

## STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 4th day of June, 2009, the following order was made and entered:

### **RE: APPROVAL OF PUBLIC COMMENT PERIOD ON PROPOSED RULES OF JUVENILE PROCEDURE**

On a former day, to-wit, May 1, 2009, came the Youth Services Committee of the Court Improvement Program, chaired by Jane Moran, and presented to the Court proposed procedural rules for juvenile status and delinquency cases arising under Chapter 49, Article 5 of the West Virginia Code, such rules having been approved by the Court Improvement Program Oversight Board.

Upon consideration whereof, the Court is of opinion to and does hereby approve a period of public comment on the proposed rules, to conclude on **September 8, 2009**, with comments to be filed in writing with the Clerk of the Court. The proposed rules are attached to this order in their entirety, including comments, as proposed by the committee.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court

# **PROPOSED WEST VIRGINIA RULES OF JUVENILE PROCEDURE**

**Proposed by the Court Improvement Program Youth Services Committee  
Public Comment period approved by Supreme Court Order dated June 4, 2009  
Public Comment Period to Conclude September 8, 2009**

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## **Rule 1. Scope, Application and General Purpose**

(a) *Scope and Application.* These rules govern the procedures in the courts of West Virginia having jurisdiction over delinquency and status offense matters pursuant to West Virginia Code, Chapter 49, Articles 5 through 5E, and apply to both delinquency and status offense proceedings except where otherwise specified or limited. If these rules are in conflict with other rules or statutes, these rules shall apply.

(b) *Notice.* Where these rules require giving notice to parties, notice shall be given to the juvenile or juvenile's counsel, the juvenile's parents or legal guardians, the prosecuting attorney, any agency having custody of the juvenile, and any others specified by particular rule as having an interest in matters before the court.

(c) *General Purpose.* These rules are intended to establish uniform practices and procedures for the courts of the State of West Virginia having juvenile jurisdiction, and to assure that the statutory and constitutional rights of juveniles are protected. These purposes should be pursued through means that are fair and just, that recognize the unique characteristics and needs of juveniles, and that give juveniles access to opportunities for personal and social growth, while promoting public safety and reducing juvenile offenses. These rules shall be construed to achieve these ends.

(d) *Rights Generally.* Juveniles charged with delinquency or status offenses are given the same rights as adults charged with criminal offenses, and in some instances they are afforded more protection. The courts must work to ensure that the rights of alleged juvenile offenders are protected. Juveniles should be informed of all of their statutory and constitutional rights during the proceedings.

### Comments

Sources -- *W. Va. Const., art. VIII, § 3 (Supreme Court rule-making authority)*  
*Games-Neely ex rel. W. Va. State Police v. Real Property, 211 W. Va. 236, 565 S.E.2d 358 (2002)*

## **Rule 2. Terminology**

As used in these rules, these terms mean as follows:

(a) "Division" or "DJS" means the West Virginia Division of Juvenile Services.

(b) "Department" or "DHHR" means the West Virginia Department of Health and Human Resources.

(c) "Multidisciplinary Team" or "MDT" means the treatment team convened to assess, plan and implement a comprehensive, individualized service and treatment plan for a juvenile and the

juvenile's family involved in a status offense proceeding, or in a delinquency proceeding when the court is considering placing the juvenile in the department's custody or placing the juvenile out of home at the department's expense.

(d) "Referee" means a juvenile referee appointed pursuant to West Virginia Code § 49-5A-1, or in any county without a juvenile referee, any magistrate designated by the circuit court to perform the functions and duties which may be performed by referee.

### **Rule 3. Juvenile Jurisdiction**

Juvenile jurisdiction of circuit courts over proceedings related to and controlled by these rules is as provided in West Virginia Code § 49-5-2(a) through (f). Juvenile referees, including those magistrates so designated, act under the jurisdiction of the appointing circuit court to the extent authorized by statute. Prepetition diversion generally relating to all alleged status and delinquency offenses is within circuit court jurisdiction as authorized under West Virginia Code §§ 49-5-2a, -3, and -3a. Prepetition diversion specifically relating to alleged delinquency offenses involving harm to an animal is within circuit court jurisdiction as authorized under West Virginia Code § 49-5-13f.

### **Rule 4. Venue**

(a) The petition shall be filed in the county in which the alleged offense occurred. Upon notice and motion of a party, and for good cause shown, the court may order the petition removed to another county.

(b) "Good cause" shall include a showing on the record that removal is in the best interest of the juvenile and the least restrictive alternative available to the court which insures the safety of the juvenile; and that the removal to the more appropriate forum will result in the efficient administration of justice, including recognition of the seriousness of the crime, consideration of victim's rights, and availability of witnesses. "Good cause" may include a showing on the record that the juvenile, or the juvenile's parents or legal guardians, are absent from the court's jurisdiction, but can be found in another county within the state; or that there are one or more pending petitions regarding the juvenile in another county.

(c) Any procedure to remove a petition to another county shall not be initiated prior to the appointment of counsel to represent the juvenile.

(d) If the court is informed during the course of a juvenile proceeding that a juvenile proceeding involving the juvenile is pending in another county, the court shall stay the proceedings and communicate with the court in which the other proceeding is pending so that the issues in both petitions may be litigated in the most appropriate sequence and manner, whether in one or both forums.

(e) Objections regarding improper venue must be raised prior to the adjudicatory hearing or they are deemed to be waived.

Comments

Sources --     *W. Va. Code § 49-5-7(a)(1)*  
                  *W. Va. Rules of Crim. Pro., Rule 12(b)*  
                  *State v. Tommy Y, Jr., 219 W. Va. 530, 637 S.E.2d 628 (2006)*

**Rule 5. Appointment of Counsel**

(a) *Generally.* The juvenile has the right to be represented by an attorney at all stages of proceedings brought under the delinquency and status offense provisions of Chapter 49, Article 5. This right attaches no later than when the juvenile first appears before a judicial officer. The attorney shall initially consult with the juvenile privately, outside of the presence of any parent or legal guardian. The attorney, whether court-appointed or privately retained, shall act solely as the counsel for the juvenile.

(b) *Appointment of Counsel.*

(1) *Delinquency and Status Offenses.* Except as otherwise specifically provided in this rule, in any proceeding in which the juvenile is charged with an offense, including any proceeding in which a juvenile is alleged to have violated the terms of probation for a prior offense or where a modification of a prior disposition is proposed, the court shall appoint counsel at public expense to represent the juvenile, if the juvenile cannot afford counsel and private counsel has not been retained to represent the juvenile.

(2) *Juvenile Traffic Offenses and Other Offenses Heard in Magistrate Court.* In any proceeding in which the juvenile is charged in magistrate court with a violation of a traffic law, as defined under West Virginia Code § 49-5-1(f), or with a violation of West Virginia Code §§ 60-6-9 or 11-16-19, or a violation of West Virginia Code, Chapter 20, the juvenile or the juvenile's parents or legal guardians may retain private counsel, but the juvenile does not have a right to appointment of a public defender or other counsel at public expense.

(3) *Municipal Offenses.* In any proceeding in which the juvenile is charged in municipal court with a municipal ordinance regulating traffic, enforcing a municipal curfew, or regulating or prohibiting public intoxication, drinking or possessing alcoholic liquor or beer in public places, or any other act prohibited by West Virginia Code §§ 60-6-9 and 11-16-19, the juvenile or the juvenile's parents or legal guardians may retain private counsel, but the juvenile does not have a right to appointment of a public defender or other counsel at public expense.

(4) *Appearance before a Grand Jury.* A juvenile appearing before a grand jury as a witness shall be represented by an attorney at public expense if the juvenile cannot afford to retain private counsel and is not granted immunity for the juvenile's testimony.

**(c) Eligibility for Court-Appointed Counsel at Public Expense.**

(1) *When Parents or Juvenile Cannot Afford to Retain Counsel.* A juvenile and a juvenile's parents or legal guardians are financially unable to obtain counsel if the juvenile is unable to obtain adequate representation without substantial hardship for the juvenile or the juvenile's family. The court shall inquire to determine the financial eligibility of a juvenile for the appointment of counsel, and such determination shall be made in accordance with West Virginia Code § 29-21-16.

(2) *When Parents Can Afford to Retain Counsel.* If the parents or legal guardians of a juvenile can afford to retain counsel and have not retained counsel for the juvenile, and the juvenile cannot afford to retain counsel, the court may order the parents or legal guardians to provide, by paying for, legal representation for the juvenile in the proceedings. Such order may be entered only after giving the parents or legal guardians a reasonable opportunity to be heard. The court may disregard the assets of the juvenile's parents or guardians and appoint counsel for the juvenile, as provided in paragraph (1) above, if the court concludes, as a matter of law, that the juvenile and the parents or guardians have a conflict of interest that would adversely affect the juvenile's right to effective representation of counsel, or concludes, as a matter of law, that requiring the juvenile's parents or guardians to provide legal representation for the juvenile would otherwise jeopardize the best interests of the juvenile.

**(d) Right of Parents to Counsel.** The parents or legal guardians of a juvenile who is the subject of a juvenile proceeding have the right to retain their own counsel at their own expense, but such right does not create an entitlement on the part of the juvenile's parents or guardians to participate as full and separate parties in the juvenile proceeding.

**(e) Withdrawal of Counsel.** A public defender or other appointed or retained lawyer cannot withdraw from a juvenile case until all proceedings have been completed, except upon written order of the court pursuant to a written motion, or upon written substitution of counsel approved by the court. A lawyer who wishes to withdraw from a case must file a written motion and serve it by mail or personal service upon the client and upon the prosecuting attorney; and the lawyer shall have the matter heard by the court. If the court approves the withdrawal, it shall be effective when the order has been served on the client and the prosecuting attorney by mail or personal service and proof of such service has been filed with the court.

**(f) Joint Representation.** When two or more juveniles are alleged to have participated in the same act or occurrence or in the same series of acts or occurrences constituting an offense or offenses and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall personally advise each juvenile, and the juvenile's parents or legal guardians, of the right to effective assistance of counsel, including separate representation. Unless the court concludes, based upon specific findings set forth in the record, that there is good cause to believe that no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each juvenile's right to counsel, including appointment of separate counsel.

(g) Guardian Ad Litem. A juvenile's parents or legal guardians are presumed to act in the juvenile's best interests in providing input and guidance to the juvenile on important decisions made during juvenile proceedings. However, under circumstances indicating to the court that the parents or guardians have a serious and tangible interest that is hostile to the interests of the juvenile and that might be affected by the result of the adjudication, or if the court finds reason to believe that the parents' or guardians' influence over the juvenile is contrary to the juvenile's best interests, the court may appoint a guardian ad litem for the juvenile.

#### Comments

*An example of such conflict of interest under subparagraph (c)(2) would be when a parent is a complaining witness in the juvenile proceeding.*

*Rule 8(a) reflects the statutory requirement [W. Va. Code § 49-5-7(b)] that a juvenile's parents or legal guardians also be named in the juvenile petition as respondents. The provision in Rule 5(d) above limiting parent or guardian participation as full and separate parties in the juvenile proceeding, for the reasons detailed in State v. Kirk N., 214 W. Va. 730, 591 S.E.2d 288 (2003), is not in conflict with the Rule 8(a) requirement.*

Sources -- W. Va. Code § 49-5-2(h)  
W. Va. Code § 29-21-2(2)  
W. Va. Code § 29-21-16(c)  
W. Va. Rules of Crim. Pro., Rule 44(c)  
State v. Kirk N., 214 W. Va. 730, 591 S.E.2d 288 (2003)

### **Rule 6. Taking a Juvenile into Custody**

#### **(a) Orders for Immediate Custody.**

(1) *Probable Cause Required.* In proceedings formally instituted by the filing of a juvenile petition, probable cause may be established by facts set forth in the verified petition and by any affidavit attached to the petition.

(2) *Immediate Custody Order for Delinquency Offenses.* The circuit court, a juvenile referee, or a magistrate may issue an order for immediate custody of a juvenile charged with a delinquency offense if the judicial officer finds that there is probable cause to believe that one of the following conditions exists:

(A) the petition shows that grounds exist for the arrest of an adult in identical circumstances;

(B) the health, safety, and welfare of the juvenile demand such custody;

(C) the juvenile is a fugitive from a lawful custody or commitment order of a court; or

(D) the juvenile is alleged to be a juvenile delinquent with a record of willful failure to appear at juvenile proceedings and custody is necessary to assure the juvenile's presence before the court.

(3) *Immediate Custody Order for Status Offenses.* The circuit court, a juvenile referee, or a magistrate may issue an order for immediate custody of a juvenile charged with a status offense if the judicial officer finds that there is probable cause to believe that one of the following conditions exists:

- (A) the health, safety, and welfare of the juvenile demand such custody; or
- (B) the juvenile is a fugitive from a lawful custody or commitment order of a court.

(4) *Immediate Custody Order Following Failure to Appear.* If a juvenile served by personal service of process with a petition and summons pursuant to West Virginia Code § 49-5-7(a)(2) fails to appear for the initial hearing, the circuit court, a juvenile referee, or a magistrate may issue an order for immediate custody based upon such failure to appear in response to the summons.

(5) *Contents of Order for Immediate Custody.* An order for immediate custody shall be signed by a circuit judge, juvenile referee, or magistrate, and shall:

- (A) order the juvenile to be brought immediately before the circuit court or other available judicial officer, for a detention hearing;
- (B) state the name and address of the juvenile, or if unknown, designate the juvenile by any name or description by which the juvenile can be identified with reasonable certainty;
- (C) state the age and sex of the juvenile, or, if the age of the juvenile is unknown, that the juvenile is believed to be of an age subject to the juvenile jurisdiction of the court;
- (D) state the reasons why the juvenile is being taken into custody;
- (E) when applicable, state the reasons for a limitation on the time or location of the execution of the order for custody;
- (F) state the time and date when issued, and the county and court where issued;
- (G) state that continuation in the home is contrary to the welfare of the juvenile with specific findings as to why; and whether the department of health and human resources made reasonable efforts to prevent the out-of-home placement or that the emergency situation made such efforts unreasonable or impossible; and
- (H) if the juvenile is being taken into custody in relation to a status offense, direct the law-enforcement officer taking custody to immediately notify the department of health and human resources.

(6) *Who May Execute.* An order for immediate custody may only be executed by a law-enforcement officer authorized by law to execute an arrest warrant.

(7) *How Executed.* An order for immediate custody shall be executed by taking the juvenile into custody.

(8) *Where Executed.* An order for immediate custody may be executed at any place in the state except where prohibited by law, unless the judicial officer who issues the warrant limits in writing on the order the location where the order may be executed.

(9) *When Executed.* An order for immediate custody may be executed at any time unless the judicial officer who issues the order limits in writing on the order the time during which the order may be executed.

(10) *Possession of Order.* An existing order for immediate custody need not be in the law-enforcement officer's physical possession at the time the juvenile is taken into custody.

(11) *Notice.* When an order for immediate custody is executed, the juvenile's parents or legal guardians shall immediately be informed of the custody and the reasons why the juvenile is being taken into custody as stated in the order. If a parent or guardian cannot be located, a close relative shall be informed of the custody and order.

**(b) *Custody Without a Court Order.*** Absent a court order, a juvenile may be taken into custody by a law-enforcement officer only if one of the following conditions exists:

(1) grounds exist for the arrest of an adult in identical circumstances;

(2) emergency conditions exist which, in the judgment of the officer, pose imminent danger to the health, safety, and welfare of the juvenile;

(3) the officer has reasonable grounds to believe that the juvenile has left the care of his or her parents or guardians without consent, and the health, safety, and welfare of the juvenile is endangered;

(4) the juvenile is a fugitive from a lawful custody or commitment order of a juvenile court;

(5) the officer has reasonable grounds to believe the juvenile to have been driving a motor vehicle with any amount of alcohol in his or her blood; or

(6) the juvenile is the named respondent in an emergency protective order issued pursuant to West Virginia Code § 48-27-403, and the individual filing the petition for the emergency protective order is the juvenile's parent or legal guardian.

**(c) *Prompt Presentment Upon Custody.*** Upon taking a juvenile into custody with or without a court order under one of the circumstances specified in this rule, the law-enforcement officer shall immediately bring the juvenile before the circuit court or other available judicial officer for a detention or placement hearing.

#### Comments

Sources -- W. Va. Code § 49-5-8

### **Rule 7. Informing Juvenile of Charges and Rights**

(a) A juvenile alleged to be a delinquent or status offender shall be provided a copy of the signed petition at the first appearance before a judicial officer. The juvenile petition shall conform to Rule 8 as to contents. Unless waived by the juvenile, the court shall read the allegations of the charging document to the juvenile and determine that the juvenile understands them, and if not, provide an explanation. The juvenile has the right to counsel at the first appearance, and court-appointed counsel shall be provided pursuant to Rule 5 if the juvenile is without counsel.

(b) A juvenile alleged to be a delinquent or status offender, and any parent, guardian or custodian then appearing, shall be informed by the judicial officer at the first appearance of the following:

(1) *Right to Know Charges.* The juvenile is charged with being a delinquent or a status offender, as specified in the petition;

(2) *Presence of Parent or Guardian.* Each parent or legal guardian and juvenile has the right to be present at any proceeding in the juvenile's case;

(3) *Right to Remain Silent.* The juvenile has the right to remain silent and the juvenile cannot be asked questions about the current charge or charges without the presence of a lawyer. If the juvenile gives up the right, anything the juvenile says can be used against the juvenile in court proceedings;

(4) *Right to Preliminary Hearing.* The juvenile has the right to preliminary hearing where a judicial officer will decide if the State has produced sufficient evidence to proceed toward an adjudicatory hearing. At the preliminary hearing the juvenile through counsel, may cross-examine any state witness and may present witnesses and other related evidence on the juvenile's behalf;

(5) *Testimony by Juvenile.* The juvenile has the right to testify at any hearing and likewise, the juvenile has the right not to testify and such silence may not be held against the juvenile. No one can force the juvenile to be a witness at any time in any part of these proceedings;

(6) *Trial by Jury.*

(A) *Alleged Status Offenders.* A juvenile alleged to have committed a status offense is not entitled to a trial by jury.

(B) *Alleged Delinquent Offenders.* A juvenile alleged to have committed a delinquent offense, which if committed by an adult would expose the adult to incarceration, shall be entitled to a trial by a jury of 12 persons.

(C) *Offenses with No Possibility of Confinement.* A juvenile charged with any delinquent offense where confinement is not possible, due either to the statutory penalty, or because the court rules prior to adjudication that confinement will not be imposed, shall not be entitled to a trial by jury.

(7) *Possibility of Removal or Other Consequences.* If the juvenile admits any delinquency or status offense or if found to have committed any such offense at the adjudicatory hearing, the juvenile could be placed outside the home. The juvenile can be ordered to pay court costs, including court-appointed counsel costs, and the juvenile can be fined up to \$100 for each offense. In addition, the court may order community service, restitution, counseling or other treatment, participation in community-based programs by the juvenile and family, suspension of driving privileges, or such other authorized sentencing alternatives as may be deemed appropriate by the court.

(c) The court shall not require the juvenile to admit or deny the charges stated in the petition after completion of informing the juvenile of the charges and rights.

#### Comments

Sources -- W. Va. Code § 49-5-9  
W. Va. Code §§ 49-5-13, -13a, -13b

### **Rule 8. Petitions**

(a) *Petitions Generally.* The petition is a verified written statement by a person who has knowledge or information concerning the facts alleged, containing specific allegations of the essential facts constituting the offense charged, including the approximate time and place of the alleged conduct. The petition shall set forth the name and address of the juvenile's parents or legal guardians, who shall be named as respondents. The petition shall contain a statement of the juvenile's right to have counsel appointed and consult with counsel at every stage of the proceeding.

(b) *Authorized Presentation.* Unless otherwise provided by statute or under subdivision (c) of this rule, the presentation and oath or affirmations regarding a delinquency or status offense shall be made by a prosecuting attorney or a law-enforcement officer showing reason to have reliable information concerning the allegations made in the petition.

(c) *Presentation Exceptions for Certain Status Offenses.*

(1) A petition for a status offense under West Virginia Code § 49-1-4(14)(A), (B) or (C) may be presented and sworn by a representative of the department of health and human resources, or by a parent, guardian or custodian showing reason to have reliable information and belief.

(2) A petition for a status offense under West Virginia Code § 49-1-4(14)(C) alleging that a juvenile is habitually absent from school without good cause may be presented and sworn by a representative of the juvenile's school district showing reason to have reliable information and belief.

**(d) Probable Cause.** If from the facts stated in the petition the judicial officer finds probable cause, the petition becomes the charging instrument initiating a juvenile proceeding.

**(e) Joinder of Parties.** Unlike criminal matters, juveniles shall not be named in petitions with other juveniles. More than one juvenile may, however, be named as participating in the same conduct that supports allegations of delinquency in the affidavit supporting the petition.

**(f) Joinder of Allegations of Delinquency.** Two or more allegations of delinquent conduct may be alleged in the same petition or may be presented in separate petitions. The state shall not fail to bring forth allegations known or that should be known to the state for the purpose of gaining an advantage in pursuing delinquency charges.

**(g) Notice of Possible Termination of Parental Rights.** The petition shall contain a notice that if the juvenile is placed out of the home by the court and remains in placement for a period of 15 months, the department of health and human resources may initiate separate proceedings to terminate the parental or custodial rights of the juvenile's parents or legal guardians.

#### Comments

Sources --     *W. Va. Code § 49-5-7*  
                  *W. Va. Code § 49-6-5b*  
                  *Harman v. Frye, 188 W. Va. 611, 425 S.E.2d 566 (1992)*  
                  *45 C.F.R. § 1356.21(i)(1)*

### **Rule 9. Service**

**(a)** Upon the filing of the petition, the court shall set a time for the preliminary hearing and appoint counsel when appropriate and necessary pursuant to Rule 5. A copy of the petition shall be served upon the juvenile by first class mail or personal service of process. If a juvenile does not appear in response to a summons served by mail, no further proceeding may be held until the juvenile is served a copy of the petition and summons by personal service of process. If a juvenile fails to appear in response to a summons served in person, an order of arrest may be issued by the court.

(b) The parents or legal guardians shall be served with notice of the proceedings in the same manner as the juvenile and required to appear with the juvenile at the time and place set for the proceedings unless such respondents cannot be found after diligent search. If any such respondent cannot be found after diligent search, the court may proceed without further requirement of notice; provided, that the court may order service by first class mail to the last known address of such respondent. The respondent shall be afforded fifteen days after the date of mailing to appear or answer.

(c) The court or referee may order the issuance of a subpoena against the person having custody and control of the juvenile ordering him or her to bring the juvenile before the court or referee.

#### Comments

Sources -- W. Va. Code § 49-5-7(a)(2) and (b).

### **Rule 10. Attendance at Hearings and Confidentiality**

(a) Right to Attend Hearing. Juvenile court proceedings are closed to the public except as provided by law. Only the following may attend hearings:

(1) the juvenile, counsel for the juvenile, and any *guardian ad litem* appointed for the juvenile;

(2) any parent or legal guardian of the juvenile and their counsel;

(3) any spouse or child of the juvenile;

(4) the prosecuting attorney;

(5) other persons requested by the parties listed in (1) through (4) if approved by the court;

(6) any probation officer and department of health and human resources caseworker involved in the proceedings;

(7) in cases in which the juvenile is accused of committing what would be a felony if the juvenile were an adult, an alleged victim or his or her representative (and parents if the alleged victim is a juvenile) under such conditions approved by the court;

(8) other persons authorized by the court under a determination that such persons have a legitimate interest in the proceedings; and

(9) in cases transferred to adult criminal jurisdiction, once the transfer is ordered and any appeal of the transfer is upheld, further proceedings shall be open to the public.

(b) Presence Required.

(1) *Juvenile*. The juvenile shall have the right to be present at all hearings. The juvenile is deemed to waive the right to be present if the juvenile voluntarily and without justification is absent after the hearing has commenced or if the juvenile disrupts the proceedings. Disruption of the proceedings occurs if the juvenile, after warning by the court, engages in conduct which prevents the orderly procedure of the court. The court may use all methods of reasonable restraint necessary to conduct the proceedings in an orderly manner. If the juvenile is restrained or removed from the courtroom, the court shall state the reasons for the restraint or removal on the record.

(2) *Counsel*. Counsel for the juvenile shall be present at all hearings, unless waived by the juvenile for good cause on the record. The prosecuting attorney shall be present for all hearings unless excused by the court in its discretion.

(3) *Adult Respondents*. The parents or legal guardians of a juvenile who is the subject of a delinquency or status offense proceeding shall accompany the juvenile to all hearings unless excused by the court for good cause shown. If any such person fails to attend a hearing with the juvenile without adequate excuse, the court may issue a subpoena or hold the person in contempt. The court may proceed if it is in the best interests of the juvenile or the administration of justice to do so even if a parent, legal guardian or other custodian fails to appear.

(c) *Right to Participate*.

(1) *Juvenile, Counsel, and Prosecuting Attorney*. The juvenile, juvenile's counsel, and prosecuting attorney have the right to participate in all hearings.

(2) *Guardian ad Litem*. Any *guardian ad litem* appointed by the court has a right to participate and advocate for the best interests of the juvenile at all hearings.

(3) *Generally*. Persons represented by counsel, who have a right to participate, shall participate through their counsel. Unrepresented persons may participate on their own behalf.

*Comments*

Sources --     *W. Va. Code § 49-5-2(i)*  
                  *W. Va. Code § 49-5-7(b) and (c)*

## **Rule 11. Release Under Bond Conditions for Delinquency and Status Offenses**

Should the judicial officer determine that unconditional release is inappropriate, but believes that an alternative to detention will provide protection to the community and safety for the juvenile, the juvenile may be admitted to bail, with or without surety, under conditions which may include any reasonable term, including but not limited to the following terms.

The juvenile shall:

- (1) not violate any criminal laws of this state or any other jurisdiction;
- (2) not enter or remain at any establishment that sells alcoholic beverages for consumption on the premises;
- (3) not use alcoholic beverages nor any controlled substance, inhalant or intoxicant of any kind unless specifically prescribed by a licensed physician;
- (4) submit to random substance screen testing at the direction of a probation officer;
- (5) report to the probation office as directed by the probation officer and be available for home visits by the probation officer;
- (6) not leave the state without the permission of the probation office;
- (7) attend school every day unless absent under a doctor's written excuse, not be suspended, complete all assignments and make reasonable efforts to make passing grades; or if approved by the probation officer seek or maintain approved employment;
- (8) remain under the supervision of the juvenile's parents or legal guardians and submit to such supervision in the matters of the juvenile's comings and goings;
- (9) not have access to or contact with a firearm or other dangerous and deadly weapons of any type;
- (10) not be ungovernable or habitually disobedient and beyond the control of parents or guardians;
- (11) abide by the decisions of the probation officer of the court who shall have the authority to designate those individuals with whom this juvenile may not communicate or associate;
- (12) adhere to any curfew set by the probation officer;
- (13) have no contact with victim or any witnesses absent permission of the court or arranged through the juvenile's counsel with counsel for the state;
- (14) appear timely at all hearings when notified to appear; and
- (15) acknowledge that a substantial violation of any one or a combination of any of the limitations and restrictions is sufficient grounds to detain the juvenile pending further proceedings.

### Comments

*Sources --* W. Va. Code § 49-5-2(g)  
W. Va. Code § 49-5-8a(a)  
*SER M.C.H. v. Kinder, 173 W. Va. 387, 317 S.E.2d 150 (1984)*

## **Rule 12. Detention and Alternative Placements in Delinquency Cases**

(a) *Scope.* This rule governs all physical liberty restrictions placed upon a juvenile in delinquency cases before and after adjudication, upon disposition, or pending a probation violation hearing. For purposes of this rule, the first day of any confinement from which the designated period of time begins to run shall be included.

(b) *Types of Detention or Placement.*

(1) *Secure Detention Facility.* A secure detention facility means any public or private residential facility which includes construction fixtures designed to physically restrict the movements and activities of detainees held in lawful custody in such facility. A secure detention facility is designed to restrict a juvenile's liberty and substantially affect physical freedom or living arrangements.

(2) *Staff-Secure Facility.* A staff-secure facility means any public or private residential facility characterized by staff restrictions of the movements and activities of residents held in the lawful custody in such facility and which limits residents' access to the surrounding community, but is not characterized by construction fixtures designed to physically restrict the movements and activities of residents.

(3) *Nonsecure Facility.* A public or private residential facility not characterized by construction fixtures designed to physically restrict the movements and activities of individuals held in lawful custody in such facility.

(4) *Home Confinement.* Restriction to the juvenile's residence, with or without electronic or global positioning system monitoring, except for out-of-home activities authorized by the court.

(c) *Presumption for Unconditional Release.*

(1) The juvenile shall be released, with or without conditions, unless the judicial officer determines there is substantial likelihood that:

- (A) the juvenile's health or welfare would be immediately endangered;
- (B) the juvenile would endanger others;
- (C) the juvenile would not appear for a court hearing; or
- (D) the juvenile would not remain in the care or control of the person into whose lawful custody the juvenile is released.

(2) A juvenile who is taken into custody and found eligible for release except for the fact that no responsible adult can be found into whose custody the juvenile could be released may be detained until such time as a responsible adult can be found into whose custody the juvenile can be delivered. However, at the time the juvenile is taken into custody, a written record must be made of all attempts to locate a responsible adult in whose custody the juvenile can be released. This procedure must take place each and every day the juvenile is detained.

(d) Additional Findings Necessary for Removal. In any order requiring the removal of the juvenile from his or her home, the court shall find and state in its order: that continuation in the home is contrary to the welfare of the juvenile with specific findings as to why; and whether the department of health and human resources made reasonable efforts to prevent the out-of-home placement or that the emergency situation made such efforts unreasonable or impossible.

Comments

Sources -- W. Va. Code §§ 49-5-8 and 8a.

**Rule 13. Pre-Adjudicatory Detention Factors for Delinquency Offenses**

(a) Mandatory Release. The judicial officer shall release the accused juvenile unless:

(1) The charge is a category 1 offense;

(2) The charge is a category 2 or 3 offense and there is a judicial finding that the juvenile presents a danger to the public if not securely detained;

(3) The charge is a category 2 or 3 offense and the juvenile is an escapee from detention or any commitment setting ordered; or the juvenile has a recent record of willful failure to appear at juvenile court proceedings and no measure short of secure detention can be imposed to reasonably ensure appearance;

(4) The charge involves a violation of an alternative method of disposition;

(5) The juvenile is awaiting adjudication or disposition for an offense which would be a felony under criminal jurisdiction, and is charged with committing another offense during the interim period which would be a felony.

(6) The juvenile is awaiting adjudication or disposition for an offense which would be a felony under criminal jurisdiction, and was released on bond conditions but is found by a judicial authority to have committed a material violation of bond.

(7) The juvenile has been determined to be a fugitive from another jurisdiction, and an official of such jurisdiction or an official from the West Virginia Interstate Compact Office has formally requested that the juvenile be placed in detention.

(b) Bond. When mandatory release is applicable, such release may be upon appropriate bond conditions set by the judicial officer pursuant to Rule 11.

(c) No Mandatory Detention. A juvenile who is excluded from mandatory release under subparagraph (a) is not to be automatically detained. No category of alleged conduct in and of itself may justify a failure to exercise discretion to release upon consideration of the needs of the juvenile and the community.

(1) Discretionary Release. In every situation in which the detention of an arrested juvenile is permissible, the judicial officer shall first consider and determine whether the juvenile qualifies for an available diversion program or release under bond conditions, or whether any other form of control short of detention is available to reasonably reduce the risk of flight or misconduct. The judicial officer should explicitly state in writing the reasons for rejecting each of these forms of release.

(2) Secure vs. Other Detention. When appropriate, the judicial officer shall consider staff-secure detention alternatives prior to committing a juvenile to a secure detention facility.

(d) Threatening Witnesses. An additional ground for detention is a determination by a judicial officer that there exists a substantial likelihood of danger to one or more witnesses should the juvenile be released.

(e) Delinquency Offense Categories for Detention Assessments.

(1) Category 1 Offenses. Treason; Murder, 1<sup>st</sup> or 2<sup>nd</sup> Degree, or Felony Murder; Murder of Child; Kidnapping; Sexual Assault, 1<sup>st</sup> or 2<sup>nd</sup> Degree; Robbery; Malicious Assault; Possession with Intent to Deliver, or Manufacture or Delivery of Controlled Substances; Arson, 1<sup>st</sup> Degree; Sexual Abuse 1<sup>st</sup> Degree; Brandishing a Deadly Weapon; Possession or Carrying a Deadly Weapon by Minor; and Attempted Category 1 Offense.

(2) Category 2 Offenses. Child Sexual Abuse; Incest; Child Abuse, Injurious; Child Neglect, Injurious; Burglary; Sexual Assault, 3<sup>rd</sup> Degree; Voluntary Manslaughter; Sexual Abuse, 2<sup>nd</sup> Degree; Unlawful Wounding; and Attempted Category 2 Offense.

(A) All other charges of criminal-type behavior which, in the case of an adult would be punishable by a sentence of not less than one year and if proven as a juvenile offense, could result in a commitment to a secure facility, but is not herein enumerated, will be considered under the terms and conditions of Category 2 offenses.

(3) Category 3 Offenses. DUI (causing death or personal injury); Abduction; Extortion; DUI, 2<sup>nd</sup> or 3<sup>rd</sup> Offense; Possession or use of Explosives; Malicious Killing of Animal; Arson, 2<sup>nd</sup>, 3<sup>rd</sup>, or 4<sup>th</sup> Degree; Unlawful Shooting; Involuntary Manslaughter; Negligent Homicide (vehicular); Assault; Battery; Hit and Run Causing Personal Injury; Escape from Division of Juvenile Services Custody; Sexual Abuse, 3<sup>rd</sup> Degree; and Attempted Category 3 Offense.

(f) Discretion to Release Even if One or More Factors are Met. Even if a juvenile meets one or more of the detention factors above, the judicial officer has broad discretion to release that juvenile following the detention hearing if other less restrictive measures would be adequate under the specific circumstances as determined by the court.

### Comments

*Unconditional vs. Conditional or Supervised Release.* In order to minimize the imposition of release conditions on persons who would appear in court without them, and present no substantial risk in the interim, each judicial circuit should develop guidelines for the use of various forms of release based upon the resources and programs available, and analysis of the effectiveness of each form of release.

Sources -- W. Va. Code § 49-5-8  
W. Va. Code § 49-5-8a  
W. Va. Code § 49-5-9(a)(4)  
W. Va. Code § 49-5A-2  
*Facilities Review Panel v. Coe*, 187 W. Va. 541, 420 S.E.2d 532 (1992)

#### **Rule 14. Pre-Adjudicatory Placement Factors for Status Offenses**

(a) Mandatory Release. The judicial officer shall release the accused juvenile unless:

(1) Circumstances present an imminent danger to the health, safety, and welfare of the juvenile if released;

(2) No responsible adult can be found into whose custody the juvenile could be released. However, the custody order shall direct the custodial agency or facility: (i) to make a written record of all attempts to locate such a responsible adult; (ii) that this procedure must take place each day the juvenile is detained; and (iii) that the juvenile shall be returned to court forthwith if a responsible adult is found for the court's consideration of release of the juvenile to such adult; or

(3) The juvenile has run away or absconded from a lawful custody or commitment order of a juvenile court of this State, or any other jurisdiction operating under the Interstate Compact on Juveniles (W. Va. Code § 49-8-1, *et seq.*) or the Interstate Compact for Juveniles (W. Va. Code § 49-8A-1, *et seq.*)

(b) Nonsecure or Staff-Secure Placement. A juvenile placed in custody by reason of subparagraph (a)(1), (2), or (3) above may only be placed in a nonsecure or staff-secure facility.

(c) Less Restrictive Alternatives. In reaching the decision to place a juvenile in a nonsecure or staff-secure facility, the judicial officer shall first consider all less restrictive alternatives, such as placement with a willing adult relative, and all reasonably ascertainable factors relevant to the permissible reasons for custody under subparagraph (a)(1), (2), or (3) above.

(d) Custody in Department. The department of health and human resources shall be immediately notified of any pre-adjudicatory custody hearing to be held, and any juvenile held pursuant to this rule may be placed in the legal custody of the department pending further proceedings by the court.

(e) Additional Findings Necessary for Removal. In any order requiring the removal of the juvenile from his or her home, the court shall find and state in its order: that continuation in the home is contrary to the welfare of the juvenile with specific findings as to why; and whether the department of health and human resources made reasonable efforts to prevent the out-of-home placement or that the emergency situation made such efforts unreasonable or impossible.

#### Comments

Sources --      W. Va. Code § 49-5-8  
                      W. Va. Code § 49-5-8a  
                      W. Va. Code § 49-5A-2  
                      W. Va. Code § 49-8-2

### **Rule 15. Domestic Violence Emergency Protective Orders as Juvenile Petitions**

(a) Emergency Protective Orders Treated as Juvenile Petitions. A domestic violence petition filed pursuant to West Virginia Code § 48-27-403 by or on behalf of the juvenile's parent, legal guardian or other person with whom the juvenile resides that results in the issuance of an emergency protective order naming the juvenile as the respondent shall be treated as a petition arising under Chapter 49, Article 5, alleging the juvenile is a juvenile delinquent. The magistrate court shall notify the prosecuting attorney within 24 hours of the issuance of the emergency protective order, and the prosecuting attorney may file an amended verified petition within two judicial days, if desired. The appointment of a guardian ad litem and the family court hearing shall proceed; and any domestic violence order issued by the family court shall remain in effect until the juvenile petition is addressed by order in the circuit court or the protective order expires under its own terms.

(b) Notice to Department. If a law-enforcement official takes into custody a juvenile named as a respondent in an emergency protective order issued pursuant to West Virginia Code § 48-27-403 wherein the individual filing the domestic violence petition is the juvenile's parent or legal guardian or other person with whom the juvenile resides, upon presentment for a detention hearing the judicial officer shall immediately notify the department of health and human resources as required by West Virginia Code § 49-5-8(c)(C)(3).

(c) Presumption for Release. The judicial officer shall release the juvenile unless:

(1) Circumstances present an immediate threat of serious bodily harm to the juvenile or others if released; or

(2) No responsible adult can be found into whose custody the juvenile can be delivered. However, the detention order shall direct the custodial agency or facility: (i) to make a written record of all attempts to locate such a responsible adult; (ii) that this procedure must take place each day the juvenile is detained; and (iii) that the juvenile shall be returned to court forthwith if a responsible adult is found for the court's consideration of release of the juvenile to such adult.

**(d) Detention.** A juvenile detained by reason of subparagraph (c)(1) or (2) above may only be detained in a nonsecure or staff-secure facility. Provided, if the judicial officer determines that serious physical violence is the basis for the emergency protective order or that a substantial and credible risk of bodily injury is present, the court may order the juvenile detained in a secure facility. If the juvenile is placed in a secure or staff-secure facility, the judicial officer shall within 24 hours refer the matter to circuit court, and the court shall hold a detention review hearing pursuant to Rule 16 within three judicial days.

**(e) Less Restrictive Alternatives.** In reaching the decision to detain a juvenile in a nonsecure or staff-secure facility, the judicial officer shall first consider all less restrictive alternatives, such as placement with a willing adult relative, and all reasonably ascertainable factors relevant to the permissible reasons for detention under subparagraph (c)(1) or (2) above.

**(f) Additional Findings Necessary for Removal.** In any order requiring the removal of the juvenile from his or her home, the court shall find and state in its order: that continuation in the home is contrary to the welfare of the juvenile with specific findings as to why; and whether the department of health and human resources made reasonable efforts to prevent the out-of-home placement or that the emergency situation made such efforts unreasonable or impossible.

**(g) Bond.** Should the juvenile be detained under this rule, release under bond may be addressed after the prosecuting attorney has been notified and given the opportunity to file an amended juvenile petition pursuant to West Virginia Code § 49-5-7(f).

#### Comments

*The subparagraph (d) provision regarding secure detention in limited circumstances goes beyond the statutory authorization for only nonsecure or staff-secure placement. However, due to the unavailability of nonsecure or staff-secure placement alternatives for truly violent juveniles, provision must be made for secure detention in these circumstances.*

Sources -- W. Va. Code § 49-5-7(f)  
W. Va. Code § 49-5-8(b) and (c)

### **Rule 16. Review of Detention**

The circuit court may schedule a review of pre-adjudicatory detention or placement consistent with the following:

(a) Request For Hearing. A review of detention or placement may be requested by the juvenile, juvenile's counsel, prosecuting attorney, DHHR, DJS, probation officer, or upon application of any person with an interest in the matter. If the court finds a reasonable basis exists for the request, a hearing shall be scheduled as soon as possible, and no later than three judicial days after the request. The court may also set a detention or placement review hearing on its own motion.

(b) Notice. The person requesting review shall make the request with notice to all parties and any agency with custody of the juvenile.

(c) Relevant Evidence. Subject to constitutional limitations and privileged communications, the court may admit any evidence, including reliable hearsay and opinion evidence, that is relevant to the decision regarding continued detention or placement of the juvenile.

(d) Continued Detention or Placement. The court may continue the detention or placement only if the court makes appropriate findings pursuant to Rule 13 or 14, whichever applies.

#### Comments

Sources -- *W. Va. Code § 49-5A-4*  
*Arbogast v. R.B.C., 171 W. Va. 737, 301 S.E.2d 827 (1983)*

### **Rule 17. Admission at Initial Appearances**

(a) No inquiry relative to admission or denial of the charges or the juvenile's demand for a jury trial may be made by the court until the court has determined whether the proceeding is to be transferred to criminal jurisdiction.

(b) If a juvenile enters a plea of denial to charges alleged in the petition at the arraignment stage, the court shall conduct all further proceedings for adjudication in accordance with these rules. If the juvenile remains silent when confronted with the charges the court shall proceed in the same manner as if the juvenile had denied the charges.

### **Rule 18. Preliminary Hearings**

(a) Timeliness and Purpose. A preliminary hearing shall be held within 20 days after the juvenile is served with the petition, or within 10 days if the juvenile is detained, unless a preliminary hearing was conducted in conjunction with a detention hearing, or waived by the juvenile after being advised by counsel. The purpose of a preliminary hearing is to determine if there is probable cause to believe the alleged juvenile offense has been committed and that the juvenile before the court is the person who committed it. If probable cause is found by the presiding judicial officer the matter shall be bound over to the circuit court for an adjudication.

(b) Types of Evidence. Evidence shall be introduced at the preliminary hearing under the rules of evidence prevailing in a criminal trial except that hearsay evidence may be received if there is a substantial basis for believing:

- (1) The source of the hearsay is credible;
- (2) There is a factual basis for the information furnished; and
- (3) That it would impose an unreasonable burden on one of the parties or a witness to require the primary source of the evidence be produced.

(c) The Juvenile's Participation. The juvenile's counsel has the right to cross-examine the state's witnesses and introduce evidence.

(d) No Probable Cause Found. If the judicial officer is of the opinion that the state has failed to establish probable cause, the petition shall be dismissed, the juvenile released, and the bond, if any, discharged.

(e) Records. The judicial officer shall electronically record the preliminary hearing or if conducted by the circuit court, by way of the court's regular method for recording hearings. The judicial officer conducting the hearing shall promptly transmit any electronically recorded record to the circuit clerk. The circuit court shall consider any motion for transcription of the preliminary hearing made by the juvenile or the state, with appropriate provisions for payment of the cost of transcription to be included in any order for transcription. Should recording procedures fail, the judicial officer shall make a summary of the proceeding and file the written summary with the circuit clerk.

### **Rule 19. Improvement Periods**

(a) Motion. At any time prior to adjudication, the juvenile may, before the circuit court, move for the allowance of an improvement period. If the court finds that the best interest of the juvenile is likely to be served by an improvement period, the court may delay the adjudicatory hearing and grant an improvement period. A motion for an improvement period, whether granted or denied, may not be construed as an admission or be used in evidence.

(b) Duration and Terms. An improvement period may be granted for any period not exceeding one year. The terms of the improvement period, as determined by the court to address the treatment and rehabilitative needs of the juvenile, shall be set forth in a written order provided to the parties and counsel within 10 days of the hearing in which the motion was granted. In its discretion and based upon the particular circumstances, the court may direct that the juvenile be subject to the supervision of a probation officer during the improvement period; and may schedule the matter for interim judicial reviews. If the juvenile successfully completes the improvement period, the court shall dismiss the proceeding.

(c) Services and Treatment. As part of the terms of the juvenile's improvement period, the court may direct the DHHR to provide services and treatment to address the rehabilitative needs of the juvenile and associated needs of his or her family. In appropriate cases, the court may place the

juvenile in the custody of the department for out-of-home placement and treatment during all or part of the improvement period. If the juvenile is placed out of the home, the court shall find and state in the written order that continuation in the home is contrary to the best interests of the juvenile and why; and whether or not the department made reasonable efforts to prevent out-of-home placement or that exigent circumstances made such efforts unreasonable or impossible.

(d) *Revocation.* Upon a motion to revoke the improvement period filed by the prosecuting attorney or probation officer, the court shall schedule a hearing upon the motion with notice to the parties and counsel. If the state proves to the court by clear and convincing evidence that the juvenile has committed a substantial violation of one or more terms of the improvement period, the court shall terminate the improvement period and schedule an adjudicatory hearing on the original petition, to commence within 30 days of the revocation.

#### Comments

Sources --     *W. Va. Code § 49-5-9(b)*  
                  *In re Greg H., 208 W. Va. 756, 542 S.E.2d 919 (2000)*

### **Rule 20. Transfer to Criminal Jurisdiction**

(a) *Scope.* This rule applies to juvenile proceedings where a transfer to criminal jurisdiction is sought pursuant to the provisions of West Virginia Code § 49-5-10.

(b) *Motion by the State.* Any transfer motion made by the prosecuting attorney shall be filed and served at least eight days prior to the adjudicatory hearing. The motion must state, with particularity, the grounds for the requested transfer, including the statutory basis relied upon as set forth in West Virginia Code § 49-5-10.

(c) *Inquiries.* No inquiries relative to admission or denial of the allegations contained in the petition or the demand for a jury trial may be made of the juvenile until the court has determined whether the proceedings will be transferred to criminal jurisdiction.

(d) *Notice.* The juvenile, the juvenile's counsel, and the juvenile's parents or legal guardians shall be provided notice of the transfer motion at the time of filing and the hearing date.

(e) *Conduct of Hearing on Motion to Transfer.*

(1) *Timing.* A hearing shall be held within seven days of the filing of the motion to transfer. The court may continue the hearing for a reasonable period of time upon a motion by the prosecuting attorney or juvenile's counsel demonstrating good cause.

(2) *Burden of Proof.* The burden is on the state to establish by clear and convincing evidence that the grounds for transfer exist.

(3) *Mandatory Transfer.* The court shall transfer a juvenile proceeding to criminal jurisdiction if there is probable cause to believe that the conditions listed in West Virginia Code § 49-5-10(d)(1), (2) or (3) exist.

(4) *Discretionary Transfer.* The court may transfer a juvenile proceeding to criminal jurisdiction if there is probable cause to believe that the conditions listed in West Virginia Code § 49-5-10(e), (f) or (g) exist.

(5) *Discovery.* The juvenile shall be entitled to full discovery under Rule 21. Discovery obligations shall apply to both evidence regarding the charged offense and any evidence presented regarding personal factors under West Virginia Code § 49-5-10(e), (f) or (g). The juvenile shall be subject to the reciprocal discovery requirements contained in these rules. The prosecuting attorney shall provide discovery no later than seven days prior to the transfer hearing, and the juvenile's counsel shall provide discovery no later than four days prior to the hearing.

(6) *Evidence.* The West Virginia Rules of Evidence shall apply to the portion of the hearing dealing with evidence of the charged offense. The court shall in its discretion admit reliable evidence regarding personal factors under West Virginia Code § 49-5-10(e), (f) or (g).

(7) *Suppression Motions.* The juvenile shall be permitted to file suppression motions under W. Va. R. Crim. P. Rule 12(b)(3). The court shall hear evidence and make findings of fact and law regarding any such motions.

(8) *Testimony.* The prosecuting attorney and juvenile shall be afforded the opportunity to present witnesses, present evidence and cross-examine witnesses. The parties shall have an opportunity to present an argument on the issue of transfer. The juvenile has the right to testify regarding the charged offense as well as personal factors affecting transfer. A juvenile who testifies regarding personal factors alone shall not be subject to cross-examination regarding the charged offense. All evidence, testimony, and argument shall be made a part of the court record.

(f) *Order.* The court shall issue an order containing findings of fact and conclusions of law regarding the issue of transfer. If an order of transfer is issued pursuant to West Virginia Code § 49-5-10(e), (f), or (g) it shall contain detailed factual findings regarding the juvenile's mental state, physical condition, maturity, emotional state, home and family environment, school experience, and other relevant personal factors. For every petition seeking a discretionary transfer, the court shall give specific reasons as to why the transfer was or was not made.

(g) *Appeal.* A juvenile who has been transferred to criminal jurisdiction pursuant to West Virginia Code § 49-5-10(e), (f) or (g) has the right to either directly appeal an order of transfer to the supreme court of appeals or to appeal the order of transfer following a conviction of the offense of transfer. Any appeal shall follow the procedures set forth in West Virginia Code § 49-5-10(j).

(h) *Transfer Request by Juvenile.* The court shall transfer a juvenile proceeding to criminal jurisdiction upon the motion of a juvenile who has attained the age of 14 years. The court shall

conduct a proceeding on the record to insure that any such demand is made knowingly, voluntarily, and intelligently, and with knowledge of the possible penalties under the criminal jurisdiction of the court. The court shall permit transfer only when it finds that the juvenile has been fully and effectively informed by counsel regarding the juvenile's constitutional, statutory, and procedural rights.

(i) Disposition Alternative. If a juvenile charged with delinquency is transferred to adult jurisdiction and there convicted, the court may make its disposition in accordance with the juvenile dispositional statutes and rules in lieu of sentencing the juvenile as an adult.

#### Comments

Sources -- *W. Va. Code § 49-5-10*  
*State v. CJS, 164 W. Va. 473, 263 S.E.2d 899 (This case and subsequent cases require the court to make factual findings on a juvenile's personal factors when a case is transferred under the court's discretionary power.)*  
*Subparagraph (i) is based upon W. Va. Code § 49-5-13(e).*

### **Rule 21. Discovery**

(a) Initial Disclosures. The prosecuting attorney shall advise the juvenile's counsel in writing of the following:

(1) Evidence obtained against the juvenile as a result of any search, seizure or electronic forms of recording voice, pictures or both.

(2) Statements made by the juvenile including the names of individuals present at the time of the statement and the relationship, if any, to the juvenile.

(3) Evidence acquired or discovered as a result of the statements referenced in subparagraph (b).

(4) A narrative of identification procedures involving the juvenile including live or photo lineups.

(b) Disclosures Prior to Adjudication. The prosecuting attorney shall make the following disclosures in anticipation of adjudication:

(1) Witnesses. The name, address and telephone number of witnesses the state intends to call in its case-in-chief, and any prior written or recorded statement of such witnesses.

(2) Statements of Accomplices. Summaries of oral statements and copies of transcribed recorded statements made by accomplices of the juvenile.

(3) *Documents and Tangible Objects.* Permit the juvenile's counsel to inspect and copy relevant books, papers, documents, photographs and tangible objects that the state intends to introduce at adjudication.

(4) *Reports of Examinations and Tests.* Provide copies of reports of physical, mental, scientific tests or examinations. A written summary of the anticipated testimony regarding such reports shall also be provided.

(5) *Juvenile's Record.* Provide the juvenile's counsel with prior allegations of delinquency, prior adjudications and improvement periods.

(6) *Exculpatory Information.* Disclose to the juvenile's attorney any material or information known to the state that tends to disprove the allegations of the petition or be in mitigation at disposition.

(7) *Prior Statements.* Any prior written or recorded statements of the juvenile.

(c) *Disclosure by the Juvenile.* The juvenile's counsel shall make the following disclosures:

(1) *Witnesses.* The name, address and telephone number of witnesses the juvenile intends to call in the juvenile's case-in-chief, and any prior written or recorded statement of such witnesses.

(2) *Documents and Tangible Objects.* Permit the prosecuting attorney to inspect and copy relevant books, papers, documents, photographs and tangible objects that the juvenile intends to introduce at adjudication.

(3) *Reports of Examinations and Tests.* Provide copies of reports of physical, mental, scientific tests or examinations which the juvenile intends to introduce in the juvenile's case in chief at the adjudicatory hearing. A written summary of the anticipated testimony regarding such reports shall also be provided.

(4) *Notice of Specific Defenses.* Inform the prosecuting attorney in writing of any of alibi, entrapment, duress, insanity, self-defense and lack of jurisdiction defense.

(d) *Time Limitations.*

(1) *Juvenile Detained.* If the juvenile is detained in a facility operated by the Division of Juvenile Services:

(A) Initial disclosures by the state under paragraph (a) shall be made not less than five days prior to the date set for the preliminary hearing.

(B) Disclosures by the state under paragraph (b) shall be made not less than ten days prior to the date set for the adjudicatory hearing.

(C) Disclosures by the juvenile under paragraph (c) shall be made not less than ten days prior to the date set for the adjudicatory hearing.

(2) *Juvenile Not Detained.* If the juvenile is not detained in a facility operated by the Division of Juvenile Services or is released prior to the time limitations imposed by Rule 27(a), disclosures under paragraphs (a), (b), and (c) shall be made not less than 30 days prior to the date set for the adjudicatory hearing.

(3) Upon motion and for good cause shown the court may alter the time limitations provided by this rule.

(e) *Further Disclosure by the State.*

(1) Nothing in these rules shall prohibit the juvenile from filing a motion with three days prior notice to the state and prior to adjudication requiring the state to disclose to the juvenile's counsel any additional information relevant to the juvenile's innocence, guilt or culpability.

(2) If the court denies the motion, upon application of the juvenile's counsel the court shall inspect and preserve such information, identified by the juvenile's counsel with some specificity.

(f) *Further Disclosures by the Juvenile.*

(1) Upon motion by the prosecuting attorney with three days prior notice to the juvenile's counsel and a showing that the sought procedures listed below will be material in determining whether or not the juvenile committed an alleged act or acts, the court at any time prior to adjudication may, subject to constitutional limitations, order the juvenile to:

- (A) appear in a line up;
- (B) speak for a witness for the purpose of voice identification;
- (C) be fingerprinted;
- (D) permit measurements and weight of the juvenile's body;
- (E) pose for non-reenactment photographs;
- (F) permit the taking of blood, hair or saliva samples;
- (G) provide handwriting specimens; and
- (H) submit to reasonable physical or medical examination.

(g) *Information Not Subject to Disclosure.*

(1) *Pertaining to the Juvenile.* Unless otherwise provided by these rules, any legal research, records, correspondence, reports or memoranda to the extent they contain opinions, theories, or conclusions of the juvenile, the juvenile's counsel, members of counsel's staff or counsel's agents participating in the representation of the juvenile are not subject to disclosure.

(2) *Pertaining to the State.* Unless otherwise provided by these rules, any legal research, records, correspondence reports or memoranda to the extent they contain opinions, theories, or conclusions of the prosecuting attorney, members of prosecuting attorney's staff, or police agencies participating in the representation of the state are not subject to disclosure.

(h) Depositions. Depositions for adjudications shall be taken and used under the same conditions as depositions pursuant to Rule 15 of the West Virginia Rules of Criminal Procedure.

(i) Continuing Duty to Disclose. If after compliance with any discovery rule or court order, the prosecuting attorney or counsel for the juvenile discovers additional material information or witnesses subject to disclosure, counsel shall promptly notify opposing counsel of the existence of the additional information.

(j) Protective and modifying orders. Upon a sufficient showing the court may at any time order that certain discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the state or juvenile, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an *ex parte* showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

## **Rule 22. Subpoenas**

(a) For Attendance of Witnesses. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court, the name of the state as the petitioner and the first name and initial of the last name of the juvenile, and the juvenile case number, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. When a subpoena seeks the attendance and testimony of a witness who is a minor, the subpoena shall specifically name and be directed to a parent or custodian, directing such parent or custodian to bring the minor to give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed, but otherwise blank, to the party requesting it, who shall fill in the blanks before it is served.

(b) Juveniles Unable to Pay. A subpoena may be issued for service on a named witness upon an *ex parte* application of a juvenile upon a satisfactory showing that the juvenile is financially unable to pay the subpoena costs and fees of the witness. The costs incurred by the subpoena process and the fees of the witness are paid as in the case of a witness subpoenaed in behalf of the state.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the sheriff, by a deputy sheriff, or by any other credible person who is not a party and who is not less than 18 years of age. Service of a

subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person, if demanded, the fee for one day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the state or an officer or agency thereof, or any subpoena issued under subparagraph (b) above.

(e) Place of Service. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena was issued or of the circuit court for the county.

### **Rule 23. Severance**

(a) Generally. When two or more juveniles are charged with any offense arising out of the same circumstances, they shall be adjudicated separately unless the court specifically finds that no prejudice will result from joint adjudication. Where the offense would be a felony if charged as an adult, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to each juvenile, and the interests of justice before ordering a joint adjudicatory hearing. A juvenile in a joint hearing shall be adjudicated in the same manner as a juvenile adjudicated separately.

(b) Severance Because of Improper Joinder. Where a juvenile was improperly joined in a proceeding, the court shall order severance upon motion of the prosecuting attorney or the juvenile's counsel. Improper joinder is not a ground for dismissal.

(c) Severance Because of Another Juvenile's Out-of-Court Statement. If the prosecuting attorney in a joint adjudicatory hearing intends to offer an out-of-court statement by one of the juveniles which is not admissible against the other in the state's case-in-chief, the juvenile against whom the statement is offered may move for severance. The court shall require the prosecuting attorney to elect one of the following options:

(1) a joint adjudicatory hearing at which the statement is not received in evidence;

(2) a joint adjudicatory hearing at which the statement is received in evidence only after all references to the juvenile making the motion have been deleted, if admission of the statement with the deletions will not prejudice that juvenile; or

(3) severance.

(d) Severance During Adjudicatory Hearing. If the court, during an adjudicatory hearing, determines severance is necessary to achieve a fair determination of the guilt or innocence of one or more of the juveniles in a joint hearing, the court shall order severance upon a finding of manifest necessity or with the consent of the juvenile to be adjudicated separately.

## **Rule 24. Pre-Adjudication Motions**

(a) The prosecuting attorney or any juvenile alleged to be a delinquent or status offender shall be afforded the right to file any motions as would be permissible under these rules or the West Virginia Rules of Criminal Procedure.

(b) An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

### Comments

Sources -- *W. Va. Rules of Crim. Pro., Rule 12(a)*  
*Tommy Y., Jr., 219 W. Va. 530, 637 S.E.2d 628 (2006)*

## **Rule 25. Pre-Adjudication Conferences**

(a) Timing. The court, in its discretion or upon the motion of the juvenile's counsel or the prosecuting attorney, may order a pretrial conference. At the conclusion of any such conference, the court shall direct the entry of a memorandum order of the pretrial matters agreed upon by the parties or decided by the court.

(b) Evidentiary and Other Issues. At the pretrial conference, the court shall determine whether there are any evidentiary or constitutional issues and, if not fully addressed during the conference, schedule an omnibus hearing. If there is no pretrial conference, evidentiary or constitutional issues raised by written motion of the juvenile's counsel or prosecuting attorney shall be heard by the court in an omnibus hearing at a time that will promote a fair and expeditious trial.

(c) Admissions. No admissions made by the juvenile or the juvenile's attorney at a pretrial conference or hearing shall be used against the juvenile unless the admissions are reduced to writing and signed by the juvenile and the juvenile's attorney.

### Comments

Source -- *W. Va. Rules of Crim. Pro., Rule 17.1*

## Rule 26. Pre-Adjudicatory Competency Evaluations

Whenever the circuit court has reasonable cause to believe that a juvenile who is the subject of a pending petition may be incompetent to stand trial, or that the juvenile's diminished mental capacity will be a significant factor in his or her defense, *sua sponte* or upon a motion filed by the State or on behalf of the juvenile, the court shall order a forensic evaluation of the juvenile in accordance with the procedures set forth in West Virginia Code, Chapter 27, Article 6A, Sections 2 and 4.

### Comments

Source -- W. Va. Code § 27-6A-9

## Rule 27. Commencement of Adjudication

Unless good cause is shown, specified in a written order:

(a) For a Juvenile in Detention. The adjudication shall be commenced within 30 days of the juvenile being placed in detention; provided, if the charges involve a right to a jury and there has been a jury demand by the juvenile, the adjudication shall be commenced no later than the next term of court.

(b) For a Juvenile Not in Detention. An adjudication shall be commenced within 60 days of the service of the petition upon the juvenile.

(c) Release. If the juvenile is detained and the adjudication has not commenced within the time periods specified in subparagraph (a), the juvenile shall be released subject to such nonmonetary release conditions as may be required by the court, and the adjudication shall thereafter commence within 60 days.

(d) Dismissal. The petition shall be dismissed without prejudice if the adjudication has not commenced within the time periods set forth in subparagraphs (b) or (c) above, whichever is applicable, and the court has not granted a continuance for good cause or an improvement period.

(e) Improvement Period. If an improvement period has been granted, but revoked prior to a successful conclusion, the adjudication shall be commenced within 30 days of the revocation.

(f) Effect of Mistrial; Order For New Hearing. Upon a declaration of a mistrial, or an order of the circuit court or supreme court granting a new adjudication hearing, a status hearing shall be held within 15 days to schedule a new adjudication hearing in accordance with the timeframes set forth in this rule.

Comments

Source -- W. Va. Code § 49-5-9(a)(4)

**Rule 28. Adjudication by Admission**

(a) The court shall not accept a juvenile's admission to a charge at any stage of the proceedings without first determining the following based on the juvenile's statements on the record or contained in a written document signed by the juvenile and counsel.

(1) The juvenile understands the allegations in the petition and the elements of each charge, and that there is a factual basis for the admission.

(2) The juvenile understands that he or she has a right to adjudication on the merits, and to require proof of all of the elements of all of the charges.

(3) The juvenile understands the other rights, and possible consequences, as set forth in Rule 7.

(4) The juvenile understands the court's power to make a disposition of the charges if they are admitted, including:

(A) The court's dispositional authority includes the most severe step of placing the juvenile in an institution.

(B) The court's jurisdiction over an adjudicated delinquent could be up to the juvenile's 21<sup>st</sup> birthday. The court's jurisdiction over status offenders could be up to their 18<sup>th</sup> birthday.

(C) The court can modify a disposition, even repeatedly, until the termination of the court's jurisdiction.

(D) The juvenile understands the potential future consequences of the court's disposition which may include:

(i) The possible effect on future dispositions imposed as a juvenile; and

(ii) The possible effect on future sentences imposed as an adult.

(b) With the consent of the prosecuting attorney and the approval of the court, the juvenile shall be allowed to enter an admission to a lesser-included offense than is charged.

(c) Binding Admissions. A juvenile charged with a delinquency offense can enter plea negotiations with the state's attorney with the goal of reaching a settlement regarding the plea entered, whether the plea will be to the offense charged or to a lesser offense, and disposition. The court may accept or reject the entire agreement.

(d) Disposition. If the court accepts the juvenile's admission, the court shall schedule a disposition hearing in accordance with Rule 34.

(e) Withdrawal of an Admission. A juvenile may, on the record or by written motion filed with the court, request to withdraw an admission to the charges for good cause shown. The court may

allow the juvenile to withdraw the admission: (1) before disposition if it is fair and just to do so giving due consideration to the reasons given and any prejudice withdrawal of the admission would cause due to action taken in reliance on the juvenile's admission; or (2) any time upon a showing that withdrawal is necessary to correct manifest injustice.

**(f) *Record.*** A record shall be made of the adjudicatory hearing. The record shall be transcribed: (1) pursuant to a court order; or (2) when the juvenile seeks an appeal or other review. The court reporter shall furnish a transcript of the proceedings at no charge to any indigent juvenile who seeks an appeal or other review if an affidavit is filed stating that neither the juvenile nor the juvenile's parents or legal guardians have the ability to pay for the transcript.

#### Comments

*Sources -- In re Harry W., 204 W. Va. 583, 514 S.E.2d 814 (1999)*  
*State ex rel. J.M. v. Taylor, 166 W. Va. 511, 276 S.E.2d 199 (1981)*  
*W. Va. Code § 49-5-2(m)*  
*W. Va. Code § 49-5-11*  
*W. Va. Rules of Crim. Pro., Rule 11*

### **Rule 29. Jury at Adjudication**

**(a)** When a juvenile is charged with a delinquent act which, if charged against an adult would expose the adult to possible incarceration upon conviction, the juvenile, the juvenile's counsel, or the juvenile's parent or guardian may demand, or the court upon its own motion may order, a jury for the adjudicatory hearing. A jury shall consist of 12 members; but at any time before verdict, the parties may stipulate in writing with the approval of the court that a valid verdict may be returned by a jury consisting of less than 12 persons.

**(b)** Should a juvenile elect to proceed to an adjudication by the court and waive the right to a jury for a delinquency charge under subparagraph (a), such waiver shall be in writing and approved by the court.

**(c)** When a juvenile is charged with: (1) a status offense; (2) a delinquent act where incarceration is not a possibility under the equivalent adult criminal offense; or (3) where the court rules prior to the adjudicatory hearing that a disposition involving out-of-home placement will not be imposed if the juvenile is adjudicated as having committed the delinquent offense, the court shall conduct the adjudicatory hearing without a jury. Provided, if the court proceeds without a jury pursuant to this subparagraph, a subsequent determination of a substantial violation of any service or treatment plan or any condition of probation will not preclude a modified disposition involving an out-of-home placement.

**(d)** Prior to voir dire, all prospective jurors for an adjudicatory hearing shall be instructed by the court regarding the confidentiality of juvenile proceedings.

(e) The provisions of this rule have no application to teen court programs conducted under West Virginia Code § 49-5-13d.

### Comments

*The Legislature's use of the adult criminal terms "statutory penalty" and "sentence of incarceration" in West Virginia Code § 49-5-6(b) is somewhat ambiguous in the context of juvenile law. But, the legislative intent is fairly clear--if incarceration is not a "statutory penalty" for an adult offense, after adjudication a judge may not place a juvenile out-of-home in a secure facility. And in cases where the equivalent adult offense does include the possibility of confinement, if a judge rules pre-trial that a "sentence of incarceration" will not be imposed and conducts the adjudicatory hearing without a jury -- this would likewise preclude the MDT or judge from considering a secure facility commitment at the dispositional stage. The term "sentence of incarceration" is interpreted to mean out-of-home placement in a "secure facility" as defined in West Virginia Code § 49-1-4(13), since juveniles cannot be "incarcerated" in any other fashion.*

Sources --      W. Va. Code § 49-5-6  
                      W. Va. Code § 49-5-11a  
                      W. Va. Code § 49-5-13  
                      W. Va. Code § 49-5-13d  
                      W. Va. Code § 49-5-14  
                      State v. Kirk N., 214 W. Va. 730, 591 S.E.2d 288 (2003)

### **Rule 30. Contested Adjudicatory Hearing**

(a) Initial Procedure. At the beginning of the adjudicatory hearing, if the court has not previously determined the following information at a pre-adjudicatory conference, the court shall:

(1) verify the full name, age, and residence of the juvenile who is the subject of the matter;

(2) determine whether all necessary persons are present and identify those present for the record; and

(3) determine whether notice requirements have been met and, if not, whether the affected persons waive notice.

(b) Order of Adjudicatory Hearing. The order of the hearing shall be as follows:

(1) the prosecuting attorney may make an opening statement, confining the statement to the facts that the state expects to prove;

(2) the juvenile's counsel may make an opening statement after the prosecutor's opening statement (or waiver of the same) or may reserve the opening statement until immediately before offering the defense evidence. The statement shall be confined to a statement of the defense and the facts expected to be proved;

(3) the prosecuting attorney shall offer evidence in support of the petition;

(4) the juvenile's counsel may offer evidence in defense of the juvenile;

(5) the juvenile's counsel and the prosecuting attorney shall have the right to cross-examine witnesses;

(6) the prosecuting attorney may offer evidence in rebuttal of the defense evidence, and the juvenile's counsel may then offer evidence in rebuttal of the state's rebuttal evidence.

(7) at the conclusion of the evidence, the prosecuting attorney may make a closing argument and rebuttal argument to any closing argument by the juvenile's counsel; and

(8) the juvenile's counsel may make a closing argument.

(c) *Record*. A record shall be made of the adjudicatory hearing. The record shall be transcribed: (1) pursuant to a court order; or (2) when the juvenile seeks an appeal or other review. The court reporter shall furnish a transcript of the proceedings at no charge to any indigent juvenile who seeks an appeal or other review if an affidavit is filed stating that neither the juvenile nor the juvenile's parents or legal guardians have the ability to pay for the transcript.

#### Comments

Source -- W. Va. Code § 49-5-2(m)

### **Rule 31. Evidence**

Except as modified in West Virginia Code § 49-5-2, the West Virginia Rules of Evidence shall apply, including the use of depositions as contemplated by Rule 15 of the Rules of Criminal Procedure.

### **Rule 32. Standard of Proof**

(a) *Delinquent Offense*. The burden is on the State to prove the allegations in the petition beyond a reasonable doubt before an adjudication can be made that a juvenile committed a delinquent offense.

(b) *Status Offense*. The burden is on the State to prove the allegations in the petition by clear and convincing evidence before an adjudication can be made that the juvenile committed a status offense.

Comments

Sources -- W. Va. Code § 49-5-11(c) and (d)

**Rule 33. Adjudication Findings**

Within seven days of the conclusion of the adjudication hearing, the court shall issue an order stating its findings that the allegations in the petition have or have not been proven. Findings may be made on the record at the conclusion of the adjudicatory hearing, but must be followed up in writing within the seven days. For good cause, the court may extend the time for filing written findings for an additional seven days. If one or more offenses have been proven at the adjudication hearing, the court shall schedule a dispositional hearing. The court shall dismiss the petition if the allegations have not been proven.

**Rule 34. Dispositional Hearing**

(a) *Generally*. Juveniles adjudicated as delinquent or status offenders are entitled to be sentenced in the least restrictive manner possible that will meet their needs and protect the welfare of the public. The goal in disposition should be the rehabilitation of the juvenile to enable and promote becoming a productive member of society. In disposition, the court has discretion when determining terms and conditions, and is not limited to the relief sought in the petition. The court shall consider the best interests of the juvenile and the welfare of the public when rendering its decision.

(b) *Timing*. After the court finds that charges in the petition have been admitted or sustained by proper proof at the adjudicatory hearing, the court may conduct a disposition hearing immediately, unless the multidisciplinary treatment team planning process needs to be completed for disposition, or schedule the matter for a disposition hearing in accordance with the following timeframes:

(1) *Detained Juvenile*. If a juvenile is currently being detained or otherwise being held in out-of-home custody, the court shall hold the dispositional hearing within 30 days of the conclusion of the adjudicatory hearing.

(2) *Non-Detained Juvenile*. If a juvenile is not being detained or otherwise being held in out-of-home custody, the court shall hold the dispositional hearing within 60 days of the conclusion of the adjudicatory hearing.

(3) *Continuances*. For good cause, including but not limited to pre-dispositional examination, diagnosis and classification, or difficulties in locating an appropriate proposed

placement, by written order, the court may extend the time period to hold a dispositional hearing for one additional period of up to 60 days. Except in extraordinary circumstances, if the court fails to hold a dispositional hearing for a juvenile held in detention or other out-of-home custody within the time limits prescribed by this rule, the juvenile shall be released from detention or other out-of-home custody. If a dispositional hearing for a juvenile is not conducted within the time limits prescribed by this rule, the court may also dismiss the case.

(c) Conduct and Manner of Hearing. The court shall give the juvenile, the state, and any victim an opportunity to be heard during the dispositional hearing. The juvenile and the state may put on witnesses and present evidence regarding the disposition of the juvenile. The juvenile shall be given the opportunity to comment on any proposed disposition during the hearing.

(d) Record. A record shall be made of the dispositional hearing. The record shall be transcribed:

(1) pursuant to a court order; or

(2) when the juvenile seeks an appeal or other review. The court reporter shall furnish a transcript of the proceedings at no charge to any indigent juvenile who seeks an appeal or other review if an affidavit is filed stating that neither the juvenile nor the juvenile's parents or legal guardians have the ability to pay for the transcript.

#### Comments

Sources --     *W. Va. Code § 49-5-2(m)*  
                  *W. Va. Code § 49-5-11*  
                  *W. Va. Code § 49-5-13*  
                  *W. Va. Code § 49-5-13a*  
                  *W. Va. Code § 49-5-13b*  
                  *West Virginia Trial Court Rules 16.07(f)*  
                  *State v. Kenneth Y., 217 W. Va. 167, 617 S.E.2d 517 (2005)*  
                  *State v. Brandon B., 218 W. Va. 324, 624 S.E.2d 761 (2005)*

### **Rule 35. Multi-Disciplinary Treatment Teams**

(a) Convening of Multi-Disciplinary Treatment Teams. After a juvenile is adjudicated as a status or delinquent offender pursuant to the provisions of West Virginia Code Chapter 49, Article 5, the multi-disciplinary treatment team shall have the responsibilities specified below:

(b) Comprehensive Assessment Requirement.

(1) *Status Offenders.* Whenever a juvenile is adjudicated as a status offender pursuant to West Virginia Code § 49-5-11(d), the department of health and human resources shall promptly convene a multi-disciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, to determine the juvenile's mental and physical condition, maturity and education level, home and family environment, rehabilitative needs, and recommended service plan.

(2) *Delinquent Offenders.* If the juvenile is adjudicated as a delinquent and the court refers the juvenile for comprehensive assessment by the multi-disciplinary treatment team pursuant to West Virginia Code § 49-5D-3, the probation officer shall promptly notify the DHHR and the DJS in order to allow the MDT to convene and develop a comprehensive individualized service plan for the juvenile.

(c) Assessment Timeframe and Report.

(1) The assessment must be completed within 45 days following adjudication, unless for good cause shown, the court extends the assessment period by written order providing the reasons for the extension of time. If the juvenile is being detained or otherwise being held in out-of-home custody, the assessment must be completed within 21 days following adjudication.

(2) Upon completion of the assessment, the DHHR shall be responsible for providing the assessment report, forthwith, to members of the multi-disciplinary treatment team; provided, if the juvenile has been adjudicated delinquent and ordered into the custody of the DJS for examination and diagnosis, the DJS shall be responsible for providing the assessment report to the MDT.

(3) The assessment report must also be provided by the responsible agency to the court and counsel at least 72 hours before the dispositional hearing.

(d) Access to and Confidentiality of Information. The multi-disciplinary treatment team shall be afforded access to information in the possession of the DHHR, DJS, law-enforcement agencies, and other state, county, and local agencies; and the agencies shall cooperate in the sharing of information as may be provided by West Virginia Code §§ 49-5D-3(d), 49-5D-6, 49-7-1, and any other relevant provision of law. Any multi-disciplinary team member who acquires confidential information shall not disclose such information except as permitted by statute or these rules.

(e) Responsibilities. The multi-disciplinary treatment team shall submit written reports to the court as required by these rules or by the court, shall meet with the court at least every three months, as long as the juvenile remains in the legal or physical custody of the state, and shall be available for status conferences and hearings as required by the court.

(f) Scope of this Rule. This rule is to be construed broadly to effectuate cooperation and communication between all service providers, parties, counsel and the court.

#### Comments

Sources --     *W. Va. Code § 49-5D-1, et seq.*  
                  *W. Va. Code § 49-5-7(e)*  
                  *W. Va. Code § 49-5-13(a)*  
                  *W. Va. Code § 49-5-21*  
                  *State v. Brandon B., 218 W. Va. 324, 624 S.E.2d 761 (2005)*

### **Rule 36. Recommendations of the Multi-Disciplinary Treatment Team**

(a) Individualized Service Plan. The multi-disciplinary team shall develop an individualized service plan for the juvenile based upon the assessment report provided pursuant to Rule 35, and based upon the team's independent investigation of the juvenile's circumstances and rehabilitative needs. The multi-disciplinary treatment team shall provide its proposed individualized service plan to the court and counsel at least 72 hours prior to the juvenile's dispositional hearing.

(b) Conflicting Determinations Regarding the Plan. If the multi-disciplinary treatment team cannot agree on a service plan or if, upon review of the proposed service plan, the court determines not to adopt the team's plan, upon motion or *sua sponte*, the court shall schedule and hold a hearing within ten days (prior to entry of a dispositional order placing the juvenile in the dispositional custody of the DHHR or in an out-of-home setting) to consider evidence from the team as to its rationale for the purposed service plan or reasons regarding disagreement on the plan. After such hearing, if the court does not adopt the team's recommended service plan for the juvenile, it shall make specific written findings as to why the team's plan was not adopted.

(c) Out-of-State Placement. In any case in which the court determines that the most appropriate placement of the juvenile is an out-of-state facility or program, the court shall set forth in the placement order the reasons why the juvenile was not placed in an in-state facility or program.

(d) Exceptions. Nothing in these rules should be construed to require a multi-disciplinary team meeting to be held prior to temporarily placing a juvenile out-of-home under exigent circumstances.

#### Comments

Sources --     *W. Va. Code § 49-5D-3 and 3a*  
                  *W. Va. Code § 49-5D-8*

### **Rule 37. Case Plan**

(a) Case Plan for Foster Care. For every juvenile in foster care under the supervision of the DHHR or DJS, the custodial agency must prepare a case plan for the child within the first 60 days of entering the care, custody and control of the agency.

(b) Coordination with Multi-Disciplinary Team. The Case Plan shall be developed in coordination and consultation with the Multi-Disciplinary Team and the comprehensive assessment process.

(c) Contents of Case Plan. The Case Plan shall include, but need not be limited to:

(1) A description of the type of home or institution in which a child is to be placed or is placed, including a discussion of the safety and appropriateness of the placement.

(2) The factors to be considered in determining the safety and appropriateness of the placement shall include, consistent with the best interest and special needs of the juvenile, whether the placement is the least restrictive setting, the most nurturing setting, in reasonable proximity to the juvenile's home, and any other factor the court deems pertinent. If the juvenile has been placed in a home or facility welfare agency a substantial distance from the home of the parents, or in another State, the reasons why such placement is in the best interest of juvenile must be set forth.

(3) A plan for assuring that the juvenile receives safe and proper care and that services are provided to the parents, juvenile and foster parents, if applicable, in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the juvenile.

(4) The health and education records of the juvenile, including the most recent information available regarding:

- (A) The names and address of the juvenile's health and educational providers;
- (B) The juvenile's grade level performance;
- (C) The juvenile's school record;
- (D) A record of the juvenile's immunizations;
- (E) The juvenile's medications; and
- (F) Any other relevant health and education information.

(5) For a juvenile age 14 or older, written descriptions of the programs and services which will help prepare the juvenile for the transition from foster care to independent living.

(6) If a Chapter 49, Article 6 proceeding is contemplated by the DHHR, in the case of a juvenile with respect to whom the permanency plan is adoption or placement in another

permanent home, documentation of the steps the DHHR is taking to find an adoptive family or other permanent living arrangement for the juvenile, to the place the juvenile with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, such documentation shall include juvenile specific recruitment efforts such as the use of State, regional and national adoption exchanges.

(7) If a Chapter 49, Article 6 proceeding is contemplated by the DHHR, in the case of a juvenile with respect to whom the permanency plan is placement with a relative and receipt of kinship guardianship assistance subsidy, a description of:

(A) The steps the DHHR has taken to determine that it is not appropriate for the juvenile to be returned home or adopted;

(B) The reasons for any separation of siblings during placement;

(C) The reasons why a permanent placement with a fit and willing relative through a kinship guardianship subsidy is in the juvenile's best interest;

(D) The ways in which the juvenile meets the eligibility requirements for a kinship guardianship assistance subsidy;

(E) The efforts the DHHR has made to discuss adoption by the juvenile's relative foster parent as a more permanent alternative to legal guardianship and, in the case of a relative foster parent who has chosen not to pursue adoption, documentation of the reasons therefore; and

(F) The efforts made by the DHHR to discuss with the juvenile's parent or parents the kinship guardianship assistance subsidy, or the reasons why the efforts were not made.

(8) A plan for ensuring the educational stability of the juvenile while in foster care, including:

(A) Assurances that the placement of the juvenile takes into account the appropriateness of the current educational setting and the proximity to the school in which the juvenile is enrolled at the time of placement; and

(B) An assurance that the custodial agency has coordinated with appropriate local educational agencies to ensure that the juvenile remains in the school in which the juvenile is enrolled at the time of placement; or

(C) If remaining in such school is not in the best interests of the juvenile, assurances by the custodial agency and the local educational agency to provide immediate and appropriate enrollment in a new school, with all of the educational records of the juvenile provided to the school.

### **Rule 38. Disposition--Status Offenses**

**(a) *Referral for Service Plan.*** If the allegations in a petition alleging that the juvenile is a status offender are admitted or sustained by clear and convincing proof, the court shall refer the juvenile to the department of health and human resources for services, pursuant to West Virginia Code § 49-5-11, and order the DHHR to report back to the court with regard to the juvenile's progress at least every 90 days until the court, upon motion or *sua sponte*, determines the disposition completed and dismisses the case from its docket. Services provided shall be

designed to develop skills and social supports for the juvenile and to resolve problems related to the juvenile and his or her family. Services may include, but are not limited to, referral of the juvenile and parents, guardians and other family members to services for psychiatric or other medical care, or psychological, legal, educational or other social services, as appropriate to the needs of the juvenile and his or her family.

**(b) Further Order of Compliance.** If necessary, the DHHR may petition the circuit court:

(1) For a court order to enforce compliance with a service plan or to restrain actions that interfere with or defeat a service plan; or

(2) For a court order to place a juvenile out of home in a non-secure or staff-secure setting, and/or to place a juvenile in the custody of the DHHR.

**(c) Further Disposition Alternatives.** In ordering any further disposition of the status offender under subparagraph (b) above, the court is not limited to the relief sought in the DHHR petition and shall make every effort to place the juvenile in community-based programs and facilities which are the least restrictive alternatives appropriate to the needs of the juvenile and the community.

**(d) Out-of-Home Placement Findings.**

(1) In every case where the court orders an out-of-home placement for the juvenile, the order shall further find and state in the order that continuation in the home is contrary to the best interests of the juvenile and why; and whether or not the DHHR made reasonable efforts to prevent out-of-home placement or that exigent circumstances made such efforts unreasonable or impossible.

(2) The prior actual provision of services by the DHHR under subparagraph (a) above is not in all cases a jurisdictional prerequisite for the filing of a petition seeking an order for out-of-home placement and/or department custody. However, such relief at the outset may only be granted upon a showing by clear and convincing evidence that such a placement or custody order is actually necessary; and that the effective provision of services cannot occur absent such an order. Any order granting such placement or transfer must be based on specific findings and conclusions by the court with respect to the grounds for and the necessity of the order.

**(e) Financial Support.** If the court places the juvenile in the custody of the DHHR, an appropriate order of financial support shall be imposed upon the parents or legal guardians. The circuit court shall make the determination and enter the order establishing a child support obligation, and any subsequent modification thereto, in accordance with West Virginia Code § 49-7-5 and the *Guidelines for Child Support Awards* found in West Virginia Code § 48-13-101, *et seq.* The *Guidelines* may be disregarded, or the calculation of a support obligation under the *Guidelines* may be adjusted, only if the court makes specific findings that use of the *Guidelines* is inappropriate.

**(f) Removal of Case to Another County.** At disposition or any time thereafter, if the juvenile resides in another county, the court, upon motion or *sua sponte* may determine that the best interests of the juvenile warrant removal of the case to the other county where the juvenile resides for dispositional supervision and quarterly reviews. Such removals in post-disposition matters are further governed by West Virginia Code § 56-9-1. If the case is removed to the juvenile's county of residence for dispositional supervision and review, the court shall direct the circuit clerk to send the file to the juvenile's home county within five days of the entry of the removal order.

**(g) Modification of Disposition.** A dispositional order may be modified by the court in conformance with West Virginia Code § 49-5-14.

Comments

Sources --      *W. Va. Code § 49-5-11a*  
                      *W. Va. Code § 49-5-7(a)(1)*  
                      *W. Va. Code § 49-5-14*  
                      *W. Va. Code § 49-7-5*  
                      *W. Va. Code § 56-9-1*  
                      *State v. Damian R., 214 W. Va. 610, 591 S.E.2d 168 (2003)*

## Rule 39. Delinquency Disposition

### (a) Findings.

(1) The dispositional order by the court shall contain written findings of fact to support the disposition and shall contain the following information:

(A) why public safety and the best interest of the juvenile are served by the disposition ordered;

(B) what alternative dispositions, if any, were recommended to the court and why such recommendations were not ordered; and

(C) if the disposition changes the custody or placement of the juvenile:

(i) the reasons why public safety and the best interest of the juvenile are not served by preserving the juvenile's present custody; and

(ii) suitability of the placement, taking into account the program of the placement facility and assessment of the juvenile's actual needs.

(b) Department of Health and Human Resources Custody. Upon a finding that a parent or custodian is not willing or able to take custody of the juvenile, that a juvenile is not willing to reside in the custody of a parent or custodian, or that a parent or custodian cannot provide the necessary supervision and care of the juvenile, the court may place the juvenile in the temporary custody of the DHHR. The order shall further find and state that continuation in the home is contrary to the best interests of the juvenile and why; and whether or not the DHHR made reasonable efforts to prevent the out-of-home placement or that the exigent circumstances leading to the delinquency adjudication made such efforts unreasonable or impossible.

(c) Division of Juvenile Services Commitments. Upon a finding that the best interests of the juvenile or the welfare of the public require it, the court may commit the juvenile to the custody of the Director of the Division of Juvenile Services for placement in a juvenile services facility for the treatment, instruction, and rehabilitation of juveniles; provided, that the court maintains discretion to consider alternative dispositional arrangements. The order shall further find and state that continuation in the home is contrary to the best interest of the juvenile and why; and whether or not the DHHR made reasonable efforts to prevent out-of-home placement or that the exigent circumstances leading to the delinquency adjudication made such efforts unreasonable or impossible. Commitments shall not exceed the maximum term for which an adult could have been sentenced for the same offense and any such maximum allowable commitment to be served in a juvenile services facility may take into account any time served by the juvenile in a detention center pending adjudication, disposition, or transfer.

(d) Financial Support. If the court places the juvenile in the custody of the DHHR or DJS, an appropriate order of financial support shall be imposed upon the parents or legal guardians. The circuit court shall make the determination and enter the order establishing a child support obligation, and any subsequent modification thereto, in accordance with West Virginia Code § 49-7-5 and the *Guidelines for Child Support Awards* found in West Virginia Code § 48-13-101, *et seq.* The *Guidelines* may be disregarded, or the calculation of a support obligation under the

*Guidelines* may be adjusted, only if the court makes specific findings that use of the *Guidelines* is inappropriate.

(e) Probation. Upon a finding that the juvenile is in need of extra-parental supervision: (1) place the juvenile under the supervision of a probation officer of the court while leaving the juvenile in the home; and (2) prescribe a program of treatment, therapy or limitations upon the juvenile's activities under reasonable terms which are within the juvenile's ability to perform, including any appropriate program of community service and restitution.

(f) Removal of Case to Another County. At disposition or any time thereafter, if the juvenile resides in another county, the court, upon motion or *sua sponte* may determine that the best interests of the juvenile warrant removal of the case to the other county where the juvenile resides for dispositional supervision and quarterly reviews. Such removals in post-disposition matters are further governed by West Virginia Code § 56-9-1. If the case is removed to the juvenile's county of residence for dispositional supervision and review, the court shall direct the circuit clerk to send the file to the juvenile's home county within five days of the entry of the removal order.

(g) Modification of Disposition. A dispositional order may be modified by the court in conformance with West Virginia Code § 49-5-14. If the modification sought is revocation of probation, Rule 46 shall apply.

#### Comments

Sources --      W. Va. Code § 49-5-13(b)  
                      W. Va. Code § 49-5-7(a)(1)  
                      W. Va. Code § 49-7-5  
                      W. Va. Code § 56-9-1  
                      *State v. Kristopher G.*, 201 W. Va. 703, 500 S.E.2d 519 (1997)

### **Rule 40. Delinquency Disposition - Predisposition Reports**

(a) Investigations and Evaluations. The court may order an investigation of the personal and family history and environment of the juvenile, and medical, psychological or chemical dependency evaluations of the juvenile:

- (1) with the consent of the juvenile, juvenile's counsel, and the parents or legal guardians of the juvenile, before the charges in the petition have been proved; or
- (2) at any time after the charges in the petition have been proved.

(b) Psychological Evaluation. The court, *sua sponte* or upon motion of counsel, may order a psychological examination of the juvenile prior to disposition. The report of the examination shall be made available to the parties no later than 72 hours before the dispositional hearing.

(c) Psychological and Medical Evaluation Pursuant to § 49-5-13a.

(1) *Period of Custody.* The court may order, in aid of disposition, that the juvenile be taken into the custody of the Division of Juvenile Services to undergo a complete diagnostic evaluation and medical examination.

(2) *Duration.* The period of custody shall not exceed 60 days.

(3) *Multi-Disciplinary Team.* During the period the juvenile is in custody, the DJS shall convene a multi-disciplinary team to aid in determining the appropriate recommended disposition for the juvenile. Within ten days of the end of the examination period, the multi-disciplinary team shall prepare a report discussing the results and findings of the examinations, and the team's recommendations for the juvenile.

(4) *Team Members.* The team shall consist of those persons specified in West Virginia Code § 49-5D-3.

(d) *Probation Officer Predisposition Reports.* The probation officer assigned to the court shall, upon request of the court, make an investigation of the environment of the juvenile and the alternative dispositions possible. The report of such investigation shall not be made available to the court until after the adjudicatory hearing. The probation officer report shall file the predisposition report 72 hours prior to the time scheduled for the disposition hearing and provide copies of the report to the juvenile's counsel, the prosecuting attorney, and the parents or legal guardians of the juvenile; and when the court is considering placing the juvenile in DHHR custody or placing the juvenile out of home at DHHR expense, provide a copy to the local DHHR office.

(e) *Advisory.* When the court orders a predisposition investigation, the court shall advise the juvenile, the juvenile's counsel, the prosecuting attorney and the juvenile's parents or legal guardians that a predisposition investigation is being ordered, the nature of the evaluations to be included, and the date when the reports resulting from the investigation are to be filed with the court.

#### Comments

Sources -- W. Va. Code § 49-5-13(a)  
W. Va. Code § 49-5D-3(a)(2)

## **Rule 41. Mental Health Disposition**

**(a) Procedures for Commitment to a Mental Health Facility.** Should the juvenile, the prosecuting attorney, the probation officer, or the court on its own motion, request disposition pursuant to West Virginia Code § 49-5-13(b)(6), the following shall apply:

(1) The DHHR Bureau for Behavioral Health and Health Facilities shall be given notice that the court is considering a commitment of the juvenile to a mental health facility.

(2) If the court determines that probable cause exists to believe the juvenile has a mental illness requiring in-patient treatment further delinquency proceedings shall be stayed and the juvenile ordered to undergo a diagnostic study as designated by the court to permit the court to receive expert opinions on the advisability of in-patient treatment, the expected duration of time the juvenile shall remain out of the home, the suggested treatment plan and the types of facilities available within the state, or if no such facility exists within the state, out-of-state where appropriate treatment of the juvenile may be administered. The examination may be arranged by the community mental health center where the juvenile resides.

**(b) Proposed Placement by DHHR.** Not more than five judicial days after issuance of the evaluation ordered pursuant to subparagraph (a)(2) above, the DHHR shall provide the court, counsel for the juvenile, the prosecuting attorney, and the probation officer with its recommendations for placement. The recommendations shall include available in-state placements and the projected date of when the placement will be available. If no appropriate in-state placement exists or the projected in-state placement will not be available within five days of the hearing contemplated by subparagraph (c) below, DHHR shall provide the court with a list of available out-of-state placements and the projected date the placement will become available. The recommendations shall also detail how the recommended facility will meet the juvenile's treatment needs.

**(c) Hearing on Commitment.** Not more than five judicial days after the recommended placement report by the DHHR as required by subparagraph (b) above, the court shall conduct a hearing on commitment. If the criterion for commitment under West Virginia Code, Chapter 27 is met, the court shall consider the recommended placement as provided by the DHHR. The court thereafter may follow the recommendation, reject the recommendation and refer the matter back to the DHHR for additional recommendations, or accept recommendations of the juvenile, the prosecuting attorney or the probation officer.

**(d) Commitment Findings.** If the court orders commitment of the juvenile to a mental health facility, in addition to the findings specifically supporting such commitment, the court shall further find and state in the order that continuation in the home is contrary to the best interests of the juvenile and why; and whether or not the DHHR made reasonable efforts to prevent out-of-home placement or that exigent circumstances made such reasonable efforts unreasonable or impossible.

## **Rule 42. Permanency Hearings**

(a) *Timing and Purpose.* For every juvenile in out-of-home custody of the DHHR, the court shall conduct a permanency hearing within 14 months of the date of the juvenile's initial removal from the home, and at least once every 12 months thereafter so long as the juvenile remains out of the home in DHHR custody. The purpose of the hearing is to determine the permanency plan for the juvenile that includes whether, and if applicable when, the child will be returned to the parent or the state will file a petition for termination of parental rights as a proceeding arising out of West Virginia Code Chapter 49, Article 6, or referred for legal guardianship, or placed in another planned living arrangement. Procedural safeguards shall be applied with respect to parental rights pertaining to the removal of the juvenile from the home of his parents, to a change in the juvenile's placement and to any determination affecting visitation privileges of parents; and procedural safeguards shall be applied to assure that in any permanency hearing held with respect to the juvenile, the court consults, in an age-appropriate manner, with the juvenile regarding the proposed permanency or transition plan. In the discretion of the court, the hearing may be scheduled and held concurrently with a judicial review hearing, so long as the permanency plan matters are distinctly addressed in the hearing and reflected in a written order.

(b) *Findings.* At the permanency hearing, the court shall determine the juvenile's permanency plan, make findings as to whether the department made reasonable efforts to finalize the permanency plan, find whether or not the department made reasonable efforts to permanently place the juvenile in a timely manner, and identify services required to meet the juvenile's needs.

(c) *Notice.* In addition to parties and counsel, foster parents or relatives providing care for the juvenile, if any, shall be given timely written notice of permanency hearings, and shall be afforded the right to be heard in any such hearing.

(d) *Written Order.* The court shall issue a written order within 10 days following the permanency hearing.

## **Rule 43. Judicial Review**

(a) *Applicable Cases.* Following adjudication, in every status offense case and in every juvenile delinquency case in which a multidisciplinary treatment team has convened, the court shall conduct regular judicial review of the case with the multidisciplinary treatment team. These judicial review hearings may be conducted as often as considered necessary by the court. Provided, if the juvenile is in the custody of the DHHR and in an out-of-home placement, the judicial reviews shall occur at least once every three months.

(b) *Hearing and Order.* In review hearings, the court shall address the extent of progress in the case, treatment and service needs, permanent placement planning for the juvenile, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, including the progress made toward alleviating or mitigating the causes necessitating placement, and any other matters that the court considers pertinent. An order reflecting the matters covered,

any uncontested rulings, and the scheduling of an evidentiary hearing on any contested matter shall be issued by the court within 10 judicial days of the judicial review.

(c) Required Findings. At the conclusion of each judicial review hearing, the court shall make a finding as to whether or not the department made reasonable efforts to finalize the permanency plan, and such finding shall be set forth in the written order issued following the hearing.

(d) Video Appearances. If video conferencing is available, the court may direct, with or without a motion, that the juvenile or other hearing participants may appear for a judicial review by video conference.

(e) Notice. In addition to the parties and counsel, foster parents or relatives providing care for the juvenile, if any, shall be given timely written notice of each review hearing, and shall be afforded the right to be heard in any such hearing.

#### Comments

Source -- W. Va. Code § 49-5-21

### **44. Termination of Parental Rights**

(a) Timing. When a juvenile has been out of the home in DHHR custody for 15 of the most recent 22 months the DHHR is required to file a petition to terminate the parental rights of the parents, unless the department has determined and documented in the case plan made available for court review a compelling reason why termination of parental rights is not in the best interests of the juvenile.

(b) Compelling Reason. Compelling reason determined by the department not to seek termination of parental rights may include, but is not limited to, the following: (1) the juvenile's developmental needs require continued out-of-home placement for an additional number of months, and the parents have cooperated with referrals, visitation, family conferences, and therapy; (2) the juvenile is habitually truant and absconds from the home, and the current placement has an on-site school with therapeutic intervention with parental involvement; (3) the juvenile's rehabilitative needs require an extended out-of-home placement and the juvenile is an older teen who does not want parental rights terminated; or (4) no grounds to file a petition to terminate parental rights exist.

(c) Seeking Termination. Any petition seeking termination of parental rights must be filed as a proceeding arising under West Virginia Code Chapter 49, Article 6; and handled in accordance with those statutes and the related procedural rules for child abuse and neglect proceedings.

#### Comments

Sources -- W. Va. Code § 49-6-5b  
45 C.F.R. § 1356.21(i)(2)

### **Rule 45. After-Care Planning**

(a) Not less than four months prior to a juvenile being discharged from any facility or placement, the agency in whose custody the juvenile is placed shall notify the court of the date of anticipated discharge, and the court shall:

(1) Set the matter for hearing during a quarterly judicial review, to occur not less than 45 days before the juvenile is to be discharged, for consideration of an after-care plan.

(2) Require the state agency in whose custody the juvenile is placed, in conjunction with the MDT, to provide a written recommended after-care plan to the court not less than 10 days prior to the hearing, which recommendation shall at a minimum include the following:

(A) Description of the juvenile's current placement and services.

(B) Suggested services required to fully implement the juvenile's After-Care Life Skills Plan, and identify the social worker/case manager assigned to supervise the services.

(C) Identify possible sources of funding for the after-care plan.

(D) Recommendations for post-discharge judicial review.

(b) Notice of the recommended after-care plan shall be provided pursuant to West Virginia Code § 49-5-20(a).

(c) Following the hearing, the court shall make findings of fact and conclusions of law as to whether adoption of the recommended after-care plan is in the best interest of the juvenile, and consistent with purposes of these rules as stated in Rule 1(c), enter an appropriate order.

(d) The court shall require the state agency having custody of the juvenile to provide additional or alternative plans if deemed necessary by the court.

#### Comments

*This rule does not apply to juveniles who have been transferred to adult jurisdiction. Those juveniles are subject to review by the circuit court pursuant to West Virginia Code § 49-5-16(b).*

Source -- W. Va. Code § 49-5-20

### **Rule 46. After-Care Review**

If the court has implemented the provisions of an after-care plan, the court shall review the progress made toward achieving the goals of the plan during each judicial review. Review hearings may be conducted as often as is considered necessary by the court until the juvenile is

discharged from the court's supervision, or until age 18 for status offense adjudications and age 21 for delinquency adjudications.

Comments

Sources --     W. Va. Code § 49-5-20  
                  W. Va. Code § 49-5-21  
                  W. Va. Code § 49-5-2(f)

**Rule 47. Probation Violations**

(a) Commencement of Proceedings. Proceedings for revocation of probation may be commenced based upon a petition to modify disposition filed by the probation officer showing probable cause to believe the juvenile has violated one or more conditions of probation. Based upon the petition, the court may issue an order for immediate custody if warranted under the circumstances, as provided by Rule 6, or the court may schedule a review hearing and provide notice of the hearing to the juvenile, the juvenile's counsel, the juvenile's parents or legal guardians, and the prosecuting attorney at least 72 hours prior to the hearing. If the juvenile fails to appear in response to a review hearing notice, the court may issue an order for immediate custody.

(b) Contents of Probation Violation Petition. The probation violation petition and supporting affidavits, if any, shall include:

- (1) the name, date of birth and address of the juvenile;
- (2) the name and address of the juvenile's parents or legal guardians;
- (3) the underlying offense or offenses and the date of each offense for which a violation of probation is alleged; and
- (4) a description of any additional facts and circumstances upon which the request for revocation is based.

(c) Hearing Timeframe. If a juvenile is taken into custody, the review hearing shall be held within 5 judicial days; otherwise, the review hearing shall be held within 10 judicial days of the filing of the petition.

(d) Standard of Proof. The court may modify or revoke a juvenile's probation if it finds clear and convincing proof of a substantial violation of one or more probationary terms.

(e) Findings Required. Any revocation of probation shall be based upon findings clearly set forth in the record and resulting order. If the court orders out-of-home placement for the juvenile, the court is required to further set forth the facts which lead to the conclusion that no less restrictive alternative is appropriate; and the order shall further find and state that continuation in the home is contrary to the best interests of the juvenile and why; and whether or not the DHHR made reasonable efforts to prevent the out-of-home placement or that exigent circumstances made such efforts unreasonable or impossible.

### Comments

*Sources -- W. Va. Code § 49-5-14  
State v. McDonald, 173 W. Va. 263, 314 S.E.2d 854 (1984)*

### **Rule 48. Search Warrants**

Issuance of search warrants is governed by Rule 41 of the West Virginia Rules of Criminal Procedure, except as modified by this Rule. If the focus of the warrant pertains to a juvenile, the *ex parte* request for such warrant shall be conducted as a closed juvenile proceeding pursuant to Rule 10. The written application and supporting affidavit or affidavits, the original warrant, any duplicate warrant, the transcript of any hearing on the application for the warrant, and any related documents shall be deemed to be confidential juvenile court records under West Virginia Code § 49-5-17.

### Comments

*Sources -- W. Va. Rules of Crim. Pro., Rule 41  
W. Va. Code § 49-5-2(i)  
W. Va. Code 49-5-17*

### **Rule 49. Confidentiality of Juvenile Records**

Juvenile proceedings conducted under Chapter 49 of the West Virginia Code are not public proceedings. Additionally, the records of these proceedings are not open for public inspection. Disclosure of juvenile records is not permitted, unless specifically authorized pursuant to West Virginia Code §§ 49-5-17(b) or 49-7-1.

### Comments

*Sources -- W. Va. Code §§ 49-5-17 and 49-7-1*

### **Rule 50. Sealing Juvenile Records**

**(a) *Generally.*** The records of juveniles charged with a delinquency or status offense should not follow the juvenile for the rest of his or her life. These records are sealed by the court to protect the rights of the juvenile when they reach adulthood. The records of juvenile proceedings conducted under Chapter 49 of the West Virginia Code should be sealed:

- (1) one year after the juvenile's 18th birthday, or
- (2) one year after personal or juvenile jurisdiction of the court is terminated, whichever is later.

(b) Records of Proceedings Transferred to Criminal Jurisdiction. The records of a juvenile proceeding transferred to criminal jurisdiction are open to the public. Provided, these records should be sealed under the following circumstances:

- (1) the juvenile is acquitted;
- (2) the juvenile is found guilty of an offense other than offense upon which the waiver or order of transfer was granted; or
- (3) the offense upon which the waiver or order of transfer was granted is subsequently dismissed.

(c) Effect. When the record of a juvenile proceeding is sealed by the court it has the legal effect of extinguishing the offense as if it never occurred. Once the record of a juvenile is sealed, it may only be opened by order of the circuit court.

#### Comments

Source -- W. Va. Code § 49-5-18

### **Rule 51. Development of Life Skills Curriculum and Transitional Plan**

(a) Life Skills Curriculum. For every juvenile between ages 14 and 18 years in the custody of DHHR or DJS, as part of the MDT process, the individualized service plan shall include a Life Skills Curriculum. Life skills to be taught to the juvenile shall include, at a minimum: personal hygiene, food and financial management; housekeeping, nutrition planning, job seeking skills, educational/vocational instruction, and community resources. Pursuant to each juvenile's Life Skills Curriculum, the MDT shall monitor, pursuant to West Virginia § 49-5D-3, the instruction of juveniles between the ages of 14 and 18 years who are evaluated as likely to remain in the care and custody of DHHR or DJS until they are 18 years of age. The juvenile shall participate in the formulation of his or her Life Skills Curriculum.

(b) Transitional Plan. No later than 6 months immediately prior to the date on which the juvenile will attain 18 years of age, the MDT shall assist the juvenile with developing a transitional plan that is individualized at the direction of the juvenile, which includes specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and workforce supports and employment services.

(c) Services. A juvenile who meets the eligibility criteria for transitional plan services shall receive, in addition to those services specified in subparagraph (a) of this rule, the services ordered by the court related to the transitional plan. Delivery of these services shall be monitored by the case worker/case manager assigned to supervise the case and reported to the court at judicial reviews so long as the juvenile remains under court jurisdiction.

(d) Reports. The case worker/case manager assigned to supervise the juvenile shall report to the court during judicial reviews regarding efforts to obtain appropriate transitional plan services,

including but not limited to, a voluntary placement agreement with the juvenile, educational training vouchers, other services funded through the Chafee Foster Care Independent Living Program, and training to procure a driver's license, if applicable.

Comments

*A juvenile living in a transitional living placement may be eligible to earn a subsidy, in addition to any traditional support payment, based on a showing of consistent participation in life skills classes and other life skills activities, in school, and in his or her job training program or employment. A cash incentive program for participation in Chafee-funded juvenile programs is available through the DHHR. The MDT and court is encouraged to identify other funding sources and positive incentives for program participation by juveniles. A job-training program for a juvenile should provide training skills compatible with the juvenile's abilities and interests which will increase his or her employability for jobs available in the region. As a part of the job-training program, the juvenile should be provided the opportunity to obtain a GED if completion of high school is not part of the juvenile's service plan. But continuing eligibility to remain in a transitional living program should not be terminated upon the juvenile's inability to obtain a GED.*

Sources -- W. Va. Code § 49-5B-4(b) and (c)  
42 U.S.C. § 675 (H.R. 6893, eff. Oct. 7, 2008)