might be children in crises for whom relatives cannot be immediately identified. If these types of situations arise, an extensive relative search shall be conducted in an attempt to find a relative who will take responsibility for such children. The assumption is that every child has a relative somewhere that cares for them and who would take responsibility for them. Modern-day technologies, such as ancestral projects on the internet, provide excellent means for conducting relative searches. If relatives are found, they will be properly notified about the issue or issues and given the opportunity to take responsibility for the children. If searches for relatives are unsuccessful or that reveal uncaring relatives, other tiospaye will be given notice and opportunity to take responsibility for the children. Tiospaye have adoption ceremonies through which they can adopt children who are abandoned.

[30.10] TRIBAL CASE AND CODE EXAMPLES—Traditional Restitution and Reconciliation

**District Court of the Navajo Nation (Crownpoint District)
In the Matter of the Interest of D.P., a Minor, 3 Nav. R. 255 (1982)**

Situation before the Court

On February 28, 1982 this minor was found to have violated criminal law as a juvenile and to have committed what would otherwise have been the offenses of armed robbery, unlawful use of a deadly weapon, and unauthorized use of an automobile had he been an adult. The order of the same date ordered that the juvenile "make restitution to the victim in the amount of One Thousand Dollars (\$1,000.00) and no/100." That order was appealed, and on August 6, 1982 the Court of Appeals dismissed the appeal for failure to comply with the Rules of Appellate Procedure.

When the case was returned to this court the child asked that the amount of restitution be reduced due to his unemployment and the failure of the victim to prove the amount of damage. On October 29, 1982 the deputy prosecutor moved the court to leave the victim to collect his damages through a separate civil action. Finally, on November 22, 1982 both the counsel for the child and the Navajo Nation entered into a stipulation asking that this action be dismissed because of unknown damage amounts, the fact restitution was not requested by the prosecution, that the amount of restitution is unreasonable and unsubstantiated, and that the rules of court and the law of the Navajo Nation do not allow for restitution in juvenile cases.

Whether Restitution in Juvenile Cases is Permitted by Law

The question of whether restitution is permitted in juvenile cases is easily answered, and counsel should be ashamed to execute a stipulation agreeing there is no such law. 9 NTC Sec. 1191(6) clearly authorized the court to "order that the child be required to make restitution for damage or loss caused by his wrongful acts." While the statute does say that the obligation to make restitution is only that of the child, it is clear that the court has the power to order it.

It is of no consequence whatsoever that the prosecutor did not ask for restitution to the victim in this case. The court has the independent right and duty to justice to order whatever relief is appropriate and fits under the circumstances. 9 NTC Sec. 1191. As is noted below, restitution in criminal and quasi-criminal cases is also a matter of Navajo custom, and this court will require it whenever and wherever it is appropriate to the circumstances.

Restitution under Navajo Common (Custom) Law

In general Anglo-European history, the victims of crime lost their right to be paid back for a crime by the offender. Some Anglo historians argue that this was because of the need of European governments to build social unity and stop revenge, the desire of kings to take all

powers to themselves, and the practice of kings taking money in the form of fines as payment to protect the wrongdoers from the vengeance of the victim. This ridiculous trend, which thankfully is being slowly replaced by concern for the victim of crime, is totally the opposite from the traditional Navajo way.

Under Navajo tradition, all offenses (with the exception of witchcraft) were punished by payments to the victim or the victim's immediate family and clan. In this case, robbery with injury would be punished by a payment of "blood money" to the immediate family, plus a multiple payment for any property taken. Theft would be punished by a multiple payment to the victim of the immediate family group.

The Navajo tradition recognized that the central ideas of punishment were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way by requiring extra payments to the victim or the victim's family (rather than to the kind or state), and give a visible sign to the community that wrong was punished. The offender was given the means to return to the community by making good his or her wrong. Surely this is a far better concept of justice than to leave the victim out of the process of justice and leaving the victim with no means of healing the injury done.

Therefore this court finds that not only is restitution permitted under Navajo custom law, but indeed it was so central to the Navajo tradition in offenses that it should be presumed to be required in any juvenile disposition.

Eastern Band of Cherokee Indians

PART II—CODE OF ORDINANCES

Chapter 7A—JUVENILE CODE

ARTICLE V. LAW ENFORCEMENT PROCEDURES IN DELINQUENCY PROCEEDINGS

Sec. 7A-53. Dispositional alternatives for delinquent juvenile.

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives:

(4) Require restitution, full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The court may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the court shall not require the juvenile to make immediate restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.

[30.11] TRIBAL CODE COMMENTARY

Values and Purpose—The CCTGAP-informed provisions setting out the values and purposes of tribal children’s or juvenile codes focus on generally protecting customs and culture, the rights of families to their religious and traditional preferences, preserving the nuclear and extended family units, preserving opportunities for children to learn about their culture and heritage or to preserve their ethnic identity, and to ensure that services include cultural support. The Oglala Sioux Tribe’s Children’s code stands out in explicitly protecting the unity of the extended family unit (“tiospaye”) and in its substantial provisions defining Lakota kinship and the roles and duties associated with it. See discussion below.

The Hopi Tribe in Ordinance 35, Chapter II A., states that it is the purpose of the code to “preserve the unity of the family [and] provide for the full consideration of religious and traditional preferences and practices of families during the disposition of the matter.”

The Native Village of Barrow in Section 4-1-1 B. of its Children’s Code, states that it “establishes the following procedures to protect the best interests of children, and the future of the Tribe and its customs and culture. . . .” Further it provides that [a]ll provisions of this Code shall be liberally construed in order to give effect to the following purposes with regard to child welfare: . . . [p]rotect the best interests of children [and] prevent the unwarranted breakup of families, maintain the connection of children to their families, their community and the Tribe . . . [p]rovide child welfare services to children and families that are in accord with the laws, traditions, and cultural values of the Tribe . . . and [p]reserve the opportunity for children to learn about their culture and heritage, and to become productive adult members of the NVB Tribe community, by experiencing culture on an ongoing basis.”

The Oglala Sioux Tribe in its Child and Family Code at Section 401.4, states that the code “shall be liberally interpreted and construed to fulfill the . . . purposes [including] . . . [t]o preserve the unity of the tiwahe and tiospaye, separating the child from his or her parents, tiwahe and/or tiospaye, only when necessary; . . . [t]o recognize and reinforce the tribal customs and traditions of the Oglala Lakota Oyate regarding child-rearing; . . . [t]o preserve and strengthen children’s cultural and ethnic identities; and . . . [t]o provide services and cultural support to children and families to strengthen and rebuild the Oglala Lakota Nation.” The code at Section 402.2(3) defines “tiwahe” as “[a] family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.” At Section 402.2(2) it defines “tiospaye” as “[t]he root of Lakota social structure . . . comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.” At Section 402.2(1) the code defines “oyate” as “[t]he Lakota People.”

The Oglala Sioux Tribe’s code, in Section 402.1 et seq., also includes more substantial provisions defining Lakota kinship with a more detailed background on the tiospaye and tiwahe; the connection between kinship and essentially caretaking and guardianship of children by the tiwahe; how kin traditionally talk to one another and interact; respect for and the place and

role of elders as wisdom keepers, teachers and mediators; the proper ways to know and address relatives; and the making of ceremonial relatives, including traditional adoption.

Rights, Duties, and Obligations—A number of tribes have set out lists of “positive” rights in addition to various “negative rights” that we are more familiar with. Positive rights are things that the tribe or government must provide, as opposed to those things that a tribe or government can’t do to you (e.g., seizing you and your car and throwing you in jail without fair process). The Native Village of Barrow Children’s Code at Section 4-3-1, lists the following positive rights relevant to CCTGAP including:

A child has a right to . . .

- Life, survival, development, and a standard of living . . . reflective of the traditions and cultural values of that child’s people
- From birth to acquire and form an identity, including name, tribal affiliation, language, and cultural heritage
- Learn about and preserve his identity throughout his life, including the right to maintain ties to his birth parents, his extended family, and his village
- Learn about and benefit from tribal history, culture, language, spiritual traditions, and philosophy
- If separated from his parents for the child’s best interests, the right wherever possible not to be separated from other members of his immediate and extended family
- If separated from his parents for the child’s best interests, the right to special protection and assistance to ensure the maintenance of ethnic, cultural, religious, and linguistic heritage
- Education, including cultural teachings and training on how to safely undertake subsistence activities and other potentially dangerous work

Contrast this with the shorter Oglala Lakota Tribe’s list at Section 403.1:

All children have a right to . . .

- A mother
- A father
- Identify with the traditional way of life
- Learn to speak his or her language
- A family
- Know their relatives
- Know the traditional laws, customs, and ceremonies of the people
- Live according to and to practice the traditional laws, customs, and ceremonies that govern the people

There is debate about the legal implications of positive rights. Lawyers argue that they are either, aspirational and thus unenforceable, or they are enforceable and the tribe may be forced to pay to make such a right real if successfully sued by a child and his family. Note, sadly,

that some positive rights might never be enforceable like the right of a child to have a mother or father. Aspirational language may still influence a judge in his or her interpretation of other provisions of a statute. Tribal law drafting committees will need to discuss what their intent might be and memorialize this in the statutory language.

The Native Village of Barrow Code at Section 4-3-3 also sets out the responsibilities and rights of extended family members. The section begins by recognizing that extended family members have a “secondary, common responsibility for the upbringing and development of children in their family.” The responsibilities and rights of extended family members include the responsibilities and rights to . . .

- Be responsible for helping children acquire and form identities, including name, tribal affiliation, language, and cultural heritage
- Be responsible for intervening or assisting when necessary to ensure the continuity of the child’s upbringing and the maintenance of the child’s ethnic, cultural, religious, and linguistic heritage
- Be timely noticed by the court of any judicial or other proceeding involving the child
- Be heard in any judicial or other proceeding involving the child
- Reasonable visitation with the child
- Request a family conference

Again, there is debate about the enforceability of the responsibilities (the rights are easier to effect). For example, would such statutory provisions create a right on the part of the tribe or the child and his family to sue extended family members for breach of responsibility? If yes, what would be the remedy (e.g., money damages)? Again, aspirational language may still influence a judge in his or her interpretation of other provisions of a statute. As stated above, tribal law drafting committees will need to discuss what their intent might be and memorialize this in the statutory language.

Contrast the Native Village of Barrow language with the Oglala Lakota Tribe’s “traditional family rights” and “traditional laws governing the decisions affecting children” at Sections 403.2 and 401.5. These provisions are more like a code of ethics for family members in their dealings with one another—to have “faithfulness,” “wisdom,” “spirituality,” “fortitude,” “generosity,” “respect,” and to advise and counsel others. Such provisions, no doubt, will be difficult for an outsider judge to apply. However, assuming that the tribe appoints its own people as judges or those very familiar with its ways, such provisions could be a powerfully effective for interpreting other parts of the statute.

Choice of Law—Choice of law provisions are mandates from the tribal legislature to the tribal judiciary directing them in what laws to apply and in what order to disputes that come before the courts. If your community is committed to integrating CCTGAP into your judge made law, it is critical to include custom and tradition in your tribe’s “choice of law” provision. It is also

important to consider where custom and tradition sits in the order of law to be applied. If it sits above tribal written law (the constitution, statutes, resolutions, etc.), then custom and tradition will trump the constitution, statutes and codes. This may pose serious problems where the legislated rules represent the consensus (or majority consensus) on what customs should be reinforced and what safety measures should trump custom (for example, if your statute/code says that extended family members have rights to notice and participation in children's proceeding but only if they are not "dangerous relatives"). If custom and tradition sits below the tribe's written law but before the importation of foreign law, it may be used by the judge as the default gap-filler where the tribal council has not legislated. Many tribes treat custom and tradition as mandatory law at this level.

The Hopi Tribe in its Resolution H-12-76 at Section 2(a), treats custom and tradition as a mandatory gap filler after the application of the tribe's written law. This means that the tribal judge has to apply it where the tribe's written law fails to address the issue before the court: "The Courts of the Hopi Tribe, in deciding matters of both substance and procedure . . . shall look to and give weight as precedent to . . . (1) The Hopi Constitution and Bylaws; (2) Ordinances of the Hopi Tribal Council; (3) Resolutions of the Hopi Tribal Council; (4) Customs, traditions and culture of the Hopi Tribe. . . ."

The Hopi Tribe's choice of law provision at Section 2(b) also provides for importation of foreign law where neither the tribe's written law nor its customs or traditions have an answer. However, it prohibits the recognition and application of foreign law where it is "inconsistent with either the spirit or the letter of either the Hopi custom, traditions, or culture of the Hopi Tribe."

Contrast this with the Stockbridge-Munsee Tribe's approach at Section 1.3, where instead of using a choice of law provision, it makes the consideration of custom part of how a judge must read only that particular statute (a.k.a. "rules of statutory construction"): "This code is exempted from the rule of strict construction. . . . Whenever there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling. . . ."

The Native Village of Barrow Code at Section 3-11 provides the clearest direction for judges by dividing "mandatory authorities" (judges have to apply it) from "persuasive" authorities (judges may apply it), and by making "customs and traditions" mandatory after the tribe's written laws:

"The Tribal Court, in deciding matters of both substance and procedure, shall look to and give weight as precedent to the following mandatory authorities in the following order: 1. The Constitution and Bylaws of the NVB Tribe; 2. Agreements with other tribes entered into by the NVB Tribal Council; 3. Statutes of the NVB Tribe; 4. Resolutions of the NVB Tribe; 5. Common law of the NVB Tribal Court; and 6. Customs and traditions of the NVB Tribe."

Notice that the Native Village of Barrow Tribe statute ranks agreements with other tribes and the “common law of the NVB Tribal Court” higher than its customs and traditions, which means that provisions in the agreement and prior written judicial opinions will influence or trump the interpretation or application of customs and traditions in future cases.

The Native Village of Barrow Tribe statute at Section 3-8 E. also includes a requirement that where a tribal judge finds that an agreement, tribal statute, or resolution “contravenes the customs or traditions,” the judge must issue a “written notice of the conflict” to the tribal council, along with a copy of the judge’s written opinion in the case.

Process for Finding CCTGAP—Tribal judicial codes often contain processes describing how a tribal judge may identify culture, custom, and tradition. There are three popular methods. The judge may “take judicial notice of generally accepted and known custom.” This means that a judge may simply recognize and restate a custom that everyone in the tribal community is familiar with. The judge may also hold hearings with “traditional expert witnesses” testifying as to what the custom is and then the judge ultimately decides what parts of the custom are relevant to the dispute in front of him, how it is defined, and how the custom will be applied to the parties. Finally, a particular tribe may have established a culture-bearer or elders panel or a similar body to assist the judge in identifying and defining a particular custom. Some tribes have set up these bodies and set out a “certification process” where a tribal judge may certify a question to the body and where it can then send a written answer back to the judge who then applies the written custom to the facts in the case before him or her in tribal court. The judge’s final written “opinion and order” in the tribal court case would then describe the custom and how it was to be applied to the parties and their problem in the case. All such process should be set out in tribal court statutes/codes to ensure the consistent application of custom and tradition in tribal court cases over time, and to ensure the orderly development of the tribe’s common law (judge made law) incorporating custom and tradition.

The Native Village of Barrow Judicial Code at Section 3-5 provides for all three custom identification processes, including: (1) “judicial notice”—“The court may take judicial notice of Iñupiat custom or tradition only if the court finds the custom or tradition to be generally known and accepted within the NVB tribal community;” (2) custom-law-finding hearings—“A party who intends to raise an issue of Iñupiat custom or tradition shall give notice to the other party and the court through its pleading. . . . The proponent of custom or tradition must then plead it to the court with sufficient proof to establish by a preponderance of the evidence that the custom or tradition exists and that it is relevant to the issue before the court”; and (3) certification to a culture-bearers panel—“If the judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the court shall certify the question to the Elders Council.”

Note that tribal judges will need at least two methods at all times, judicial notice and custom law finding hearings or judicial notice and a culture-bearer panel. This is due to the fact that not all tribal judges will know “custom or tradition generally known and accepted” as they may be a non-tribal member or not from the same region or group within the tribal communities as the

parties. Also, it may be prudent to include all three processes where there is uncertainty as to the consistent availability of funding and staffing of the culture-bearer panel.

The Oglala Sioux Tribe provisions are similar to those of the Native Village of Barrow at Sections 412.1 and 412.2 which establish a “Tiospaye Advisory Council” which “shall resolve questions or disputes about the customs and traditions certified to them by a Children and Family Court Judge.” The Council “shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Children and Family Court for use in its proceedings. . . . A decision of the Tiospaye Advisory Council shall not be binding as precedent until it is incorporated into an order of the Children and Family Court.”

However, the Oglala Sioux Tribe at Section 412.1(c)(2) further empowers its Tiospaye Advisory Council “to issue official opinions on the decisions of the Children and Family Court if the Council feels that such decisions are inconsistent with the provisions of the Child and Family Code.” Recall that their Children’s Code contains extensive cultural definitions, values, ethics, and responsibilities and rights for extended family members.

Both the Native Village of Barrow and the Oglala Sioux Tribe Codes include provisions authorizing their culture-bearer bodies to engage in the ongoing documentation of custom and tradition. See Section 3-7 E. of the NVB Judicial Code and Section 412.3 of the OST Children’s Code.

Notice and Participation Rights for Extended Family—Once a tribal community has identified “who is family” with respect to a child, it will be important to define the terms “parent” or “extended family” (or the traditional terms and categories) in order to provide them with notice and participation rights when a child is detained, taken into custody, or involved in court proceedings. If your community desires to hold parents and extended family members responsible for their youth, they will need to have information and participation rights in the juvenile justice system process. Note that the Oglala Sioux Tribe’s definition of “extended family” at Section 402.3, includes “an adult relative of a child,” but not “[an adult relative] who has . . . been deemed by a court of competent jurisdiction to be a danger to the child.”

The Oglala Sioux Tribe’s Children’s Code at Section 408.8 provides “tiwahe” and “tiospaye” members with the “right to be present at all stages of the [court] proceedings,” and to “speak on the child’s behalf if the child so requests.” Tiwahe is defined at Section 402.2(3), as “a family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people). Tiospaye (or “extended family”) is defined at Section 402.2(2), as “[t]he root of the Lakota social structure . . . comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.” Section 402.3 further defines extended family to include:

“(A) The paternal and maternal grandfather and grandmother;

- (B) Siblings of the grandparents;
- (C) Father and mother;
- (D) Paternal and maternal uncle and aunt;
- (E) Brother and sister;
- (F) The spouses of persons listed in (A) through (E);
- (G) Any adult person legally adopted in (A) through (E); and
- (F) Any adult member of the child's tiospaye, or other adult person adopted by the child's tiospaye as a relative through a formal ceremony."

The OST definitions of family are expansive and appear to include biological parents, all adult biological relatives who have not been found to be a danger to the child, and ceremonial relatives. The burden of providing notice to family and "tiospaye interpreters" regarding hearings involving the child is put on the "clerk of the court" in Section 408.1. In other parts of the OST Children's Code, the burden of providing notice to parents and the child's "tiospaye interpreter" is put on the child protective services agency regarding notice of any removal of the child from the home (Section 406.8). The tiospaye interpreter is defined in another part of the code to be a representative of the tiospaye and liaison with the children's court to speak for the children of the tiospaye who are court involved. A key consideration to make notice effective will be to locate responsibility for maintaining updated family trees, including ceremonial relatives, and contact information for family members, with a responsible agency and/or official.

The Native Village of Barrow Children's Code at Section 4-3-3 F.-I., establishes the rights of resident extended family members to "be timely noticed by the court of any judicial or other proceeding involving the child"; to be "heard in any judicial or other proceeding involving that child," should that person "come , , , forward in a timely manner"; and the right to "request a family conference." The NVB Children's Code defines extended family member at Section 4-2 15. To include: "Any adult sibling, grandparent, aunt, uncle, great aunt, great uncle, or cousin of the child, including adoptive adult siblings, grandparents, aunts, uncles, great aunts, great uncles, and cousins." The NVB Children's Code provisions notably differ from the OST provisions by providing family with the right to request family conferences.

Cultural Education for Personnel—Once a tribal community has drafted or amended its children's laws to incorporate CCTGAP, it will be necessary to train justice system and service provision personnel and others on both the substance and process of the new law, and particularly with respect the CCTGAP provisions. The question is whether and how this should be set out in the statute/code and/or what should be part of a negotiated MOU or MOA (agreements) with tribal agencies, private agencies, and/or other governments.

The Oglala Sioux Tribe's Children's Code in its Sections 416.1 to 416.3 mandates expansive compliance across tribal entities to comply with the new law. This includes its justice system, law enforcement and service provider agencies, educational and healthcare entities, and even its religious entities. All are mandated to revise their mission and vision statements, to adapt

their policies and procedures and the delivery of services to the new law, and also to provide orientations and trainings about the new law.

Although all these agencies and entities are mandated to comply with the new children's law including its CCTGAP provisions, the OST mandates may prove to be impossible to enforce where the entity is not tribally controlled and/or located within reservation boundaries (this would necessitate the negotiation and signing of MOUs or MOAs—agreements). Also, it is also unreasonable to expect that private entities governed by board of directors, for example, would be agreeable or feel obligated to revise their mission statements. A more workable approach would be to invite them to participate in early community discussions and/or to give them an opportunity to provide feedback on the draft law(s). Finally, even tribally controlled agencies and entities have their own distinct missions and legal parameters. A better approach would be to have the statute authorize the negotiation of inter-agency agreements including provisions for the development or reform of policies and procedures and the nature of required orientations and trainings.

Traditional Placements, Guardianships, and Adoptions—In juvenile court proceedings, from time to time, there will be a need to place a youth outside the home. Whether this is temporary (sometimes called “interim care,” “respite care,” or a temporary “guardianship”) or permanent (sometimes called “guardianship” or “adoption”), tribal communities will need to explore what traditional arrangements or present day generally accepted practices exist. The community should discuss the pros and cons of including these arrangements within the interim care (emergency) provisions and the disposition alternatives within their juvenile justice codes.

Here we provide examples from the tribal dependency court context (tribal children's codes dealing with child abuse and neglect). The first example from the Rosebud Tribe, at Section 2-2-7, sets out a process for judicial recognition of an existing placement of a child with “another family”:

“After a period of two years in the care of another family, the court upon petition of the adoptive parents, will recognize that the adoptive parents in a custom or tradition adoption have certain rights over a child even though parental rights of the natural parents have never been terminated.”

The Rosebud code requires an attestation by two reliable witnesses.

The second example, from the Native Village of Barrow Children's Code at Sections 4-5-5 A. to 4-5-5 U., sets out a more elaborate process for legally effecting traditional adoptions—where new parents will be made and added to a child's existing set of parents. While the Rosebud provisions are far simpler, the NVB provisions ensure greater protections for the child in that they: (1) ensure that the adoptive parent is old enough; (2) ensure that both spouses agree to the adoption; (3) ensure that the child will be safe by undertaking background checks on prospective adoptive parents; (4) ensure proof of a child's membership status, proof of consent

on the part of the birth parents, prospective adoptive parents, and children over 14 years of age, protect the child's tribal membership and property rights, and require a statement of the reasons for the adoption; and (5) require a hearing and findings from a tribal court judge that "the child is suitable for adoption," that the consents are valid, that the adoptive parents are "financially, morally, and physically fit to adopt," "how best to allocate parental rights and responsibilities between parents," and "whether the best interests of the child will be promoted by the adoption," before the adoption is legally recognized.

Neither the Rosebud provisions, nor the NVB provisions, terminate the biological parents' parental rights. This means that the tribal court and/or some sort of family conferencing or mediation process will likely be necessary to handle parenting disputes where the multiple sets of parents cannot agree in the future and on an ongoing basis.

Diversion to Traditional Authorities, Entities, Healers, Mentors, and Activities—As can be gleaned from the model provisions highlighted in this resource for tribal juvenile justice codes, there is a preference for the diversion of youth from the juvenile justice system at multiple stages, some even prior to any justice system involvement. For truant youth or for families-in-need-of-care, ideally, there should be diversions at the school and/or law enforcement levels. For recurrent status offending youth, there should be statutory diversions before trial or disposition (a.k.a. "informal adjustment," via "consent decrees," or similar terms). For juvenile offenders there should also be pretrial and predisposition diversions processes. For all status and juvenile offenders who find themselves adjudicated, the statute should provide yet one more opportunity for diversion through court-ordered participation in community-based programs and activities as part of the judges' final dispositions. Basically, you want to create as many doors exiting the juvenile court process as you can to screen, assess, treat, and divert youth to therapeutic and cultural programming and activities. The reasons for having multiple doors include having multiple opportunities for youth and their families to seek assistance when they might be ready. Also different tribal officials are in charge of the different doors (e.g., school officials, law enforcement, juvenile intake officers, prosecutors and presenting officers, and judges) and you may not want to hinge the fate of youth and their families on the discretion of just one official at a given time.

However, creating all of these "doors out of the juvenile justice system" assumes that youth and their families will have somewhere to go. One of the most important things your tribal community will want to consider is the type of cultural entities, authorities, healers, mentors, and/or activities you will want to divert youth and families to and/or what type of cultural programming you will wish to design and implement.

There is a universe of possibilities here but three common approaches are to divert youth and their families directly to existing traditional entities/activities (e.g. traditional authority figures, healers, and ceremonies), to design and implement cultural programming (e.g., history and language education programs, hunting, fishing, gathering, and/or subsistence activities), and/or to modify existing non-Indian justice, dispute resolution, and therapeutic processes to

accommodate a tribe's CCTGAP (e.g., wellness courts, family conferencing, mediation/peacemaking, sentencing circles).

Here we provide examples from the Oglala Sioux Tribe that opted to provide two required doors or "diversions," from their children's court process. These include first, an initial referral to the tiospaye, or extended family, and then an informal resolution process (a quasifamily conferencing process) once a child becomes court involved.

See the Oglala Sioux Tribe's Section 405.2(c) where it states "[i]n cases where incidences are reported to service agencies, employees of the service agencies . . . cannot take arbitrary actions as tiospaye have the right and responsibility to initially attempt to resolve each and every case or situation." If this tiospaye involvement does not remedy the situation or if it does not happen and a child proceeds through the children's court process, Section 408.13 provides that the child may be referred to an "informal resolution process." This is an informal meeting with the child, his or her family, child protective services, the tiospaye interpreter, and members of the child's tiospaye for the purpose of developing a plan of intervention.

Traditional Restitution and Reconciliation—Many tribes view restitution as a part of their CCTGAP. For example, the Navajo Tribe in *In the Matter of the Interest of D.P.*, found that restitution is a matter of custom and centers on the harm suffered by the victim. The Navajo court stated:

"Under Navajo tradition, all offenses (with the exception of witchcraft) were punished by payments to the victim or the victim's immediate family. . . . the central ideas of punishment were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way by requiring extra payments, . . . and give a visible sign to the community that wrong was punished. The offender was given the means to return to the community by making good his or her wrong."

The Navajo formulation of restitution favors concepts of reparations to the victim, punishment, satisfying public calls for justice, and providing the offender with "making good his wrong."

The Eastern Band of Cherokee Indians Juvenile Code, at Section 7A-53, sets out a fairly standard provision in authorizing its juvenile court to order restitution as a disposition alternative:

"The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives: . . . [r]equire restitution, full or partial, payable within a 12 month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile."

Tribal communities should explore whether their CCTGAP includes the concept of restitution and what its parameters include. For example, what amount of restitution? Payable to whom?

Should youth be excused from paying if they can't pay it? Should their parents be required to pay? What happens if they can't afford it?

[30.12] EXERCISES

Points for discussion*

What is custom, is it legal, where do we find it, who knows it best?

- “Custom” is law and it permeates every subject category within the written laws of a tribe;
- Custom law exists and operates underneath written tribal laws in many contemporary tribal societies. A functional definition of substantive custom is one that distinguishes . . .
 - “custom as a kernel of law” (what people feel/believe/do given certain values) (e.g., women have certain mandatory duties to their families, clans and villages; including organizing and carrying out baby namings, weddings, their part in funerals, and ceremonially supporting their husbands and clansmen);
 - “custom of a legal nature in its natural setting” (legal norms versus social norms where the traditional system somehow backs or recognizes the legal norm) (e.g., where a clan uncle declares that a clanswoman has met her duties and recognizes her right to use a house or a field); and
 - “custom that is enforceable under tribal law” (custom that is incorporated into written tribal law in a policy-making process) (e.g., a tribal statutory provision recognizing the property rights of caretakers of elders once the elder has passed and defining “caretaking” to include meeting both basic day-to-day needs of the elders and ceremonial support);
- Custom law varies among groups at the subtribal level (villages, clans, bands, etc.). Tribal societies are comprised of multiple legal levels with differences in their legal structure and their substantive bodies of custom;
- Tribal legislators, judges, and ad-hoc elders may not be the most reliable sources to identify and define customary law elements. Some sources are more reliable than others for identifying and defining relevant legal norms (custom that is law in its natural setting). For example, traditional authorities from the same village or clan who have decided similar cases in the past would be more reliable;
- Custom law often naturally arises from kinship, ceremonial, and other relationships and looks like duties and obligations with rules about what happens in case of a breach of duty;
- All contemporary tribal societies arguably have “new custom laws” that are naturally arising and that are in the process of being internalized by members. Customs or generally accepted practices (and their underlying values) may change but may still be considered “custom that is law”; and
- Not all tribes “find” custom in the same way. Check the court establishment code, judicial code, court rules, or tribal common law to determine what custom knowing or finding process is used.

*Taken and condensed from Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking.”

The following exercises are meant to guide you in identifying and integrating culture, customs, traditions, and generally accepted practices into various sections of the tribal juvenile code.

Step 1: Hold a discussion about CCTGAP with stakeholders (youth and their families, etc.) culture bearers, elders, and interested community members to refine views and definitions, and to find and document relevant CCTAGP. Begin with the following questions.

How do we recognize and incorporate “custom”?

A. What terms and definitions should we use when working with “custom”?

“Social Norm” and “Legal Norm”

“Tradition” and “Current Practice”

“Traditional Authority” and “Modern Secular Authority”

“Traditional Legal Levels” and “Secular Legal Levels”

“Policy Making”

“Social Norm” and “Legal Norm”

“Social Norm”—A felt standard of proper behavior

“Legal Norm”—A felt standard of proper behavior backed by official recognition or sanction

1. Identify a social norm in your community. What is something that everyone says you should or shouldn’t do?

2. Identify an unwritten legal norm in your community. What is something that everyone says you should or shouldn’t do? What happens to you if you do or forget to do this thing?

“Tradition” and “Current Practice”

“Tradition”—Old values or ways of doing things

“Current Practice”—Current, generally accepted ways of doing things

3. Identify a tradition in your community. What is the old way of doing things? How have things changed? Is there a different current practice for this tradition now?

“Traditional Authority” and “Modern Secular Authority”

“Traditional Authority”—The old offices or respected leaders

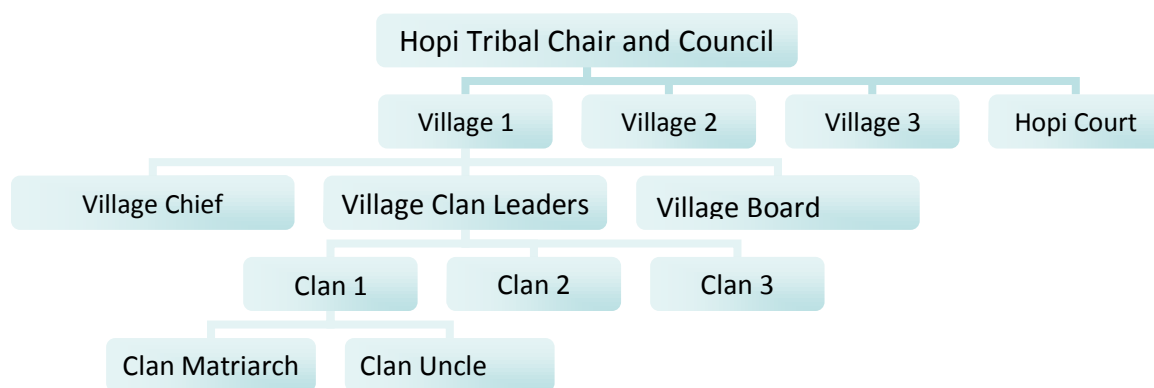
“Modern Secular Authority”—Constitutionally or statutorily recognized leaders or other leaders elected or appointed by the community

4. Identify several traditional authorities in your community:

5. Identify several tribal secular leaders:

“Traditional Legal Levels” and “Secular Legal Levels”

“Legal Levels”—Legal norms vary within different, traditional and secular legal levels, that is, the custom law may be different for different villages, clans, bands, and so forth, within one tribe. The written tribal law (constitution, codes, resolutions, tribal court opinions, and orders) may also deal differently with people from different villages, clans, bands, and so forth.



Example: The Hopi Tribe in Arizona

6. Identify your community's traditional and secular legal levels. Identify a norm that may be different from one place to the next. Is there written tribal law that recognizes different norms/rules for different groups?

"Policy Making," Custom, and Tradition

"Policy Making"—When you formalize custom in your written tribal law (constitution, code, or tribal court opinion), you are engaging in policy making—that is picking and choosing bits of custom and putting them in your modern written tribal law—for a good reason.

Custom or Tradition

Mother's Sister = Mother

Tribal Policy

Mother's Sister has a right to notice of involuntary dependency hearings regarding her sister's children

7. Can you think of an example where your tribe has done this?

B. Define who is family

"Natural Parent(s)"—The mother and father who conceive the child.

"Nuclear Family"—A kin group consisting only of parents and children. The prevalence of nuclear families in modern nations reflects the realities of industrialism, geographic mobility, a lack of ties to the land, and the sale of labor for cash.

"Extended Family"—The term "extended family" is used in tribal communities to mean close kin outside the nuclear family, including "band relatives," "clan relatives," etc.

"Band Relatives"—Comprised of nuclear families that join the husband's or wife's family on a seasonal basis—traditionally to hunt or gather.

“Clan Relatives”—Comprised of a permanent social unit whose members say they have an ancestor(s) in common. Membership is determined at birth and is lifelong.

“Matrilineal Descent”—A person is born into the mother’s group automatically at birth. That group is considered close family.

“Patrilineal Descent”—A person is born into the father’s group automatically at birth. That group is considered close family.

“Ceremonial Relatives”—People who are selected, or who come to be relatives for ceremonial or other purposes.

8. Who do you consider to be your child’s “relatives” in your community? Is it the same on both the mother’s and father’s side? Are there ceremonial or other important traditional relationships?

C. Identify any “third parents.”

“Third Parent Status”—Those kin, designated by specific kin terms, who are understood to have parent-like duties, obligations, and privileges (rights) with respect to a child(ren) they are kin to.

“Kin Types”—Genealogical kin types such as biological father (F), mother (M), son (S), daughter (D), brother (B), sister (Z), child (C), and husband (H) and wife(W).

“Kin Terms”—The words used for different relatives in the native language.

9. Are there certain relatives that equal natural parents (who are like “third parent(s)”) in duties and rights with respect to children?

10. What is the word for “mother” in your language? Does the child call more than one person in his or her life by this term?

11. What is the word for “father” in your language? Does the child call more than one person in his or her life by this term?

12. Are there other important names or terms to a child to note here?

D. Determine what duties and obligations are owed to youth.

13. What traditional duties are owed to children? Which people are primarily responsible for the care, supervision, protection, and education of boys? Which people are primarily responsible for the care, supervision, protection, and education of girls?

E. Figure out what your CCTGAP documenting committee should work on.

14. Make a list of questions to be explored and documented by a custom-law finding body of culture bearers or elders⁴³ on the following topics relevant to the tribal juvenile justice system (add in your own topics as they arise):

- Values, such as “respect,” “honor,” “patience,” “teaching others,” “self-respect,” “honoring self,” “positive beliefs about self,” and so forth

⁴³ This body or committee should work in tandem with a separate law or code drafting committee and should regularly share its “found CCTGAPs” to inform the law drafting process as it happens. The law/code drafting committee should provide a list of topics and questions to the custom law finding body/committee to have it explore topics and answer questions relevant to the juvenile code drafting process as an integral part of its law/code drafting process.

- Beliefs in spiritual renewal leading to healing and recovery
- Beliefs and practices about behavior, health, healing, humor, and children/youth
- How one should manage thoughts, emotions, and physical reactions
- Worldview about family
- Worldview about children and youth
- Duties and obligations owed between people (e.g., parent-child and child-parent, ceremonial aunt-child and child-aunt) who are related to each other in the nuclear, extended, and ceremonial family
- How boys should be raised
- How girls should be raised
- Good parenting skills
- Good communication skills
- Traditional placements, guardianships, and adoptions
- Traditional authorities, entities, healers, and mentors
- Traditional healing practices, activities, and ceremonies used to provide instruction, about relationships and parenting
- Traditional restitution and reconciliation

Step 2: Examine the current situation.

Review your tribal laws to determine whether you have any of the following provisions (note you will need to check your constitution, judicial or court establishment code, and your children's laws):

- Values and/or Purpose Statement
- Youth and Family Bill of Rights
- Bill of Duties and Obligations to Youth
- Choice of Law Provision Allowing or Mandating use of CCTGAP
- Provisions Authorizing Judges to Notice, Find, and/or Apply CCTGAP in Tribal Court
- Notice and Participation Rights for Extended Family Members
- Mandating Cultural Education for Justice System and Treatment Personnel
- Provisions Defining and Authorizing Traditional Temporary Placements, Guardianships, and/or Adoptions
- Diversion Provisions to Traditional Authorities, Entities, Healers, and/or Mentors
- Provisions Defining Traditional Restitution and Reconciliation Processes

What is working well under your current laws? What is not working?

Step 3: Capture the key provisions.

- Which of your tribal constitutional provisions, codes, or court rules will need to be amended?
- What new laws or codes will need to be drafted?
- Do you need to establish a law-finding/documenting committee of stakeholders/culture bearers/elders? If yes, who should be recruited to be on the committee?

Read & Discuss*

What is custom, is it legal, where do we find it, who knows it best?

- "Custom" is law and it permeates every subject category within the written laws of a tribe;
- Custom law exists and operates underneath written tribal laws in many contemporary tribal societies. A functional definition of substantive custom is one that distinguishes ...
 - "custom as a kernel of law" (what people feel/believe/do given certain values) (for example, women have certain mandatory duties to their families, clans and villages; including organizing and carrying out baby-namings, weddings, their part in funerals, and ceremonially supporting their husbands and clansmen);
 - "custom of a legal nature in its natural setting" (legal norms vs. social norms where the traditional system somehow backs or recognizes the legal norm) (for example where a clan uncle declares that a clanswoman has met her duties and recognizes her right to use a house or a field); and
 - "custom that is enforceable under tribal law" (custom that is incorporated into written tribal law in a policymaking process) (for example a tribal statutory provision recognizing the property rights of caretakers of elders once the elder has passed and defining "caretaking" to include meeting both basic day-to-day needs of the elders and ceremonial support);
- Custom law varies among groups at the sub-tribal level (villages, clans, bands, etc.). Tribal societies are comprised of multiple legal levels with differences in their legal structure and their substantive bodies of custom;
- Tribal legislators, judges, and ad-hoc elders may not be the most reliable sources to identify and define customary law elements. Some sources are more reliable than others for identifying and defining relevant legal norms (custom that is law in its natural setting). For example, traditional authorities from the same village or clan who have decided similar cases in the past would be more reliable;
- Custom law often naturally arises from kinship, ceremonial, and other relationships and looks like duties and obligations with rules about what happens in case of a breach of duty;
- All contemporary tribal societies arguably have "new custom laws" that are naturally arising and that are in the process of being internalized by members. Customs or generally accepted practices (and their underlying values) may change but may still be considered "custom that is law"; and
- Not all tribes "find" custom in the same way. Check the court establishment code, judicial code, court rules, or tribal common law to determine what custom knowing or finding process is used.

**Taken and condensed from Pat Sekaquaptewa, "Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking," 32 AM. INDIAN L. REV., 319, 329 (2007-2008).*

CHAPTER 31

WELLNESS COURT

[31.1] OVERVIEW

Since the late 1990s tribes have established and implemented what are now known as “tribal healing to wellness courts” (a.k.a. “wellness courts”). These therapeutic court dockets are modeled on the state drug court model but modified in important ways that are tailored to each tribal community. The three primary types of tribal wellness court are targeted at: (1) adult criminals who have a substance abuse problem; (2) juveniles who have a substance use or abuse problem; and (3) parents with allegations of maltreatment against them who have a substance use or abuse problem. Youth would conceivably be eligible to participate in either a juvenile wellness court and/or a family wellness court focused on young parents. Note that a number of tribal juvenile wellness courts also label their juvenile (as opposed to their parent-focused docket) as a “family wellness court.” A few tribes may also be experimenting with a DUI/DWI wellness court that targets individuals who drive while drunk/drinking.

Therapeutic “dockets” or courts have a dramatically different process than standard court process. The job of the judge is not to find facts or truth and to apply the law to the facts in an adversarial process (like a *Law and Order* trial on TV). Rather, his or her job is to work with a team of service providers to individuals and their families to ensure that they are proceeding through an individualized treatment plan. The judge holds wellness community hearings where everyone in the wellness court program is required to attend. In these community hearings the judge checks on the progress of the individual and gives out incentives or sanctions for progress or noncompliance. Typically, a successful “participant” (note that they are not called “juveniles” or “defendants”), graduates from the wellness court program and his or her original charge or petition is dismissed in the regular tribal court. Participants are held accountable in this process in every way, to be on time, to attend required appointments and activities, to undergo random alcohol and drug tests, to undertake community services, etc. The judge and the “wellness team” are simultaneous parent figures, mentors, and a support system for participants, many of whom may have never had such people in their lives.

We include a chapter on wellness dockets/courts here as a preferred diversion model for working with tribal youth who are using and/or abusing substances. Typically “violent offenders” are ineligible for wellness court participation. This exclusion may need to be reconsidered in tribal communities with significant numbers of traumatized youth who badly need the support and access to treatment (particularly mental health screening, assessment, and treatment services), but who also tend to be in the violent offender category. Below we provide statutory/MOU examples from a juvenile, family, and adult wellness court process.

[31.2] TRIBAL CODE AND MOU EXAMPLES

Muscogee (Creek) Nation of Oklahoma

CODIFICATION #26. JUDICIAL BRANCH/COURTS

Section 100. Be It Enacted By the Muscogee Nation in Council Assembled:

Section 101. Findings: The National Council Finds That:

1. The Muscogee Nation currently has both a criminal code and a juvenile code governing criminal and juvenile actions arising within the jurisdictional boundaries of the Muscogee Nation.
2. Drug and/or alcohol abuse is a commonly recurring factor in a substantial number, if not the majority, of juvenile cases within the Nation's Children and Family Services Administration as well as in adult criminal cases.
3. The Nation's current programs and services designed to address family problems and conditions are often inadequate where such problems and conditions are the result, in whole or in part, of chronic drug and/or alcohol abuse.
4. There is a need to reduce the incidence of drug and alcohol abuse within the Muscogee Nation and to create and implement a program integrating alcohol and drug treatment and other rehabilitative services and resources within the Nation's judicial system.
5. With funding provided in 1996 from a grant funded in 1996 by the U.S. Department of Justice, the Nation formed a family drug court planning team whose members have been meeting since February 1997 to discuss and plan a family drug court program within the Muscogee (Creek) Nation judicial system. The members of the family drug court planning team have also participated in both national and state drug court training sessions to assist them in developing a drug court program.
6. The family drug court planning team members studied the problems of chronic alcohol and drug abuse and its effects on families and have recommended the establishment of a Family Drug Court Pilot Project as the initial substantive step in creating a program specifically designed to address the cycle of alcohol and drug abuse and the disintegration of families within Muscogee Nation caused by such abuse.
7. The Muscogee Nation was recently awarded a drug court implementation grant by the U.S. Department of Justice to assist with funding the implementation of a family drug court program within the Nation's criminal and juvenile justice system.

8. It is in the best interests of the Muscogee Nation and its Indian families to implement a Family Drug Court Pilot Project pursuant to the federal drug court grant awarded by the Department of Justice.

Section 102. Purpose:

The purpose of this Act is to provide for and establish a Family Drug Court Pilot Project within the Muscogee Nation's judicial system, to authorize the members of a family drug court implementation team to prepare policies, procedures, inter-agency departmental protocols and standards for the Family Drug Court Pilot Project, and to authorize the Administration to seek other funding sources to assist in the development of a Family Drug Court Pilot Project.

Section 103. Family Drug Court Pilot Project: Court Authority and Rules: Family Drug Court Implementation Team:

A. There is hereby established a Family Drug Court Pilot Project within the Muscogee Nation's judicial system.

B. The judge of the Muscogee (Creek) Nation District Court is hereby authorized to order and/or impose sanctions and incentives for participants who enter into the Family Drug Court Pilot Project program. The Court's powers and authority hereunder shall include, but are not limited to, the following:

- (1) approving and enforcing treatment plans;
- (2) holding participants in direct or indirect contempt of court for willful violations of the Court's orders, including Court-ordered treatment plans;
- (3) imposing fines and/or costs;
- (4) ordering the performance of community service;
- (5) ordering participants to receive mandatory inpatient/outpatient drug or alcohol treatment or counseling;
- (6) ordering random and/or periodic urinalysis testing;
- (7) placement of children in the legal and/or physical custody of Children and Family Services Administration and/or other persons;
- (8) authorizing increased or restricted contact with other family members or increased or restricted supervised visitation with children);
- (9) extending, accelerating, and/or terminating treatment plan(s) and/or ordering that non-compliant participants be discharged from the Family Drug Court program;
- (10) where a participant in the program has materially and/or repetitively violated the terms of his or her court-ordered treatment plan, ordering that the participant be placed in confinement for a period not to exceed 5 days for each violation, but only after the Court expressly finds that the participant's violation of the plan was willful and that other sanctions or incentives are inadequate; and
- (11) imposing any other condition, standard, requirement, treatment, service, training or activity which the Court deems appropriate under the facts and circumstances of the case in the exercise of the court's sound discretion.

The District Court may, in its discretion, adopt written rules and procedures for the conduct of hearings and proceedings within the Family Drug Court program and the administration of cases therein, provided that copies of such rules and procedures shall be public documents and made available to all persons participating in the Family Drug Court Program and, upon request to any citizen or attorneys admitted to the Muscogee (Creek) Nation Bar Association.

C. There is hereby established the Family Drug Court Implementation Team, which shall consist of at least one representative from each of the following agencies or departments of Muscogee Nation: Office of the Attorney General, Children and Family Services Administration (hereinafter CFSA), Muscogee Nation Behavioral Health and/or Employee Health Department, Lighthorse Police, and such other person or persons as may be designated by the Principal Chief. The Speaker of the National Council may appoint one member of the National Council to attend Implementation Team meetings in an ex-officio capacity.

D. The Family Drug Court Implementation Team is hereby authorized to develop policies, procedures, and inter-agency/departmental protocols and standards for use in the operation of the Family Drug Court Pilot Project, as well as standardized forms and other documents to be used in the program. In developing the foregoing, the Team shall consult with their respective agencies, the judicial branch, attorneys who provide indigent defense services, and other outside agencies.

E. The CFSA shall be primarily responsible for managing and coordinating services and activities under the individual treatment plans, provided that in drafting and formulating individual treatment plans, CFSA shall consult with other agencies participating in the program in accordance with the inter-agency protocols and standards adopted pursuant to Subsection D of this Section.

F. Muscogee Nation Behavioral Health shall be the primary service provider for alcohol and drug abuse assessments, testing, counseling, and treatment services to be provided under the individual treatment plans, provided that Muscogee Nation Behavioral Health shall coordinate its services with other agencies participating in the program in accordance with the inter-agency protocols and standards adopted pursuant to Subsection D of this Section.

G. The Principal Chief or his designee is authorized to seek and apply to other funding or sources for the purpose of implementing a Family Drug Court program within the Muscogee (Creek) Nation justice system.

Section 104. Cooperative Agreements:

The Principal Chief, with the assistance of the Attorney General, is hereby authorized to negotiate and enter into on behalf of the Muscogee (Creek) Nation appropriate cooperative agreements with state and local governments for integrating and/or coordinating the Muscogee (Creek) Nation Family Drug Court Pilot Project with agencies of such other governments.

Section 105. Expiration:

The Family Drug Court Pilot Project shall expire twenty-four months after the date on which this ordinance is enacted, after which date no additional cases shall be taken into the Family Drug Court Pilot Project program without further legislation creating a permanent Family Drug Court or extending the Pilot Project authorized herein; provided, that any cases in the program still pending at the end of said 24-month period shall continue to be administered to completion in accordance with this ordinance.

CODIFICATION *27. JUDICIAL PROCEDURES—AN ORDINANCE OF THE MUSCOGEE (CREEK) NATION AMENDING NCA 98-77 TO ESTABLISH A PERMANENT FAMILY DRUG COURT PROGRAM**Section 100. Be It Enacted By the Muscogee (Creek) Nation in Council Assembled:****Section 101. Findings: The National Council Finds That:**

A. On August 29, 1998, the National Council adopted NCA 98-77 that established a Family Drug Court Pilot Project, created a Family Drug Court Implementation Team, and authorized the adoption and implementation of Family Drug Court Rules, policies, and procedures.

B. Section 105 of NCA 98-77 created an expiration date for the Family Drug Court Pilot Project which was to occur twenty-four months after the date on which said ordinance was enacted.

C. In June 1999, the Family Drug Court Pilot Project began accepting participants and providing a specialized court docket in which to provide treatment, supervision, case management, and accountability for Family Drug Court participants.

D. The Family Drug Court Implementation Team has executed a Memorandum of Understanding between the respective agencies involved, drafted policies and procedures to govern the Family Drug Court Program, and developed standardized forms and orders to be used by said Program. The Family Drug Court Implementation Team meets regularly and is encouraged by the operation of the Family Drug Court Program and the level of cooperation between the participating agencies.

E. There is a need to continue the operation of the Family Drug Court Program beyond the expiration date of the Family Drug Court Pilot Project and to enhance the resources and services provided to Family Drug Court participants and their families.

F. It is in the best interests of the Muscogee (Creek) Nation and its Indian families to establish a permanent Family Drug Court Program and to pursue funding sources to assist in the continuation of the Family Drug Court Program.

Section 102. Purpose:

The purpose of this Act is to provide for and establish a permanent Family Drug Court Program within the Muscogee (Creek) Nation's judicial system by repealing the expiration date of the Family Drug Court Pilot Project program, by amending NCA 96-77 to rename the "Family Drug Court Pilot" program as the "Family Drug Court Program" and to otherwise carry out the authorities, functions, and responsibilities of said Program pursuant to NCA 98-77.

Section 104. Amendment:

Section 104 of NCA 98-77 which is titled "Cooperative Agreements" shall be amended by adding the following language to the end of the existing Section 104:

"In addition, the Principal Chief, with the assistance of the Attorney General, is hereby authorized to negotiate and enter into on behalf of the Muscogee (Creek) Nation appropriate cooperative agreements/contracts with substance abuse treatment facilities, local jails and/or detention facilities, and other agencies in order to provide more comprehensive treatment and sanctions services for the Family Drug Court Program."

Eastern Band of Cherokee Indians

PART II—CODE OF ORDINANCES

Chapter 7C CHEROKEE TRIBAL DRUG COURT

Sec. 7C-1. Purpose.

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

- (a) To offer treatment to both juvenile and adult offenders who have committed a crime that is directly or indirectly related to a substance abuse or addiction issue;
- (b) To identify and recommend potential Cherokee Tribal Drug Court participants to the Cherokee Tribal Drug Court Team for legal and clinical screening as soon as possible during the sentencing or dispositional stage of the court process;
- (c) To strictly monitor and supervise each participant through regular and frequent drug and alcohol testing, court appearances and program requirements;
- (d) To impose immediate sanctions and offer immediate rewards or incentives when a participant's behavior warrants such actions; and
- (e) To make the participant a valued intricate part of the Cherokee Tribal Drug Court and to encourage and support each participant in the goal of individual wellness and sobriety.

Sec. 7C-2. Definitions.

(a) Cherokee Tribal Drug Court. The Cherokee Tribal Drug Court is a trial court of special jurisdiction within the provisions of Section 7-1(a), with jurisdiction to hear all cases referred to it pursuant to Cherokee law.

(b) Cherokee Tribal Drug Court Judge. The Cherokee Tribal Drug Court Judge shall be appointed upon nomination by the Principal Chief, and confirmation by the Tribal Council for a term of four years. The Cherokee Tribal Drug Court Judge shall be an attorney licensed by the North Carolina State Bar and shall be subject to the other requirements of Section 7-8. In the case of a vacancy, the Chief Justice of the Cherokee Court may name a temporary replacement for a period not to exceed 120 days. The Cherokee Tribal Drug Court Judge is an Associate Judge of the Trial Courts of Special Jurisdiction pursuant to Section 7-1(b).

(c) Tribal Drug Court Team. The Drug Court Team shall consist of the Drug Court Judge, Case Coordinator, Case Manager and Treatment Specialist. The Drug Court Team may also include other members as set forth in the Policies and Procedures.

Sec. 7C-3. Jurisdiction.

(a) The Cherokee Tribal Drug Court shall have jurisdiction over any case that is transferred by the Cherokee Court. Upon successful completion of the Cherokee Tribal Drug Court program, or at such a time when a participant of the Cherokee Drug Court becomes ineligible to continue in the program as set out in the Cherokee Tribal Drug Court policies and procedures, the Cherokee Tribal Drug Court will transfer jurisdiction of each case back to the Cherokee Court for any final disposition. All sanctions imposed by the Cherokee Tribal Drug Court, including terms of incarceration, must be completed before the participant returns to Cherokee Trial Court.

(b) Referrals to the Cherokee Tribal Drug Court may be made by the Cherokee Court once a criminal defendant has pled guilty of or has been convicted of at least one criminal charge where alcohol or drugs are involved. Cherokee Tribal Drug Court referrals may be made as a part of a conditional sentence or may be made as part of a split or suspended sentence.

(c) Once a referral is made to the Cherokee Tribal Drug Court, the participant shall be assigned to a caseworker who shall begin the eligibility process as set out in the Policy and Procedures Manual. The Cherokee Drug Court Judge shall order any ineligible individuals back to the Cherokee Trial Court for final disposition of the defendant's case(s) pursuant to the Policies and Procedures Manual. Individuals who are determined to be eligible by the Cherokee Drug Court Team may enter the Cherokee Tribal Drug Court.

Sec. 7C-5. Rules of Evidence.

The Rules of Evidence adopted by the Eastern Band of Cherokee Indians shall not apply in any Cherokee Tribal Drug Court proceedings. The Cherokee Tribal Drug Court shall not be a court of

record. All information obtained from or disclosed by a participant under the jurisdiction of Cherokee Tribal Drug Court is privileged and confidential information. However, confidential information may always be disclosed after the participant has signed a proper consent form, even if it is protected by Federal confidentiality regulations. The regulations also permit disclosure without a participant's consent in several situations, including medical emergencies, program evaluations and communications among program staff. Offenders who refuse to sign consent forms permitting essential communications can be excluded from treatment or be terminated from Cherokee Tribal Drug Court. Additionally, a judge may order disclosure as allowed by federal, tribal, and state law.

Sec. 7C-6. Cherokee Tribal Drug Court procedures.

(a) Establishment of policies and procedures.

(1) Policies and procedures for the Cherokee Tribal Drug Court shall be established by the Cherokee Tribal Drug Court Team.

(2) Thereafter, the Cherokee Tribal Drug Court Team shall amend and modify the policies and procedures as necessary to improve the Cherokee Tribal Drug Court process. Any such amendments or modifications shall be by a majority vote at a Cherokee Tribal Drug Court Team meeting with each member eligible to carry one vote and notice of the meeting must be given to each member of the Cherokee Tribal Drug Court Team at least seven days prior to the meeting.

(3) In order for the policies and procedures to be amended or modified, there shall be present at the Cherokee Tribal Drug Court Team meeting the judge and at least four other members of the Cherokee Tribal Drug Court Team.

(b) Sessions.

(1) All Cherokee Tribal Drug Court sessions shall be closed to the public except for invited guests as allowed by HIPAA (Health Insurance Portability and Accountability Act) regulations.

(2) The Cherokee Tribal Drug Court is strictly a non-adversarial forum and there shall be no prosecuting or defense attorneys allowed to participate in any court proceedings.

(3) The Cherokee Tribal Drug Court Judge shall make all findings of facts relevant to each participant's case pursuant to the policies and procedures adopted by the Cherokee Tribal Drug Court Team.

(4) Cherokee Tribal Drug Court sessions shall proceed pursuant to the policies and procedures adopted by the Cherokee Tribal Drug Court Team.

(5) Cherokee Tribal Drug Court sessions shall require a Judge, Case Manager, Case Coordinator, and one of the following team members: community elder, treatment specialist or law enforcement officer of the Cherokee Tribal Drug Court Team in order to proceed.

(c) Sanctions. If a participant is not compliant with the requirements of the Cherokee Tribal Drug Court, sanctions against the non-compliant individual may be issued by the Cherokee Tribal Drug Court Judge. Sanctions include but are not limited to incarceration, community service work and increase in requirements issued by the Cherokee Tribal Drug Court Team.

(d) Treatment. At any time the Drug Court deems it appropriate, the Team can require a participant to enter a Substance Abuse Intensive Outpatient Program or to an inpatient facility.

CASS COUNTY/LEECH LAKE BAND OF OJIBWE WELLNESS COURT

MEMORANDUM OF UNDERSTANDING

AGREEMENT between the Cass County Sheriff, Walker Police Department, Leech Lake Tribal Police Department, Minnesota State Patrol, Cass County Attorney, Walker City Attorney, Ninth Judicial District Public Defender, Cass County Health, Human and Veterans Services, Pine Manors Treatment Center, Ninth Judicial District Administration, Cass County District Court Judge, Leech Lake Tribal Council, and Leech Lake Tribal Court.

The parties to this Agreement endorse the mission and goals of the Cass County Wellness Court (wellness court) so that participants may eliminate future criminal behavior and improve the quality of their lives. The parties recognize that for the wellness court mission to be successful, cooperation and collaboration must occur within a network of agencies.

The parties to this Agreement support the following mission statement:

The purpose of the Cass County Leech Lake Band of Ojibwe Wellness Court is to reduce the number of repeat substance dependent and DWI offenders by using a team approach in the court system. Upon acceptance, candidates will be provided the opportunity to participate in individual treatment programs designed to promote accountability, self-sufficiency and to enhance public safety. Compliance will be accomplished by using an established system of court ordered sanctions/ incentives as well as community and family support systems.

The parties agree that there are ten principles under which the respective agencies will work cooperatively. They are:

1. The wellness court integrates alcohol and other drug treatment services with criminal justice system processing.
2. The wellness court uses a non-adversarial approach, prosecution and defense counsel to promote public safety while protecting participants' due process rights.
3. Eligible participants are identified early and referred to the wellness court.
4. The wellness court provides access to a continuum of alcohol, drug and other related treatment and rehabilitation services.

5. Frequent alcohol and other drug testing monitors abstinence.
6. A coordinated strategy governs the wellness court responses to the participant's compliance.
7. There is ongoing judicial interaction with each wellness court participant.
8. A monitoring and evaluation plan measures the achievement of program goals and gauges effectiveness.
9. Continuing interdisciplinary education promotes effective substance abuse court planning, implementation, and operations.
10. Forging partnerships among wellness courts, public agencies, and community-based organizations, generate local support and enhance the wellness court's effectiveness.

INDIVIDUAL AGENCY RESPONSIBILITIES AND STAFF COMMITMENTS

Wellness Court Judge

1. The judge will assume the primary role to motivate and monitor the participants of the wellness court program.
2. The judge will ensure a cooperative atmosphere for attorneys, case managers, probation, law enforcement, and treatment providers to stay focused on the task of providing substance abusers with treatment opportunities.
3. The judge will provide the necessary reinforcers when deemed appropriate while maintaining the integrity of the court.
4. The judge will participate as an active member of the staffing team and chairs the Steering Committee.
5. The judge will provide training to new or replacement judges.
6. The judge will act as a mediator to develop resources and improve interagency linkages.
7. The judge will act as a spokesperson to educate the community and peers about the wellness court program.

Wellness Court Coordinator

1. The coordinator will be assigned to the wellness court program for the term of this Agreement, as funding permits, and will participate as an active member of the staffing team and the Steering Committee.
2. The coordinator will provide oversight to the wellness court program.
3. The coordinator will organize events and meetings, compile supporting materials to disseminate to stakeholders and providers of services to maintain linkages, develop marketing strategies, create a press package and act as a media contact person.
4. The coordinator will continuously monitor and evaluate the progress of the wellness court program participants.
5. The coordinator will seek funding sources; respond to grant solicitations; implement and monitor grant funds and provide fiscal, narrative, and statistical information as required by the funding source to ensure the ongoing operation of the program.
6. The coordinator will provide or seek continuing training for the wellness court team.

7. The coordinator will provide an annual report setting forth the incidence of recidivism among wellness court graduates.
8. The coordinator will provide leadership and direction to ensure compliance with the National Standards set forth by the National Association of Wellness Court Professionals.
9. The coordinator will create court calendars; prepare reports for staffings and assure timely dissemination of compliance information; perform case flow coordination; expedite processes of notification, service placement, rescheduling, and preparation of warrants; collect fees; and monitor compliance.
10. The coordinator will provide training to new or replacement coordinator.
11. The coordinator will negotiate and monitor treatment and ancillary service contracts; conduct site visits; review progress reports and assist in audits and certification monitoring; create and monitor standards for urine collection and compliance reporting; ensure gender, age, and culturally specific treatment services.
12. The coordinator will create and maintain a data collection system to monitor client compliance, identify trends, and provide a basis for evaluation.

County/City Attorney

1. The county/city attorney will be assigned to the wellness court program for the term of this Agreement, as funding permits, and will participate as an active member of the staffing team and the Steering Committee.
2. The county/city attorney will assist in identifying non-violent defendants arrested for specified drug- or alcohol-related offenses.
3. The county/city attorney may dismiss charges on drug-related offenses only after the participants have successfully completed the wellness court program.
4. The county/city attorney agrees that a positive drug test or open court admission of drug possession or use alone will not result in the filing of additional charges based on that admission.
5. The county/city attorney makes decisions regarding the participant's continued enrollment in the program based on performance in treatment and in the program rather than on legal aspects of the case, barring additional criminal behavior.
6. The county/city attorney will participate as a team member, operating in a non-adversarial manner during court, to promote a sense of a unified team presence.
7. The county/city attorney, during staffings, will advocate for effective sanctions and incentives for program compliance or lack thereof.
8. The county/city attorney will contribute to the team's efforts in community education and local resource acquisition.
9. The county/city attorney will contribute to the education of peers, colleagues, and judiciary in the efficacy of wellness courts.
10. The county/city attorney will provide training to new or replacement prosecutor.

Public Defender

1. The public defender will be assigned to the wellness court program for the term of this Agreement, as funding permits, and will participate as an active member of the staffing team and the Steering Committee.
2. The public defender will assist in identifying non-violent defendants arrested for specified drug- or alcohol-related offenses.
3. The public defender will advise the defendant as to the nature and purpose of the wellness court, the rules governing participation, the consequences of abiding or failing to abide by the rules and how participating or not participating in wellness court will affect his/her interests.
4. The public defender will explain all of the rights that the defendant will temporarily or permanently relinquish.
5. The public defender will explain that because criminal prosecution for admitting to alcohol or other drug use in open court will not be invoked, the defendant is encouraged to be truthful with the judge, the case manager, and the treatment staff, and inform the participant that he or she will be expected to speak directly to the judge, not through an attorney.
6. The public defender will participate as a team member, operating in a non-adversarial manner during court, to promote a sense of a unified team presence.
7. The public defender, during staffings, will advocate for effective sanctions and incentives for program compliance or lack thereof.
8. The public defender will contribute to the team's efforts in community education and local resource acquisition.
9. The public defender will contribute to the education of peers, colleagues, and judiciary in the efficacy of wellness courts.
10. The public defender will train a new or replacement public defender.

Treatment Provider

1. The treatment provider will participate fully as a team member and will work as a partner to ensure their success.
2. The treatment provider will ensure that the participant receives the highest level of care available, at a reasonable cost, by all contracted and ancillary service providers.
3. The treatment provider will ensure that the participants are evaluated in a timely and competent process and that placement and transportation are effectuated in an expedited manner.
4. The treatment provider will provide progress reports to the team prior to staffings so that the team will have sufficient and timely information to implement sanctions and incentive systems.
5. The treatment provider will advocate for effective sanctions and incentives during staffings.
6. The treatment provider will provide training to the team on assessment basis of substance abuse, the impact of treatment on the offender and the potential for relapse.
7. The treatment provider will contribute to the team's efforts in community education and local resource acquisition.

8. The treatment provider will contribute to the education of peers, colleagues, and judiciary in the efficacy of wellness courts.

Probation Officer

1. One probation officer will be assigned to provide field supervision of wellness court participants for the term of this Agreement, as funding permits, and will participate as an active member of the staffing team.
2. The probation officer will provide coordinated and comprehensive supervision and case management so as to minimize participant manipulation and splitting of program staff.
3. The probation officer will monitor accountability of social activities and home environment of the participant.
4. The probation officer will develop effective measures for drug testing and supervision compliance reporting that provide the team with sufficient and timely information to implement sanctions and incentive systems.
5. The probation officer will participate in bi-weekly case reviews with the judge, treatment provider, and wellness court staffing team.
6. The probation officer will coordinate the utilization of community-based services such as health and mental health services, victims' services, housing, entitlements, transportation, education, vocational training, job skills training, and placement to provide a strong foundation for recovery.
7. The probation officer will provide on-site progress reports to the judge.
8. The probation officer will provide frequent, observed drug testing on a random basis.
9. The probation officer will participate as an active member of the Steering Committee.
9. The probation officer will contribute to the team's efforts in community education and local resource acquisition.
10. The probation officer will contribute to the education of peers, colleagues, and judiciary in the efficacy of wellness courts.

Cass County Sheriff's Department

1. An officer from the sheriff's department will be assigned to the wellness court program for the term of this Agreement, as funding permits, and will participate as an active member of the Steering Committee.
2. The sheriff's department will provide information of participant appropriateness from law enforcement sources to the team, and make recommendations to the team.
3. The sheriff's department will provide access to in-custody treatment services for those returning to custody as a sanction.
4. The sheriff's department will facilitate the swift delivery of bench warrants for participants who have absconded from the program, and release them into treatment on the judge's orders.
5. The sheriff's department will provide a monitoring function to the team by going on joint home visits, reporting on a participant's activities in the community, and supervising participation in community service.

6. The sheriff's department will provide assistance, information, and support to participants in the community encouraging them to succeed in the program.

Police Departments

1. The police department serves as a liaison between the Steering Committee and the community and provides information to the Steering Committee on community issues related to drug or alcohol abuse.
2. The police department provides feedback on potential candidates for the wellness court program.
3. The police department will provide a monitoring function to the team by going on joint home visits, reporting on a participant's activities in the community, and supervising participation in community service.
4. The police department will provide assistance, information, and support to participants in the community encouraging them to succeed in the program.
5. A representative from the police department will participate as an active member of the Steering Committee.

Minnesota State Patrol

1. The state patrol will serve as a liaison between the Steering Committee and the community and provide information to the Steering Committee on community issues related to drug or alcohol abuse.
2. The state patrol will provide feedback on potential candidates for the wellness court program.
3. The state patrol will provide a monitoring function to the team by reporting on a participant's activities in the community.
4. The state patrol will provide assistance, information, and support to participants in the community encouraging them to succeed in the program.
5. A representative from the state patrol will participate as an active member of the Steering Committee.

Ninth Judicial District Wellness Court Coordinator/Evaluator

1. The district wellness court coordinator will assist in providing oversight to the wellness court program.
2. The district wellness court coordinator will assist the wellness court team with monitoring the progress of the program.
3. The district wellness court coordinator will assist in developing a data collection system that will collect relevant information critical to the program's survival, such as immediately detecting noncompliance of a participant or to observe developmental trends.
4. The district wellness court coordinator will develop evaluation policies and procedures, and manage the evaluation process of the wellness court.

5. The district wellness court coordinator will assist in: seeking funding sources; responding to grant solicitations; implementing and monitoring grant funds; and providing fiscal, narrative and statistical information as required by a funding source to ensure ongoing operation of the program.

6. The district wellness court coordinator will assist in providing or seeking ongoing training of the wellness court team.

In creating this partnership and uniting around a single goal of addressing an underlying problem affecting our community, we are pledged to enhance communication between the courts, law enforcement, and treatment programs. Through this linkage of services, we expect greater participation and effectiveness in addressing drug offenders involved in the criminal justice system.

Agreement Modifications

Any individual agency wishing to amend/modify this Agreement will notify the Steering Committee of the issue(s). The Steering Committee will address the issue(s) for purposes of modifying/amending the Agreement. The issue will be decided by consensus (if possible) or by simple majority, if not.

[31.3] TRIBAL CODE COMMENTARY

Wellness Court Establishment, Funding, and So Forth—The Muscogee Creek Nation in its judicial ordinances 26 and 27 establishes a “Family Drug Court” to combat its juvenile and adult drug and

order and/or impose sanctions and incentives for participants in the drug court program. These powers include but are not limited to:

- approving and enforcing treatment plans;
- holding participants in direct or indirect contempt of court for willful violations of the court’s orders, including court-ordered treatment plans;
- imposing fines and/or costs;
- ordering the performance of community service;
- ordering participants to receive mandatory inpatient/outpatient drug or alcohol treatment or counseling;
- ordering random and/or periodic urinalysis testing;
- placement of children in the legal and/or physical custody of CFSA and/or other persons;
- authorizing increased or restricted contact with other family members or increased or restricted supervised visitation with children;
- extending, accelerating, and/or terminating treatment plan(s) and/or ordering that non compliant participants be discharged from the Family Drug Court program;
- ordering that the participant be placed in confinement for a period not to exceed five days for each violation, but only after the court expressly finds that the participant’s violation of the plan was willful and that other sanctions or incentives are inadequate; and
- imposing any other condition, standard, requirement, treatment, service, training, or activity which the court deems appropriate under the facts and circumstances of the case in the exercise of the court’s sound discretion.

Section 103 also establishes the “Family Drug Court Implementation Team.” It designates the Muscogee Nation Behavioral Health as the primary service provider for alcohol and drug abuse assessments, testing, counseling, and treatment services. It also authorizes the “Principal Chief” or his designee to apply to other funding sources for the purposes of implementing the drug court program. Finally, Section 104 authorizes the Principal Chief to negotiate and enter into cooperative agreements with state and local governments to support drug court operations.

Wellness Court Jurisdiction and Process—The Eastern Band of Cherokee (EBC) through Chapter 7C of its “Code of Ordinances” sets out its jurisdiction, rules of evidence, and tribal drug court procedures in order to “offer treatment to both juvenile and adult offenders who have committed a crime that is directly or indirectly related to a substance abuse or addiction issue.” Section 7C-1. In Section 7C-3, the EBC defines the jurisdiction of the Cherokee Tribal Drug Court as “over any case that is transferred by the Cherokee Court.” And that “upon successful completion . . . , or at such a time when a participant . . . becomes eligible to continue in the program . . . , the Cherokee Tribal Drug Court will transfer jurisdiction of each case back to the

Cherokee Court for any final dispositions.” Transfers may be made once a criminal defendant pleads guilty, or once he has been convicted of a crime, or as part of a conditional, split, or suspended sentence.

Under Section 7C-5, the EBC prohibits the application of the Rules of Evidence to Cherokee Tribal Drug Court proceedings. Further it mandates that the drug court shall not be a court of record. It also mandates that “all information obtained from or disclosed by a participant . . . is privileged and confidential.” However, “confidential information may always be disclosed after the participant has signed . . . a consent form.”

Finally, Section 7C-6 authorizes the Cherokee Tribal Drug Court Team to develop the policies and procedures for the Cherokee Tribal Drug Court. We note that the majority of tribal wellness courts forgo enacting statutory/code provisions governing the process of their wellness courts and opt instead to follow the state approach of empowering the team to develop “policies and procedures.”

Other notable provisions include the requirement that the sessions be closed to the public, that the drug court be a “strictly non-adversarial forum,” and that the judge “shall make all findings of facts relevant to each participant’s case pursuant to the policies and procedures.”

Wellness Court Cooperative Agreements—The Cass County/Leech Lake Band of Ojibwe Wellness Court MOU is an agreement between state, county, city, and tribal law enforcement, the county attorney, public defender, health, human, and veterans services, treatment center, state and county judges and administration, and the Leech Lake Tribal Council and Tribal Court. The parties agree to support a common mission of “reduc[ing] the number of repeat substance dependent and DWI offenders by using a team approach.” The agreement spells out the respective duties of the Wellness Court Judge, the Wellness Court Coordinator, the County/City Attorney, the Public Defender, the Treatment Provider, the Probation Officer, the County Sheriff’s Department, the Police Departments, the State Patrol, and the Wellness Court Coordinator/Evaluator in pursuit of the common mission to implement the tribal wellness court.

Interagency and intergovernmental agreements are crucial to effective wellness court operations for purposes of intake, treatment, monitoring, and so forth.

[31.4] EXERCISES

The following exercises are meant to guide you in developing the wellness court related sections of the tribal juvenile code and/or the tribal wellness code.

Exercises

- If you currently have a tribal wellness [drug] court, find and examine any code provisions referencing your wellness court – do you need or want code provisions supporting your wellness court (wellness court establishment, funding, changes to tribal court process to divert cases, to modify disposition alternatives, and to authorize tribal judges to make special orders, e.g., random alcohol and drug testing)?
 - Adult criminal wellness courts handle alcohol and/or drug abusing adults who are alleged to have committed a crime
 - Family wellness courts handle alcohol and/or drug abusing parents who are alleged to have maltreated their children (e.g., child abuse or neglect)
 - Juvenile wellness courts handle alcohol and/or drug using/abusing youth who are alleged to have committed a status offense or juvenile offense (note that some tribal juvenile wellness courts call them “family wellness courts”)
- If you are interested in developing a juvenile wellness court, list the answers to the following (obtain actual data where possible) ...
 - What are your youth’s “substances of choice”?
 - What kinds of mental health problems do your youth tend to have?
 - What kinds of family problems do your youth tend to have?
 - What kinds of youth misconduct is common in your community?
 - Who would you want to be eligible for your juvenile wellness court?
- Make a list of entities that you would need to provide services to youth and their families and with whom you would need to enter into Memorandums of Agreement or Understanding or contracts with.

Points for Discussion

Take a hard look: What kinds of substance use/abuse, mental health, and family problems do our families have?

The hard lives—and high suicide rate—of Native American children on reservations

SACATON, ARIZ. The tamarisk tree down the dirt road from Tyler Owens's house is the one where the teenage girl who lived across the road hanged herself. Don't climb it, don't touch it, admonished Owens's grandmother when Tyler, now 18, was younger. There are other taboo markers around the Gila River Indian reservation—eight young people committed suicide here over the course of a single year.

"We're not really open to conversation about suicide," Owens said. "It's kind of like a private matter, a sensitive topic. If a suicide happens, you're there for the family. Then after that, it's kind of just, like, left alone."

But the silence that has shrouded suicide in Indian country is being pierced by growing alarm at the sheer number of young Native Americans taking their own lives—more than three times the national average, and up to 10 times on some reservations.

A toxic collection of pathologies—poverty, unemployment, domestic violence, sexual assault, alcoholism and drug addiction—has seeped into the lives of young people among the nation's 566 tribes. Reversing their crushing hopelessness, Indian experts say, is one of the biggest challenges for these communities.

"The circumstances are absolutely dire for Indian children," said Theresa M. Pouley, the chief judge of the Tulalip Tribal Court in Washington state and a member of the Indian Law and Order Commission.

Pouley fluently recites statistics in a weary refrain: "One-quarter of Indian children live in poverty, versus 13 percent in the United States. They graduate high school at a rate 17 percent lower than the national average. Their substance-abuse rates are higher. They're twice as likely as any other race to die before the age of 24. They have a 2.3 percent higher rate of exposure to trauma. They have two times the rate of abuse and neglect. Their experience with post-traumatic stress disorder rivals the rates of returning veterans from Afghanistan."

In one of the broadest studies of its kind, the Justice Department recently created a national task force to examine the violence and its impact on American Indian and Alaska Native children, part of an effort to reduce the number of Native American youth in the criminal justice system. The level of suicide has startled some task force officials, who consider the epidemic another outcome of what they see as pervasive despair.

Last month, the task force held a hearing on the reservation of the Salt River Pima-Maricopa Indian Community in Scottsdale. During their visit, Associate Attorney General Tony West, the third-highest-ranking Justice Department official, and task force members drove to Sacaton, about 30 miles south of Phoenix, and met with Owens and 14 other teenagers.

"How many of you know a young person who has taken their life?" the task force's co-chairman asked. All 15 raised their hands.

"That floored me," West said.

A 'trail of broken promises'

There is an image that Byron Dorgan, co-chairman of the task force and a former senator from North Dakota, can't get out of his head. On the Spirit Lake Nation in North Dakota years ago, a 14-year-old girl named Avis Little Wind hanged herself after lying in bed in a fetal position for 90 days. Her death followed the suicides of her father and sister.

"She lay in bed for all that time, and nobody, not even her school, missed her," said Dorgan, a Democrat who chaired the Senate Committee on Indian Affairs. "Eventually she got out of bed and killed herself. Avis Little Wind died of suicide because mental-health treatment wasn't available on that reservation."

Indian youth suicide cannot be looked at in a historical vacuum, Dorgan said. The agony on reservations is directly tied to a "trail of broken promises to American Indians," he said, noting treaties dating back to the 19th century that guaranteed but largely didn't deliver health care, education and housing.

When he retired after 30 years in Congress, Dorgan founded the Center for Native American Youth at the Aspen Institute to focus on problems facing young Indians, especially the high suicide rates.

"The children bear the brunt of the misery," Dorgan said, adding that tribal leaders are working hard to overcome the challenges. "But there is no sense of urgency by our country to do anything about it."

At the first hearing of the Justice Department task force, in Bismarck, N.D., in December, Sarah Kastelic, deputy director of the National Indian Child Welfare Association, used a phrase that comes up repeatedly in deliberations among experts: "historical trauma."

Youth suicide was once virtually unheard of in Indian tribes. A system of child protection, sustained by tribal child-rearing practices and beliefs, flourished among Native Americans, and everyone in a community was responsible for the safeguarding of young people, Kastelic said.

"Child maltreatment was rarely a problem," said Kastelic, a member of the native village of Ouzinkie in Alaska, "because of these traditional beliefs and a natural safety net."

But these child-rearing practices were often lost as the federal government sought to assimilate native people and placed children—often against their parents' wishes—in "boarding schools" that were designed to immerse Indian children in Euro-American culture.

In many cases, the schools, mostly located off reservations, were centers of widespread sexual, emotional and physical abuse. The transplantation of native children continued into the 1970s; there were 60,000 children in such schools in 1973 as the system was being wound down. They are the parents and grandparents of today's teenagers.

Michelle Rivard-Parks, a University of North Dakota law professor who has spent 10 years working in Indian country as a prosecutor and tribal lawyer, said that the "aftermath of attempts to assimilate American and Alaska Natives remains ever present . . . and is visible in higher-than-average rates of suicide."

The Justice Department task force is gathering data and will not offer its final recommendations to Attorney General Eric H. Holder Jr. on ways to mitigate violence and suicide until this fall. For now, West, Dorgan and other members are listening to tribal leaders and experts at hearings on reservations around the country.

Continued....

"We know that the road to involvement in the juvenile justice system is often paved by experiences of victimization and trauma," West said. "We have a lot of work to do. There are too many young people in Indian country who don't see a future for themselves, who have lost all hope."

The testimony West is hearing is sometimes bitter, and witnesses often come forward with great reluctance.

"It's tough coming forward when you're a victim," said Deborah Parker, 43, the vice chair of the Tulalip Tribes in Washington state. "You have to relive what happened. . . . A reservation is like a small town, and you can face a backlash."

Parker didn't talk about her sexual abuse as a child until two years ago, when she publicly told of being repeatedly raped when she "was the size of a couch cushion."

Indian child-welfare experts say that the staggering number of rapes and sexual assaults of Native American women have had devastating effects on mothers and their children.

"A majority of our girls have struggled with sexual and domestic violence—not once but repeatedly," said Parker, who has started a program to help young female survivors and try to prevent suicide. "One of my girls, Sophia, was murdered on my reservation by her partner. Another one of our young girls took her life."

Stories of violence and abuse

Owens recalls how she used to climb the tamarisk tree with her cousin to look for the nests of mourning doves and pigeons—until the suicide of the 16-year-old girl. The next year, the girl's distraught father hanged himself in the same tree.

"He was devastated and he was drinking, and he hung himself too," Owens said.

She and a good friend, Richard Stone, recently talked about their broken families and their own histories with violence. When Owens was younger, her uncle physically abused her until her mother got a restraining order. Stone, 17, was beaten by his alcoholic mother.

"My mother hit me with anything she could find," Stone said. "A TV antenna, a belt, the wooden end of a shovel."

Social workers finally removed him and his brothers and sister from their home, and he was placed in a group home and then a foster home.

Both Owens and Stone dream about leaving "the rez." Owens hopes to get an internship in Washington and have a career as a politician; Stone wants to someday be a counselor or a psychiatrist.

Owens sometimes rides her bike out into the alfalfa and cotton fields near Sacaton, the tiny town named after the coarse grasses that once grew on the Sonoran Desert land belonging to the Akimel O'Odham and Pee Posh tribes. She and her friends sing a peaceful, healing song she learned from the elders about a bluebird who flies west at night, blessing the sun and bringing on the moon and stars.

One recent evening, as the sun dipped below the Sierra Estrella mountains, the two made their way to Owens's backyard. They climbed onto her trampoline and began jumping in the moonlight, giggling like teenagers anywhere in America.

But later this month on the reservation, they will take on an adult task. Owens, Stone and a group of other teenagers here will begin a two-day course on suicide prevention. A hospital intervention trainer will engage them in role-playing and teach them how to spot the danger signs.

"In Indian country, youths need to have somebody there for them," Owens said. "I wish I had been that somebody for the girl in the tamarisk tree."

*Taken from The Washington Post, March 9, 2014 [obtain permission for publication]

CHAPTER 32

PEACEMAKING COURTS

[32.1] OVERVIEW

There are about thirty-four tribes that currently have peacemaking courts. Some focus on youth and family, while the majority of peacemaking courts are for both adults and youth and families. Historically, tribes dealt with disputes according to their own customs and traditions. Peacemaking courts are seen as a way to continue or reassert those traditional means of dealing with conflict and disputes. Many tribes organized peacemaking courts in the 1990s. Peacemaking courts are often led by respected members of the tribe and are not necessarily led by a judge. Peacemaking allows for all parties to come together, discuss problems, voice their perspectives and concerns, and eventually come to a resolution. The goal is to restore balance and harmony to the community through consensus and personal responsibility. We include a chapter on peacemaking courts as an example of working with youth to demonstrate their role in the community and to take responsibility for their actions. Often peacemaking can supplement tribal court sentences and can be used in conjunction with probation. If the issue that brings the youth into court is not too serious or it is the first court appearance, then peacemaking court may be the only venue necessary to resolve the issue.

[32.2] TRIBAL CODE EXAMPLES

Little River Band of Ottawa Indians

Peacemaking Guidelines

Section 1. Establishment of Odenaang Enjinoojimoying (A Place of Healing Many Hearts)

1.01 The Tribal Government of the Little River Band of Ottawa Indians has established a Peacemaking System to be used in cooperation with the present court system for cases involving minors and adults. Cases can be referred to Peacemaking through tribal courts, state courts, any federally recognized tribe, any historic tribe or Anishinaabek of the Three Fires, or employees of the Little River Band of Ottawa Indians.

Section 2. Vision Statement

2.01 The vision of Odenaang Enjinoojimoying is to provide a traditional conflict resolution process for children, families, and tribal employees. This process of applying traditional values to alternative dispute resolution will focus on promoting the resolving of a problem or dispute and the healing between participants to restore their relationship.

Section 3. Philosophy

3.01 The peacemaking setting is much different from state court proceedings. Unlike the state court system, which is divisive by its nature and involves a judge or jury making the decisions for others, Peacemaking encourages people to solve their own problems. Peacemaking sessions are conducted by two Peacemakers: one male and one female to create balance. Peacemaking involves (1) discussing issues in a respectful manner; (2) assisting individuals with understanding and accepting responsibility for his/her wrongdoings; (3) promoting healthy relationships; and (4) working with participants to plan and make group decisions about future actions. Planning, respect, and consensus in Peacemaking sessions replace imposed decisions that use punishment to correct behavior. Rather than judge people, peacemaking addresses bad decisions and their consequences and substitutes healing in place of force.

Section 4. Purposes of Peacemaking

4.01 Little River Band of Odawa Indians Peacemaking Department encourages people to solve their own problems in a safe environment. In Peacemaking, decisions are reached through discussing the wrongdoing of the child, a family member, or a tribal employee, and any other underlying issues. In a Peacemaking session, the Peacemakers will use their knowledge and draw from the customs and traditions of the Anishinaabek. The Peacemakers will strive to achieve a setting that will (1) allow active participation from parents and families whose children are in trouble; (2) provide an environment for the wrongdoer to take responsibility for his/her wrongful behavior; (3) provide an environment that is safe for victims and wrongdoers to work out problems and begin the healing process; and (4) assist in locating traditional practices and teaching and community based services to children, youth, families, and others.

Section 6. Eligibility and Request for Peacemaking

6.01 Individuals for peacemaking include children, youth, adult tribal members, and tribal employees.

- (a) Children and youth who have a case pending, and adults who have a civil case pending before the Little River Band of Ottawa Indians Tribal Court.
 - (b) Children and youth who have a case pending, and adults who have a civil case pending before another tribal court.
 - (c) Children and youth who have a case pending, and adults who have a civil case pending before the state court in Michigan.
 - (d) Members of a federally recognized tribe, state historic tribes, or any Anishinaabek who would like to voluntarily become a participant can assist in the Peacemaking process.
- (1) Examples of possible Peacemaking session could include but not be limited to the following situations involving children, youth, adult tribal members, and tribal employees.
- (1.1) Child in need of care.
 - (1.2) Delinquent offenders who have committed minor offenses.
 - (1.3) Youth, and adults referred to Peacemaking from another federally recognized tribe.
 - (1.4) Referral from the Case Intake Team (CIT) explained further in the Juvenile Code.
 - (1.5) Representatives from other outside agencies, i.e. school, and nontribal social services referrals.

6.02 Peacemaking may hear the following type of cases.

- (a) All children and youth who are facing a status offense or a nonstatute offense in the Little River Band of Ottawa Indians Tribal Court System. If another tribal court or state court request that a case be transferred to Peacemaking. Also adult civil cases.
- 1. Status Offense: a violation of criminal law due to the person's status as a minor. Examples include truancy, minor in possession of alcohol, and incorrigibility.
 - 2. Nonstatus Offense: all crimes that are considered felonies or misdemeanors regardless of a person's age. Examples include shoplifting, larceny, and assault.
 - 3. Civil Cases: involves disputes, conflicts, and/or a wrongdoing committed between private individuals and/or organizations. Examples include contracts, divorce, and personal injury.
 - 4. Individuals who voluntarily seek the services of Peacemaking.

...

6.05 Case Intake Team

The CIT is multidisciplinary group and they shall convene on a regular basis to determine if the case should (1) be delayed for prosecution in order to develop and implement an appropriate plan or (2) if it should be forwarded for prosecution in the Tribal Court.

...

6.07 Review

The CIT shall review the juvenile's progress every thirty (30) days. If at any time the CIT concludes that the juvenile is not working toward the goals of the plan, the CIT shall ask the Presenting Officer to file a petition for formal adjudication.

Section 8. Peacemaking Cases.

8.01 Steps in Peacemaking Sessions. The following is a guideline to conduct a Peacemaking session. Alternative Dispute Resolution (ADR) may be used upon the participant request. The Peacemaking Session will follow these steps:

- (a) Smudging. The peacemakers will begin the session by smudging.
- (b) Prayer. The session will open with a prayer that is appropriate for the participants and the occasion. A peacemaker may lead the prayer or designate any person to open with the prayer.
- (c) Preparatory Instructions.
 - (1) Introductions. All of the participants will introduce themselves and the Peacemakers will explain the following ground rules:
 - (2) Rules. Describe the ground rules that all participants must follow during the Peacemaking session.
 - (2a) Peacemaking sessions are voluntary.
 - (2b) Listen with respect.
 - (2c) It is okay to disagree. There will be no name calling or personal attacks. (No cussing.)
 - (2d) Each participant will get a chance to speak, there will be no interrupting.
 - (2e) Speak for yourself and not as the representative of any group.
 - (2f) Explain that judges and lawyers have no direct role in the Peacemaking session.
 - (2g) Peacemaking participants will comply with the peacemaking agreement. If they fail to follow the agreement, the Tribal Court shall enforce the agreement through a court order.

(d) Some or all of the participants may decide that they do not want a traditional peacemaking session, and opt for an ADR session. The rules for an ADR session are the same; however the Anishinaabek customs and traditions will be absent. The participants' decision shall be respected.

8.02 Confidentiality. Confidentiality is what builds the trust and the respect for the peacemaking process. A strict confidentiality policy shall be adhered to. Aside from the peacemaking agreement, the documents and case files are confidential. As mandatory reporters of suspected child abuse, the peacemakers are required to disclose the information to proper authorities.

8.03 Record Keeping. All juvenile and adult Peacemaking files and records shall be destroyed six (6) months after completion and discharge from peacemaking. If the peacemaking file is part of a condition of probation, the file will remain in the probation file until the youth reaches the age of eighteen, at that time all documents, records, and case files will be destroyed.

8.04 Peacemaking Objectives. Each participant is encouraged to discuss their issue, problems, or conflict openly. The Peacemakers will facilitate the discussion and ensure that there is balance. The Peacemakers will create a safe environment of Respect, Humility, Truth, Empathy, Trust, and Forgiveness.

- (a) The objectives are to reveal the issues, problems, or conflicts to make it clear, so the participants will be able to understand, and start to resolve the issues.
- (b) Restate the purpose of the Peacemaking Session, and what the participant's roles and objectives are in this process.
- (c) Anishinaabek traditions and customs will be used to assist in the process. Developing strategies and different approaches to resolve the issues will help the participants in creating an agreement that will be beneficial to all parties involved.
- (d) Be specific about times, dates, functions, and assignments of what each person's responsibilities are, and what they will do to satisfy the agreement.
- (e) Ensure that all participants are heard and their ideas considered, and that the session is productive and constructive.

Little River Band of Ottawa Indians

Juvenile Code

Section 4. Components and Process.

4.01 Components.

- a. *Creation of the Case Intake Team.* The Case Intake Team (CIT) is created the purpose of assisting juveniles, their families, and the community at the earliest point of intervention. The Case Intake Team shall promote the stability and security of the Tribe and its families by fully exercising the Tribe's rights and responsibilities under this Code and the Indian Child Welfare Act of 1978 (25 U.S.C. ss. 1902-1963). *See Section 6 of this Code.*
- b. *Creation of Peacemaking.* Peacemaking is created in this Code for the purpose of providing a traditional conflict-resolution process to children, youth, and families. The vision of Peacemaking is to provide opportunities for resolution and healing to the parties involved, which will promote healthier lifestyles and relationships. See Odenaang Enjinoojimoying ("*A Place of Healing Many Hearts*")—the *Peacemaking Guidelines*.

4.02. *Process.* The process explained in this section provides a broad overview of this Code. All other provisions in this Code that appear to be in conflict with this Section shall govern.

- a. The Presenting Officer shall determine the type of offense (status or nonstatus) that the juvenile allegedly committed and if it falls under the jurisdiction of the Tribe. If the case falls under Tribal jurisdiction, the Presenting Officer shall forward it to the Peacemakers or Case Intake Team. See Odenaang Enjinoojimoying—*Peacemaking Guidelines* and Section 6 of this Code.
- b. The following cases shall be immediately referred to the Peacemakers:
 - 1. When a case represents the juvenile's first appearance before the Little River Band of Ottawa Indians' Children's Court on a status offense. This section applies regardless of whether the juvenile has committed a status and/or nonstatus offense in another court in the past.
- c. All other cases shall be forwarded to the Case Intake Team who shall forward it to the appropriate investigator. The investigator shall investigate the allegations and write a report that shall include recommendations. This report will then be presented to the Case Intake Team.

- d. The Case Intake Team shall convene on a regular basis and determine if the case should: (1) be investigated; (2) be delayed for prosecution in order to develop and implement an appropriate plan; or (3) be forwarded for prosecution in the Tribal Court.
- e. If the case is not immediately referred to the Tribal Court, the Case Intake Team shall develop an appropriate plan for the juvenile and/or family and review it on a regular basis. The plan may include Peacemaking sessions and counseling sessions.
- f. A case shall be referred to the Court for adjudication if rejected by the Case Intake Team or within nine months of when the alleged inappropriate behavior occurred. *See Section 11.03(b) of this Code.*

...

Section 8. Peacemaking.

8.01. Guidelines Governing Peacemaking.

The Tribal Judiciary shall promulgate the guidelines governing Peacemaking. *See Odenaang Enjinoojimoying—Peacemaking Guidelines.*

8.02. Cases to Be Heard. The Peacemakers have the authority to hear:

- a. all juvenile cases involving a first-time status offense in the Little River Band of Ottawa Indians Tribal Court system;
- b. all other cases referred by the Case Intake Team;
- c. all other cases that are referred by the Tribal Court; and
- d. cases from persons requesting to voluntarily access Peacemaking.

8.03. Case Denial. Peacemakers have the right to refuse any case after it has been referred and denied in writing by two Peacemaking groups. *See Odenaang Enjinoojimoying—Peacemaking Guidelines.*

Northern Arapaho Nation

Title 7. Peacemaker Code

SECTION 103 Establishment of Peacemaker Court. The Peacemaker Court of the Northern Arapaho Nation is hereby established as a department of the Shoshone and Arapaho Tribal Court (“Tribal Court”) of the Wind River Indian Reservation, Wyoming. The chief judge of the Tribal Court shall supervise the activities of the Peacemaker Court and shall exercise supervisory control over any Peacemaker appointed pursuant to these rules.

SECTION 104 Scope. Subject to the limitations under Section 203, a judge of the Tribal Court may appoint a Peacemaker in a community where the parties to the dispute are members of the Northern Arapaho Tribe, or Indians residing on the Wind River Indian Reservation, Wyoming, or where the matter in dispute involves certain personal and community relationships including, but not limited to, the following:

- (a) Marital disputes and disputes involving family strife;
- (b) Disputes among parents and children;
- (c) Minor disputes between neighbors as to community problems such as nuisances, animal trespass or annoyance, disorderly conduct, breaches of the peace and like matters;
- (d) Alcohol use or abuse by family members or neighbors;
- (e) Conduct causing harm, annoyance, or disunity in the immediate community;
- (f) Minor community business transactions of a sum of \$1,500 or less; and

(g) Any other matter which the chief or associate judge of the Tribal Court finds should or can be resolved through the use of the Peacemaker Court.

...

SECTION 202 Powers of Peacemakers. Peacemakers are officers of the Tribal Court when acting as a Peacemaker and performing the functions of the Peacemaker Court under these rules, and they shall have the privileges and immunities of court officers. Peacemakers shall have the power to:

- (a) Mediate disputes among persons involved in the peacemaking process by attempting to get them to agree as to the nature and scope of the problems affecting them and to agree on what should be done to resolve those problems;
- (b) Use traditional Northern Arapaho culture and other ways of mediation and community problem solving;
- (c) Instruct or lecture individuals on the traditional Northern Arapaho teachings relevant to their problem or conduct;
- (d) Compel persons involved in a dispute, affected by it, or in any way connected with it, to meet to discuss the problem being worked on and to participate in all necessary peacemaking efforts; and
- (e) Use any reasonable means to obtain the peaceful, cooperative, and voluntary resolution of a dispute subject to peacemaking. No force, violence, or the violation of rights secured to individuals by the American Indian Civil Rights Act will be permitted.
- (f) If parties to a dispute agree in writing or orally before the Tribal Court, a Peacemaker may arbitrate a dispute by hearing all sides of it and then issuing a decision. Any such decision will have the effect of a court judgment when submitted to the Tribal Court for entry as a written judgment. Such decision may be appealed pursuant to the rules of the Tribal Court regarding civil appeals.

SECTION 203 Limitations; Peacemakers Not Judges. Peacemakers shall only have the authority to use traditional and customary Northern Arapaho methods and other accepted nonjudgmental methods to mediate disputes and obtain the resolution of problems through agreement. Peacemakers shall not have the authority to decide a disputed matter unless all parties to the dispute agree to such authority. Appointed Peacemakers shall not have authority to hear any appeal from any decision of:

- (a) The Northern Arapaho Business Council;
- (b) The Tribal Court including, but not limited to, any appeal from a final decision of the Tribal Appellate Court;
- (c) Employers, when the decision of the employer is regarding any rights or obligations of the employer or employee governed by personnel policies or procedures of the employer.

...

PART 600 — TRANSFER OF CASES FROM TRIBAL COURT TO PEACEMAKER COURT

SECTION 601 General Policy. Certain civil and criminal actions in Tribal Court may be transferred to the Peacemaker Court where they fall within one of the kinds of matters within the jurisdiction of the Peacemaker Court described in Sec. 104, or where it is in the interest of justice to make such a referral for good cause shown.

SECTION 602 Civil Matters. Civil actions falling within the provisions of Sec. 104 may be referred to Peacemaker Court with the written stipulation of all the parties to the action or for good cause shown to the Tribal Court.

SECTION 603 Criminal Matters. Any criminal matter may be transferred to the Peacemaker Court where:

- (a) The case does not involve injury to a person or property;
- (b) Where the victim to the alleged offense consents;
- (c) Where the offense is a victimless crime; or
- (d) Where there is a finding of guilty, the victim consents to peacemaking, and peacemaking would be an appropriate condition of probation for achieving harmony and reconciliation with the victim.

SECTION 604 Criminal Probation. The Tribal Court may, as a condition of criminal probation, require the defendant to submit to the Peacemaker Court for traditional and customary counseling, instruction, and lectures appropriate to his or her offense. The Tribal Court may require the defendant to pay a reasonable fee as required of other parties before the Peacemaker Court pursuant to Section 307.

SECTION 605 Transfer on Condition. Any case may be transferred to the Peacemaker Court on any reasonable condition, with a stay of proceedings before the Tribal Court, and the Tribal Court may reassume jurisdiction over a case upon breach of or the failure to satisfy any condition imposed.

Navajo Nation

Title 7. Courts and Procedure: Chapter 3. Judicial Branch: Subchapter 10. Navajo Nation Peacemaking Program (Hózhóójí Naat'áanii)

7 NAVAJO CODE § 409

§ 409. Establishment

It is hereby recognized and affirmed that there is a Navajo Nation Peacemaking Program (Hózhóójí Naat'áanii) within the Judicial Branch of the Navajo Nation. The Peacemaking Program shall be the central point of peacemaking information and coordination with the Navajo Nation Judicial Branch.

§ 410. Purposes

The purposes of the Navajo Nation Peacemaking Program include to promote a nonadversarial forum for solving disputes where the parties to the dispute voluntarily agree or are referred to peacemaking; to promote peacemaking counseling services to clients of the Navajo Nation Courts; to promote peacemaking support and assistance to Navajo Nation Courts when requested to make recommendations on sentencing; to provide education and training on Navajo culture, traditions, and other Navajo accepted beliefs to individuals, organizations, and communities; to provide support and technical assistance to peacemakers; to promote the research, development, and learning of Navajo culture, traditions, and other Navajo-accepted beliefs in support of judicial and community programs; and to provide problem-solving assistance to peacemakers, judges, court staff, and others concerning the peacemaking

process. Peacemaking is intended to promote healing and reestablish harmony among those persons participating in peacemaking.

§ 411. Responsibility and Authority

The Navajo Nation Peacemaking Program shall have the authority and power to undertake the following functions and duties:

- A. To conform the procedures of Hózhóǫ́jí Naat'áanii to traditional Hózhóǫ́jí Naat'áanii concepts, including K'é, clanship, and other principles of Navajo culture, traditions, and other Navajo-accepted beliefs, establish standards and procedures for that process, and otherwise develop standards, principles, and procedures for the development of Hózhóǫ́jí Naat'áanii in accordance with Navajo culture, traditions, and other Navajo-accepted beliefs and the laws of the Navajo Nation.
- B. To maintain a list of peacemakers and provide technical support to peacemakers to facilitate the conduct of peacemaking.
- C. To periodically evaluate the techniques of peacemakers and the peacemaking process.
- D. To authorize peacemakers to enter into funding agreements with the Judicial Branch for mileage and training.
- E. To perform such other functions and duties that are in accordance with Navajo Nation law and purposes of the Navajo Nation Peacemaking Program and that will promote the practice of peacemaking.

§ 412. Personnel

The Navajo Nation Peacemaking Program shall be administered by a Peacemaking Program Coordinator. All personnel, including the coordinator, shall be subject to Navajo Nation Judicial Branch personnel policies and procedures approved by the Judiciary Committee of the Navajo Nation Council.

§ 413. Legislative Oversight

The Navajo Nation Peacemaking Program shall operate under the legislative oversight of the Judiciary Committee of the Navajo Nation Council pursuant to the powers granted that Committee in 2 N.N.C. § 571 et seq. The Navajo Nation Peacemaking Program shall operate pursuant to a Plan of Operation approved by the Judiciary Committee of the Navajo Nation Council.

[32.3] TRIBAL CODE COMMENTARY

The tribal statutes highlighted provide examples of things to consider when structuring a peacemaking court.

Establishing Peacemaking Courts

The Little River Band of Ottawa Indians (“Little River”) has a specific “Peacemaking Guidelines” code and also covers peacemaking courts in their Juvenile Code. In section 1.01 the peacemaking guidelines (“guidelines”) explain that the peacemaking court can be used in conjunction with the current court system. It also states that both juveniles and adults can participate. The Northern Arapaho Nation (“Northern Arapaho”) explains in section 103 that the peacemaking court operates under the tribal court. Similarly, the chief judge may exercise oversight of the peacemaking court. In section 409 of the Navajo Nation Code (“Navajo”) the peacemaking court is established within the Navajo Nation Judicial Branch. It is up to your tribe to decide how much oversight the judicial branch has over the peacemaking court and the details of how it operates within your tribal government.

Vision, Philosophy, Objectives, and Purpose of Peacemaking

In the Little River guidelines section 2.01, the vision includes working with children, which is important because it reaffirms the tribal commitment in using the peacemaking process to assist juveniles. It is also important to note that the tribe uses traditional conflict resolution and values in the process. Similarly, the focus is on resolving issues and healing. It is important to have these, or similar, terms memorialized in the code because it demonstrates the tribes support of such programs.

The Little River peacemaking court philosophy is stated in section 3.01. It explains how the peacemaking process is different from state court in that peacemakers do not judge the participants. In addition the peacemaking system is not adversarial like Western courts. The peacemakers assist the participants to solve their own problems. It also emphasizes the importance of respect and healing.

In section 4.01 of the Little River guidelines the tribe explains the purposes of peacemaking. The goal is to have participants solve their own problems. In doing so, “the wrongdoer” takes responsibility and all can heal; in addition, traditional practices and community services are sought out for the participants. Within Navajo code section 410, the Nation explains its purposes of peacemaking within its jurisdiction. The peacemaking program is not adversarial and may make sentencing recommendations to the Navajo Nation Courts. The peacemaking program provides education and training on Navajo culture, traditions, and teachings to participants. The program seeks to promote healing and harmony to its participants. Both of these programs emphasize the nonadversarial nature of the peacemaking process and the importance of traditional culture.

Under section 8.04 of the Little River guidelines, the peacemaking court objectives are to reveal the issues, problems, or conflicts to make it clear, so the participants will be able to understand

and start to resolve the issues. The objectives are met by ensuring that everyone is heard, using customs and traditions, all within a safe environment.

Who Is Eligible, What Types of Cases Can Be Heard

The Little River Guidelines section 6.01 states that children, youth, adult tribal members and tribal employees are eligible for peacemaking. It delineates that children and youth who have civil cases pending before the Little River Court, another tribal court, or the state court in Michigan are eligible. Other possible situations are child in need of care, delinquent offenders who have committed minor offenses, youth referred to peacemaking from another federally recognized tribe, a referral from the Case Intake Team (CIT) (a multidisciplinary team that works for the tribe and intervenes in juvenile issues to assist), and referrals from other outside agencies, that is, school and nontribal social services referrals. This is important because the scenarios in which a juvenile can come into the peacemaking court are set out in the code.

In the Little River Guidelines section 6.02 and the Little River Juvenile Code 8.02 the tribe explains what cases can be heard in the peacemaking court: all children and youth who are facing a first time status offense, a nonstatute offense, or civil case in the Little River Band of Ottawa Indians Tribal Court System, or a request from another tribal court or state court that a case be transferred to peacemaking. As well as all other cases referred by the Case Intake Team, all other cases that are referred by the Tribal Court; and cases from persons requesting to voluntarily access peacemaking.

Under Northern Arapaho section 104 peacemaking court participants must be members of the Northern Arapaho tribe or an Indian residing on the Wind River Indian Reservation. The peacemaking court can also hear an issue if it involves certain personal and community relationships including, but not limited to, the following: marital disputes, disputes among parents and children, minor disputes between neighbors, alcohol use or abuse by family members or neighbors, or any other matter that the chief or associate judge of the Tribal Court finds should or can be resolved through the use of the Peacemaker Court.

Process/Steps of Peacemaking

An example of how a peacemaking session may be conducted is described in the Little River Guidelines section 8.01. This includes a traditional opening and prayer, introductions, rules, and the opportunity to use Alternative Dispute Resolution if desired.

Confidentiality and Record Keeping

The Little River Guidelines set out some good strategies for confidentiality and record keeping. In section 8.02 the guidelines explain that peacemakers must abide by confidentiality, including keeping documents and case files confidential. However, in the case of suspected child abuse the peacemakers are required to disclose information to proper authorities. In section 8.03 the guidelines state that all peacemaking files are to be destroyed six months after peacemaking is completed. However, if the peacemaking is a condition of probation then the file will stay with probation until the juvenile is eighteen years old. At that point, all the documents and files will be destroyed. It is important for peacemaking court participants to feel comfortable and safe

with the process. Laying out confidentiality requirements in the code memorializes the courts commitment to confidentiality and the expectations of the peacemaking court process.

Peacemaker's Role and Authority

In section 202 of the Northern Arapaho code, the peacemaker's powers are defined. They are given the power to mediate disputes between peacemaking court participants; use traditional Northern Arapaho culture mediate and instruct individuals; move the peacemaking process along; and issue decisions that are binding in court. In section 203, the Northern Arapaho code explains that peacemakers can only use custom, tradition, and nonjudgmental methods in peacemaking court. They can only hear a case if all parties agree to participate in peacemaking court. They do not have the authority to hear an appeal from a decision of the business council, tribal court, or an employer. It is a good practice to define what the peacemaker can and cannot do.

The peacemaking court authorities and power are described in the Navajo Nation code section 411. The peacemaking court ensures that Navajo culture, traditions, and beliefs determine the peacemaking process and procedures. The peacemaking court also keeps a list of peacemakers and provides them with support. The peacemakers and the peacemaking process are also subject to review by the peacemaking court. Here, the peacemaking court has a list of enumerated powers that it exercises independent of the peacemakers.

Transfer from Other Courts

In section 601, the Northern Arapaho code states that only certain civil and criminal cases (described in section 104) may be transferred into the peacemaking court, unless a referral shows good cause. Section 603 explains which criminal matters can be transferred: the case does not involve injury to a person or property; a case in which the victim to the alleged offense consents; a case in which the offense is a victimless crime; or where there is a finding of guilty, the victim consents to peacemaking, and peacemaking would be an appropriate condition of probation for achieving harmony and reconciliation with the victim. This ensures that victims are not compelled to participate if they are not comfortable.

In section 604, the code authorizes the tribal court to transfer a defendant on criminal probation into the peacemaking court for traditional and customary counseling, instruction and lectures appropriate to his or her offense. Section 605 explains that any case can be transferred into the Northern Arapaho peacemaking court on any condition, while the case is stayed in tribal court. If the condition is not completed, then tribal court will reassert jurisdiction over the case.

Unique Issues for Juvenile Cases

The Little River Band of Ottawa Indians has a juvenile code that specifically addresses juvenile participation in peacemaking court. In the Guidelines section 6.05, the Case Intake Team's (CIT) role is stated. The CIT determines whether a juvenile case will be forwarded to prosecution or if it will be delayed for participation in the peacemaking court. Under guidelines section 6.07, if a juvenile case is referred to peacemaking court, the CIT will review the case every thirty days. If

the juvenile is not making progress the CIT will defer to prosecution to move forward on formal adjudication.

Little River Juvenile Code 4.01 (b) explains that peacemaking is established to provide traditional conflict resolution for children, youth, and families, as well as provide healing for all involved in the process. Section 4.02 outlines the process of peacemaking for juveniles. A juvenile's first offense in the Little River tribal court will be immediately referred to the peacemaking court. All other cases will proceed through the CIT, which refers the case to an investigator who in turn investigates and makes a recommendation. The CIT can determine how a case will proceed and develop a plan for the juvenile and/or family if not immediately forwarded to the tribal court. If the CIT rejects a case then the case will be referred to tribal court. It is helpful to have timelines and procedures spelled out in the code.

[32.4] EXERCISES

The following exercises are meant to guide you in developing the peacemaking related sections of the tribal juvenile code and or the tribal peacemaking code.

Exercises

- Find and examine your tribal codes to see if you have any provisions related to mediation or “peacemaking” (note that these might be contained in a judicial code, court establishment code, and/or court rules)
 - Who is eligible to participate in peacemaking?
 - What types of issues can be handled by the current process?
 - What is the outcome of the peacemaking (how will a juvenile court judge know what happened)?
- If possible, flow chart what happens in your peacemaking process from beginning to end.
- Make a list of the pros and cons of using peacemaking as part of your juvenile justice process.
- Make a list of any needed changes to accommodate juveniles and their families (e.g., where in the juvenile code would you divert to peacemaking, or what types of peacemakers should be recruited/trained to work with juveniles and their families, etc.).

Read & Discuss*

What is peacemaking? How does it work?

FORT McDOWELL YAVAPAI NATION, SCOTTSDALE, ARIZ., Dec. 6, 2011—Twelve practitioners and policymakers from both tribal and state courts participated in a roundtable about Indian peacemaking with an eye toward introducing peacemaking in non-Indian settings.

The roundtable was sponsored by the U.S. Department of Justice's Bureau of Justice Assistance, in collaboration with the Center for Court Innovation.

Peacemaking is a traditional Native American approach to justice. While the exact form peacemaking takes varies among tribes, it usually consists of one or more peacemakers—often community elders—who gently guide a conversation involving not only those directly involved in an offense or conflict but family members, friends, and the larger community. Most forms of peacemaking follow a few simple rules. Among them, according to Barry Stuart, the retired chief judge of the Yukon Territorial Court, are “don’t dump and run”—in other words, participants must stay until the end and listen respectfully to all speakers. Other rules include “speak the truth” and “no shaming or blaming,” Stuart said.

While conventional Anglo-Western criminal courts generally focus on determining a defendant's guilt and sentence, peacemaking is restorative, focusing less on punishing the individual and more on mending relationships and healing the community. It does this by creating a safe space that nurtures participatory skills and new connections.

Peacemaking also differs from mediation. Barbara A. Smith, a justice on the Supreme Court of the Chickasaw Nation, said that the difference between western mediation and Indian peacemaking is that “mediation is about an issue; peacemaking is about relationships. ... The key is the peacemakers go in not with the thought of solving the issue. Instead, it's about helping everyone learn to talk to one another” so that they can resolve the problem themselves.

Stanley L. Nez, peacemaker liaison in the Aneth Judicial District of the Navajo Nation, said peacemaking has deep roots in Indian culture, religion and outlook. Native Americans value harmony and interconnectedness, he said, noting that harmonious relationships among humans are just as important as a harmonious relationship among the basic elements of the universe—“earth, air, water, and fire.”

David D. Raasch, an associate judge with the Stockbridge-Munsee Tribal Court, said a peacemaking session is less structured than a courtroom, where procedures are dictated by case law and legislation. Peacemaking is “like opening the floodgates on a dam. The water can flow where it will flow,” he said.

All participants agreed that peacemaking is perpetrator, victim, families and the community at large to address the damage caused by an offense and put safeguards in place to reduce the likelihood of recidivism.

“We say all the people in the circle are now probation officers because they can call together another circle if the [offender] does something wrong,” said Michael A. Jackson, the keeper of the circle in the Village of Kake and magistrate in Alaska District Court.

By the end of the roundtable, which took place over a day and a half, participants seemed to agree that it was possible to adapt the key components of peacemaking for use in a non-tribal setting, including a state court.

The peacemaking roundtable is one of several initiatives sponsored by the Center for Court Innovation's Tribal Justice Exchange. Funded by the U.S. Department of Justice, the Exchange encourages state and tribal practitioners to consider the question: What lessons can state and tribal courts learn from each other? The hope is the answers will help strengthen both tribal and state court systems by expanding knowledge of proven strategies and fostering mutual understanding.

The peacemaking roundtable was moderated by Brett Taylor with assistance from Aaron Arnold and Erika Sasson. The roundtable will be summarized in a report, scheduled to be completed in early 2012, that will serve as a resource for those interested in creating peacemaking programs in their communities, tribal and non-tribal.

**Taken from “Can Peacemaking Work Outside of Tribal Communities?,” Center for Court Innovation, [courtinnovation.org](http://www.courtinnovation.org/research/can-peacemaking-work-outside-tribal-communities), September 25, 2014. Go to <http://www.courtinnovation.org/research/can-peacemaking-work-outside-tribal-communities>*

CHAPTER 33

TEEN COURTS

[33.1] OVERVIEW

The National Association of Youth Courts defines teen courts (also known as youth, peer, and student courts) as a program “in which youth sentence their peers for minor delinquent and status offenses and other problem behaviors.”⁴⁴ Teen or Youth Courts have been growing in number since the mid 1990’s. There are a few teen courts in Indian Country, however, the Kake Youth Circle Peacemaking program is currently the only one that is codified within the tribal code. Other tribal teen courts may be operating, but they are not codified. This may be due to the fact that some tribal teen courts are operated by tribal agencies other than the court or by community organizations.⁴⁵

A teen court can be dispositional or adjudicatory. A dispositional court is one in which the youth has already admitted to the behavior that brings them into court, and the teen court program is established to determine a “fair and appropriate disposition”⁴⁶ for the youth. Whereas an adjudicatory teen court allows the youth to enter a not guilty plea, then court must determine their responsibility for the offense. Most teen courts allow referrals from judges, police, probation officers, and schools. Cases heard often include theft, criminal mischief, vandalism, minor assault, possession of alcohol, minor drug offenses, truancy, and other status offenses and non-violent misdemeanor offenses.⁴⁷

There are many ways to structure a teen court. Tribes should explore different options to determine what best fits the community and cultural values. Ada Pecos Melton, discusses in her article “Building Culturally Relevant Youth Courts in Tribal Communities” four basic teen court models: Adult Judge, Youth Judge, Youth Tribunal, and Peer Jury. However, a hybrid could be created as well. The Adult Judge model is one that most state programs use. It requires an adult for a judge (often times a volunteer attorney), while the youth volunteer as prosecution, defense, court clerk, bailiff and jurors. In a Youth Judge model, a teen volunteer serves as judge. The teen has typically served as an attorney in previous sessions. All of the other roles are also filled by teen volunteers. In the Youth Tribunal there are no jurors, instead youth attorneys present the case to a youth judge or panel of youth judges. Often there is one experienced youth judge who consults with two not as experienced judges. This model is used for arraignments if a court is adjudicatory. A Peer Jury court does not use attorneys, instead a case presenter reads the facts to the court. The case presenter may be the teen court coordinator, probation, law enforcement, or volunteer (youth or adult). A jury made up of 6-8 youth poses questions to the teen and then make sentencing recommendations. The judge is an adult.⁴⁸

There are many benefits of having a teen court, for example it provides a forum to deal with status offenses like truancy and minor offenses such as traffic violations and non-violent crimes. Teen courts also allow for youth to participate in their tribal government and understand how

⁴⁴ http://www.youthcourt.net/?page_id=24 retrieved September 2, 2014.

⁴⁵ Ada Pecos Melton, “Building Culturally Relevant Youth Courts in Tribal Communities,” page 72.

⁴⁶ An Update on Teen Court Legislation, Michelle E. Heward, September 2006, page 5.

⁴⁷ Ada Pecos Melton, page 71.

⁴⁸ Ada Pecos Melton, page 73.

courts work. Similarly, youth become engaged in their community and gain leadership skills. Those youth who are “sentenced” in the teen court can learn traditional skills through cultural based community service, as well as becoming more connected with their community. The court provides benefits to the tribe in that it provides opportunities for tribal agencies to work together on these issues, as well as potential opportunities to work with off reservation agencies. Overall tribal youth who need assistance are brought into the teen court for intervention and the underlying problems can be addresses.⁴⁹

As previously mentioned, the majority of tribal teen courts are not codified within tribal codes. Most are programs that receive support from different tribal agencies. Similarly, there are less state teen courts operating under legislation than there are teen court programs that operate without legislation. Benefits of codifying your teen court are the potential for funding (whether that is from the tribe or outside sources), it demonstrates that your program is established and has parameters. Other benefits of codification include: sources for referral into the court and provides sentencing options.

[33.2] TRIBAL CODE EXAMPLE

Keex’ Kwan Judicial Peacemaking Code

Organized Village of Kake

Chapter 4: Kake Youth Circle Peacemaking

Section 1: Purpose of Kake Youth Circle Peacemaking

The Youth are our treasures of our Tribe and hope for the future. The purpose of the Kake Youth Circle Peacemaking is to encourage responsible behavior and choices among our Youth, to empower them to participate in decision-making when problems arise among their peers, and to preserve and promote the cultural values and practices of the Kake Youth Circle Peacemaking Tribe. The Consensus Agreement ordered by the Kake Youth Circle Peacemaking shall be designed to help and heal victims, wrongdoers, and the Village of Kake. This Ordinance outlines the basic structure and procedures of the Kake Youth Circle Peacemaking, and is intended to provide a fair and equitable process that is consistent with the Organized Village of Kake Tribal Constitution, OVK tribal ordinances, the requirements of the Indian Civil Rights Act, and compatible with the unwritten laws and values of Organized Village of Kake.

...

Section 3. Jurisdiction of the Kake Youth Circle Peacemaking

The Kake Youth Circle Peacemaking shall have limited jurisdiction over health, safety, and welfare matters arising among the village Youth between and including the ages of 8 through 18. Those subjects include use of alcohol and illegal drugs, vandalism, trespass, theft, bullying, harassment, disorderly conduct, tardiness, truancy and juvenile curfew. However, the Kake District Court of Alaska may at any time, initially take, or take over a case when the complexity or seriousness of the situation warrants it.

⁴⁹ Ibid, page 72-3, 76.

Section 4. Youth Coordinator and Youth Panel

The OVK shall designate a Youth Coordinator and establish a panel of at least two youth to work with and advise the Youth Coordinator. Duties of the Youth Coordinator and Panel may include:

- Receiving petitions or referrals filed with the Kake Youth Circle Peacemaking, Tribal Youth Court.
- Answering the phone calls or receiving mail for the Youth Court.
- Maintaining files for the Court and a Court calendar
- Helping to select Circle participants when asked to do so
- Notifying parties and Circle participants of Circle hearings
- Drafting Consensus Agreements for the Keeper of the Circle to sign
- Receiving proof of Compliance with Consensus Agreements
- Maintaining records of Youth Court finances

Section 5. Beginning a Case by Petitioning or Referral

- A. Beginning Cases by Petitions:** A case may begin by anyone giving a Petition describing an incident, problem, or situation to the Youth Coordinator, or to any one of the Organized Village of Kake Social Services and/or SEAHRC (Southeast Alaska Regional Health Consortium Alaska) Counselors. Petition forms shall be made available at the OVK Office. The person filing a Petition shall be called the Petitioner and may be asked to sit in the Circle on the case. Two youth and staff shall meet to review the petition and decide whether or not the Kake Youth Circle Peacemaking should hold a Circle on the case. If so, they shall proceed to select Circle participants under Section 7(B) of this Ordinance. The OVK Youth Coordinator shall schedule a date for the Circle, and notify the parties.
- B. Beginning Cases through Referrals:** A case may begin by a referral from a state court judge or law enforcement officer, or by referral from another tribal court. A Review meeting shall be called by the Clerk to review the referral and decide whether or not the Kake Youth Circle Peacemaking should hold a Circle on the case. If so, the OVK Tribal Youth Coordinator or designated OVK staff person shall proceed to select Circle participants. The Tribal Youth Coordinator shall schedule a date for the Circle, and notify the parties.

Section 6. Determining Circle Participants and Keeper of the Circle

Circle participants and the Keeper of the Circle shall be chosen by the Tribal Youth Coordinator or designated OVK staff.

Section 7. Notification of Circle Hearings

The Tribal Youth Coordinator shall notify the parties being accused of a wrongdoing and Circle participants about the date, time, place of Circle hearings. The notice to the parties shall include a copy of the petition or reason they are being brought to the Peacemaking Circle, and shall state that if the parties believe they are being wrongly accused that they may immediately notify the OVK Youth Coordinator who will schedule a hearing before the

OVK Council. Notice for Peacemaking Circles shall be given at least three days prior to the Circle date.

Section 8. Kake Youth Circle Peacemaking

- A. Peacemaking Circle:** The Kake Youth Circle Peacemaking Tribal Youth Court shall be conducted through the use of Peacemaking Circles.
- B. Choosing the Circle participants and Circle Keeper:** Circle participants and the Facilitator of the Circle shall be chosen by the OVK Youth Coordinator plus two Youth from the Youth Panel, and shall not be parties in the case or live in the same household as the wrongdoer coming before the circle.
- C. Circle Participants:** In general, participants of Peacemaking Circles shall include resident Youth between and including the ages of 8 and 18, are selected by the Youth Coordinator and two youth. The OVK Youth Coordinator shall be present at Circle hearings in order to write the decision of the Circle on a Consensus Agreement form. Circles may also include adult community members, parents, teachers, counselors, and any other person who those choosing Circle participants decide should be in the Circle.
- D. Keeper's Role for Opening and Conducting the Circle:**
- The Keeper of the Circle shall begin the Circle process by opening the Circle.
 - Opening the Circle may include a prayer or special comments from an Elder or someone in the Circle.
 - The Keeper shall ask the participants to agree to the Oath of Confidentiality and Fairness written in Section 8 of this Ordinance.
 - One person shall talk at a time with no interruptions.
 - The Keeper shall outline the rules of the Circle and ask participants if there are any additional rules they would like to see the Circle go by.
 - Comments shall be limited to maximum of five minutes, unless permission granted by Facilitator.
 - The Keeper shall state what the situation is that the Circle will be hearing.
 - The Keeper shall begin the Circle by passing the talking stick or other special object in a clockwise direction.
 - The Keeper shall be responsible for keeping order in the Circle should that become necessary.
 - The Keeper shall summarize the highlights of what has been said after each round of discussion.
 - Participants shall show respect to one another and not point blame.
 - The Keeper shall state the final consensus of the Circle, and make sure that it is an accurate summary of the Circle's decision, and sign the written Consensus Agreement after the Tribal Court Clerk or OVK Youth Coordinator has prepared it.
 - All comments made in the Circle shall be confidential.
- E. Basic Rules of the Circle:** The most basic rule of the Circle is that persons shall have respect for one another. Only one person shall speak at a time, which shall be the

person with the talking stick, or as directed by the Keeper of the Circle. What is said in the Circle shall stay in the Circle, and shall not be discussed outside of the Circle.

- F. Order of Speaking:** Once the Keeper has opened the Circle, he or she shall pass the talking stick around the Circle and participants shall speak only when they hold the stick. If a person chooses not to speak, they may pass the stick on to the next person in the Circle. The discussion of the Circle shall continue in this manner unless the Keeper directs otherwise.
- G. Process of the Circle:** The first round: quick introductions shall be made, stating name and the person being supported (victim, wrongdoer). The second round of the Circle discussion shall be for participants to voice their feelings (speaking from the heart), opinions, share information, and generally talk about the situation. After these things are thoroughly aired, the Keeper shall begin a new round of discussion focusing on appropriate solutions and sentencing.
- H. Decision of the Circle:** The decisions of the Circle shall be made by consensus. The discussion in the Circle shall proceed until everyone can stand behind the decisions being made. The decision of the Circle shall be written on a Consensus Agreement form by the OVK Youth Coordinator or Court Clerk and signed by the Keeper of the Circle, by the victim, and the wrongdoer. The decision shall include who shall do specific tasks that may be decided by the Circle, who shall Mentor the wrongdoer, and specify guidelines for the sentences decided.
- I. Mentors:** Specific adult mentors shall be assigned to oversee the progress of wrongdoers in completing their sentences. Mentors shall sign off on proof of compliance forms when wrongdoers complete tasks assigned in Consensus Agreements within the allowed timeframe.
- J. Follow-up on Circle Consensus Agreements:** Before a Circle adjourns a session, it shall make a specific plan for how follow-up will be monitored, and may set a date to reconvene the Circle to examine the progress of a case if appropriate in 30 days. If a party is not complying with an Consensus Agreement of the Circle, the person may be brought before the Circle again, or the case may be referred to the Kake District Court.

Section 9. Oath of Confidentiality and Fairness

Participants of the Circle shall agree to the following oath:

"I promise to not discuss what is said in this Circle outside of the Circle. I will work towards a fair agreement about what should be done."

Section 10. Failure to Appear for a Peacemaking Circle

If a wrongdoer was served with a notice about a Circle hearing but fails to show up for a Hearing, the Kake Youth Circle Peacemaking Tribal Youth Circle may send a designated adult to get the person if the person is in the Village, or set another Circle date.

Section 11. Creative Sentencing – Options for Consensus Agreements

The Circle participants shall design sentences intended to help and heal victims, offenders, and the Village of Kake. The Circle shall assign specific adult mentors to oversee the completion of sentences. The Circle may choose one or more from the following options:

- A. Community Service Work:** Work sentences shall benefit the needy, the village residents as a whole, the Elders, the victim of an offense, offenders, and/or the youth. Work sentences may include and are not limited to cutting wood, hauling water, shoveling snow, doing laundry, or cleaning homes or yards for needy people or the community hall or church, working in the school, conducting village surveys, helping the local police officer, working with carpenters or other tradesmen in the village, working in the OVK or City Offices, participating in preparations for community events, building maintenance or repair and cleaning up trash in the Village of Kake. Circle participants shall not order work sentences that only benefit themselves personally. Work sentences shall not displace persons employed in the Village or employment opportunities. Work sentences shall be completed within 30 days unless otherwise directed by the Court.
- B. Restitution:** The Circle may order a wrongdoer to make restitution to his or her victims or to the Village. Restitution is defined to include payment of money, repairing property, and apologies. Restitution payment shall go through the OVK Youth Coordinator. Non-monetary restitution shall be supervised by OVK Youth Coordinator or by another person designated by the Circle.
- C. Apologies:** The Circle may order wrongdoers to make apologies to victims, parents or guardians, and/or to the whole village at OVK meetings or gatherings. The Circle may specify if the apologies shall be in writing or oral or both.
- D. Essays and Presentations:** The Circle may order wrongdoers to write essays and/or to give presentations. The Consensus Agreement shall specify the topics for such essays and the minimum length. If a presentation is required, the audience such as the OVK Council, school or Elders shall be specified
- E. Organize Events or Fundraisers:** The Circle may order wrongdoers to organize events for the Youth and village residents. Wrongdoers may also be ordered to organize fundraisers for restitution or village projects.
- F. Counseling by Professional Counselors, Peacemakers, and Elders:** The Circle participants may counsel wrongdoers in a helpful spirit. The Circle may order professional counseling, as long as the counseling is available in the village, or counseling by specific Kake Elders. The Circle may also order peer counseling by specific peers, or participation in talking circles.
- G. Substance Abuse Awareness Sessions and Talking Circles:** The Circle may order participation in substance abuse awareness sessions or talking circles in the Village.
- H. Traditional Activities:** The Circle may order a person found in violation of an ordinance to participate in seasonally appropriate traditional activities such as fish camps, trapping, hunting, putting up fish or meat, culture camps, preparing Native foods, traditional crafts and Native language activities, and other tribally sponsored or approved traditional activities.

Section 12. Proof of Compliance with Circle Consensus Agreements and Failure to Comply

If a party is ordered to do something, the party shall file a Proof of Compliance form with the OVK Youth Coordinator within 7 days after completion of the Consensus Agreement forms. Mentors shall sign off on Proof of Compliance forms. Mentors shall notify the OVK Youth Coordinator in the event the person they are mentoring does not complete the requirements of

a Consensus Agreement. The OVK Youth Coordinator may schedule another Circle or report any failures to comply with Consensus Agreements to the regular Kake Youth Circle Peacemaking, schedule a Contempt of Court hearing, and provide notice to the party of the hearing.

Section 13. Appeals

A panel of three Peacemakers from the Organized Village of Kake Tribal Court shall serve as the Appellate Court for the Kake Youth Circle Peacemaking, Tribal Youth Court. A Youth who wishes to appeal a case may file a Notice of Appeal with the OVK Youth Coordinator or Court Clerk within 10 days after receiving a Consensus Agreement from the Kake Youth Circle Peacemaking, Tribal Youth Court. A Review Meeting shall be held, and the decision made to accept the appeal or not shall be made. If the appeal is accepted, the Review Team shall determine which three Peacemakers shall serve as the Appellate Court for the case. Appeals filed after 10 days shall not be considered.

[33.3] STATE CODE EXAMPLE

ARTICLE 12 - TEEN COURT PROGRAM

7-13-1201. Short title.

This act shall be known and may be cited as the "Wyoming Teen Court Program".

7-13-1202. Definitions.

(a) As used in this act:

(i) "Minor offense" means any crime punishable as a misdemeanor or the violation of any municipal ordinance, provided the maximum penalty authorized by law for the offense does not exceed imprisonment for more than six (6) months and a fine of not more than seven hundred fifty dollars (\$750.00);

(ii) "Supervising court" means the municipal court or circuit court by whose order a teen court program is established pursuant to rules and regulations promulgated by the Wyoming supreme court;

(iii) "Teen" for the purposes of this act means a person who has attained the age of thirteen (13) years of age and is under the age of majority;

(iv) "Teen court" or "teen court program" means an alternative sentencing procedure under which regular court proceedings involving a teen charged with a minor offense may be deferred and subsequently dismissed on condition that the defendant participate fully in the teen court program and appear before a jury of teen peers for sentencing and that the defendant successfully complete the terms and conditions of the sentence imposed. This sentencing is in addition to the provisions of W.S. 7-13-301 and 35-7-1037;

(v) "This act" means W.S. 7-13-1201 through 7-13-1205.

7-13-1203. Authority to establish teen court program.

(a) The Wyoming supreme court shall adopt rules and regulations governing teen court by July 1, 1996.

(b) In addition to any other power authorized, a municipal court judge, with the approval and consent of the governing body of the municipality, or any circuit court judge, with the approval and consent of the board of county commissioners, may by order establish a teen court program and training standards for participation in accordance with this act to provide a disposition alternative for teens charged with minor offenses.

(c) In any case involving the commission of a minor offense by a teen defendant, the supervising court may, without entering a judgment of guilt or conviction, defer further proceedings and order the defendant to participate in a teen court program, provided:

(i) The teen defendant, with the consent of, or in the presence of, the defendant's parents or legal guardian, enters a plea of guilty in open court to the offense charged;

(ii) The restitution amount, if any, owed to any victim has been determined by the supervising court;

(iii) The defendant requests on the record to participate in the teen court program and agrees that deferral of further proceedings in the action filed in the supervising court is conditioned upon the defendant's successful completion of the teen court program; and

(iv) The court determines that the defendant will benefit from participation in the teen court program.

(d) If the supervising court determines that the teen defendant has successfully completed the teen court program, the supervising court may discharge the defendant and dismiss the proceedings against him.

(e) If the defendant fails to successfully complete the prescribed teen court program, the supervising court shall enter an adjudication of guilt and conviction and proceed to impose sentence upon the defendant for the offense originally charged.

(f) Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for any purpose. If the original offense charged was a traffic offense, the court shall, within thirty (30) days after the discharge and dismissal is entered, submit to the department of transportation an abstract of the record of the court evidencing the defendant's successful completion of the teen court program. The department shall maintain abstracts received under this subsection as provided by W.S. 31-5-1214(f).

7-13-1204. Program criteria.

(a) A teen court program may be established under this act in accordance with the following criteria:

- (i) The judge of the teen court shall be the judge of the supervising court or an attorney admitted to practice in this state appointed by the supervising court to serve in a voluntary capacity and shall serve at the pleasure of the supervising court;
- (ii) Procedures in teen court shall be established by order of the supervising court in conformance with the provisions of this act and shall be subject to any uniform procedures for teen courts as may be prescribed by the Wyoming supreme court;
- (iii) The supervising court may authorize the use of its courtroom and other facilities by the teen court program during times when the courtroom and facilities are not required for the normal operations of the supervising court;
- (iv) The teen defendant, as a condition of participation in the teen court program, may be required to pay a nonrefundable fee not to exceed ten dollars (\$10.00). Fees collected under this paragraph by a municipal court shall be credited to the treasury of the municipality. Fees collected under this paragraph by a circuit court shall be credited to the treasury of the county;
- (v) The teen court program may involve teens serving as voluntary teen court members in various capacities including, but not limited to jurors, prosecutor-advocates, defender-advocates, bailiffs, clerks and supervisory duties;
- (vi) Every teen defendant appearing in teen court shall be accompanied by a parent or guardian;
- (vii) The teen court jury shall impose restitution, if any, in the amount established by the supervising court;
- (viii) The supervisory court, in accordance with the rules and regulations promulgated by the Wyoming supreme court, shall establish a range of sentencing alternatives for any case referred to teen court. Sentencing alternatives shall include, but not be limited to:
 - (A) Community service as authorized by the supervising court;
 - (B) Mandatory participation in law related education classes, appropriate counseling, treatment or other education programs;
 - (C) Require the teen defendant to participate as a juror or other teen court member in proceedings involving teen defendants;
 - (D) Fines, not to exceed the statutory amount.
- (ix) The teen court jury shall not have the power to impose a term of imprisonment.

7-13-1205. Juvenile courts authorized to establish teen court program.

(a) Notwithstanding any other provision of the Juvenile Justice Act, W.S. 14-6-201 through 14-6-252, a juvenile court may establish and offer a teen court program substantially complying with the provisions of this act as an alternative to any disposition authorized by W.S. 14-6-229(d), provided:

(i) Participation in the teen court program shall be limited to teens charged under the Juvenile Court Act with having committed a minor offense and who have been adjudicated delinquent;

(ii) The juvenile and all parties to the proceeding, including any guardian ad litem appointed in the juvenile court proceeding to represent the best interests of the juvenile, consent to the juvenile's participation in the teen court program;

(iii) The juvenile and the juvenile's parents or guardian waive any rights to confidentiality otherwise available under the Juvenile Court Act; and

(iv) The juvenile court finds that participation in the teen court program would be in the best interest of the juvenile.

[33.4] TRIBAL CODE AND STATE LEGISLATION COMMENTARY

The tribal code is helpful in providing examples of integrating cultural practices into a court process that is not adversarial and can assist youth. Although the Kake program is technically called a Peacemaking Court, it is also a teen court. Many aspects of the Kake program could be adapted into a tribal teen court. The Wyoming teen court provides helpful examples that can be applied to tribes as well.

Purpose

It is a good idea to have the reasons listed as to why the tribe wants a teen court. In Chapter 4: Kake Youth Circle Peacemaking, Section 1 the Kake Village explains that the program not only empowers youth, but preserves cultural values and practices. It also emphasizes how important the youth are to the tribe. It is a good practice to explain that the program is consistent with the tribal constitution, tribal ordinances, ICRA and unwritten cultural values.

Authority to Establish

Laying out the power to establish the teen court is a good practice. Wyoming state in section 7-13-1203 explains that the Wyoming supreme court lays out the rules for lower courts to set up teen courts in their jurisdictions. A municipal court or circuit court judge may establish a teen court program as long as the governing body approves and consents to the program. The teen court is defined as a “disposition alternative for teens charged with minor offenses.” This exact language may not fit all tribes, but is a good example to describe which government branch(es) of tribal government has the power to establish the teen court.

Further, in section 7-13-1205 the Wyoming statute explains that a juvenile court may “establish and offer” a teen court. However, the teen court program must follow the acts requirements such as described later in the section “Who Participates?.”

Jurisdiction

In section 3 of the Kake code, it explains that teen court jurisdiction is over youth between ages 8 through 18 years of age. The program has a limited jurisdiction over health, safety and welfare matters that occur among the village youth. The matters include alcohol and drug use, vandalism, trespass, theft, bullying, harassment, disorderly conduct, tardiness, truancy and juvenile curfew. The Kake District Court can initially take or take over a case if it is too complex or serious for the teen court.

Youth Panel and Youth Coordinator

Section 4 of the Kake code lays out the youth coordinator and youth panel roles. The village chooses a youth coordinator and a panel of two or more youth. Their duties include receiving referrals and petitions, taking phone calls, receiving mail, maintaining court files, assisting with the court calendar, assisting in selecting teen court participants, notifying participants and parties of hearings, drafting consensus agreements, receiving consensus agreement proof of compliance, and maintaining youth court finance records.

These roles are helpful in defining what the youth court organizational staff will do. These roles and expectations can be altered to what best fits a particular tribal culture and how involved the staff will be with the teen court.

How a case comes into the Teen Court

According to the Kake code section 5, a case enters the teen court through either petition or referral. Anyone can file a petition (which describes an incident, problem or situation) with the teen court youth coordinator, village social services, or Southeast Alaska Regional Health Consortium Alaska Counselors. Petition forms are at Organized Village of Kake (OVK) office. The person filing the petition (“petitioner”) may be asked to participate in the circle. Two youth and staff will meet to review the petition and decide whether or not to take the case.

A case may enter the court by referral from a state court judge or law enforcement officer or from another tribal court. The clerk will call for a review meeting to determine if the teen court will take the case. It would also be helpful if the code stated that the Kake court can refer a case to the teen court. This would simply further strengthen tribal court authority and jurisdiction over the teen court.

According to Wyoming statute 7-13-1203, a case enters the teen court by a teen defendant committing a minor offense. The court determines that the teen defendant will benefit from teen program. The court has the option defer the proceedings (and not enter a judgment) and order the teen defendant into the teen court program. However, the teen defendant must enter a guilty plea to the offense in open court with the consent of his/her parent or guardian. Any restitution amount must be determined by the court. The teen defendant must request on the record to participate in the teen court program; he/she must also agree that deferring the

proceedings in the supervising court is conditioned on his/her successfully completing the teen court program.

The Wyoming statute gives the court discretion over who enters the program. It is positive that the judgment against the teen can be deferred while he/she completes the program. The requirements allow the teen to demonstrate that he/she wants to participate in the program. It also allows the court to have a guilty plea in case the teen does not complete the program.

Who Participates?

In the Kake Code Section 6 explains that the youth coordinator or designated OVK staff will choose the teen court circle participants. This allows the program to have discretion over who participates. This also can be problematic because there are no clear rules as to who is admitted, however it is up to the individual tribal court to decide who participates based on norms and culture.

According to the Wyoming statute 7-13-1205, teens may participate in the teen court program if they have committed a minor offense and have been adjudicated delinquent. The teen and parent/guardian (or guardian ad litem) must consent to the teen's participation in the program. The teen and parent/guardian must waive any rights to confidentiality available under the Juvenile Court Act. Also the court must decide that the program is in the teen's best interest. This process only includes teens who have committed an offense and does not allow for the program to allow participants who may need the program, but have not been convicted of an offense. Whereas the Kake program has the potential to admit teens who may be in trouble, but have not been convicted of an offense.

How the Program Functions

According to the Wyoming statute 7-13-1205, the teen court allows the teen into the court as described in "How a case comes into the Teen Court" and "Who Participates." Under 7-13-1204, The judge in the teen court shall be a judge in the supervising court or an attorney admitted to practice in Wyoming, who is appointed by the supervising court. The teen court will take place in the supervising court's courtroom. The teen participant is required to pay nonrefundable fee of \$10.00, which goes to the county treasury. It is not clear if the fee goes back into the program, but that is a possibility for tribes to exercise if they choose. The jurors, prosecutor-advocates, defender-advocates, bailiffs, and clerks may be teens who are involved with the teen court. Every teen defendant appearing in teen court must be accompanied by a parent or guardian.

Under section 12-5, if the teen completes the program, then the court may dismiss the proceedings against him/her. If the teen does not complete the program, then the court will enter the guilty plea and will impose a sentence for the original offense. This ensures that the teen completes the program and that if he/she does not, then the teen will be sentenced for their offense.

According to the Kake code section 8, the teen court (which also functions as a peacemaking circle), is based on respect. The tenets are tribally based and are different than that of the Wyoming court. The steps of the Kake program are spelled out in great detail. Only one person is allowed to speak at a time and everything spoken in the circle is to be kept confidential. The leader of the circle (keeper) begins the circle discussion with introductions and stating the names of the victim and wrongdoer. The second round allows for participants to speak their feelings, opinions, share information, and talk about the situation. Finally, the keeper leads a discussion on solutions and sentencing. Any decision that the circle makes must be by consensus. Adult mentors will be assigned to watch over the wrongdoers in completing their sentences. This circle program works according to Kake culture and has many beneficial components that allow all participants to be heard.

Sentencing

The Wyoming statute section 7-13-1204, lays out sentencing options for the teen court program. The teen court can impose restitution. The supervisory court can impose: community service, mandatory participation in law related education classes; appropriate counseling, treatment or other education programs; require the teen defendant to participate as a juror or other teen court member in proceedings involving teen defendants; and fines. These sentencing options are good ones and allow the court discretion in working with the teen. However, they do not cover any potential culture issues that tribes may want to include. The Kake code in section 11 allows for cultural issues in sentencing. The program assigns an adult mentor to oversee the completion of the sentencing options. The options include: community service, restitution, apologies, essays and presentations, organize events or fundraisers, counseling by professional counselors, peacemakers, and elders, substance abuse awareness sessions and talking circles, and/or traditional activities. These options allow the circle to be creative in sentencing and integrate the teen into traditional and community practices as appropriate.