



# DISABILITIES LAW PROGRAM

COMMUNITY LEGAL AID SOCIETY, INC.

100 W. 10th Street, Suite 801

Wilmington, Delaware 19801

(302) 575-0690 (TTY) (302) 575-0696 Fax (302) 575-0840

www.declasi.org

## MEMORANDUM

To: SCPD Policy & Law Committee  
From: Laura J. Waterland  
Re: Recent Regulatory Initiatives and Legislation  
Date: February 7, 2018

Consistent with Council requests, I am providing an analysis of relevant proposed regulations appearing in the February 2018 issue of the Register of Regulations. There were no identified education regulations, but there are a few proposed regulations potentially impacting people with disabilities, as well as several final regulations that Councils commented on previously. As requested, I have also included a review of several newly introduced bills: HBs 305-306-307-308, SB 146 and a draft bill related to burden of proof in special education cases.

### Proposed Regulations

1. DMMA Amending Fair Hearing Regulation DSSM 5304.3[21 DE Reg. 606 (February 1, 2018)]

DMMA proposes to amend the Delaware Social Services Manual (DSSM) 5304.3, with the stated goal of aligning DMMA Medicaid Managed Care policy with the new federal requirements found in the CMS Medicaid Managed Care Final Rule.

As background, historically a recipient of Medicaid services enrolled in managed care who wished to challenge an adverse decision could file for an internal appeal with the MCO and independently file for a state fair hearing with an independent hearing officer who is not in the employ of the MCO. The recipient did not have to use these processes in any order, and could choose one over the other, or do both. There was no requirement that the recipient "exhaust" the internal appeal process before going forward with a state fair hearing. CMS extensively revised the Medicaid Managed Care regulations. One significant change is that the regulations now require a recipient of Medicaid Managed care services to exhaust the MCO appeal process before they can file for a state fair hearing.

This particular amendment to §5304.3 makes it clear that a recipient can request a state fair hearing only after they have received a notice from the MCO of an appeal resolution that remains adverse, or when the MCO has failed to adhere to the notice and timing requirements associated with the internal appeal process found in 42 CFR §438.408. This means that generally speaking a state fair hearing can only be requested upon receipt of an adverse appeal

---

KENT COUNTY 840 Walker Road, Dover, DE  
SUSSEX COUNTY 144 E. Market Street, Georgetown, DE

(302) 674-8500  
(302) 856-0038

DELAWARE'S PROTECTION AND ADVOCACY SYSTEM FOR PERSONS WITH DISABILITIES

decision from the MCO, unless the MCO has not followed notice requirements or handled the appeal within the appropriate time frame. This change reflects the changes made necessary by CMS.

The second change to 5304.3 adds language that “the rules do not prevents the MCO from “offering...one level of appeal” prior to the state fair hearing. This amendment is problematic. Existing language allows for the MCO to offer conciliation services. It is unclear, even with regard to conciliation services, 1.) that a recipient can decline such an offer; 2.) that the MCO cannot delay the issuance of their decision in the appeal while they make this offer or engage in conciliation; and 3.) that these processes do not act as a stay on the fair hearing process. These issues would all have to be further clarified in the regulation, provided conciliation is actually allowed by the regulations. There is a provision in the new regulations for obtaining an External Medical Review (42 CFR 438.402 (c)(B) which is instructive. This regulation does clarify that the process is at the option of the enrollee and does not delay or otherwise impact the timing of the appeal or the right to file a state fair hearing request. It is worth noting that I did not find any authority for allowing an MCO to offer conciliation in the regulations.

More troublesome is the prohibition in the federal regulation regarding multiple levels of appeal. The proposed language appears to suggest that the MCO can offer an additional level of appeal after they have issued an appeal resolution upholding an adverse benefit determination. That is the only way to read the language in context with the rest of the section. However, 42 CFR 438.402 (b) very clearly states that an MCO can only have one level of appeal for enrollees. Moreover, even in the context of offering conciliation if that is permissible under the regulations, it must be made plain that the service is voluntary and cannot delay the fair hearing process.

The final change relates to adding language that clarifies that expedited review can extend to both physical and mental conditions and changes the time that the MCO must issue a decision to 72 hours, not 3 working days, making clear that decisions may be have to rendered over weekends and holidays if necessary. This change is beneficial and Councils should consider endorsing .

The change to the language in 5304.3 that allows the MCO to offer “one level of appeal” after issuing a decision on an appeal appears to violate the regulation and Councils should consider asking that it be withdrawn, and that the regulation be further amended to make clear that an conciliation services are voluntary and do not impact the appeal and/or fair hearing procedures.

## 2. DMMA Amending CHIP regulations [21 DE Reg. 608 (February 1, 2018)].

In this proposed change, DMMA states that its purpose is to align CHIP regulations with the Mental Health Parity and Addiction Equity Act (MHPAEA) and the Patient Protection and Affordable Care Act (ACA). The changes seek to ensure that coverage for mental health and substance abuse disorders is no more restrictive than coverage for medical/surgical conditions. These changes appear to be compatible with the requirements of the federal statutes and guidance from CMS, and Councils probably do not need to take any action on them.

## **Final Regulations**

1. Final DMMA SPA Targeted Case Management for Children and Youth with Serious Emotional Disturbance [21 DE. Reg. 628].

GACEC commented on this proposed extension of services through a state plan amendment. GACEC endorsed with the suggestion that the qualifying age limit be extended beyond age 18 to allow services for children in foster care. DMMA agreed to remove the age restriction and to extend coverage to adolescents who are eligible for DPBHS services. DMMA also incorporated some requirements related to frequency of family meetings and crisis planning, among other issues. I recommend no further action, other than to thank DMMA for the changes.

2. Final DMMA Amendment for Prior Medical Costs Reg. [21 DE. Reg.637 (February 1, 2018)].

Councils recommended amendments to the proposed changes in December 2017. DMMA clarified that this regulation does not affect individuals living in institutions. DMMA rejected the suggestion that one year was not a sufficient amount of time to process insurance claims.

3. DSS Final Regulation on Relative Child Care [21 DE. Reg. 639 February 1, 2018].

SCPD expressed numerous concerns that these changes would negatively impact families with special needs who have difficulty finding child care, especially for their older children, outside of the home. DSS denies that there is any child care shortage. It is clear that DSS is throwing the baby out with the bathwater in an attempt to rein in what they consider to be abuse of the relative child care program. DSS indicates that "The agency is fully aware that there may be circumstances where exceptions must be made, particularly, for those families who may have a special need. The agency is amenable to addressing these exceptions as they present themselves." DSS rejected all of the proposed changes and recommendations, including leaving in substantial training requirements for all relative child care providers ( who are not licensed).

Councils may wish to reiterate their concerns regarding this one size fits all approach to family needs and request that DSS issue additional regulations clarifying its obligation to provide accommodations for families with special needs. If they are "amenable" to doing something they are required by law to do, they should put in their regulations.

## **Proposed Bills**

These comments are preliminary and will may be further fleshed out after conversations with the Policy and Law Committees of the councils. There are series of bills related to sentencing and other criminal justice issues for juveniles. All appear to relate to the idea that juvenile offenders should not be treated as adult offenders, and that judges should have more discretion in formulating sentences.

HB 305. This bill amends 16 Del. Code §4751B by removing juvenile adjudications from the list of “prior qualifying Title 16 convictions” that can lead to vastly increased sentences for subsequent drug offenses as an adult. Judges can continue to use juvenile sentences as a factor in adult sentences, but the juvenile convictions will no longer automatically trigger enhanced penalties.

HB 306. Currently, every person over the age of 15 who is in possession of a firearm during the commission of a Class B felony must be tried as an adult in the adult court system. HB 306 seeks to amend 11 Del. Code §1447A by leaving the decision to try a minor as an adult under these circumstances to the judge and also raises the age to over 16. Superior Court could choose under the proposed revision to send a case back to Family Court. It is worth noting that this discretion was given back to Superior Court last year for other felonies that were previously non-discretionary. (HB 9).

HB 307. This bill repeals 10 Del. Code §1009 and 11 Del Code §1448 to remove all mandatory minimum sentencing schemes for juveniles adjudicated delinquent in Family Court.

HB 308. This bill removed the sunset provision in HB 405 of the 148<sup>th</sup> General Assembly to allow the continuation of a program allowing the issuance of civil citations to juveniles who have committed minor misdemeanors as an alternative to arrest and the introduction of the criminal justice system. This bill has already passed both houses and is awaiting signature.

SB 146. This bill seeks to amend 10 Del. Code §1017 to require the mandatory expungement of felony cases that were terminated in favor of the child.

#### Analysis of Juvenile Crime Bills

All of these bills are efforts to have the criminal code to allow judges more discretion in crafting appropriate sentences for juvenile offenders. The philosophy underpinning the proposed changes is the recognition that juveniles should not be viewed as, and treated like, adults in the criminal justice system. The bills also reflect the understanding that juveniles are not yet fully developed and do not have the same ability to control impulses and make good decisions that we expect from adults.

There are a myriad of reasons why it is good public policy to enable juvenile offenders to stay in the Family Court and juvenile justice system. Exposing juveniles to adult jails is dangerous and undermines rehabilitation efforts. The adult corrections system will not address the underlying issues that may have led to the offender’s criminal behavior, setting the juvenile offender up for a lifetime of criminal behavior when targeted treatment may lead to a better outcome. These measures will also help to address the disproportionate representation of minority children and children with disabilities in the correctional system by diverting young offenders to treatment or other more appropriate settings. The Councils may wish to consider endorsing these bills as advancing a more nuanced approach to juvenile justice in Delaware that will lead to better long term outcomes.

HB 294. This bill seeks to amend Title 21 to transfer the responsibility for establishing,

administering and setting fees for courses of instruction and programs for rehabilitation for individuals who have had their licenses revoked for driving under the influence of drugs or alcohol from the Department of Homeland Security to the Division of Substance Abuse and Mental Health. Because DSAMH has the expertise to address the rehabilitation needs of individuals with substance abuse issues and is in a better position to provide services that these offenders may need, the Councils should consider endorsing this legislation.



the Federal Code of Regulations as a result of the Medicaid Managed Care Final Rule.

#### *Summary of Proposed Changes*

Effective for services provided on and after February 11, 2018, Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend the Division of Social Services Manual section 5304.3 regarding Managed Care Hearings, specifically, to align DMMA Medicaid Managed Care Policy with the new Federal Requirement, Medicaid Managed Care Final Rule.

#### *Public Notice*

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the state public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on the proposed regulation. Comments must be received by 4:30 p.m. on March 5, 2018.

#### *Provider Manuals Update*

A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates. DMAP provider manuals and official notices are available on the Delaware Medical Assistance Provider Portal website: <https://medicaid.dhss.delaware.gov/provider>.

#### **Fiscal Impact**

There is no or minimal fiscal impact as the changes in regulation are only clarification of internal policy.

#### **5304.3 Presiding Over DMMA Managed Care Hearings**

42 CFR 438.408(f), 42 CFR 438.410

This policy applies to recipients enrolled in a managed care organization.

Recipients of medical services from the Division of Medicaid and Medical Assistance may ~~appeal an adverse decision of a Managed Care Organization (MCO) to the Division~~ request a hearing from the Division after receiving an MCO's notice of appeal resolution upholding an adverse benefit determination or the MCO's failure to adhere to the notice and timing requirements in 42 CFR 438.408. The decision of the DSS Hearing Officer is a final decision of the Department of Health and Social Services and is binding on the MCO.

The MCO is responsible for the preparation of the hearing summary under §5312 of these rules and the presentation of its case. The MCO is subject to the rules, practices, and procedures detailed herein.

These rules do not prevent an MCO from offering conciliation services or a ~~grievance hearing~~ one level of appeal prior to the fair hearing conducted by DSS.

##### 1. Recipients Are Entitled to an Expedited Resolution in Cases of Emergency

The MCO is responsible for establishing and maintaining an expedited review process for appeals when the MCO determines or the provider indicates that taking the time for standard resolution could seriously jeopardize the claimant's life, physical or mental health or ability to attain, maintain, or regain maximum function. The expedited review can be requested by the claimant or the provider on the claimant's behalf.

The MCO must provide for prompt access to MCO case records as specified in DSSM 5403. The MCO must also issue an expedited resolution within ~~3 working days~~ 72 hours after receiving the appeal. Expedited appeals must otherwise follow all other standard appeal requirements.

If the MCO denies a request for an expedited resolution of an appeal, it must:

- i. resolve the appeal within the standard time frame of ~~45~~ 30 days.
- ii. make reasonable efforts to provide prompt oral notice of the denial and provide written notice of the denial to the claimant within 2 calendar days and inform the recipient of the right to file a grievance if he or she disagrees with that decision.

15 DE Reg. 86 (07/01/11)

16 DE Reg. 419 (10/01/12)

21 DE Reg. 606 (02/01/18) (Prop.)

DSSM

Existing language

**5304.3 Presiding Over DMMA Managed Care Hearings**

42 CFR 438.408(f), 42 CFR 438.410

This policy applies to recipients enrolled in a managed care organization.

Recipients of medical services from the Division of Medicaid and Medical Assistance may appeal an adverse decision of a Managed Care Organization (MCO) to the Division. The decision of the DSS Hearing Officer is a final decision of the Department of Health and Social Services and is binding on the MCO.

The MCO is responsible for the preparation of the hearing summary under §5312 of these rules and the presentation of its case. The MCO is subject to the rules, practices, and procedures detailed herein.

These rules do not prevent an MCO from offering conciliation services or a grievance hearing prior to the fair hearing conducted by DSS.

**1. Recipients Are Entitled to an Expedited Resolution in Cases of Emergency**

The MCO is responsible for establishing and maintaining an expedited review process for appeals when the MCO determines or the provider indicates that taking the time for standard resolution could seriously jeopardize the claimant's life or health or ability to attain, maintain, or regain maximum function. The expedited review can be requested by the claimant or the provider on the claimant's behalf.

The MCO must provide for prompt access to MCO case records as specified in DSSM 5403. The MCO must also issue an expedited resolution within 3 working days after receiving the appeal. Expedited appeals must otherwise follow all other standard appeal requirements.

If the MCO denies a request for an expedited resolution of an appeal, it must:

- i. resolve the appeal within the standard time frame of 45 days.
- ii. make reasonable efforts to provide prompt oral notice of the denial and provide written notice of the denial to the claimant within 2 calendar days.

## Subpart F—Grievance and Appeal System

SOURCE: 81 FR 27853, May 6, 2016, unless otherwise noted.

 Back to Top

### §438.400 Statutory basis, definitions, and applicability.

(a) *Statutory basis.* This subpart is based on the following statutory sections:

(1) Section 1902(a)(3) of the Act requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly.

(2) Section 1902(a)(4) of the Act requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.

(3) Section 1932(b)(4) of the Act requires Medicaid managed care organizations to establish internal grievance procedures under which Medicaid enrollees, or providers acting on their behalf, may challenge the denial of coverage of, or payment for, medical assistance.

(b) *Definitions.* As used in this subpart, the following terms have the indicated meanings:

*Adverse benefit determination* means, in the case of an MCO, PIHP, or PAHP, any of the following:

(1) The denial or limited authorization of a requested service, including determinations based on the type or level of service, requirements for medical necessity, appropriateness, setting, or effectiveness of a covered benefit.

(2) The reduction, suspension, or termination of a previously authorized service.

(3) The denial, in whole or in part, of payment for a service.

(4) The failure to provide services in a timely manner, as defined by the State.

(5) The failure of an MCO, PIHP, or PAHP to act within the timeframes provided in §438.408(b)(1) and (2) regarding the standard resolution of grievances and appeals.

(6) For a resident of a rural area with only one MCO, the denial of an enrollee's request to exercise his or her right, under §438.52(b)(2)(ii), to obtain services outside the network.

(7) The denial of an enrollee's request to dispute a financial liability, including cost sharing, copayments, premiums, deductibles, coinsurance, and other enrollee financial liabilities.

*Appeal* means a review by an MCO, PIHP, or PAHP of an adverse benefit determination.

*Grievance* means an expression of dissatisfaction about any matter other than an adverse benefit determination. Grievances may include, but are not limited to, the quality of care or services provided, and aspects of interpersonal relationships such as rudeness of a provider or employee, or failure to respect the enrollee's rights regardless of whether remedial action is requested. Grievance includes an

enrollee's right to dispute an extension of time proposed by the MCO, PIHP or PAHP to make an authorization decision.

*Grievance and appeal system* means the processes the MCO, PIHP, or PAHP implements to handle appeals of an adverse benefit determination and grievances, as well as the processes to collect and track information about them.

*State fair hearing* means the process set forth in subpart E of part 431 of this chapter.

(c) *Applicability*. This subpart applies to the rating period for contracts with MCOs, PIHPs, and PAHPs beginning on or after July 1, 2017. Until that applicability date, states, MCOs, PIHPs, and PAHPs are required to continue to comply with subpart F contained in the 42 CFR parts 430 to 481, edition revised as of October 1, 2015.

↑ Back to Top

#### **§438.402 General requirements.**

(a) *The grievance and appeal system*. Each MCO, PIHP, and PAHP must have a grievance and appeal system in place for enrollees. Non-emergency medical transportation PAHPs, as defined in §438.9, are not subject to this subpart F.

(b) *Level of appeals*. Each MCO, PIHP, and PAHP may have only one level of appeal for enrollees.

(c) *Filing requirements*—(1) *Authority to file*. (i) An enrollee may file a grievance and request an appeal with the MCO, PIHP, or PAHP. An enrollee may request a State fair hearing after receiving notice under §438.408 that the adverse benefit determination is upheld.

(A) *Deemed exhaustion of appeals processes*. In the case of an MCO, PIHP, or PAHP that fails to adhere to the notice and timing requirements in §438.408, the enrollee is deemed to have exhausted the MCO's, PIHP's, or PAHP's appeals process. The enrollee may initiate a State fair hearing.

(B) *External medical review*. The State may offer and arrange for an external medical review if the following conditions are met.

(1) The review must be at the enrollee's option and must not be required before or used as a deterrent to proceeding to the State fair hearing.

(2) The review must be independent of both the State and MCO, PIHP, or PAHP.

(3) The review must be offered without any cost to the enrollee.

(4) The review must not extend any of the timeframes specified in §438.408 and must not disrupt the continuation of benefits in §438.420.

(ii) If State law permits and with the written consent of the enrollee, a provider or an authorized representative may request an appeal or file a grievance, or request a State fair hearing, on behalf of an enrollee. When the term "enrollee" is used throughout subpart F of this part, it includes providers and authorized representatives consistent with this paragraph, with the exception that providers cannot request continuation of benefits as specified in §438.420(b)(5).

(2) *Timing*—(i) *Grievance*. An enrollee may file a grievance with the MCO, PIHP, or PAHP at any time.

(ii) *Appeal*. Following receipt of a notification of an adverse benefit determination by an MCO, PIHP, or PAHP, an enrollee has 60 calendar days from the date on the adverse benefit determination notice in which to file a request for an appeal to the managed care plan.

(3) *Procedures*—(i) *Grievance*. The enrollee may file a grievance either orally or in writing and, as determined by the State, either with the State or with the MCO, PIHP, or PAHP.

(ii) *Appeal*. The enrollee may request an appeal either orally or in writing. Further, unless the enrollee requests an expedited resolution, an oral appeal must be followed by a written, signed appeal.

↑ Back to Top

#### **§438.404 Timely and adequate notice of adverse benefit determination.**

(a) *Notice*. The MCO, PIHP, or PAHP must give enrollees timely and adequate notice of an adverse benefit determination in writing consistent with the requirements below and in §438.10.

(b) *Content of notice*. The notice must explain the following:

(1) The adverse benefit determination the MCO, PIHP, or PAHP has made or intends to make.

(2) The reasons for the adverse benefit determination, including the right of the enrollee to be provided upon request and free of charge, reasonable access to and copies of all documents, records, and other information relevant to the enrollee's adverse benefit determination. Such information includes medical necessity criteria, and any processes, strategies, or evidentiary standards used in setting coverage limits.

(3) The enrollee's right to request an appeal of the MCO's, PIHP's, or PAHP's adverse benefit determination, including information on exhausting the MCO's, PIHP's, or PAHP's one level of appeal described at §438.402(b) and the right to request a State fair hearing consistent with §438.402(c).

(4) The procedures for exercising the rights specified in this paragraph (b).

(5) The circumstances under which an appeal process can be expedited and how to request it.

(6) The enrollee's right to have benefits continue pending resolution of the appeal, how to request that benefits be continued, and the circumstances, consistent with state policy, under which the enrollee may be required to pay the costs of these services.

(c) *Timing of notice*. The MCO, PIHP, or PAHP must mail the notice within the following timeframes:

(1) For termination, suspension, or reduction of previously authorized Medicaid-covered services, within the timeframes specified in §§431.211, 431.213, and 431.214 of this chapter.

(2) For denial of payment, at the time of any action affecting the claim.

(3) For standard service authorization decisions that deny or limit services, within the timeframe specified in §438.210(d)(1).

(4) If the MCO, PIHP, or PAHP meets the criteria set forth for extending the timeframe for standard service authorization decisions consistent with §438.210(d)(1)(ii), it must—

(i) Give the enrollee written notice of the reason for the decision to extend the timeframe and inform the enrollee of the right to file a grievance if he or she disagrees with that decision; and

(ii) Issue and carry out its determination as expeditiously as the enrollee's health condition requires and no later than the date the extension expires.

(5) For service authorization decisions not reached within the timeframes specified in §438.210(d) (which constitutes a denial and is thus an adverse benefit determination), on the date that the timeframes expire.

(6) For expedited service authorization decisions, within the timeframes specified in §438.210(d)(2).

⬆ Back to Top

#### **§438.406 Handling of grievances and appeals.**

(a) *General requirements.* In handling grievances and appeals, each MCO, PIHP, and PAHP must give enrollees any reasonable assistance in completing forms and taking other procedural steps related to a grievance or appeal. This includes, but is not limited to, auxiliary aids and services upon request, such as providing interpreter services and toll-free numbers that have adequate TTY/TTD and interpreter capability.

(b) *Special requirements.* An MCO's, PIHP's or PAHP's process for handling enrollee grievances and appeals of adverse benefit determinations must:

(1) Acknowledge receipt of each grievance and appeal.

(2) Ensure that the individuals who make decisions on grievances and appeals are individuals—

(i) Who were neither involved in any previous level of review or decision-making nor a subordinate of any such individual.

(ii) Who, if deciding any of the following, are individuals who have the appropriate clinical expertise, as determined by the State, in treating the enrollee's condition or disease.

(A) An appeal of a denial that is based on lack of medical necessity.

(B) A grievance regarding denial of expedited resolution of an appeal.

(C) A grievance or appeal that involves clinical issues.

(iii) Who take into account all comments, documents, records, and other information submitted by the enrollee or their representative without regard to whether such information was submitted or considered in the initial adverse benefit determination.

(3) Provide that oral inquiries seeking to appeal an adverse benefit determination are treated as appeals (to establish the earliest possible filing date for the appeal) and must be confirmed in writing, unless the enrollee or the provider requests expedited resolution.

(4) Provide the enrollee a reasonable opportunity, in person and in writing, to present evidence and testimony and make legal and factual arguments. The MCO, PIHP, or PAHP must inform the enrollee of the limited time available for this sufficiently in advance of the resolution timeframe for appeals as specified in §438.408(b) and (c) in the case of expedited resolution.

(5) Provide the enrollee and his or her representative the enrollee's case file, including medical records, other documents and records, and any new or additional evidence considered, relied upon, or generated by the MCO, PIHP or PAHP (or at the direction of the MCO, PIHP or PAHP) in connection with the appeal of the adverse benefit determination. This information must be provided free of charge and sufficiently in advance of the resolution timeframe for appeals as specified in §438.408(b) and (c).

(6) Include, as parties to the appeal—

(i) The enrollee and his or her representative; or

(ii) The legal representative of a deceased enrollee's estate.

 Back to Top

#### **§438.408 Resolution and notification: Grievances and appeals.**

(a) *Basic rule.* Each MCO, PIHP, or PAHP must resolve each grievance and appeal, and provide notice, as expeditiously as the enrollee's health condition requires, within State-established timeframes that may not exceed the timeframes specified in this section.

(b) *Specific timeframes—*(1) *Standard resolution of grievances.* For standard resolution of a grievance and notice to the affected parties, the timeframe is established by the State but may not exceed 90 calendar days from the day the MCO, PIHP, or PAHP receives the grievance.

(2) *Standard resolution of appeals.* For standard resolution of an appeal and notice to the affected parties, the State must establish a timeframe that is no longer than 30 calendar days from the day the MCO, PIHP, or PAHP receives the appeal. This timeframe may be extended under paragraph (c) of this section.

(3) *Expedited resolution of appeals.* For expedited resolution of an appeal and notice to affected parties, the State must establish a timeframe that is no longer than 72 hours after the MCO, PIHP, or PAHP receives the appeal. This timeframe may be extended under paragraph (c) of this section.

(c) *Extension of timeframes.* (1) The MCO, PIHP, or PAHP may extend the timeframes from paragraph (b) of this section by up to 14 calendar days if—

(i) The enrollee requests the extension; or

(ii) The MCO, PIHP, or PAHP shows (to the satisfaction of the State agency, upon its request) that there is need for additional information and how the delay is in the enrollee's interest.

(2) *Requirements following extension.* If the MCO, PIHP, or PAHP extends the timeframes not at the request of the enrollee, it must complete all of the following:

(i) Make reasonable efforts to give the enrollee prompt oral notice of the delay.

(ii) Within 2 calendar days give the enrollee written notice of the reason for the decision to extend the timeframe and inform the enrollee of the right to file a grievance if he or she disagrees with that decision.

(iii) Resolve the appeal as expeditiously as the enrollee's health condition requires and no later than the date the extension expires.

(3) *Deemed exhaustion of appeals processes.* In the case of an MCO, PIHP, or PAHP that fails to adhere to the notice and timing requirements in this section, the enrollee is deemed to have exhausted the MCO's, PIHP's, or PAHP's appeals process. The enrollee may initiate a State fair hearing.

(d) *Format of notice—(1) Grievances.* The State must establish the method that an MCO, PIHP, and PAHP will use to notify an enrollee of the resolution of a grievance and ensure that such methods meet, at a minimum, the standards described at §438.10.

(2) *Appeals.* (i) For all appeals, the MCO, PIHP, or PAHP must provide written notice of resolution in a format and language that, at a minimum, meet the standards described at §438.10.

(ii) For notice of an expedited resolution, the MCO, PIHP, or PAHP must also make reasonable efforts to provide oral notice.

(e) *Content of notice of appeal resolution.* The written notice of the resolution must include the following:

(1) The results of the resolution process and the date it was completed.

(2) For appeals not resolved wholly in favor of the enrollees—

(i) The right to request a State fair hearing, and how to do so.

(ii) The right to request and receive benefits while the hearing is pending, and how to make the request.

(iii) That the enrollee may, consistent with state policy, be held liable for the cost of those benefits if the hearing decision upholds the MCO's, PIHP's, or PAHP's adverse benefit determination.

(f) *Requirements for State fair hearings—(1) Availability.* An enrollee may request a State fair hearing only after receiving notice that the MCO, PIHP, or PAHP is upholding the adverse benefit determination.

(i) *Deemed exhaustion of appeals processes.* In the case of an MCO, PIHP, or PAHP that fails to adhere to the notice and timing requirements in §438.408, the enrollee is deemed to have exhausted the MCO's, PIHP's, or PAHP's appeals process. The enrollee may initiate a State fair hearing.

(ii) *External medical review.* The State may offer and arrange for an external medical review if the following conditions are met.

(A) The review must be at the enrollee's option and must not be required before or used as a deterrent to proceeding to the State fair hearing.

(B) The review must be independent of both the State and MCO, PIHP, or PAHP.

(C) The review must be offered without any cost to the enrollee.

(D) The review must not extend any of the timeframes specified in §438.408 and must not disrupt the continuation of benefits in §438.420.

(2) *State fair hearing.* The enrollee must request a State fair hearing no later than 120 calendar days from the date of the MCO's, PIHP's, or PAHP's notice of resolution.

(3) *Parties.* The parties to the State fair hearing include the MCO, PIHP, or PAHP, as well as the enrollee and his or her representative or the representative of a deceased enrollee's estate.

 [Back to Top](#)

#### **§438.410 Expedited resolution of appeals.**

(a) *General rule.* Each MCO, PIHP, and PAHP must establish and maintain an expedited review process for appeals, when the MCO, PIHP, or PAHP determines (for a request from the enrollee) or the provider indicates (in making the request on the enrollee's behalf or supporting the enrollee's request) that taking the time for a standard resolution could seriously jeopardize the enrollee's life, physical or mental health, or ability to attain, maintain, or regain maximum function.

(b) *Punitive action.* The MCO, PIHP, or PAHP must ensure that punitive action is not taken against a provider who requests an expedited resolution or supports an enrollee's appeal.

(c) *Action following denial of a request for expedited resolution.* If the MCO, PIHP, or PAHP denies a request for expedited resolution of an appeal, it must—

(1) Transfer the appeal to the timeframe for standard resolution in accordance with §438.408(b)(2).

(2) Follow the requirements in §438.408(c)(2).

 [Back to Top](#)

#### **§438.414 Information about the grievance and appeal system to providers and subcontractors.**

The MCO, PIHP, or PAHP must provide information specified in §438.10(g)(2)(xi) about the grievance and appeal system to all providers and subcontractors at the time they enter into a contract.

 [Back to Top](#)

#### **§438.416 Recordkeeping requirements.**

(a) The State must require MCOs, PIHPs, and PAHPs to maintain records of grievances and appeals and must review the information as part of its ongoing monitoring procedures, as well as for updates and revisions to the State quality strategy.

(b) The record of each grievance or appeal must contain, at a minimum, all of the following information:

(1) A general description of the reason for the appeal or grievance.

- (2) The date received.
- (3) The date of each review or, if applicable, review meeting.
- (4) Resolution at each level of the appeal or grievance, if applicable.
- (5) Date of resolution at each level, if applicable.
- (6) Name of the covered person for whom the appeal or grievance was filed.

(c) The record must be accurately maintained in a manner accessible to the state and available upon request to CMS.

↑ Back to Top

**§438.420 Continuation of benefits while the MCO, PIHP, or PAHP appeal and the State fair hearing are pending.**

(a) *Definition.* As used in this section—

*Timely files* means files for continuation of benefits on or before the later of the following:

(i) Within 10 calendar days of the MCO, PIHP, or PAHP sending the notice of adverse benefit determination.

(ii) The intended effective date of the MCO's, PIHP's, or PAHP's proposed adverse benefit determination.

(b) *Continuation of benefits.* The MCO, PIHP, or PAHP must continue the enrollee's benefits if all of the following occur:

(1) The enrollee files the request for an appeal timely in accordance with §438.402(c)(1)(ii) and (c)(2)(ii);

(2) The appeal involves the termination, suspension, or reduction of previously authorized services;

(3) The services were ordered by an authorized provider;

(4) The period covered by the original authorization has not expired; and

(5) The enrollee timely files for continuation of benefits.

(c) *Duration of continued or reinstated benefits.* If, at the enrollee's request, the MCO, PIHP, or PAHP continues or reinstates the enrollee's benefits while the appeal or state fair hearing is pending, the benefits must be continued until one of following occurs:

(1) The enrollee withdraws the appeal or request for state fair hearing.

(2) The enrollee fails to request a state fair hearing and continuation of benefits within 10 calendar days after the MCO, PIHP, or PAHP sends the notice of an adverse resolution to the enrollee's appeal under §438.408(d)(2).

(3) A State fair hearing office issues a hearing decision adverse to the enrollee.

(d) *Enrollee responsibility for services furnished while the appeal or state fair hearing is pending.* If the final resolution of the appeal or state fair hearing is adverse to the enrollee, that is, upholds the MCO's, PIHP's, or PAHP's adverse benefit determination, the MCO, PIHP, or PAHP may, consistent with the state's usual policy on recoveries under §431.230(b) of this chapter and as specified in the MCO's, PIHP's, or PAHP's contract, recover the cost of services furnished to the enrollee while the appeal and state fair hearing was pending, to the extent that they were furnished solely because of the requirements of this section.

 [Back to Top](#)

#### **§438.424 Effectuation of reversed appeal resolutions.**

(a) *Services not furnished while the appeal is pending.* If the MCO, PIHP, or PAHP, or the State fair hearing officer reverses a decision to deny, limit, or delay services that were not furnished while the appeal was pending, the MCO, PIHP, or PAHP must authorize or provide the disputed services promptly and as expeditiously as the enrollee's health condition requires but no later than 72 hours from the date it receives notice reversing the determination.

(b) *Services furnished while the appeal is pending.* If the MCO, PIHP, or PAHP, or the State fair hearing officer reverses a decision to deny authorization of services, and the enrollee received the disputed services while the appeal was pending, the MCO, PIHP, or PAHP, or the State must pay for those services, in accordance with State policy and regulations.



# DEPARTMENT OF HEALTH AND SOCIAL SERVICES

## DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. §512)  
16 DE Admin. Code 11006

**FINAL**

**ORDER**

### Relative Child Care

#### **NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to amend Division of Social Services Manual regarding Relative Child Care, specifically, *to outline participation requirements, documentation and training*. The Department's proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the November 2017 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by December 1, 2017 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

#### **SUMMARY OF PROPOSAL**

The purpose of this notice is to advise the public that Delaware Health and Social Services (DHSS)/Division of Social Services (DSS) is proposing to amend Division of Social Services Manual regarding Relative Child Care, specifically, *to outline participation requirements, documentation and training*.

#### **Statutory Authority**

- Child Care Development Fund (CCDF)
- Child Care Development Block Grant CFR 98.2, 98.41

#### **Background**

Relative Child Care is one of several child care options for parents who receive a child care subsidy. The original intent of the program was to provide a child care option for parents who worked during "non-traditional" hours (i.e. shift work, weekends); however, this intent was never formally established through policy. As this type of care is unlicensed, the Division of Social Services (DSS) seeks to revise the current policy to restore the original intent and integrity of the program. In addition, new federal regulations have been established to ensure the health and safety of all children who receive subsidy. DSS is responsible for ensuring that all Purchase of Care providers comply with these new regulations. The revised Relative Child Care policy will enable the Division to better determine who is eligible to participate as a provider, confirm relationships, and fully comply with the new federal health and safety regulations. There are no budget implications as a result of this policy revision.

#### **Summary of Proposal**

##### *Purpose*

To establish a structured policy regarding Relative Child Care and to ensure sufficient monitoring of this type of care.

##### *Summary of Proposed Changes*

Effective for services provided on and after February 11, 2018 Delaware Health and Social Services/Division of Social Services proposes to amend the Division of Social Service Manual to outline participation requirements, documentation and training.

##### *Public Notice*

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Social Services (DSS) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on the proposed regulation. Comments were to have been received by 4:30 p.m. on March 1, 2018.

#### **Fiscal Impact Statement**

The policy revision will have no fiscal impact since the purpose is simply to restore the program to its original intent.

The policy revision does not require any additional staff, system changes, or additional costs.

### Summary of Comments Received with Agency Response and Explanation of Changes

The State Council for Persons with Disabilities (SCPD) offered the following summarized observations:

SCPD commented that there is an ostensible error in Section 5 on p. 378. The first bullet literally allows care in a child's home only for 4-5 children. The reference to "minimum of four children in the home" should be "minimum of one child in the home". Compare Section 6.

**Agency Response:** The Division of Social Services (DSS) appreciates the council's comment regarding the requirement of a minimum number of children to be cared for in the child's home. DSS policy **11003.5 In-Home Child Care** dictates the following:

The Fair Labor Standards Act requires that in-home child care providers be treated as domestic service workers. As a result, DSS must pay these providers the federal minimum wage. Paying the federal minimum wage would make the cost of in-home care disproportionate to other types of care. As a result, DSS has placed a limit on parental use of the in-home care option.

A. As of July 1994, in-home care has been limited to:

1. Families in which four or more children require care, or
2. Families with fewer children only as a matter of last resort.

B. Examples of "last resort" may include:

1. The parent works the late shift in a rural area where other types of care are not available,
2. There is a special needs child for whom it is impossible to find any other child care arrangement.

Therefore the DSS statement regarding the minimum number of children is correct. There must be a minimum of four children in the home in order for children to be cared for in the children's home; but not more than five. When the care is provided in the caregiver's home the minimum requirement is one child.

**Second,** Section 3 requires a relative provider to be "21 years of age or older". In contrast, the applicable federal regulation defines relative child care providers as "18 years of age or older". See 45 CFR 98.2. Moreover, states are restricted in their discretion to add requirements not included in the federal regulations:

- (b) Lead agencies may not set health and safety standards and requirements other than those required in paragraph (a) of this section that are inconsistent with the parental choice safeguards in §98.3(f).

45 CFR 98.41(b)

**Agency Response:** DSS appreciates the council's comment regarding restrictions on the lead agency in their discretion to add requirements not included in the federal regulations. As we have been receiving a substantial number of requests for relative care for providers who were not suitable for a myriad of reasons DSS, in its effort to ensure the health and safety of children, proposes this and other revisions to the Relative Care Policy. We understand that the state is restricted in its discretion to add requirements not included in the federal regulations and we have reached out to the Administration for Children and Families, who administers the Child Care and Development Fund, for further guidance regarding this issue.

**Third,** Section 3 includes the following limit: "Relative child care is limited to evening and weekend shift work hours only." This is ill-conceived given the overall shortage of child care providers. Moreover, "special needs" parents and children are eligible for the State child care program. See 16 **DE Admin. Code** 11003.7.8. It may be extremely difficult for a parent of a special needs child ages 13-18 to identify a licensed provider to add a 13-18 year old to their daycare. Moreover, "special needs" parents often rely on relatives for parenting assistance and federal law requires states to accommodate that reliance. See Joint DOJ/HHS LOF to Mass. Dept. Of Children & Families (1/29/15), published at [https://www.ada.gov/ma\\_docf\\_lof.pdf](https://www.ada.gov/ma_docf_lof.pdf). See also U.S. DOJ/HHS Joint Guidance, "Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (8/15)", published at [https://www.ada.gov/doj\\_hhs\\_ta/child\\_welfare\\_ta.pdf](https://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf). At a minimum, Section 3 should be revised to allow relative child care for special needs children and adults apart from evening and weekend shifts. It would also be prudent to authorize exceptions for all parents with the approval of DHSS.

**Agency Response:** DSS appreciates the Council's comment regarding the limitations on the Relative Care choice for parents. At this time the Division is not aware of any factual documentation regarding a child care shortage in our state. We are, however, setting the stage to conduct some research to determine if in fact the child care demand is greater than the supply, and where services may be lacking. Moreover, the division has seen a significant increase in the request for relative care by providers who are unsuitable for a myriad of reasons. We have had a rash of parents pulling their children from centers to allow relatives to provide care, parents attempting to get people other than relatives to provide care, people other than the authorized relatives actually caring for the children when site visits are conducted (which means they have not been finger printed), relative providers caring for the children at sites other than the authorized sites, relative providers/

children who are unable to be located when attempting to conduct site visits, relative care providers allowing other adults who have not been fingerprinted, in the home, around the children, relatives providing care in environments that were not safe for children, etc. In its efforts to, as best it can, ensure the health and safety of children the division has made the decision to restore the integrity of the relative care program by limiting this choice to parents who need care during non-traditional hours such as weekends, and evening shifts. The agency is fully aware that there may be circumstances where exceptions must be made, particularly, for those families who may have a special need. The agency is amenable to addressing these exceptions as they present themselves.

Fourth, DMMA is imposing the following requirements on relative providers: 1) completion of orientation class on relative child care rules and regulations; 2) 28 hours of approved training within 12 months; 3) 3 hours of health and safety training annually; and 4) completion of both CPR and first aid courses resulting in certification followed by recertification every 2 years. See Section 4. DMMA is treating relative child care providers as if they were licensed day care providers even though they are exempt from licensing. See 16 DE Admin. Code 11004.4.1. Asking a typical grandparent to spend an estimated 40 hours in training to care for a grandchild is "overkill".

**Agency Response:** DSS appreciates the Council's comment regarding the required training for Relative Care Providers. Although these providers are exempt from licensing standards the division believes that best practices and health and safety standards are the foundation of quality child care. Meeting the basic health and safety needs of all children sets the stage for positive child outcomes. The pre-service, training and annual training modules provide caregivers with an overview of basic health and safety information and ensures that caregivers continue to be knowledgeable about current and best practices regarding child care.

No change to the regulation was made as a result of these comments.

DSS is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given by the State Council for Persons with Disabilities.

#### FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2017 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Division of Social Services Manual regarding Relative Child Care, specifically, *to outline participation requirements, documentation and training*, is adopted and shall be final effective February 11, 2018.

1/18/18

Kara Odom Walker, MD, MPH, MSHS  
Secretary, DHSS

#### FINAL

#### 11006.7 Determining Relative Child Care

45 CFR 98.2, 98.41

This policy applies to families who request Purchase of Care funding for a relative to provide child care.

**1. The relative providing child care must be related to the child by:**

- Marriage.
- Blood relationship, or
- Court decree.

**2. The relative providing child care must be related to the child in one of the following relationships:**

- Great-Grandparent.
- Grandparent.
- Adult Sibling.
- Aunt, or
- Uncle.

**3. The relative provider shall:**

- Be 21 years of age or older;
- Only provide care for the children of one family member;
- Not reside in the same home as the children needing care; and
- Only provide care during non-traditional hours that are not normally offered through a licensed child care provider. Relative child care is limited to evening and weekend shift work hours only.

**4. The relative provider must successfully complete:**

- The "Criminal History, Child Abuse, and Neglect Background Check Request Form". This form must be completed for the relative provider and each individual 18 years of age or older who is living in the relative provider's home;
- The orientation class on relative child care rules and regulations;
- 28 hours of approved training within 12 months of completing the relative child care orientation class;
- Three hours of health and safety training annually; and
- CPR and first aid courses. The relative provider's certifications must be current and re-certifications must be completed every two years.

**5. In the children's home, the relative provider shall:**

- Care for a minimum of four children in the home. The total number of children who are cared for in the home may not exceed a maximum of five children.
- Care for no more than two children under two years of age.
- Care for the children of one family member. The children must be related as siblings.

**6. In the relative provider's home, the relative provider shall:**

- Care for a minimum of one child in the home. The total number of children who are cared for in the home may not exceed a maximum of five children.
- Care for no more than two children under two years of age.
- Care for the children of one family member. The children must be related as siblings.

Note: Parents and caretakers who need child care during non-traditional hours shall be referred to Delaware's statewide Resource and Referral Agency for assistance in finding a provider.



SPONSOR: Rep. J. Johnson & Rep. Heffernan & Rep. Longhurst &  
Rep. Lynn & Rep. Potter & Sen. Townsend & Sen. Henry  
& Sen. Lawson & Sen. McDowell  
Reps. Bentz, Brady, Pardee; Sen. Lavelle

HOUSE OF REPRESENTATIVES  
149th GENERAL ASSEMBLY

HOUSE BILL NO. 305

AN ACT TO AMEND TITLE 16 OF THE DELAWARE CODE RELATING TO CONTROLLED SUBSTANCES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend Section 4751B, Title 16 of the Delaware Code by making deletions as shown by strike through  
2 and insertions as shown by underline as follows:

3 § 4751B. Prior qualifying Title 16 convictions.

4 For the purposes of this subchapter:

5 (1) A "prior qualifying Title 16 conviction" means any prior adult felony conviction for a Title 16 offense where  
6 the conviction was 1 of former § 4751, § 4752, or § 4753A of this title, or any other former section of this title that was, at  
7 the time of conviction, a class C or higher felony; or where the conviction was 1 of § 4752, § 4753, § 4754, § 4755, or §  
8 4756 of this title, or any other felony conviction specified in the controlled substances law of any other state, local  
9 jurisdiction, the United States, any territory of the United States, any federal or military reservation, or the District of  
10 Columbia, which is the same as, or equivalent to, an offense specified in the laws of this State, if the new offense occurs  
11 within 5 years of the date of conviction for the earlier offense or the date of termination of all periods of incarceration or  
12 confinement imposed pursuant to the conviction, whichever is the later date. For purposes of §§ 4761(a) and (b), 4763 and  
13 4764 of this title, a "prior qualifying Title 16 conviction" means any prior adult conviction, including both felony and  
14 misdemeanor, under this title, if the new offense occurs within 5 years of the date of conviction for the earlier offense, or  
15 the date of termination of all periods of incarceration or confinement imposed pursuant to the conviction, whichever is the  
16 later date.

17 (2) "Two prior qualifying Title 16 convictions" means 1 "prior qualifying Title 16 conviction," as defined in  
18 paragraph (1) of this section, and an additional prior adult felony conviction ~~or a juvenile adjudication~~ for a Title 16  
19 offense, where the conviction ~~or juvenile adjudication~~ was 1 of former § 4751, § 4752, or § 4753A of this title, or any other  
20 former section of this title that was at the time of conviction ~~or juvenile adjudication~~ a class C or higher felony, or where  
21 the conviction ~~or adjudication~~ was 1 of § 4752, § 4753, § 4754, § 4755, or § 4756 of this title, or any other felony

22 conviction ~~or juvenile adjudication~~ specified in the controlled substances law of any other state, local jurisdiction, the  
23 United States, any federal or military reservation, or the District of Columbia, which is the same as, or equivalent to, an  
24 offense specified in the laws of this State, if the new offense occurs within 10 years of the date of conviction ~~or juvenile~~  
25 ~~adjudication~~ for the additional prior adult felony conviction ~~or juvenile adjudication~~ or the date of termination of all periods  
26 of incarceration or confinement imposed pursuant to the earlier conviction ~~or juvenile adjudication~~, whichever is the later  
27 date, and the sentence ~~or disposition following an adjudication of delinquency~~ for the additional prior adult felony  
28 conviction ~~or juvenile adjudication~~ was imposed before the offense which is the basis for the prior qualifying Title 16  
29 conviction was committed. ~~For a juvenile adjudication to count as the additional prior adult felony conviction or juvenile~~  
30 ~~adjudication, the juvenile must have reached his or her sixteenth birthday by the date the criminal act was committed which~~  
31 ~~forms the basis for the juvenile adjudication.~~

32 (3) In any offense involving a "prior qualifying Title 16 conviction" or "2 prior qualifying Title 16 convictions,"  
33 the prior qualifying Title 16 conviction or convictions, ~~including any juvenile adjudication~~, shall be proved in accordance  
34 with § 4215 of Title 11.

#### SYNOPSIS

In 2011, as part of a general overhaul of Delaware's drug laws, this provision was inserted into Title 16 to allow juvenile adjudications to count as prior qualifying offenses for purposes of increasing the sentence of certain drug offenders. Pursuant to this provision, some defendants convicted of certain drug crimes who have one prior adult drug conviction and one prior juvenile adjudication within the past 10 years face a drastic increase in sentence as follows:

A defendant convicted of "drug dealing – aggravated possession", a class D felony, will be sentenced as if he had committed a class B felony. The sentence for a class D felony is up to 8 years imprisonment. For a class B felony the sentence can be up to 25 years, and 2 years is the minimum mandatory.

A defendant convicted of aggravated possession – class E will be sentenced as if she had committed a class B felony. The penalty is elevated from a maximum of 5 years incarceration to, again, a maximum of 25 with a 2 year minimum mandatory.

A defendant convicted of aggravated possession – class F will be sentenced as though he committed a class C felony. Class C felonies are punishable by up to 15 years, rather than the maximum of 3 years for a class F.

There is no other part of the criminal code that uses a juvenile adjudication as a statutory sentence enhancement in an adult conviction. While repeat drug offenses are a legitimate concern for communities and the criminal justice system, the elevation of the punishment for a crime based on a juvenile adjudication, which was not tried before a jury, and which may be relatively remote in time is of questionable legal merit. Furthermore, in two of the above scenarios, the crime is elevated to one which requires a minimum mandatory sentence, thus reducing the discretion entrusted to judges.

This bill removes that portion of Section 4751B that allows a juvenile adjudication to be used as a second "prior qualifying Title 16 conviction." Prosecutors may still apply the sentencing enhancement for the single qualifying adult conviction that meets the criteria set out in that section, and may use the enhancement for two prior convictions where both convictions occurred when the defendant was an adult. Judges will continue to be able to consider the defendant's juvenile record as a factor in determining the appropriate sentence. Finally, where a juvenile was tried and sentenced as an adult, that conviction may still be used for the sentencing enhancement.



SPONSOR: Rep. J. Johnson & Rep. Longhurst & Rep. Heffernan &  
Rep. Lynn & Rep. Potter & Sen. McDowell & Sen. Henry  
& Sen. Townsend  
Reps. Brady, Paradee

HOUSE OF REPRESENTATIVES  
149th GENERAL ASSEMBLY

HOUSE BILL NO. 306

AN ACT TO AMEND TITLE 11 OF THE DELAWARE CODE RELATING TO CERTAIN CRIMES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

- 1 Section 1. § 1447A. Possession of a firearm during commission of a felony; class B felony.
- 2 (f) Every person charged under this section over the age of ~~15~~ 16 years ~~shall~~ may be tried as an adult,
- 3 notwithstanding any contrary provisions or statutes governing the Family Court or any other state law.

SYNOPSIS

This bill permits judges to utilize their discretion in determining whether a juvenile charged with possession of a firearm during commission of a felony should be transferred back to Family Court or remain in Superior Court. Prior to 2017, possession of a firearm during the commission of a felony was only one of five criminal charges where judges had no discretion in determining whether a juvenile should be treated as a juvenile or an adult because the statute required a juvenile charged with these offenses to be prosecuted as an adult. House Bill 9, which was enacted last year, provided judges the discretion to determine how a juvenile should be treated for four other offenses. This is a continuation of that effort.

The bill simply changes the language from 'shall' to 'may' to allow judges to weigh the possibility that a juvenile may be better served in Delaware's Family Court system through the amenability process already enumerated in Title 10 § 1010 and § 1011. This bill also raises the age from 15 to 16.





307 - no mandatory minimums

SPONSOR: Rep. J. Johnson & Rep. Longhurst & Rep. Heffernan & Rep. Lynn & Rep. Potter & Sen. McDowell & Sen. Henry & Sen. Townsend  
Reps. Brady, Paradee

HOUSE OF REPRESENTATIVES  
149th GENERAL ASSEMBLY

HOUSE BILL NO. 307

AN ACT TO AMEND TITLE 10 AND 11 OF THE DELAWARE CODE RELATING TO JUVENILES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend § 1009, Title 10 of the Delaware Code by making deletions as shown by strike through and  
2 redesignating the remaining subsections accordingly:

3 § 1009 Adjudication; disposition following adjudication; commitment to custody of Department of Services for  
4 Children, Youth and Their Families; effect.

5 ~~(e) Subject to the provisions governing amenability pursuant to § 1010 of this title, the Court shall commit a~~  
6 ~~delinquent child to the custody of the Department of Services for Children, Youth and Their Families under such~~  
7 ~~circumstances and for such periods of time as hereinafter provided:~~

8 ~~(1) Any child who has been adjudicated delinquent by this Court of 1 or more offenses which would constitute a~~  
9 ~~felony were the child charged as an adult under the laws of this State, and who shall thereafter within 12 months commit 1~~  
10 ~~or more offenses occurring subsequent to the said adjudication which offense or offenses would constitute a felony were the~~  
11 ~~child charged as an adult under the laws of this State, and thereafter be adjudged delinquent of said offense or offenses, is~~  
12 ~~declared a child in need of mandated institutional treatment, and this Court shall commit the child so designated to the~~  
13 ~~Department of Services for Children, Youth and Their Families for at least a 6 month period of institutional confinement;~~

14 ~~(2) A child committed to the custody of the Department of Services for Children, Youth and Their Families~~  
15 ~~pursuant to this subsection shall not be released from institutional confinement on pass, on extended leave or to aftercare~~  
16 ~~during the first 6 months of said commitment unless the Director of Youth Rehabilitation Services, in the Director's~~  
17 ~~discretion, determines that it is in the best interest of the child's treatment to participate in programs which may require the~~  
18 ~~child to leave the institution; thereafter, a child committed to the Department of Services for Children, Youth and Their~~  
19 ~~Families pursuant to this subsection shall not be released from institutional confinement on pass, on extended leave or to~~  
20 ~~aftercare, unless the Judge of the Family Court who originally executed the commitment order or a Judge of the Family~~  
21 ~~Court designated by the Chief Judge shall, upon a petition filed by the Department of Services for Children, Youth and~~

22 Their Families (or its duly authorized representative), the child, the parent(s) or guardian of said child, or by the Court's  
23 own initiative, with notice to the Attorney General, determine by a preponderance of the evidence presented at a hearing  
24 that the child has so progressed in a course of mandated institutional treatment that release would best serve both the  
25 welfare of the public and the interest of the child or unless the Director of Youth Rehabilitation Services, in the Director's  
26 discretion, determines that it is in the best interest of the child's treatment to participate in programs which may require the  
27 child to leave the institution;

28 (3) Where a child has been declared in need of mandated institutional treatment in accordance with paragraphs  
29 (e)(1) and (2) of this section, and the child is subsequently charged with having committed 1 or more offenses which  
30 offense or offenses occurred subsequent to the child having been declared a child in need of mandated institutional  
31 treatment, the Court shall conduct a hearing to determine whether the child is amenable to the rehabilitative processes of the  
32 Court pursuant to § 1010(e) of this title. "Offense" in this paragraph shall mean all offenses which would constitute a felony  
33 were the child charged as an adult under the laws of this State, with the exception of a charge of escape pursuant to subpart  
34 E of subchapter VI of Chapter 5 of Title 11;

35 (4) Whenever a child appears before the Court on charges which would constitute a felony were the child charged  
36 as an adult under the laws of this State, said child and any parent, guardian or custodian of said child who is present shall be  
37 specifically advised of the operation of this subsection;

38 (5) Nothing hereinbefore provided shall be construed as prohibiting the Court, upon petition and recommendation  
39 of the Department of Services for Children, Youth and Their Families, from securing for any child otherwise subject to the  
40 mandatory commitment provisions of this subsection such care and treatment as it deems necessary for diagnosed mental  
41 disorders or incapacities, or intellectual disabilities, provided that the provisions for such treatment shall not deter the Court  
42 from imposing such mandatory term of commitment as is applicable under this subsection unless the same shall be sooner  
43 suspended in accordance with paragraph (e)(6) of this section;

44 (6) As used in this subsection, "child" shall mean any juvenile who is charged with an act or course of conduct  
45 occurring on or after the child's 14th birthday which causes this subsection to be applicable;

46 (7) A copy of each and every order or disposition of the Court respecting a child committed pursuant to this  
47 subsection shall be made available to the victim or victims of the delinquent acts giving rise to the commitment upon  
48 written request to the Court therefor. [

49 (k) Subject to the provisions governing amenability pursuant to § 1010 of this title, the Court shall commit a  
50 delinquent child to the custody of the Department of Services for Children, Youth and Their Families if the child who has  
51 been adjudicated delinquent by this Court of 1 or more offenses which would constitute either possession of a firearm

52 during the commission of a felony or robbery first degree (where such offense involves the display of what appears to be a  
53 deadly weapon or involves the representation by word or conduct that the person was in possession or control of a deadly  
54 weapon or involves the infliction of serious physical injury upon any person who was not a participant in the crime) were  
55 the child charged as an adult under the laws of this State. Such child is declared a child in need of mandated institutional  
56 treatment, and this Court shall commit the child so designated to the Department of Services for Children, Youth and Their  
57 Families for at least a 12 month period of institutional confinement.

58 Section 2. Amend § 1448, Title 11 of the Delaware Code by making deletions as shown by strike through and  
59 redesignating the remaining subsection accordingly:

60 ~~(f)(1) Upon conviction, any person who is a prohibited person as described in paragraph (a)(5) of this section and~~  
61 ~~who is 14 years of age or older shall, for a first offense, receive a minimum sentence of 6 months of Level V incarceration,~~  
62 ~~and shall receive a minimum sentence of 1 year of Level V incarceration for a second and subsequent offense, which shall~~  
63 ~~not be subject to suspension. Any sentence imposed pursuant to this subsection shall not be subject to §§ 4205(b) and 4215~~  
64 ~~of this title.~~

65 ~~(2) The penalties prescribed by this subsection and subsection (g) of this section shall be imposed regardless of~~  
66 ~~whether or not the juvenile is determined to be amenable to the rehabilitative process of the Family Court pursuant to §~~  
67 ~~1010(e) of Title 10 or any successor statute.~~

#### SYNOPSIS

United States Supreme Court case law and scientific research has changed how we think about juvenile delinquency. We know now that an adolescent's brain is not fully developed until his/her mid-twenties which makes juveniles especially prone to making poor choices. In the landmark case of Miller v. Alabama, wherein the United States Supreme Court prohibited mandatory life sentences without parole for juveniles, the Court wrote: "Children are constitutionally different from adults for sentencing purposes."

This proposed legislation would repeal and remove all minimum-mandatory sentencing schemes for juveniles adjudicated delinquent in Family Court because children are different than adults. Family Court judges and commissioners would still be able to impose a commitment to a DSCYF secure placement, but would now have the ability to exercise their judicial discretion to fashion an appropriate sentence for an individual juvenile.





SPONSOR: Rep. Heffernan & Rep. J. Johnson & Rep. Potter &  
Sen. McDowell  
Reps. Baumbach, Bentz, Bolden, Keeley, Kowalko,  
Longhurst, Mitchell, Osienski, Paradee, Schwartzkopf

HOUSE OF REPRESENTATIVES  
149th GENERAL ASSEMBLY

HOUSE BILL NO. 308

AN ACT TO AMEND CHAPTER 412, VOLUME 80 OF THE LAWS OF DELAWARE RELATING TO THE  
JUVENILE OFFENDER CIVIL CITATION PROGRAM.

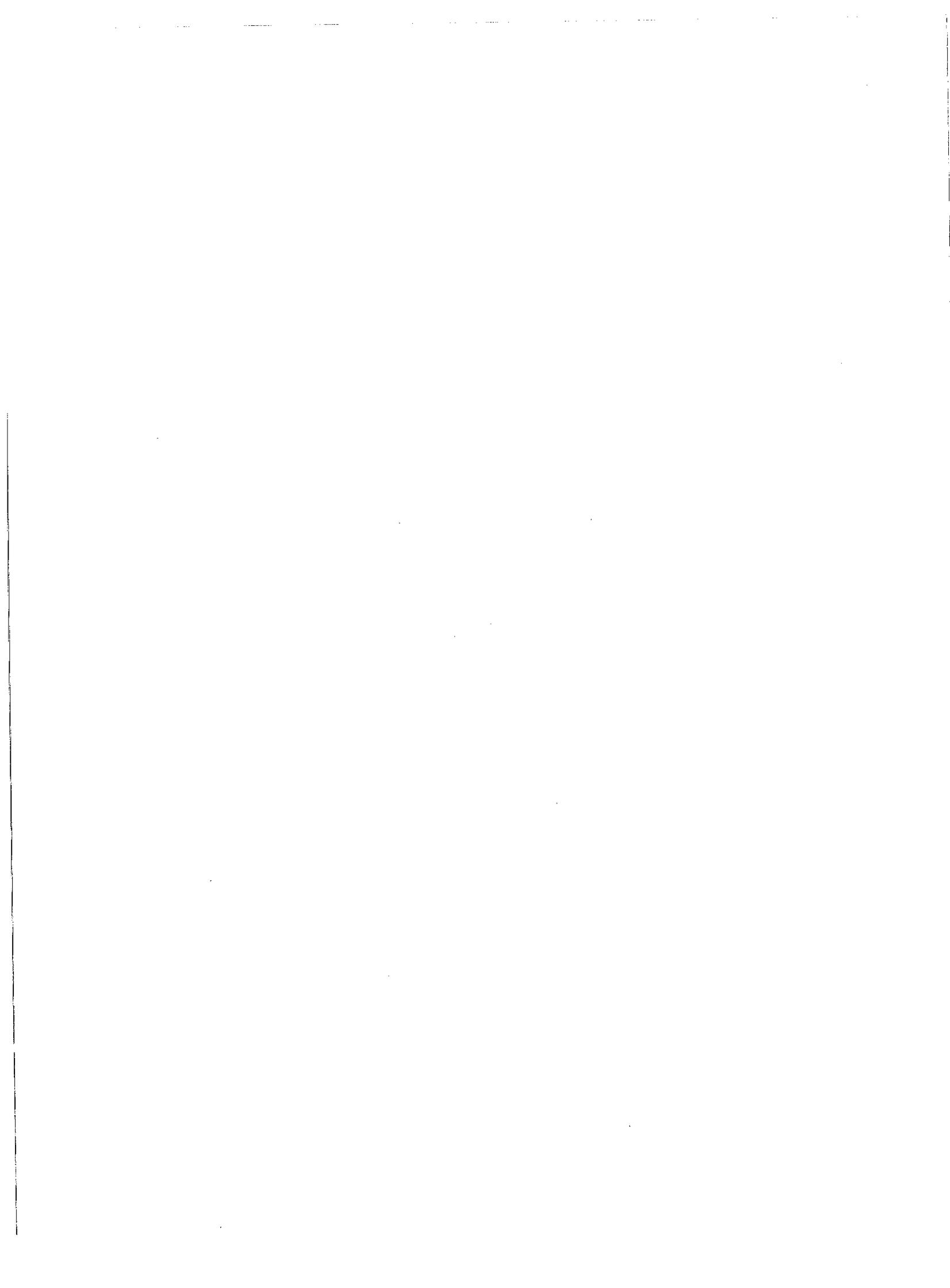
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1           Section 1. Amend Section 3, Chapter 412, Volume 80 of the Laws of Delaware by making deletions as shown by  
2 strike through and insertions as shown by underline as follows:

3           ~~Section 3. This Act expires 2 years after its enactment into law unless otherwise provided by a subsequent act of~~  
4 ~~the General Assembly.~~

SYNOPSIS

This Act removes the sunset provision contained in Volume 80, Chapter 412 of the Laws of Delaware (formerly House Bill No. 405, as amended, of the 148th General Assembly) that is set to expire the law on September 8, 2018. The purpose of Volume 80, Chapter 412 of the Laws of Delaware is to prevent first-time juvenile offenders charged with certain minor misdemeanors from entering into the juvenile criminal justice system by providing law enforcement with a civil citation procedure as an alternative to arrest.





SPONSOR: Sen. Lawson & Sen. Henry & Sen. Townsend &  
Rep. Hudson & Rep. J. Johnson & Rep. Yearick  
Sens. Cloutier, Delcollo, Ennis, Lavelle, Lopez,  
Pettyjohn, Richardson, Sokola; Reps. Baumbach, Bennett,  
Bentz, Bolden, Collins, Keeley, Kowalko, Mulrooney,  
Osienski, Ramone, D. Short, Viola, K. Williams

DELAWARE STATE SENATE  
149th GENERAL ASSEMBLY

SENATE BILL NO. 146

AN ACT TO AMEND TITLE 10 OF THE DELAWARE CODE RELATING TO JUVENILE EXPUNGMENTS

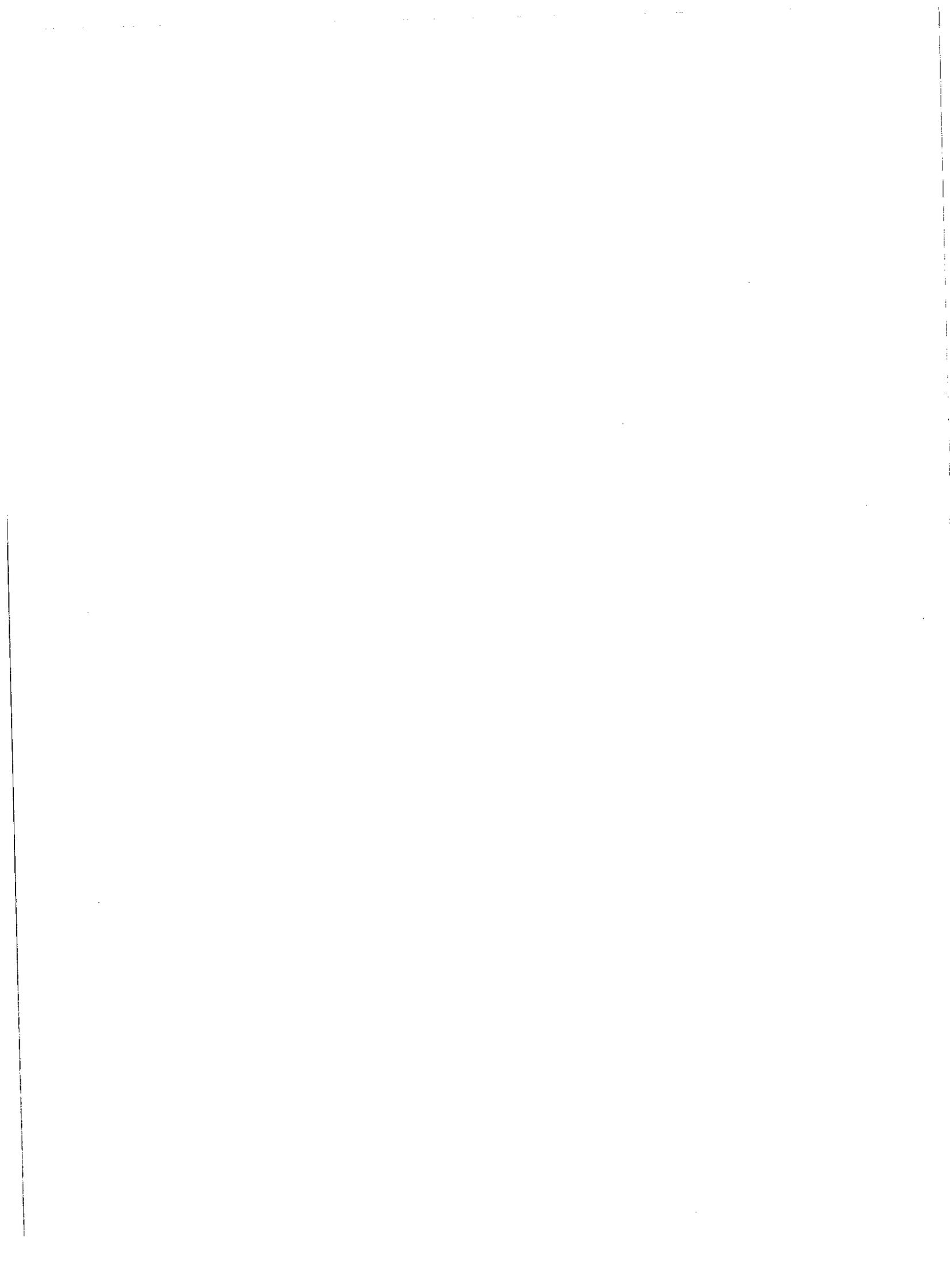
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1           Section 1. Amend § 1017, Title 10 of the Delaware Code by making deletions as shown by strikethrough and  
2 insertions as shown by underline as follows:  
3           § 1017. Mandatory expungement.  
4           (c) During the Court proceeding where any felony, misdemeanor or violation case is terminated in favor of the  
5 child, the Court sua sponte, or upon request of any party, may immediately order expungement of the juvenile criminal  
6 history, including all indicia of arrest. Prior to ordering expungement pursuant to this subsection, the Court shall review a  
7 name-based Delaware criminal background check conducted through the Delaware Justice Information System (DELJIS),  
8 in order to ensure eligibility. In cases reviewed by the Court pursuant to this subsection, the children must otherwise qualify  
9 for expungement under this section. The Court has discretion to deny immediate expungement and require compliance with  
10 § 1015(d) of this title.

SYNOPSIS

The continued existence and dissemination of a juvenile criminal record hampers an individual's ability to become a successful and productive member of society. These criminal records are a hindrance to employment, education, housing, credit, and military service. This Act streamlines Delaware's juvenile expungement code by providing the Delaware Family Court the option to immediately order an expungement in the event that a felony case was terminated in favor of the juvenile (i.e. a juvenile was found not guilty, or the charges were dropped). Delaware law currently allows the Court to do this for misdemeanor and violation cases.

Author: Senator Lawson





SPONSOR: Rep. Briggs King & Rep. Keeley & Sen. Lopez &  
Sen. Pettyjohn  
Reps. Osienski, Outten, B. Short, D. Short, Wilson; Sen.  
Hocker

HOUSE OF REPRESENTATIVES  
149th GENERAL ASSEMBLY

HOUSE BILL NO. 294

AN ACT TO AMEND TITLE 21 OF THE DELAWARE CODE RELATING TO DRIVING UNDER THE INFLUENCE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

- 1           Section 1. Amend § 4177D, Title 21 of the Delaware Code by making deletions as shown by strike through and  
2 insertions as shown by underline as follows:  
3           § 4177D. Courses of instruction; rehabilitation programs.  
4           ~~The Secretary of Safety and Homeland Security, through the Office of Highway Safety~~ The Secretary of the  
5 Department of Health and Social Services, through the Division of Substance Abuse and Mental Health, shall establish  
6 courses of instruction and programs of rehabilitation for persons whose drivers' licenses have been revoked for ~~operating~~  
7 driving a vehicle while under the influence of ~~intoxicating liquor or drugs alcohol or any drug, or both.~~ The Secretary of  
8 ~~Safety and Homeland Security~~ The Secretary of the Department of Health and Social Services shall administer such  
9 courses and programs ~~and adopt rules and regulations therefor, and~~ and adopt rules and regulations for such courses and  
10 programs. The Secretary of the Department of Health and Social Services shall establish a schedule of fees for enrollment  
11 in such courses and ~~programs which shall not~~ programs. The schedule of fees may not exceed the maximum fine imposed  
12 ~~for the offense as set forth in § 4177~~ an offense under § 4177 of this title. ~~Successful~~ A person's successful completion of  
13 the Court of Common Pleas Driving Under the Influence Treatment Program ~~shall be considered~~ is equivalent to a course  
14 of instruction ~~and/or~~ or program of rehabilitation approved under this section.  
15           Section 2. This Act takes effect 6 months after its enactment into law.

SYNOPSIS

Section 1 of this Act transfers from the Department of Safety and Homeland Security to the Department of Health and Social Services the responsibility for establishing, administering, adopting rules and regulations, and setting fees for courses of instruction and programs of rehabilitation for those whose licenses have been revoked for driving a vehicle under the influence of alcohol or any drug, or both. The Department of Health and Social Services' Division of Substance Abuse and Mental Health is better positioned to establish and operate programs aimed at treating substance abuse issues.

Section 1 of this Act also makes technical corrections to conform existing law to the standards of the Delaware Legislative Drafting Manual and to update language in this Act that is no longer consistent with language in § 4177 of Title 21.

Section 2 of this Act delays the Act's effective date for 6 months.



**SPLC**  
Southern Poverty  
Law Center

NEWS

## CHILDREN TRIED AS ADULTS FACE DANGER, LESS CHANCE FOR REHABILITATION

October 30, 2014

---

Research shows that children prosecuted in the adult criminal justice system are more likely to reoffend than those held in the juvenile justice system. But thousands continue to be sent into adult courts every year in the Deep South. The SPLC is working to reform this practice.

Patrick\* entered an Alabama prison at the age of 16.

In a little more than a year behind bars, he has witnessed more than 30 stabbings. He learned some lessons: Failing to turn over his property when a prisoner demands it puts him at risk of being stabbed, as does refusing a sexual overture. This thought hangs over him constantly.

He is always on guard, ready to fight for his survival.

Patrick is one of about 1,200 children under the age of 18 who are being held in adult prisons across the country. The number is about 10,000 when local adult jails are included.

In Alabama, children as young as 14 can be charged and convicted as adults for any alleged offense. Neighboring Florida sends more children into adult criminal court – and into adult prisons – than any other state.

“[I]n adult court, they want to lock us up,” Sander A., a Florida youth, told Human Rights Watch for a [recent report](#). “In juvenile court they want to help us make better choices.”

That, in a nutshell, is why children should not be tried as adults. The research is clear that children in the adult criminal justice system are more

likely to reoffend than if they are held in the juvenile justice system. Still, thousands are sent into the adult system every year in the Deep South.

This month, the Southern Poverty Law Center hosted or sponsored events in Alabama, Mississippi, Louisiana and Florida as part of National Youth Justice Awareness Month, a national campaign organized by the Campaign for Youth Justice to highlight the serious and devastating consequences of sending children into adult courts, jails and prisons.

“It is time to recognize the toll that misguided ‘tough-on-crime’ policies have taken on youths across this country,” said Jerri Katzerman, SPLC deputy legal director. “These policies have not only failed to make our communities safer, but have endangered children and needlessly derailed young lives.”

Research has shown that children in the adult criminal justice system are 34 percent more likely to be arrested again than those convicted of similar offenses in juvenile court. They also are 36 times more likely to commit suicide than youth in juvenile facilities.

During their time in adult lock-ups, prisoners such as Patrick often witness brutal inmate-on-inmate violence. And they are more likely to be victimized sexually.

Derrick\* has been fending off sexual advances and assaults since arriving at a prison in Alabama at age 16. Many young inmates simply submit to older inmates because they know the guards probably won't help them.

A number of professional organizations have opposed or condemned the practice of housing young people in adult lock-ups, including the American Jail Association, the American Correctional Association, the Council of Juvenile Correctional Administrators, the Association of State Correctional Administrators and the National Association of Counties.

### **‘Lost in the system’**

Research also has shown that children have a unique propensity for rehabilitation. The human brain does not fully develop until the mid-20s and the portion of the brain that governs rational decision-making is the last to develop. This means a child may engage in dangerous behavior without fully realizing the risks and consequences for themselves and others.

“I was impulsive. I wouldn’t think about the consequences,” said Luke R., a Florida youth serving a prison sentence for robbery.

It’s a refrain heard over and over.

“I don’t do the same things I was doing,” said 22-year-old Thomas G., who is on probation for a crime he committed at age 17. “I think about things before I do them.”

After presiding over juvenile court for 14 years, one Florida judge summed up the young people this way: “I’ve been here long enough to understand that when someone is 16 and I ask them why they did it and they say ‘I don’t know,’ I believe them.”

Unfortunately, the adult system fails to recognize the potential for rehabilitation in children. This can be particularly damaging for children without a strong support system of family, friends and community.

“They really get lost in the system,” said Michelle Stephens, whose son was prosecuted as an adult and incarcerated in Florida five years ago after accepting a plea agreement. “And all their inmate peers become their family. They join gangs in prison. They’re worse off than they were before they went in prison. You think they were bad before they went in prison, now you’ve just put them with hardened, lifetime criminals.”

The distance between a youth and his family can be especially difficult. Langston T. is serving a three-year prison sentence almost four hours from his hometown. After nine months, he’s yet to have a visit from his family.

“It’s a long trip,” he said.

It’s just one of the harsh realities Langston and other youths in adult prisons must face.

“Adult prison? It ain’t a place to be,” he said. “It’s just breathing and eating. You just a number in here.”

Once a young person is out of prison, it can be difficult turning a life around with a felony record. Thomas G. has found this out after serving a three-year sentence.

“What I did when I was 16, that’s still following me and will follow me for the rest of my life,” he said. “I get a job, and they find out I was convicted of a felony, and they’ve got to let me go.”

He understands that people must be punished for wrongdoing but questions why one mistake must follow him forever.

“[D]on’t keep it held over me for the rest of my life,” he said.

###

\*Name changed to protect his identity.

The quotes and stories of Sander A., Luke R., Thomas G., and Langston T. are from *Branded for Life: Florida’s Prosecution of Children as Adults under its “Direct File” Statute*, a Human Rights Watch report released in April 2014.

# FACTS ABOUT INCARCERATED YOUTH

## 70K+

The number of U.S. juvenile offenders kept from their families every week.

## 2/3

Portion of youths held for nonviolent charges — some of which wouldn't be illegal if they weren't minors.

## 10K

The number of children held in adult jails and prisons.

## 30% v. 17%

Black youths are over-represented at all levels; figures show percentage of those arrested who are black versus black youths' percentage of the general population.

# #YJAM #YOUTHJUSTICE

SOURCE: CAMPAIGN FOR YOUTH JUSTICE

SPLCENTER.ORG



\*\*\*



# PURSUING JUSTICE

A JUVENILE LAW CENTER BLOG

AUGUST 16, 2017

## Mandatory Minimums, Maximum Consequences

posted by Emily Steiner, Legal Intern, Juvenile Law Center

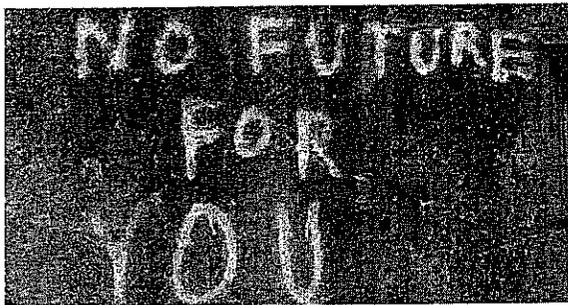


Image credit: <https://www.flickr.com/photos/donshall/1858459388/>

Over twenty years ago, academics and lawmakers promoted the idea that some children were “so impulsive, so remorseless” that they would “kill, rape, maim, without giving it a second thought.” The theory behind these “juvenile superpredators” has since been entirely disavowed, but the “tough on crime” laws enacted in response, which led to harsh mandatory sentences imposed on youth, still impact individuals who remain behind bars today.

Recently, United States Attorney General Jeff Sessions reversed an Obama administration directive that gave federal prosecutors and judges flexibility to sentence offenders below statutorily mandated minimums. In Pennsylvania, a similar bill has been referred to the state Senate Judiciary Committee that would revitalize mandatory minimum sentences in the state. Mandatory minimum sentences have not been enforced in Pennsylvania since 2015 per a state supreme court ruling that the process used to impose the sentences were unconstitutional.

The revival of strong mandatory sentencing schemes matches the “tough on crime” approach touted by the Trump administration. While mandatory minimums negatively impact all individuals involved in the criminal justice system, youth particularly face long-term consequences. The imposition of mandatory minimums exacerbates the harms that youth face in the adult criminal justice system and forces children to grow up within a system that lacks age-appropriate education and treatment to address their rehabilitative potential.

Juvenile Law Center recently advocated for youth when the state of Washington grappled with the issue of mandatory minimums imposed on children tried as adults. On Halloween night, 2012, friends Zyion Houston-Sconiers, 17-years-old, and Treson Roberts, 16-years-old, were arrested for stealing candy and cell phones from trick or treaters. Both boys were charged with multiple counts of robbery, other felonies, and - because Zyion was armed with a revolver- a number of firearm enhancements.

Due to a Washington statute requiring automatic transfer to adult court for juveniles charged with robbery, the boys were tried and convicted in the adult criminal system. Zyion faced a sentence range of 42-45 years, 31 of them required by mandatory firearm enhancements. Treson was facing 37-40 years. At sentencing, the State of Washington recognized the “perhaps excessive” sentence length required for the boys, requesting a departure from the mandatory requirement. The trial judge complied, noting he “wished he could have done more to reduce their sentences,” but Washington’s mandatory sentencing laws prevented him from doing so. As a result, Zyion was sentenced to 31 years and Treson was sentenced to 26 years, both without an opportunity for parole. On appeal, the Washington Supreme Court affirmed the convictions of Zyion and Treson, but effectively forbid mandatory minimum sentencing for juveniles by holding that the trial court must have “full discretion to depart from the sentencing guidelines and any otherwise mandatory sentence enhancements,” and must take the defendant’s youth into consideration during sentencing.

In 2014, the Iowa Supreme Court delivered a similar ruling holding mandatory minimum sentences unconstitutional as applied to juvenile offenders, finding such schemes “cannot satisfy the standards of decency and fairness embedded in article I, section 17 of the Iowa Constitution.”

While the Washington and Iowa Supreme Court decisions were considered major victories, they do not reach beyond their states. Many other states have enacted or are enacting mandatory sentencing laws that will affect the estimated 200,000 youth tried and sentenced as adults each year. When children convicted in the adult system are subjected to mandatory sentences, the court cannot consider whether a child may be reformed through rehabilitative treatment or if their age may have played a part in their offense. Instead, courts are bound by the sentences mandated by the law. This practice undermines the determination that "children cannot be viewed simply as miniature adults." The United States Supreme Court has explicitly recognized that children have "diminished culpability and greater prospects for reform" and are therefore "less deserving of the most severe punishments."

When sentencing youth, it is important to make individualized determinations of culpability that not only look to the age of a minor, but the "background and mental and emotional development of a youthful defendant." The Court has consistently recognized that youth possess levels of maturity, decision-making ability, culpability, and capacity for change and growth that differs substantially from adults. Automatic sentencing denies these and other individual characteristics of youth from being taken into account and can have long-lasting detrimental effects on children.

Subjecting youth to prosecution in the adult system in the first place deprives youth of the rehabilitative nature of the juvenile justice system and its programs, classes and activities specific to the needs of youth. Compared to youth in the juvenile system, youth in the adult system are five times more likely to be sexually assaulted during their incarceration, and two times more likely to be assaulted with a weapon. These youth are also more likely to be psychologically affected by the conditions of confinement and more likely to commit suicide. Research has shown that youth who have served sentences in the adult system reoffend more quickly and violently after release than those who served their time in the juvenile system. Each of these consequences are further exasperated by mandatory minimums that subject youth to lengthy prison stays that far surpass their culpability.

The juvenile system was modeled on the belief that children should be rehabilitated rather than punished. This ideology is undermined by the enforcement of mandatory minimum sentences for youth offenders. The juvenile "superpredator" misconception is widely recognized to have caused immeasurable harm to families and communities. So, too, should be the laws that emerged from this fallacy. Mandatory minimum sentences are harmful for youth. We should move away from these schemes rather than revitalizing them into present day law.

Tags: **JUVENILE AND CRIMINAL JUSTICE** | **JUVENILE LIFE WITHOUT PAROLE (JLWOP)**

Share:

#### **SUPPORT JUVENILE LAW CENTER**

One of the most important lessons from our 40 years of experience is that children involved with the justice and foster care systems need zealous legal advocates. Your support for our work is more important now than ever before.

Support

# Why Does the U.S. Sentence Children to Life in Prison?

 [daily.jstor.org/u-s-sentence-children-life-prison/](http://daily.jstor.org/u-s-sentence-children-life-prison/)

January 31, 2018

In 2006, Cyntoia Brown was convicted of murdering a man who hired her for sex and sentenced to life in prison. She was sixteen years old. Brown testified that she killed the man in self defense, that she was forced into prostitution by an abusive boyfriend after escaping an abusive home. None of that mattered in the Tennessee court where she was tried as an adult.



WHERE NEWS MEETS ITS SCHOLARLY MATCH

Brown is far from alone. She is one of about 10,000 Americans serving life sentences for offenses committed as a child, meaning under the age of eighteen. Of them, approximately 2,500 are serving an even more dire sentence—life without the possibility of parole (LWOP). The United States is the only country in the world that sentences people to die in prison for offenses committed as children.

The U.S. has been grappling with how to address crimes committed by children for centuries. As early as 1899, U.S. jurisdictions began creating the world's first juvenile courts, which held children less culpable for their crimes, diverting many away from adult prisons. Within decades, however, these courts found themselves under attack by prosecutors and others who feared they were too lenient on dangerous underage murderers. During the 1980s and 90s, the power of juvenile court judges was greatly reduced, with a corresponding increase in power for prosecutors and criminal trial courts, allowing thousands of teenagers like Cyntoia Brown to receive life sentences.

Since 2005, several key Supreme Court decisions and individual state laws have sought to protect children from the most extreme sentences, but even these reforms have faced significant resistance from prosecutors and lawmakers.

\* \* \*

"The past decade marks a revolution in the attitude of the state toward its offending children," proclaimed a 1909 *Harvard Law Review* article by Julian W. Mack. Until then, Mack wrote, "our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility," leaving child offenders "huddled together" with adults in jails and workhouses. Before the juvenile justice "revolution" he described, the age of criminal responsibility in U.S. states ranged from 7 to 12.

In the second half of the nineteenth century, reformers pushed for the creation of juvenile court systems that would seek to rehabilitate child offenders.

This harshness toward children derived from traditional English common law, which convicted and punished 7- to 14-year-old children as long as they appeared to understand the difference between right and wrong. There are records of children as young as 10 put to death in eighteenth century England.

In the second half of the nineteenth century, U.S. reformers pushed for the creation of juvenile court systems that would seek to rehabilitate—not just punish—child offenders. As the legal scholars David S. Tanenhaus and Steven A. Drizin outline in a 2002 paper in the *Journal of Criminal Law and Criminology*, the first juvenile court opened in 1899 in Cook County, IL (home of Chicago), thanks to reformers Lucy Flower and Julia Lathrop. By 1909, more than 30 American jurisdictions adopted similar legislation, as did Great Britain, Ireland, Canada, and Australia.

Writing in 1909, Mack captured the prevailing view toward reform over punishment: “the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian.” Ideally, he wrote, convicted children should be placed on probation, assigned a guardian, and allowed to remain in their own homes and communities. In cases where removal from the home was deemed necessary, the Supreme Court of Illinois ordered that “a real school, not a prison in disguise, must be provided.”

“What they need, more than anything else, is kindly assistance,” wrote Mack. “The aim of the court in appointing a probation officer for the child, is to have the child and the parents feel, not so much the power, as the friendly interest of the state.” He quoted a Supreme Court of Utah decision, which declared that a juvenile judge must be “a man of broad mind, of almost infinite patience, and one who is the possessor of great faith in humanity.”

As the movement toward mercy and reduced culpability for children swept the nation, in 1920 criminal law journal article, Arthur Towne, the superintendent of the Brooklyn Society for the Prevention of Cruelty to Children, considered whether New York State should follow other states in increasing its age of criminal responsibility from 16 to 18, asking:

Does he go to bed the night before his sixteenth birthday, a tender boy in need of the state’s solicitude, and awaken the next morning a bearded man, full-fledged in experience and self-control, and in ability to fulfill his obligations as a citizen? Upon donning his long trousers does he forthwith become a man; or in spite of his somewhat lengthened years and clothes, may he still be in his short “pants” mentally and morally?

Writing in 1920, Towne said adolescence continues through age 25, and that treating 14- or 16-year olds as functioning adults “simply flies in the face of present-day psychology and the hard facts.”

\*\*\*

Despite Towne’s advocacy, New York State did not stop automatically charging 16- and 17-year-olds as adults until April 2017. Juvenile courts faced decades of backlash, as prosecutors argued for discretion over whether individual cases should be heard in juvenile or criminal court. In a series of decisions, the Illinois Supreme Court stripped power from the juvenile courts, granting the state’s attorney the authority to decide in which court a child would be tried.

Beginning in the 1930s, prosecutors pushed for more power, claiming that the nation faced a dangerous new class of child murderers. In 1935, the Chief Justice of the Illinois Supreme Court declared that juvenile courts were intended for “bad boys and girls who have committed no serious crime,” but were being used to protect “highly dangerous gunmen and thieves, or even murderers.”

But even as juvenile courts were being undermined, they were simultaneously legitimized. In the 1960s, U.S. Supreme Court decisions guaranteed due process protections in juvenile court, including the right to counsel.

In 1978, the "automatic transfer law" was born. A 15-year-old New Yorker named Willie Bosket was convicted of killing two men on the subway. He was tried in juvenile court and received the maximum juvenile sentence of five years. Two days later, New York Governor Hugh Carey (in the middle of a tight re-election battle) called a special session of the legislature to produce the Juvenile Offender Act. This "automatic transfer law" required children as young as 13 to be tried as adults for murder.

Attacks on the power of the juvenile court intensified in the 1980s and 90s. "These cries grew to a fever pitch with the birth of the 'superpredator' myth in late 1995," wrote Tanenhaus and Drizin. Academics, prosecutors, and lawmakers criticized juvenile courts, using "the sound bite 'adult time for adult crime' as their mantra."

Between 1990 and 1996, forty states passed laws making it easier for juveniles to be prosecuted as adults, often by transferring power from juvenile judges to prosecutors. Other new laws prevented the sealing of juvenile records, set mandatory minimum sentences, or removed phrases like "rehabilitation" and "the best interests of the child" from statutes, replacing them with "punishment" and "the protection of the public."

While attorneys and politicians panicked about the rise of the "superpredator," juvenile crime actually declined between 1994 and 2000.

The new laws kept coming, with 43 states passing similar changes between 1996 and 1999. A 1999 report found that when juveniles were transferred to adult court and convicted of murder, they received, on average, longer sentences than adults convicted of the same crime. In 1998, close to 200,000 kids were tried as adults and 18,000 were housed in adult prisons.

"Teenagers account for the largest portion of all violent crime in America," declared then-Florida representative Bill McCollum in 1996. "They're the most violent criminals on the face of the earth." He was arguing in support of an ultimately failed federal bill that would have required some 13-year-olds to be tried as adults.

As children were increasingly tried as adults, racial minorities suffered the most. In 1997, white children made up 57 percent of juvenile cases involving offenses against others, but just 45 percent of the cases transferred to adult court. And while white youth constituted 59 percent of juvenile drug cases, they made up just 35 percent of the cases transferred to adult court.

Clinging to the "superpredator" myth, prosecutors parroted colorful claims about the nineteenth century mischief-makers that juvenile courts had been created for. According to various District Attorney's offices, the courts were created "when kids were throwing spitballs," "when kids were knocking over outhouses," and "at a time of more 'Leave it to Beaver' type crimes."

\*\*\*

While attorneys and politicians panicked about the rise of the "superpredator," juvenile crime actually declined between 1994 and 2000. A 2001 U.S. Surgeon General's report found that "there is not evidence that the young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youth in earlier years."

As it turns out, there have always been murders by children. Using the Chicago Homicide Database, Tanenhaus and Drizin located the cases of 24 children tried for homicide by juvenile courts in the early 1900s. They wrote that these cases "reveal that the juvenile court was created at a time when kids were not only throwing spitballs and knocking over outhouses, but they were also killing people." These cases show how children were protected from the adult criminal system, thanks to multiple checks on the power of prosecutors.

In one 1910 case, a 12- or 14-year-old girl (accounts differ) was accused of beating an 8-year-old girl to death with a baseball. A "coroner's jury" was summoned: a group of citizens convened to determine cause of death. "Owing to the extreme youth of the accused," declared the coroner's jury, "the Jury recommend that she be permitted to remain in the custody of her parents for the present until the case is taken up by the Juvenile Court." The authors note that coroner's juries were rife with corruption and graft. Yet in this case and others, they did serve as a check on prosecutors, helping keep children out of adult court.

In a 1908 case, twin 13-year-old boys were tried for stabbing a schoolmate to death with a letter opener. Although the coroner's jury recommended the boys go before an adult court, they were protected by other checks on the system: The grand jury ruled there was insufficient evidence to prosecute one twin, and the state officially declined to prosecute the other.

In a third case, in 1926, four 15- and 16-year-old boys were arrested in a shooting death. They took various paths through the court system, with some starting in the adult criminal system and some in the juvenile—yet ultimately, none were prosecuted as adults.

The 24 cases studied by Tanenhaus and Drizin are a small sample, but demonstrate that murders by children were far from new in the 1980s and 90s. What was new was the state's harsh punishments.

\* \* \*

In the 2000s, criminal justice reform gained traction. According to the ACLU, "after decades of punitive 'tough-on-crime' responses to youth crime and misbehavior, there has been a perceptible shift in recent years surrounding juvenile justice issues in the United States. Policymakers are slowly returning to the first principles of juvenile justice by recognizing that young people are still developing and should be given opportunities for treatment, rehabilitation, and positive reinforcement."

An early turning point came in 2005, when the U.S. Supreme Court determined that death sentences for children violate the 8th amendment's prohibition on cruel and unusual punishment in *Roper v. Simmons*. Over the next 10 years, the Court expanded on *Roper*, chipping away at the sentences that children may receive. First, in 2010, *Graham v. Florida* made it unconstitutional to sentence a child to LWOP for any crime other than murder. Two years later, *Miller v. Alabama* made

it illegal for states to impose mandatory sentences of LWOP for juveniles (judges may still use their discretion to give the sentence in rare cases of "irreparable corruption," but the sentence cannot be mandated).

The Supreme Court based these decisions on fundamental scientific differences between adult and child brains. The Court's Miller decision quoted a brief from the American Psychological Association: "It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."

In yet another groundbreaking case, the Supreme Court made the Miller decision retroactive in 2016's *Montgomery v. Louisiana*. As a result, the roughly 2,500 people serving LWOP for crimes they committed as children are eligible for resentencing hearings.

*Montgomery* does not reduce anyone's sentence automatically. Each county is responsible for its own resentencing, and District Attorneys around the U.S. have interpreted the Supreme Court's order differently. In Philadelphia County, which previously held the record for the most people serving juvenile LWOP, resentencing hearings are moving relatively quickly. At least seventy people have already been resentenced, paroled, and released. In Michigan, meanwhile, county prosecutors have announced their intentions to re-seek LWOP in 247 out of 363 juvenile cases, essentially claiming that 68 percent of kids sentenced to life without parole fit the "rare" label of "irreparable corruption." And in Louisiana, 71-year-old Henry Montgomery, the man for whom the case was named, remains incarcerated after getting a new sentence of life with the possibility of parole.

*Miller* and *Montgomery* do nothing for children serving other extreme sentences. Cyntoia Brown, who is unaffected by *Montgomery* because she is serving a regular life sentence, recently applied for clemency to Tennessee Governor Bill Haslam. She could become immediately parole-eligible if the governor commutes her sentence to time served. Without clemency, Brown will have her first shot at parole in 2055, when she will be 67 years old.

## JSTOR Citations

### The Juvenile Court

By: Julian W. Mack

*Harvard Law Review*, Vol. 23, No. 2 (Dec., 1909), pp. 104-122

The Harvard Law Review Association

### "Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide

By: David S. Tanenhaus and Steven A. Drizin

*The Journal of Criminal Law and Criminology* (1973-), Vol. 92, No. 3/4 (Spring - Summer, 2002), pp. 641-706

## Shall the Age Jurisdiction of Juvenile Courts Be Increased?

By: Arthur W. Towne

*Journal of the American Institute of Criminal Law and Criminology*, Vol. 10, No. 4 (Feb., 1920), pp. 493-515

Northwestern University School of Law

The New York Times | <https://nyti.ms/2ifRIBs>

---

SCIENCE

# You're an Adult. Your Brain, Not So Much.

Carl Zimmer

MATTER DEC. 21, 2016

Leah H. Somerville, a Harvard neuroscientist, sometimes finds herself in front of an audience of judges. They come to hear her speak about how the brain develops.

It's a subject on which many legal questions depend. How old does someone have to be to be sentenced to death? When should someone get to vote? Can an 18-year-old give informed consent?

Scientists like Dr. Somerville have learned a great deal in recent years. But the complex picture that's emerging lacks the bright lines that policy makers would like.

"Oftentimes, the very first question I get at the end of a presentation is, 'O.K., that's all very nice, but when is the brain finished? When is it done developing?'" Dr. Somerville said. "And I give a very nonsatisfying answer."

Dr. Somerville laid out the conundrum in detail in a commentary published on Wednesday in the journal *Neuron*.

The human brain reaches its adult volume by age 10, but the neurons that make it up continue to change for years after that. The connections between neighboring neurons get pruned back, as new links emerge between more widely separated areas of the brain.

Eventually this reshaping slows, a sign that the brain is maturing. But it happens at different rates in different parts of the brain.

The pruning in the occipital lobe, at the back of the brain, tapers off by age 20. In the frontal lobe, in the front of the brain, new links are still forming at age 30, if not beyond.

“It challenges the notion of what ‘done’ really means,” Dr. Somerville said.

As the anatomy of the brain changes, its activity changes as well. In a child’s brain, neighboring regions tend to work together. By adulthood, distant regions start acting in concert. Neuroscientists have speculated that this long-distance harmony lets the adult brain work more efficiently and process more information.

But the development of these networks is still mysterious, and it’s not yet clear how they influence behavior. Some children, researchers have found, have neural networks that look as if they belong to an adult. But they’re still just children.

Dr. Somerville’s own research focuses on how the changes in the maturing brain affect how people think.

Adolescents do about as well as adults on cognition tests, for instance. But if they’re feeling strong emotions, those scores can plummet. The problem seems to be that teenagers have not yet developed a strong brain system that keeps emotions under control.

That system may take a surprisingly long time to mature, according to a study published this year in *Psychological Science*.

The authors asked a group of 18- to 21-year-olds to lie in an fMRI scanner and look at a monitor. They were instructed to press a button each time they were shown

faces with a certain expression on them — happy in some trials, scared or neutral in others.

And in some cases, the participants knew that they might hear a loud, jarring noise at the end of the trial.

In the trials without the noise, the subjects did just as well as people in their mid-20s. But when they were expecting the noise, they did worse on the test.

Brain scans revealed that the regions of their brains in which emotion is processed were unusually active, while areas dedicated to keeping those emotions under control were weak.

“The young adults looked like teenagers,” said Laurence Steinberg, a psychologist at Temple University and an author of the study.

Dr. Steinberg agreed with Dr. Somerville that the maturing of the brain was proving to be a long, complicated process without obvious milestones. Nevertheless, he thinks recent studies hold some important lessons for policy makers.

He has proposed, for example, that the voting age be lowered to 16. “Sixteen-year-olds are just as good at logical reasoning as older people are,” Dr. Steinberg said.

Courts, too, may need to take into account the powerful influence of emotions, even on people in their early 20s.

“Most crime situations that young people are involved in are emotionally arousing situations — they’re scared, or they’re angry, intoxicated or whatever,” Dr. Steinberg said.

Dr. Somerville, on the other hand, said she was reluctant to offer specific policy suggestions based on her brain research. “I’m still in the learning stage, so I’d hesitate to call out any particular thing,” she said.

But she does think it is important for the scientists to get a fuller picture of how the brain matures. Researchers need to do large-scale studies to track its

development from year to year, she said, well into the 20s or beyond.

It's not enough to compare people using simple categories, such as labeling people below age 18 as children and those older as adults. "Nothing magical occurs at that age," Dr. Somerville said.

Follow Carl Zimmer on Twitter @carlzimmer

Like the Science Times page on Facebook. | Sign up for the Science Times newsletter.

---

© 2018 The New York Times Company