

# Chapter 29: Trauma-Sensitive Statutory Provisions

## [29.1] Overview

In 2013 the [Indian Law and Order Commission](#) (ILOC) issued the report,<sup>50</sup> [A Roadmap For Making Native America Safer](#), based upon its own hearings, and based in part upon hearings before the Attorney General's National Task Force on Children Exposed to Violence.<sup>51</sup> The ILOC Report found that nationally, Indian youth are vulnerable and traumatized. They experience poverty, low graduation rates, a shorter life expectancy, and higher rates of cigarette use, binge drinking, and illegal drug use. They experience high rates of abuse and neglect and are also more likely to be subject to violent victimization. They are more likely to be placed in foster care. They have high rates of early, unexpected, and traumatic death. They have greater exposure to violence and loss and are at greater risk for experiencing trauma. Native women, including young women, experience high rates of sexual assault and domestic violence. Finally, Indian youth are overrepresented in the federal and state juvenile justice systems and receive the most severe dispositions.

The ILOC Report concluded that federal and state justice systems are making matters worse by subjecting Indian country youth to complex and inadequate regimes. The federal system, for example, has no specialized juvenile division tailored to handling juveniles. Very high percentages of tribal youth end up in federal detention, but these facilities lack any secondary education services. States also have significant and often disproportionate numbers of Indian country youth with no clear way of tracking them. Finally, at the tribal level, the U.S. attorneys often decline to prosecute juvenile cases leaving tribes with little infrastructure and funding to handle juveniles (e.g., housing, mental health services).

Given a review of publicly available tribal codes, it appears that when tribal courts do handle juvenile matters they lack an array of trauma-sensitive policy and legal approaches, trauma training for juvenile justice system actors, and access to professional services, including psychologists, psychiatrists, and others who are trained in providing the necessary assessments and treatment services.

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<sup>50</sup> *A Roadmap for Making Native America Safer, Report to the President and Congress of the United States*, Indian Law and Order Commission (November 2013), available at <http://www.aisc.ucla.edu/iloc/> and <http://www.indian.senate.gov/hearing/oversight-hearing-receive-testimony-indian-law-and-order-commission-report-roadmap-making>, visited 29 August 2014.

<sup>51</sup> Attorney General's National Task Force on Children Exposed to Violence, available at <http://www.justice.gov/defendingchildhood/aian.html> and <http://www.justice.gov/defendingchildhood/aian-hearings.html>, visited 20 November 2014.

Symptoms of trauma often include smoking, use of alcohol and/or drugs, and/or running away. Tribal juvenile court judges and justice system personnel may see juvenile offenses or even crimes in this conduct. Parents, teachers, and community members may perceive that youth who have trouble concentrating and learning, who are inactive, overweight, sexually promiscuous, or who are anxious, depressed, or suicidal are the “troubled or bad kids.” What no one may see is that traumatized youth are experiencing numbing and avoidance, have increased anxiety or emotional arousal, have mood and memory problems, are reexperiencing intrusive memories, and may overreact to perceived threats and have trouble discriminating between safe and dangerous situations.<sup>52</sup>

Tribal youth advocates and juvenile justice system reformers make a number of recommendations for protecting and healing traumatized youth. These include the following:

- Provide training for tribal leaders, judges, justice system personnel, and service providers on youth and trauma;
- Mandate tribal court/judicial leadership in developing and coordinating trauma-focused programs;
- Take a hard look at the local provision of mental health services;
- Take a hard look at the local provision of respite care/housing (planned, short-term and time-limited breaks) for youth;
- Be careful not to overlook and foster existing community activities and programs that enhance resilience such as ceremonies, recreation programs, arts, mentorships, and vocational programs;
- Consider developing formal diversion programs such as family conferencing, mediation, wellness court, peacemaking court, teen court, etc.;
- Consider the establishment of special units and specialists in social services and/or behavioral health departments such as “family advocates” and “family system navigators” who focus on a justice system involving youth with mental health issues;
- Ensure effective treatments for youth, including violent youth, with significant trauma histories;
- Provide training for judges and attorneys to improve justice system interactions with youth and their families who have experienced trauma;
- Review existing court process and practice to reduce potential traumatization or retraumatization (reduce trauma triggers);

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<sup>52</sup> Characterizations of state policies and laws are taken from Jessica Feierman & Lauren Fine, *Trauma and Resilience, a New Look at Legal Advocacy for Youth in the Juvenile Justice and Child Welfare Systems*, Philadelphia, Pennsylvania Juvenile Center (2014).

- Require that trauma information be used appropriately at various stages in the juvenile and criminal justice systems to support diversion, the use self-defense claims, and as mitigating evidence in transfer, disposition, and sentencing;
- Mandate that tribal judges consider trauma when considering the often-conflicting duties to public safety and the best interests of youth;
- Ensure that trauma is accounted for in competency determinations and assessments regarding the voluntariness of confessions;
- Prohibit transfer of traumatized youth to adult criminal court; if allowed, amend criminal laws/procedures to mitigate sentencing due to trauma;
- Ensure that juvenile court dispositions provide treatment and do not inflict further harm to youth;
- Prohibit the use of “probation conditions” and “contempt orders” for traumatized youth who would likely violate conditions and where such violations would result in secure detention and retraumatization; and
- If traumatized youth are to be placed in secure detention, mandate that the judge consider the availability of mental health treatment in determining placement.

## [29.2] State and Tribal Code Examples—Purposes

### 2013 Wyoming Statutes

#### TITLE 14—CHILDREN

#### CHAPTER 6—JUVENILES

#### ARTICLE 2—JUVENILE JUSTICE ACT

#### 14-6-201. Definitions; short title; statement of purpose and interpretation.

- (c) This act shall be construed to effectuate the following public purposes:
  - (ii) Consistent with the best interests of the child and the protection of the public and public safety:
    - (a) To promote the concept of punishment for criminal acts *while recognizing and distinguishing the behavior of children who have been victimized or have disabilities, such as serious mental illness that requires treatment or children with a cognitive impairment that requires services;*

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

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

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

##### **Sec. 7A-1. Purpose.**

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

- (a) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that *juveniles* may remain in their own homes and *may be treated through community-based services* when this approach is consistent with the protection of the public safety;
- (b) Omitted
- (c) To develop a disposition in each juvenile case that reflects *consideration of the facts, the needs and limitations of the child*, the strengths and weaknesses of the family, and the protection of the public safety.

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## **THE HOPI CHILDREN'S CODE**

### **Chapter II General**

#### **A. Purpose**

It is the purpose of the Hopi Children's Code to:

(Note: Certain definitions omitted)

- 3. *provide for the care, protection, mental and physical development of the children* of the Hopi Tribe;
- 4. *ensure that a program of supervision, care, and rehabilitation will be available to those children* who come within the provisions of the code;
- 5. achieve the forgoing purposes in a family environment whenever possible separating the minor from his parents only when no alternative disposition is suitable to the child's welfare or in the tribal interest of public safety;

## Leech Lake Band of Ojibwe Judicial Code

### Title 4: Juvenile Justice Code

#### 4-1 Short Title, Purpose and Definitions

##### 4-1 B. Purpose

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

1. To preserve and retain the unity of the family whenever possible and *to provide for the care, protection, and wholesome mental and physical development of children* coming within the provisions of this code;
2. To remove children committing juvenile offenses, the legal consequences of criminal behavior and to *substitute* therefore *a program of supervision, care, and rehabilitation* consistent with the protection of the Leech Lake community;

(Note: Certain definitions were omitted)

5. To *provide a continuum of services for children and their families* from prevention to residential treatment, with *emphasis* whenever possible *on* prevention, early intervention and *community-based alternatives*.

## [29.3] State and Tribal Code Examples—Determining Competence

### VERMONT JUVENILE PROCEEDINGS STATUTE & RULES

#### VERMONT RULES FOR FAMILY PROCEEDINGS

##### Rule 1. Procedure for Juvenile Delinquency Proceedings 8/12/13

- (i) Determination of Competence to Be Subject to Delinquency Proceedings
  - (1) **In general.** —The issue of a child's competence to be subject to delinquency proceedings may be raised by motion of any party, or upon the court's own motion, at any stage of the proceedings.
  - (2) **Mental Examination.**—*Competence shall be determined through a mental examination* conducted by a psychologist or psychiatrist selected by the court. In addition to the factors ordinarily considered in determining competence in criminal proceedings, the examiner shall consider the following appropriate circumstances of the child:
    - (A) The age and developmental maturity of the child;

- (B) *whether the child suffers from mental illness* or a developmental disorder including mental retardation;
  - (C) whether the child has any other disability that affects the child's competence; and
  - (D) any other factor that affects the child's competence.
- (a) The child, or the state shall have the right to obtain an independent examination by an expert.
- (3) **Report.**—The *report of an examination* ordered by the court or obtained by the child or the state is to be *sealed and filed in the juvenile court*, with copies transmitted to counsel and available to the parties for review.
  - (4) **Statements Made in the Course of Examination.**—*No statement made in the course of an examination by the child examined*, whether or not the child has consented to, or obtained, the examination, *shall be admitted as evidence* in the delinquency proceedings for the purpose of proving the delinquency alleged *or for the purpose of impeaching the testimony of the child* examined.
  - (5) **Hearing.**—The *issue of competence shall be determined by the court after a hearing* at which all parties are entitled to present evidence. The hearing shall be held as soon as practicable after the reports of the examination or examinations are filed.
  - (6) **Determination of Competence.**—If the court determines that the child is competent to be subject to delinquency proceedings, the proceeding shall continue without delay.
  - (7) **Determination of Incompetence.**—*If the court determines that the child is not competent to be subject to delinquency proceedings, the court shall dismiss the petition without prejudice*; provided that if the child is found incompetent by reason of developmental disabilities or mental retardation; the dismissal may be with prejudice.

## [29.4] State and Tribal Code Examples—Judicial Branch Leadership

### 2012 Connecticut General Statutes

#### [Title 46b - Family Law](#)

#### Chapter 815t—Juvenile Matters

#### Section 46b-121k—Programs, services and facilities for juvenile offenders.

- (a)
- (1) The Judicial Branch shall develop constructive programs for the prevention and reduction of delinquency and crime among juvenile offenders. To develop such programs, the executive director of the Court Support Services Division within the Judicial Branch shall cooperate with other agencies to encourage the establishment of new programs and to provide a continuum of services for juvenile offenders who do not require secure placement, including, but not limited to, juveniles classified pursuant to the risk assessment instrument described in section 46b-121i, as those who may be released with structured supervision and those who may be released without supervision. When appropriate, the Judicial Branch shall coordinate such programs with the Department of Children and Families and the Department of Mental Health and Addiction Services.
  - (2) The programs shall be tailored to the type of juvenile, including the juvenile's offense history, age, maturity and social development, gender, mental health, alcohol dependency or drug dependency, need for structured supervision and other characteristics, and shall be culturally appropriate, trauma-informed and provided in the least restrictive environment possible in a manner consistent with public safety. The Judicial Branch shall develop programs that provide: (A) Intensive general education, with an individualized remediation plan for each juvenile; (B) appropriate job training and employment opportunities; (C) counseling sessions in anger management and nonviolent conflict resolution; (D) treatment and prevention programs for alcohol dependency and drug dependency; (E) mental health screening, assessment and treatment; (F) sexual offender treatment; and (G) services for families of juveniles.
- (b) The Judicial Branch may contract to establish regional secure residential facilities and regional highly supervised residential and nonresidential facilities for juveniles referred by the court. Such facilities shall operate within contracted-for capacity limits. Such facilities shall be exempt from the licensing requirements of section 17a-145.

- (c) The Judicial Branch shall collaborate with private residential facilities providing residential programs and with community-based nonresidential postrelease programs.
- (d) The Judicial Branch, as part of a publicly bid contract for an alternative incarceration program, may include a requirement that the contractor provide for space necessary for juvenile probation offices and other staff of the Court Support Services Division to perform their duties.
- (e) Any program developed by the Judicial Branch that is designed to prevent or reduce delinquency and crime among juvenile offenders shall be gender specific, as necessary, and shall comprehensively address the unique needs of a targeted gender group.
- (f) The Judicial Branch shall consult with the Commission on Racial and Ethnic Disparity in the Criminal Justice System established pursuant to section 51-10c to address the needs of minorities in the juvenile justice system.

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### (1989) BIA Tribal Juvenile Justice Code

#### 1-5 RELATIONS WITH OTHER AGENCIES

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

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

(1-5 B. Omitted)

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

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

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

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



## [29.5] State and Tribal Code Examples—Special Unit; Advocates and Navigators

### Colorado Revised Statutes

#### TITLE 27. BEHAVIORAL HEALTH—MENTAL HEALTH

#### ARTICLE 69. FAMILY ADVOCACY—MENTAL HEALTH—JUVENILE JUSTICE PROGRAMS

##### 27-69-101 Legislative declaration

- (1) The general assembly hereby finds and declares that:
  - (a) Colorado families and youth have difficulties navigating the mental health, physical health, substance abuse, developmental disabilities, education, juvenile justice, child welfare, and other state and local systems that are compounded when the youth has a mental illness or co-occurring disorder;
  - (b) Preliminary research demonstrates that family advocates increase family and youth satisfaction, improve family participation, and improve services to help youth and families succeed and achieve positive outcomes. One preliminary study in Colorado found that the wide array of useful characteristics and valued roles performed by family advocates, regardless of where they are located institutionally, provided evidence for continuing and expanding the use of family advocates in systems of care.
  - (c) Input from families, youth, and state and local community agency representatives in Colorado demonstrates that family advocates help families get the services and support they need and want, help families to better navigate complex state and local systems, improve family and youth outcomes, and help disengaged families and youth to become engaged families and youth;
  - (d) State and local agencies and systems need to develop more strengths-based, family-centered, individualized, culturally competent, and collaborative approaches that better meet the needs of families and youth;
  - (e) A family advocate helps state and local agencies and systems adopt more strengths-based-targeted programs, policies, and services to better meet the needs of families and their youth with mental illness or co-occurring disorders and improve outcomes for all, including families, youth, and the agencies they utilize;

- (f) There is a need to demonstrate the success of family advocates in helping agencies and systems in Colorado to better meet the needs of families and youth and help state and local agencies strengthen programs.
- (2) It is therefore in the state's best interest to establish demonstration programs for system of care family advocates for mental health juvenile justice populations who navigate across mental health, physical health, substance abuse, developmental disabilities, juvenile justice, education, child welfare, and other state and local systems to ensure sustained and thoughtful family participation in the planning processes of the care for their children and youth.

## **27-69-102 Definitions**

As used in this article, unless the context otherwise requires:

- (1) "Co-occurring disorders" means disorders that commonly coincide with mental illness and may include, but are not limited to, substance abuse, developmental disabilities, fetal alcohol syndrome, and traumatic brain injury.
- (2) "Demonstration programs" means programs that are intended to exemplify and demonstrate evidence of the successful use of family advocates in assisting families and youth with mental illness or co-occurring disorders.
- (3) "Division of criminal justice" means the division of criminal justice created in section 24-33.5-502, C.R.S., in the department of public safety.
- (4) "Family advocacy coalition" means a coalition of family advocates or family advocacy organizations working to help families and youth with mental health problems, substance abuse, developmental disabilities, and other co-occurring disorders to improve services and outcomes for youth and families and to work with and enhance state and local systems.
- (5) "Family advocate" means an individual who has been trained to assist families in accessing and receiving services and support. Family advocates are usually individuals who have raised or cared for children and youth with mental health or co-occurring disorders and have worked with multiple agencies and providers, including mental health, physical health, substance abuse, juvenile justice, developmental disabilities, and other state and local systems of care.
- (6) "Legislative oversight committee" means the legislative oversight committee for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems, created in section 18-1.9-103, C.R.S.

- (7) “Partnership” means a relationship between a family advocacy organization and another entity whereby the family advocacy organization works directly with another entity for oversight and management of the family advocate and family advocacy demonstration program, and the family advocacy organization employs, supervises, mentors, and provides training to the family advocate.
- (8) “System of care” means an integrated network of community-based services and support that is organized to meet the challenges of youth with complex needs, including, but not limited to, the need for substantial services to address areas of developmental, physical, and mental health, substance abuse, child welfare, and education and involvement in or being at risk of involvement with the juvenile justice system. In a system of care, families and youth work in partnership with public and private organizations to build on the strengths of individuals and to address each person’s cultural and linguistic needs so services and support are effective.
- (9) “Task force” means the task force for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems in Colorado, created in section 18-1.9-104, C.R.S.
- (10) “Unit” means the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse.

#### **27-69-103. Demonstration programs established**

There are hereby established demonstration programs for system of care family advocates for mental health juvenile justice populations that shall be implemented and monitored by the division of mental health unit, with input, cooperation, and support from the division of criminal justice, the task force, and family advocacy coalitions.

#### **27-69-104. Program scope—rules**

- (1) The unit shall promulgate rules and standards, after consultation with family advocacy coalitions and other stakeholders, for family advocacy mental health juvenile justice programs for system-of-care family advocates and family systems navigators for mental health juvenile justice populations. The programs shall:
  - (a) Focus on youth with mental illness or co-occurring disorders who are involved in or at risk of involvement with the juvenile justice system and be based upon the families’ and youths’ strengths; and

- (b) Provide navigation, crisis response, integrated planning, transition services, and diversion from the juvenile justice system for youth with mental illness or co-occurring disorders.
- (2) The unit shall provide technical assistance and coordination of family advocacy mental health juvenile justice programs throughout the state that provide system-of-care family advocates and family systems navigators for mental health juvenile justice populations with support to implement and sustain programs that best meet the needs of youth, families, and communities.
- (3) Key components of the family advocacy mental health juvenile justice programs for system-of-care family advocates and family systems navigators for mental health juvenile justice populations shall include:
  - (a) Coordination with the key stakeholders involved in the local community to ensure consistent and effective collaboration. This collaboration may include, but need not be limited to, a family advocacy organization, representatives of the juvenile court, the probation department, the district attorney's office, the public defender's office, a school district, the division of youth corrections within the department of human services, a county department of social or human services, a local community mental health center, and a regional behavioral health organization and may include representatives of a local law enforcement agency, a county public health department, a substance abuse program, a community centered board, a local juvenile services planning committee, and other community partners;
  - (b) Services to youth with mental illness or co-occurring disorders who are involved in or at risk of involvement with the juvenile justice system and other state and local systems;
  - (c) Policies concerning the work of family advocates or family systems navigators that include:
    - I. Experience and hiring requirements;
    - II. The provision of appropriate training; and
    - III. A definition of roles and responsibilities; and
  - (d) Services provided by system-of-care family advocates or family systems navigators for mental health juvenile justice populations, which services shall include:
    - I. Strengths, needs, and cultural assessment;

- II. Navigation and support services;
- III. Education programs related to mental illness, co-occurring disorders, youth and family involvement in the system of care, the juvenile justice system, and other relevant systems;
- IV. Cooperative training programs for family advocates or family systems navigators and for staff, where applicable, of mental health, physical health, substance abuse, developmental disabilities, education, child welfare, juvenile justice, and other state and local systems related to the role and partnership between the family advocates or family systems navigators and the systems that affect youth and their family;
- V. Integrated crisis response services and crisis and transition planning;
- VI. Access to diversion and other services to improve outcomes for youth and their families;
- VII. Other services as determined by the local community; and
- VIII. Coordination with the local community mental health center.

#### **27-69-105. Evaluation and reporting**

- (a) As determined by the unit, in consultation with family advocacy programs, each integrated system-of-care family advocacy program for mental health juvenile justice populations shall forward data to the unit, including:
  - (a) System utilization outcomes, including, but not limited to, available data on services provided related to mental health, physical health, juvenile justice, developmental disabilities, substance abuse, child welfare, traumatic brain injuries, school services, and co-occurring disorders;
  - (b) Youth and family outcomes, related to, but not limited to, mental health, substance abuse, developmental disabilities, juvenile justice, and traumatic brain injury issues;
  - (c) Family and youth satisfaction and assessment of family advocates or family systems navigators;
  - (d) Process and leadership outcomes, including, but not limited to, measures of partnerships, service processes and practices among partnering agencies, leadership indicators, and shared responses to resources and outcomes; and
  - (e) Other outcomes, including, but not limited to, identification of the cost avoidance or cost savings, if any, achieved by the demonstration program, the applicable

outcomes achieved, the transition services provided, and the service utilization time frames.

[\(1989\) BIA Tribal Juvenile Justice Code](#)  
[1-6 JUVENILE COURT PERSONNEL](#)

**1-6 B. Juvenile Counselor/Juvenile Probation Officer**

**1. Appointment**

The court shall appoint juvenile counselor(s) or juvenile probation officer(s) to carry out the duties and responsibilities set forth in this code. The chief judge of the tribal court shall certify annually to the tribal council the number of qualified juvenile counselor(s) or juvenile probation officer(s) needed to carry out the purpose of this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled “juvenile counselors” or “juvenile probation officers” or any other title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

**2. Qualifications**

The juvenile counselor must have an educational background and/or prior experience in the field of delivering social services to youth.

**3. Resource Development**

The juvenile court counselor shall identify and develop resources on the reservation, in conjunction with the juvenile court and the tribal council, to enhance each tribal child’s potential as a viable member of the tribal community.

**4. Duties:**

- a. Make investigations as provided in this code or as directed by the court;
- b. Make reports to the court as provided in this code or as directed by the juvenile court;
- c. Conduct informal adjustments;
- d. Provide counseling services;
- e. Perform such other duties in connection with the care, custody, or transportation of children as the court may require.

**5. Prohibited Duties**

The juvenile counselor shall not be employed as or be required to perform the duties of a prosecutor, juvenile presenter, or law enforcement official.

(Sections Omitted)

#### **1-6 D. Additional Court Personnel**

The court may set qualifications and appoint additional juvenile court personnel such as guardians ad litem, court appointed special advocates (CASAs), juvenile advocates, and/or referees whenever the court decides that it is appropriate to do so.

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### **Leech Lake Band of Ojibwe Judicial Code**

#### **Title 4: Juvenile Justice Code**

#### **4-5 Juvenile Court Personnel**

#### **4-5 B. Juvenile Service Coordinator**

##### **1. Appointment**

The court may appoint Juvenile Service Coordinator(s) to carry out the duties and responsibilities set forth in this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled “juvenile counselors,” “juvenile truancy specialists,” “juvenile caseworkers,” or “juvenile probation officers,” or any other title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

##### **2. Duties**

- (a) Make investigations as provided in this code or as directed by the court;
- (b) Make reports to the court as provided in this code or as directed by the juvenile court;
- (c) Conduct informal adjustments;
- (d) Provide referrals for counseling services;
- (e) Perform such other duties in connection with the care, custody or transportation of children as the court may require.

##### **3. Prohibited Duties**

The Juvenile Service Coordinator shall not be employed as or be required to perform the duties of a prosecutor, juvenile prosecutor, or law enforcement official.

(Sections Omitted)

#### 4-5 C. Additional Court Personnel

The court may set qualifications and appoint additional juvenile court personnel such as guardian ad litem, court appointed special advocates (CASAs), juvenile advocates, and/or referees whenever the court decides that it is appropriate to do so.

## [29.6] State and Tribal Code Examples—Mitigation in Sentencing

### 2009 Kansas Code

#### Chapter 21 CRIMES AND PUNISHMENTS

#### [Article 46 SENTENCING](#)

#### 21-4626: Same; mitigating circumstances.

Mitigating circumstances shall include, but are not limited to, the following:

- (8) At the time of the crime, the defendant was suffering from posttraumatic stress syndrome caused by violence or abuse by the victim.

## [29.7] State and Tribal Code Examples—Secure Detention

### Colorado Statutes

#### Title 19. CHILDREN'S CODE

#### Article 2. The Colorado Juvenile Justice System

#### [Part 5. ENTRY INTO SYSTEM](#)

#### 19-2-508. Detention and Shelter—Hearing—Time Limits—Findings—Review—Confinement with Adult Offenders—Restrictions

In determining whether an adult jail is the appropriate place of confinement for the juvenile, the district court shall consider the following factors:

(Sections Omitted)

- (F) The relative ability of the available adult and juvenile detention facilities to meet the needs of the juvenile, including the juvenile's need for mental health and educational services;



## THE HOPI CHILDREN'S CODE

### **Chapter I - Definitions**

(Definitions Omitted)

15. Detention: Temporary care in physically restricting facilities.

30. Shelter Care: Temporary care in physically unrestrictive facilities.

### **Chapter VI - Juvenile Offender**

(Sections Omitted)

#### **D. Taking Custody**

1. **Custody:** A minor may be taken into custody by a law enforcement officer . . .
2. Omitted
3. **Arresting Officer's Options:** The arresting officer [may] present the minor to the juvenile intake officer.

#### **E. Intake Custody Decision**

When a minor is presented to the juvenile intake officer by the arresting officer, the intake officer may, after an evaluation of the circumstances, place a minor in detention or shelter care . . .

#### **F. Custody Retained**

If the minor is not released the following provisions shall apply:

1. **Detention Pending Court Hearing:** A minor alleged to be a juvenile offender may be detained pending a court hearing, in the following places:
  - a. a shelter care facility on the Reservation approved by the Tribe and/or Bureau of Indian Affairs;
  - b. a detention facility on the Reservation approved by the Court and/or the Bureau of Indian Affairs;
  - c. a foster home on the Reservation approved by the Court and/or the Bureau of Indian Affairs.

A minor who is sixteen (16) years of age or older may be detained in a jail or facility used for the detention of adults only if:

- a. a facility as noted above is not available or would not assure adequate supervision of the minor;
- b. detention is in a cell separate and removed from sight and sound of adults;

- c. adequate supervision is provided twenty-four (24) hours a day.
- 2. **Detention Criteria:** A minor taken into custody shall not be placed in detention prior to a court's disposition unless:
  - a. the act is serious enough to warrant continued detention or shelter care;
  - b. there is reasonable cause to believe that the minor will run away and that he will be unavailable for further proceedings and/or commit a serious act causing damage to persons or property;
  - c. there is reasonable cause to believe that the minor will commit injury to persons or property of others or commit injury to himself or be subject to injury by others; or
  - d. there is reasonable cause to believe the minor has no parent(s), guardian or custodian able or willing to provide adequate supervision and care for him.

## [29.8] Tribal Code Commentary

**Purposes**—Many purpose statements in juvenile statutes mandate that judges weigh the often-competing goals of “the best interests of the child” and “protection of the public safety” in determining how to handle and dispose of juvenile cases, for example, whether to return a youth home with treatment or to send a youth to a secure juvenile detention facility. The Wyoming Statute (WY Stat § 14-6-201(c)(ii)(a)) inserts a third required consideration—judges must recognize any distinctive behavior indicating that a youth has been victimized and whether he or she has a serious mental illness (e.g., depression or posttraumatic stress disorder [PTSD]) that requires treatment. Advocates for traumatized youth argue that traumatized youth require high-quality mental health interventions in a family and/or community setting and warn that secure detention must be avoided to prevent retraumatizing them. The sample tribal statutory language references “the provision of mental development” (Hopi and Leech Lake). The Eastern Band of Cherokee statute allows that “juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety.” Similarly, Leech Lake states that its juvenile system and law is “to provide a continuum of services for children and their families from prevention to residential treatment, with emphasis whenever possible on prevention, early intervention and community-based alternatives.” The Wyoming statutory language is preferable to the tribal statutory language here as it targets trauma victims and requires judges to distinguish and recognize “children who have been victimized or have disabilities, such as serious mental illness that requires treatment.”

**Determining Competence**—We include the competency provisions of the Vermont Rule of Family Practice (V.R.F.P. 1(i)) here, although, none of the tribal juvenile statutes reviewed included or required a competency determination. The question of competency arises in determining whether a child or youth is competent to proceed in a juvenile delinquency proceeding. For example, a small

child of four years old who bites his playmate would be incompetent to proceed in a juvenile delinquency proceeding as he would not be culpable for a bad act or capable of understanding or responding to the proceedings. Likewise, advocates for traumatized youth argue, some youth are too mentally ill to be culpable for the bad act for which they are charged (e.g., they were reacting to a perceived but not actual threat because they had PTSD) and/or they are not capable of understanding or responding to the juvenile justice proceedings (which may be targeted at accountability, restitution, and/or punishment). A tribal juvenile court should have a process and criteria for identifying these youth, dismissing these cases, and redirecting them to the dependency or other appropriate tribal court dockets. The Vermont rule provides that mental examinations be undertaken by court-selected psychologists or psychiatrists and requires the examiner to consider whether the youth suffers from a serious mental illness, among other factors. The rule requires that the report be sealed and filed with the juvenile court and disallows the use of any statements made by the youth as proof of his or her delinquency or for impeachment purposes. The rule further requires a competency hearing and dismissal of petitions before the juvenile court where a youth is found to be incompetent. The implications for tribal juvenile statutes are that some youth do not belong in juvenile court as they do not understand right and wrong in the given situation and will not respond to the accountability, reparations, and/or punishment mechanisms of the system given a current serious mental illness. Tribes adopting a competency screening provision for their delinquency systems should be careful to amend their dependency laws to assume jurisdiction over these youths and their families to provide needed protections, monitoring, services, and treatment.

**Judicial Branch/Leadership**—The Connecticut statute mandates that the judicial branch, in cooperation with the Department of Children and Families and the Department of Mental Health and Addiction Services, develop prevention and crime-reduction programs for juvenile offenders, including new programs providing a continuum of services. The programs are to be tailored to the juvenile, culturally appropriate, and trauma informed. They must also provide intensive general education with an individualized remediation plan for each juvenile, appropriate job training and employment opportunities, counseling sessions in anger management and nonviolent conflict resolution, treatment and prevention programs for alcohol and drug dependency, mental health screening, assessment and treatment, sex offender treatment, and services for families and juveniles. The judicial branch is also authorized to contract with secure residential facilities and highly supervised residential and nonresidential facilities for juveniles. The judicial branch is also mandated to collaborate with private residential facilities and community-based nonresidential postrelease programs. See the Section 46b-121k of the Connecticut statute in the preceding text.

Contrast the Connecticut statute with the requirements of the 1989 BIA Tribal Juvenile Justice Code that authorizes the tribal juvenile court to cooperate with any federal, tribal, state, public, or private agency to participate in any diversion, rehabilitation, or training programs and to receive grants. The 1989 BIA Tribal Juvenile Justice Code provisions also empower the tribal juvenile court to negotiate contracts for the care and placement of children “whose status is adjudicated by the juvenile court.” The Leech Lake provisions are based upon the 1989 BIA Tribal Juvenile Justice Code. The

Connecticut approach is preferable in that it designates a “lead agency,” the judicial branch, to develop the necessary programs in coordination with other key agencies.

**Special Unit; Advocates and Navigators.** The purpose of the Colorado statute at Section 27-69-101 et seq. is to assist youth and families specifically where the youth has a mental illness or co-occurring disorder. The law establishes a mental health unit that will promulgate rules and standards after consultation with a family advocacy coalition and stakeholders, and provide navigation, crisis response, integrated planning, transition services, and diversion from the juvenile justice system for youth with mental illness or co-occurring disorders. The law uses “family advocates” and “family systems navigators” to help youth and their families access and participate in services—to navigate across mental health, physical health, substance abuse, developmental disabilities, juvenile justice, education, child welfare, and other state and local systems.

Contrast the Colorado statute with the 1989 BIA Tribal Juvenile Justice Code Section 1-6 describing tribal juvenile court personnel including a court-appointed juvenile counselor or probation officer, guardians ad litem, CASAs, juvenile advocates, and/or referees. The Leech Lake provisions are based upon the 1989 BIA Tribal Juvenile Justice Code provisions. The 1989 BIA Tribal Juvenile Justice Code and Leech Lake provisions contemplate primarily justice system personnel (e.g., intake, monitoring, legal representation, judges) while the Colorado statute adds additional advocates and navigators with specific backgrounds and training in working with mental health problems and co-occurring disorders.

**Mitigation in Sentencing.** The Kansas statute at Section 21-4626 provides for mitigation in sentencing where there is evidence that a criminal defendant was suffering from PTSD caused by violence or abuse by the victim of the crime. This scheme assumes that a juvenile offender was transferred to adult criminal court, was found guilty, and was sentenced. Youth advocates and juvenile justice system reformers argue that traumatized youth should not be transferred to an adult criminal court for processing, but if they are, their sentences should be mitigated where there is proof of trauma. They argue that such mitigation should be extended to other stress-related disorders as well (beyond PTSD) and that it should not depend on whether the victim of the crime was also the abuser of the youth.

**Secure Detention.** The Colorado statute at Section 19-2-508 requires a juvenile court judge to consider the juvenile’s need for mental health and educational services when determining what detention facility to confine a juvenile in. Youth advocates and juvenile justice system reformers argue that traumatized youth should never be put in either a juvenile or adult secure detention facility (jail). However, should this be necessary, the judge should be required to consider the youth’s trauma and mental health needs in selecting a facility.

Note that many tribes, similar to the Hopi Children’s code provisions, authorize the tribal juvenile intake officers and judges to place juveniles in secure detention, and even adult jail (for certain age ranges), pending adjudication and as a disposition alternative. This raises serious due process and

potential traumatization and retraumatization concerns where youth are detained under dangerous conditions and for long periods of time awaiting adjudication or postdisposition. Out of the tribal juvenile codes reviewed, none made the choice of a secure detention facility conditional on the availability of mental health or trauma-sensitive services.

## [29.9] Exercises

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

- Find and examine your juvenile code's provisions governing mental health screening, assessment, and treatment. What agencies or entities are responsible for undertaking these activities? What are the timing requirements?
- Make a list of what is working well and what is not.
- If you were to reform your juvenile justice system, what tribal entity or agency should be empowered and mandated to be the lead agency to establish coordinated programs for traumatized, potentially court-involved youth and their families?
- Are you interested in adopting any of the following policy/law approaches?
  - Does your tribal system designate a lead agency for working with court-involved youth with mental health problems and their families?
  - Do your laws and policies provide for special units, family advocates, and/or navigators to assist traumatized youth and their families?
  - Does your juvenile code require your juvenile judge to consider trauma as well as the protection of the child and public safety in exercising juvenile court jurisdiction over youth?
  - Does your juvenile code require your juvenile judge to determine whether a traumatized youth is competent to proceed within the juvenile justice system?
  - Does your juvenile code require that information about a youth's trauma be used appropriately (not for findings of guilt or to order secure detention) and to support diversion, the use of self-defense claims, and as mitigating evidence in transfer, disposition, and sentencing?
  - Does your juvenile code avoid the use of probation conditions and contempt orders that in effect funnel traumatized youth into secure detention facilities?

- Does your juvenile code require your juvenile judge to consider trauma and the availability of mental health services in ordering youth to secure detention facilities?
- Does your juvenile code prohibit the transfer of traumatized youth to adult criminal court?
- If not, does your criminal code require the sentencing judge to factor in the existence of trauma in determining criminal sentences?

## **Read and Discuss\***

**Can evidence-based mental health and therapeutic services be culturally adapted to provide effective and appropriate treatment for American Indian (AI) and Alaska Native (AN) youth and their families?**

### **Needs of Youth**

- The AI/AN population is especially susceptible to mental health difficulties

Average annual violent crime rate among AI/AN people over 12 years of age is approximately 2.5 times the national rate

- There is approximately one substantiated report of violent crime per year for every 30 Native children
- Average life expectancy among AI/AN people is lower than the non-Indian population
- Nearly half the AI/AN population is comprised of minors who need care, guidance, and support
- The prevalence of posttraumatic stress disorder (PTSD) is substantially higher among AI/AN persons than in the general community (22% vs. 8%)
- AI/AN persons are more vulnerable to PTSD given exposure to traumatic events coupled with the overarching cultural, historical, and intergenerational traumas
- People who have traumatic experiences and develop PTSD are at risk for other negative mental health outcomes
- Rates of substance abuse disorders, mental health disorders, particularly depression, are elevated among AI/AN peoples

### **Culturally Adapting Evidence-Based Treatments**

- Many AI/AN individuals, to survive, have developed coping strategies that leave them ill-equipped to deal with ongoing trauma, stress, and hardship

- Many AI/AN people are distrustful and reluctant to consider professional mental health services
- Therapeutic services offered in the past have often proven ineffective and inappropriate for AI/AN populations

**There is a need to . . .**

- Develop, refine, disseminate, and evaluate culturally relevant trauma intervention models for use with children in Indian country
- Culturally adapt interventions from existing evidence-based treatments
- Identify traditional healing practices, activities, and ceremonies that are used therapeutically to provide instructions about relationships and parenting

**The process of adaptation includes . . .**

- Identifying the core concepts within existing evidence-based treatments
- Identifying Native traditional teachings and concepts relevant to trauma therapy—parenting, nurturing, therapeutic practice, ways of teaching and learning, cultural worldviews used to explain individual behavior
- Using a process of ongoing and open dialogue
- Working with diverse group of Native cultural consultants
- Creating intervention and training materials and implementation support strategies and protocols

**Culturally Adapted Evidence-Based Treatments**

- The following interventions have been developed by the Indian Country Child Trauma Center at the University of Oklahoma Health Sciences Center and build upon common and tribal-specific cultural elements to provide culturally relevant therapeutic approaches that also respect the substantial individual variability in cultural identity among AI/AN people:
- **Honor Children, Making Relatives**—based upon Parent Child Interaction Therapy, clinical application of parenting techniques in a traditional framework, emphasizing honor, respect, extended family, instruction, modeling, and teachings
- **Honoring Children, Respectful Ways**—congruent with evidence-based group treatment for children with sexual behavioral problems, designed to honor children and promote their self-respect while also promoting respect for others, elders, and all living things

- **Honoring Children, Honoring the Future**—based on the American Indian Life Skills Development Curriculum, an evidence-based suicide prevention program, uses risk and protective factors specific to AI/AN youth as the basis for its prevention strategies, the curriculum is designed for middle and high school students and teaches communication, problem solving, depression and stress management, anger regulation, and goal setting, special attention is paid to AI/AN worldviews, communication styles and forms of recognition
- **Honoring Children, Mending the Circle**—based upon Trauma-Focused Cognitive-Behavioral Therapy, applies cognitive behavioral techniques to support the healing process of trauma in children, grounded in a traditional framework that supports the AI/AN belief in spiritual renewal leading to healing and recovery, practices about behavior, health, healing, humor, and children

\*Taken from Delores Subia Bigfoot & Janie Braden, “Adapting Evidence-Based Treatments for Use with American Indian and Native Alaskan Children and Youth,” *Focal Point* 21, no. 1 (Winter 2007): 19–22. Research, Policy, and Practice in Children’s Mental Health. Research and Training Center on Family Support and Children’s Mental Health.