

**LEGISLATIVE EDUCATION STUDY COMMITTEE  
BILL ANALYSIS**

**Bill Number:** HB 142

**51st Legislature, 1st Session, 2013**

**Tracking Number:** .190559.2SA

**Short Title:** Children's Code Delinquency Act Changes

**Sponsor(s):** Representative Tim Lewis and Others

**Analyst:** Kevin Force

**Date:** February 5, 2013

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**Bill Summary:**

SB 142 amends several sections of law, including:

- technical and “clean-up” amendments to:
  - the *Children, Youth and Family Department Act*;
  - the *Corrections Department Act*;
  - the *Victims of Crime Act*; and
- substantive amendments to:
  - the *Criminal Sentencing Act*; and
  - the *Children's Code Delinquency Act*.

A section-by-section synopsis of the bill follows:

**Sections 1 through 5, 7, 8, 10, 16 through 18, 22, 29, 31, 32 and 34** make only technical, language and “clean-up” changes to law, without any substantive amendments.

**Section 6** amends the *Criminal Sentencing Act* so that “serious youthful offenders” may not be sentenced to imprisonment for life without the possibility of parole.

**Section 9** (as well as all other remaining sections of the bill) amends the *Children's Code Delinquency Act*. Specifically, Section 9 changes one of the definitions of “youthful offender” by reducing the number of prior felony convictions needed to be considered as such from three to two.

**Section 11** would allow children in violation of a condition of their release to also be held in adult jail, rather than only children arrested or detained for a delinquent act.

**Section 12** strikes language specifying that juvenile probation officers do not have the power of law enforcement officers.

**Section 13** amends language regarding the transfer of jurisdiction over a child, so that if disposition of the child is found delinquent and subject to juvenile disposition, the court retains jurisdiction over the child.

**Section 14** clarifies that if a parent or guardian is made a party to a petition, the parties, including a parent or guardian gets a copy of the petition. Moves 32A-2-7 (D), which stated what happened when CCA did not comply with mandatory time limits to file a petition to 32A-2-8 (B).

**Section 15** moves a subsection regarding the failure of a children court's attorney to file a petition in a timely manner to a different section.

**Section 19:**

- deletes a subsection regarding the removal of an adjudicated youthful offender who has been violent toward staff or other residents of a facility to an adult jail pending a hearing; and
- limits the placement of children already in Children, Youth and Family Department (CYFD) custody, alleged to have committed a new offense, to either a detention facility or "any other suitable place."

**Section 20** deletes a subsection directing that a child who is not placed within 10 days of a dispositional hearing may be released, under appropriate supervision, so long as the child does not pose a flight risk, or a substantial risk of harm to themselves or others.

**Section 21** removes a subsection mandating that counsel shall be appointed for a child if counsel is not retained.

**Section 23:**

- adds language stating that if a youthful offender is sentenced pursuant to Section 28 (see, below, a new section regarding dual juvenile/adult sentencing), the Adult Probation and Parole Division of the Corrections Department is not required to complete a predisposition report;
- limits the court's discretion to order an evaluation of parent or custodian of a child to those parents, custodians or guardians who are parties to the case in question; and
- doubles the amount of time allowed for a predisposition evaluation to be completed to 30 from 15 days.

**Section 24** states;

- if a child receives a dual sentence but does not have adult sanctions imposed, it is not considered an adult conviction for collateral purposes;
- children are not eligible for pre-sentence confinement credit against a juvenile disposition;
- children cannot receive consecutive commitments except that "any sentence imposed shall be concurrent and served at the same time as any commitment currently being served, with the later termination date to be controlling."

**Section 25:**

- states that, in addition to other factors, if a facility decides a child is not ready for supervised release for reasons outside CYFD's control, then supervised release shall not

be an option, but rather, a transition plan shall be prepared detailing the reasons why supervised release is inappropriate; and

- adds a section stating that if a child is not placed within 10 days of a dispositional hearing the child may be released under some conditions.

**Section 26:**

- creates a new category of commitment for a child given juvenile disposition only; instead of the one year, or two year commitment, or commitment to age 21, for juvenile dispositions, now the child may be given a commitment “not to exceed the maximum adult sentence that could be imposed, or to age 21, whichever occurs first”;
- adds a section that clarifies if a child charged with a youthful offense is adjudicated only for a delinquent offense, the court may only impose juvenile sanctions; and
- removes the necessity of an amenability hearing to impose adult sanctions, if the court chooses to impose a dual sentencing scheme.

**Section 27** creates a new section that allows:

- dual sentencing of children found amenable to treatment, so that the child gets both a juvenile and adult sentence with the adult sentence “stayed”; and
- allows the adult sentence to be suspended if the child successfully completes the juvenile portion of the sentence.

**Section 28** creates a new section that:

- stating that if the child violates any condition of the terms of suspension or commits a new offense the adult portion of the dual sentence shall be invoked;
- requiring the state to only prove a violation “to a reasonable certainty;” and
- gives discretion to the court to make written findings in order to carry out juvenile sanctions rather than an adult sentence.

**Section 30** adds a subsection that states that if the child absconds, “or otherwise makes themselves absent from supervision,” the supervised release period is tolled and, if the child is detained, any time remaining to supervised release may be added to the commitment time.

**Section 33:**

- removes the limitation requiring a law enforcement request to view a child’s records to be related to the investigation of a crime; and
- adds a subsection that allows anyone authorized by contract with CYFD, or by state or federal law, to view a child’s records.

**Fiscal Impact:**

HB 142 does not contain an appropriation.

**Fiscal Issues:**

According to the Public Defender’s Department (PDD), while it is likely that the department would be able to absorb some of the new cases that might arise out of HB 142, any increase in

the number of proceedings resulting from adult sanctions for children will create a corresponding need for an increase in indigent defense funding.

According to the New Mexico Corrections Department (NMCD):

- the fiscal impact on NMCD, therefore, seems likely to be minimal, because:
  - it is unlikely that many youthful offenders will be sentenced to serve an incarceration period in NMCD custody under the provisions of this bill; and
  - any youthful offenders sentenced to the care of NMCD are more likely to be placed on adult probation with the department; and
- prison, probation, and parole costs are as follows:
  - the classification of an inmate determines custody level, and incarceration costs vary based on the custody level and particular facility;
  - the cost to incarcerate a male inmate ranges from \$38,070 per year in a state-owned and operated prison, to \$31,686 per year in a contract or private<sup>1</sup>;
  - the cost to house a female inmate at a privately owned/operated facility is \$29,375 per year;
  - because medium- and higher-custody state-owned prisons are at capacity, any net increase in inmate populations will likely need to be housed at a private facility;
  - the cost per client in probation and parole under standard supervision is \$2,227 per year;
  - the cost per client under intensive supervision is \$4,311 per year;
  - the cost per client in Community Corrections is \$3,489 per year; and
  - the cost per client per year for female residential Community Corrections programs is \$33,281 per year, and for males is \$21,728 per year.

According to the Administrative Office of the Courts (AOC):

- provisions that transfer youthful offenders to adult courts are likely to result in additional administration for both juvenile and adult courts;
- because a youthful offender may oppose a petition to revoke the stay of an adult sentence, it is likely that more hearings will necessitate additional court time and resources;
- judicial dockets are already quite busy in metropolitan areas;
- these youthful offenders must be represented by counsel, further increasing costs of representation;
- reducing the number of prior felonies, from three to two, for a person to be considered a youthful offender may also increase the number of necessary hearings, because, under dual sentencing provisions, youthful offenders may be facing a adult sentences, concurrent with his juvenile disposition;
- because the consequences of violating conditions of the disposition, or committing a new offence, carry more stringent penalties, it is likely that more cases will go to trial, both to avoid felony charges and to prevent a final adjudication from triggering youthful offender status, which may result in more court time and resources if there are fewer pleas; and
- there may also be a rise in consent decrees as a result of this measure in an effort to avoid youthful offender status.

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<sup>1</sup> Primarily only medium custody inmates are housed in private facilities.

According to CYFD:

- HB 142 has no fiscal implications for the department, as all clients who are likely to be affected by it are, or soon will be, committed to CYFD, and are therefore already covered under current and future budgets; and
- youthful offenders, faced with the possibility of going from CYFD custody to corrections, may be more motivated to successfully rehabilitate.

### **Substantive Issues:**

According to PDD:

- Section 6 reflects the recent decision by the Supreme Court of the United States (SCOTUS) in *Miller v. Alabama*<sup>2</sup>, which held that the Eighth Amendment forbids life imprisonment without the possibility of parole for children convicted of first degree murder.
- Section 9, however, is counter to *Miller* and other recent SCOTUS decisions, which recognized that differences between youth and adults compel a different, often more protective, treatment, under the US Constitution<sup>3</sup>.
- Section 19 does not address the fact that children in residential treatment centers and the like are considered to be in CYFD custody.
- The removal of language saying that counsel will be appointed for a child if counsel is not retained, suggests that children may not be entitled to appointed counsel, which is contrary to SCOTUS decisions, such as *In re Gault*<sup>4</sup>, holding that children in delinquency proceedings are entitled to many of the same due process rights as adults, including the right to representation by counsel.
- Disallowing amenability hearings for the imposition of adult sanctions, even if they are “stayed,” is also counter to SCOTUS decisions under *Gault*, that children be afforded the same due process rights as adults<sup>5</sup>.
- The creation of the “dual” or “blended” sentencing scheme is counter to the New Mexico system designed to deal with serious offenses committed by children by:
  - reversing the default position of New Mexico law that, to date, is supported by science, that recognizing the differences between youth and adults compel a different, and often more protective, treatment for youth;
  - countering current trends in law, such as was cited in *Gault* and *Miller*, recognizing the unique vulnerabilities of children; and
  - invoking a new standard of “reasonable certainty” that is contrary to current New Mexico statute that requires any probation violation to be proven beyond a reasonable doubt<sup>6</sup>, and which, by reducing the current standard of proof, increases the risk of youthful offenders being sanctioned as adults, thus further implicating constitutional due process considerations.

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<sup>2</sup> *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

<sup>3</sup> See also, e.g.: *Graham v. Florida*, 130 S.Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>4</sup> See, e.g.: *In re Gault*, 387 U.S. 1 (1967).

<sup>5</sup> See, e.g.: *Kent v. United States*, 383 U.S. 541 (1966), holding that waiver of jurisdiction from juvenile to district court must be knowing and voluntary.

<sup>6</sup> 32A-2-24(B).

- Removing, in Section 33, the provision limiting law enforcement from examining children’s records if not in the course of an investigation significantly reduces the confidentiality of the records.

According to NMCD, while the number of youthful offenders in department custody is very low, historically, and judges have been reluctant to consign juveniles to prison, under the provisions of HB 142, judges are more likely to place youthful offenders on adult probation, rather than NMCD incarceration.

According to AOC:

- The current *Children’s Code* provides a structure allowing a judge discretion to impose either a juvenile or adult sentence on a youthful offender. Further, the children’s court attorney must file a petition to seek an adult sentence for the offender and must make a showing that the child is not amenable to treatment. Dual sentencing removes the requirement that the youth not be amenable to treatment before adult sentencing.
- Youth who fail to meet these provisions may be taken into immediate custody, and a petition to revoke the stay of adult sentencing may be filed. If the stay is revoked, the youth’s status as a youthful offender is terminated and the court’s jurisdiction over the delinquent act is terminated. Thus, it is possible that under HB 142, children who are found amenable to treatment will, nevertheless, ultimately have adult sentences whereas they currently could not.
- Doubling the length of time to evaluate a detained child for pre-dispositional evaluation may result in children spending additional time in detention.

According to the AODA:

- While SCOTUS held that the Eighth Amendment forbids a scheme that *mandates* life in prison without the possibility of parole for juvenile homicide offenders<sup>7</sup>, and likewise forbids life sentences for non-homicide cases<sup>8</sup>, the current proposal falls precisely under neither decision: New Mexico only applies life without parole in homicide cases, but does not *mandate* them. HB 142, by prohibiting life without parole in juvenile homicide cases, would decide the issue by legislative action.
- Currently, a youthful offender may potentially receive either a juvenile disposition or an adult sentence, depending on what sort of crime was committed, whether the children’s court attorney seeks an adult sentence, and whether the child is amenable to treatment.
- In considering the imposition of adult sanctions, the court must review seven factors before doing so<sup>9</sup>.
- HB 142 creates a new track for youthful offenders who have committed serious felonies but who *are* amenable to treatment. Such offenders may be sentenced to juvenile disposition *and* adult sanctions that will be stayed, barring violation of the disposition order or commission of a new offense.
- The combination of both juvenile and adult sentencing schemes encourages the offender to complete the juvenile disposition without further violation, and rewards those who do

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<sup>7</sup> See *Gault*

<sup>8</sup> See *Graham v. Florida*, 560 U.S. \_\_\_\_, 130 S. Ct. 2011 (2010).

<sup>9</sup> 32A-2-20(C), NMSA 1978 (seriousness of offense; presence of aggression, violence or premeditation; use of firearms; whether the crime was committed against person or property; maturity of the child; record and history of the child; protection of the public and the likelihood of rehabilitation; and, also, any other relevant factor admitted to the record).

so. However, HB 142 does not contain procedural rights and safeguards that are applicable when a children's court attorney seeks an adult sanction, and courts are not required to consider the relevant factors, mentioned above, before levying such adult sanctions.

- Thus, it seems that a youthful offender who is *not* amenable to treatment may receive more rights than one who *is* amenable to treatment.
- HB 142 eliminates from the list of rights under the *Delinquency Act*, "If counsel is not retained for the child or if it does not appear that counsel will be retained, counsel shall be appointed for the child." Remaining language indicates that the child will be represented by counsel, but appointment of counsel is not mentioned. Regardless, the language of the bill cannot affect a child's constitutional right to counsel.

According to CYFD, dual sentencing:

- is a component of Cambio New Mexico, which emphasizes rehabilitation and regionalization over detention and punishment<sup>10</sup>, and allows the department to assess an offender's response to treatment over the course of that treatment, rather than initially, at the dispositional phase of proceedings.
- promotes both public safety and successful rehabilitation; and
- is a sentencing method adopted in multiple jurisdictions and is considered more therapeutic than transferring juvenile offenders directly to adult courts.

### **Technical Issues:**

According to PDD, conditions of release usually include custody arrangements, school attendance, and the like. Running away may be a violation of those conditions, and holding a child in adult jail for running away may create a conflict with other provisions of law<sup>11</sup>, which state that when a child is placed in protective custody for running away they may *not* be held in adult jail.

According to the Administrative Office of the District Attorney (AODA):

- Section 24 creates an exception for a sentence imposed under Section 32A-2-2(F)(2), which appears to be a typographical error, as that section is the *Delinquency Act's* statement of purpose, and makes no mention of sentencing; and
- HB 142's title:
  - identifies one of the issues providing for release if the children's court attorney fails to file in a timely manner, but it appears that the pertinent language is merely moved from one section to another without making substantive change, as the title would suggest; and
  - indicates that the bill changes the parameters of electronic hearings but, in actuality, the sentence structure of the pertinent section is altered without substantive change.

### **Committee Referrals:**

HCPAC/HJC/HAFC

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<sup>10</sup> <http://www.cyfd.org/content/jjs-facilities>

<sup>11</sup> 32A-3B-4

**Related Bills:**

HB 162 *DWI Drug Metabolite Amounts*

HB 265 *Voluntary Manslaughter Youthful Offender*

SB 203 *Juvenile Detention Requirements*