RECENT COURT DECISIONS AND LEGISLATION AFFECTING JUVENILES

UNITED STATES SUPREME COURT

🕮 *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*
137 S. Ct. 988 (2017)
Report by Kenneth Kauffman

The Individuals with Disabilities Education Act (IDEA) requires schools to provide a free appropriate public education (FAPE) for qualifying students.[1] In *Board of Education v. Rowley*,[2] the Supreme Court held that a FAPE exists if an individualized education program (IEP) is "reasonably calculated to enable the child to receive educational benefits," which in a regular classroom means it "enable[s] the child to achieve passing marks and advance from grade to grade."[3] Colloquially, this has been described as requiring a Chevy instead of a Cadillac. In *Endrew F.*, the Supreme Court has held that each child is entitled to receive not just any Chevy, but one that is reliable based on a fact-intensive evaluation of the child's unique circumstances.[4]

From preschool through fourth grade, Endrew, who has autism, was enrolled in Douglas County School District.[5] However, his IEP goals changed little from year to year as he was consistently failing to meet those goals.[6] Eventually, his parents enrolled him into a private school where he successfully advanced.[7] Six months later, the school district developed a new IEP but refused to incorporate the procedures that had enabled

[1] 20 U.S.C. § 1400 *et seq.*
[2] 458 U.S. 176 (1982).
[3] Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 995-96 (2017).
[4] *Id.* at 1001.
[5] *Id.* at 996.
[6] *Id.*
[7] *Id.*

Endrew's advancement at the private school into his new IEP.[8] His parents filed a complaint with the Colorado Department of Education alleging "that the final IEP proposed by the school district was not 'reasonably calculated to enable [Endrew] to receive educational benefits' and that Endrew had therefore been denied a FAPE."[9] However, they were denied relief by both an Administrative Law Judge and the Tenth Circuit Court of Appeals, which found that that a FAPE was sufficient "as long as it is calculated to confer 'an educational benefit [that is] merely . . . more than *de minimis*.'"[10]

The Supreme Court disagreed with the district, arguing that the required IEP fact-findings are not merely "procedural requirements—a checklist of items the IEP must address," but rather are essential for "insight into what it means, for the purposes of the FAPE, to meet the unique needs of the child with a disability."[11] For non-mainstreamed students (those educated outside of the regular education classroom), a FAPE requires instruction appropriately tailored such that the instruction is not "tantamount to sitting idly awaiting the time when they [are] old enough to drop out. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[12]

While holding that a FAPE merely required "personalized instruction, provided with sufficient supportive services to permit the child to benefit from the instruction," the *Rowley* Court failed to establish how to decide if the benefits offered were *sufficient* and explicitly declined to establish any single test of adequacy.[13] *Rowley* rejected an equal opportunity standard because FAPE is "too complex to be captured by the word 'equal' whether one is speaking of opportunities or services."[14] *Endrew* evaluates the more challenging case where mainstreaming a child is not possible.[15] Like in *Rowley*, the Court does not attempt to establish an equal opportunity standard.[16] Instead, the Court requires an educational program that is appropriately ambitious in light of the child's circumstances and that provides challenging objectives for the child to meet.[17] While "not

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[8] *Id.* at 997.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 999-1000.
[12] *Id.* at 1001.
[13] Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982).
[14] *Id.* at 198.
[15] *Endrew*, 137 S. Ct. at 1000.
[16] *Id.* at 1001.
[17] *Id.* at 1000.

a formula … this standard is markedly more demanding than the 'merely more than *de minimis*' test" otherwise the child "can hardly be said to have been offered an education at all."[18]

[18] *Id.* at 1000-01.

UNITED STATES COURT OF APPEALS, SIXTH DISTRICT

🕮 *Ohio Dep't of Medicaid v. Price*
864 F.3d 469 (6th Cir. 2017)
Report by Elizabeth Scott

The Ohio Department of Medicaid ("Ohio") petitioned the 6th Circuit Court of Appeals to review the Centers for Medicare and Medicaid Services' ("CMS") denial of a proposed amendment to Ohio's Medicaid plan.[19] The primary issue was whether pretrial juvenile detainees in Ohio are "inmate[s] of a public institution."[20] If pretrial juvenile detainees were deemed as inmates, they would be ineligible to be covered by Medicaid pursuant to 42 U.S.C. § 1396d(a)(29)(A).[21] It is the responsibility of the state government to cover the medical expenses of inmates of a public institution, and Ohio sought to avoid this obligation by deeming juvenile detainees as non-inmates.[22] The 6th Circuit denied Ohio's petition for review on the grounds that CMS's denial of the proposed amendment was not arbitrary.[23]

Judge Griffin, writing for the majority, cited 42 C.F.R. § 435.1010 of CMS's regulatory provisions, which defines an "inmate of a public institution."[24] Ohio's claims were based on the exception in part (b) of this regulation, which states that an individual is not an inmate if he is "in a public institution for a temporary period pending other arrangements."[25] First, the 6th Circuit considered the text of the Medicaid Act along with prior cases from the Supreme Court to determine that CMS has authority to administer the federal Medicaid program, and therefore should be afforded *Chevron* deference in their interpretation.[26] Finding that Congress has not spoken about the issue at hand, the court then looked at whether CMS's decision was "'based on a permissible construction of the statute.'"[27] The

[19] Ohio Dep't of Medicaid v. Price, 864 F.3d 469, 472 (6th Cir. 2017).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 473.
[25] *Id.*
[26] *Id.* at 474 (citing Chevron U.S.A. Inc. v. NRCS, 467 U.S. 837, 843-44 (1984)).
[27] *Id.* (quoting *Chevron*, 467 U.S. at 843-44).

court held that the determination of the CMS administrator that the statute did not distinguish between either juvenile and adult inmates nor pretrial and sentenced detainees, and thus that pretrial juvenile detainees are not entitled to Medicaid coverage, was permissible and not arbitrary.[28]

Ohio claimed that juvenile pretrial detainees are not inmates under CMS's regulations because these detainees are being held in a public institution until the court makes other arrangements.[29] However, the 6th Circuit rejected petitioner's arguments, instead holding that juvenile pretrial detainees are inmates, as they are not voluntarily remaining in custody.[30] In addition, the institutions where juvenile pretrial detainees are housed are not considered to be "child-care institutions" because "child-care institutions" do not include detention facilities.[31] Thus, children who are detained before trial cannot be deemed to be in child-care institutions, rendering the state ineligible for Medicaid reimbursement funds for their healthcare.[32]

Given the CMS interpretation of the regulations, the 6th Circuit held that the Ohio Department of Medicare and Medicaid Services was seeking federal Medicaid funding for a population of people who are already excluded under the applicable regulations.[33] The 6th Circuit determined that there was no need for a federal agency to distinguish between adult detainees and juvenile detainees, despite juveniles possessing different rights.[34]

The court declined to follow *Brown v. County Commissioners of Carrol County*,[35] a Maryland Court of Appeals case which Ohio raised as persuasive authority.[36] Ohio claimed that *Brown* established that "individuals in custody awaiting trial are not 'inmates of a public institution' under the federal regulation."[37] However, while *Brown* dealt with the same statutory language as the present case, it was in regards to the monetary liability of *adult* pretrial detainees for medical care they received while incarcerated.[38] Furthermore, there was no guidance from CMS in

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[28] *Id.*
[29] *Id.* at 478.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 479-80.
[33] *Id.*
[34] *Id.* at 480.
[35] Brown v. Cty. Comm'rs of Carrol Cty., 338 Md. 286 (1995).
[36] *Ohio Dep't of Medicaid*, 864 F.3d at 480 (citing *Brown*, 338 Md. at 286).
[37] *Id.*
[38] *Id.* at 480-81.

Brown.[39] Since there was guidance in this case, the 6th Circuit had to defer to CMS's reasonable interpretation of the regulation at issue, and thus pretrial juvenile detainees are ineligible for Medicaid.[40] The 6th Circuit concluded by stating that to provide juvenile pretrial detainees with federal Medicaid reimbursement would undermine the CMS's forty-plus year policy of not providing such coverage to adult defendants.[41]

Judge Clay dissented, arguing that the majority misinterpreted and thus misapplied *Chevron* deference.[42] Judge Clay held that under the language of 42 C.F.R. § 435.1010 of CMS's regulatory provisions, pretrial juvenile detainees are not inmates of a public institution, therefore making them eligible for Medicaid reimbursements.[43]

[39] *Id.* at 481.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 483.
[43] *Id.* at 492.

UNITED STATES COURT OF APPEALS, EIGHTH DISTRICT

🕮 *A.W. v. Nebraska*
865 F.3d 1014 (8th Cir. 2017)
Report by Lacia Japp

In July 2014, A.W., a minor, was adjudicated in Anoka County, Minnesota juvenile court for first degree criminal sexual that had occurred in July and August of 2013.[44] As a result of his adjudication, he was ordered to register with the predatory offender registry in Minnesota.[45] He was subsequently granted a transfer of supervision to Nebraska via the Interstate Compact for Juveniles.[46] In August 2014, A.W. and his guardians were notified that A.W. must register with the Nebraska sex offender registry under its Sex Offender Registry Act ("SORA") or face a criminal referral.[47] In response, A.W. and his guardians commenced an action for declaratory and injunctive relief under 42 U.S.C. § 1983 alleging the Nebraska legislature did not intend SORA to apply to juveniles, and that application of SORA to A.W. violates the United States and Nebraska Constitutions.[48] The District Court for the District of Nebraska granted A.W.'s motion for summary judgment, finding he was not a sex offender under SORA because an adjudicated juvenile is not a person convicted of a sex crime.[49] The State of Nebraska appealed to the Eighth Circuit Court of Appeals.[50]

The Eighth Circuit affirmed the District Court's decision.[51] Since this issue of Nebraska state law had not been heard by the Nebraska Supreme Court, the Eight Circuit interpreted SORA as it predicted the Nebraska Supreme Court would, and concluded, based on Nebraska Supreme Court precedent, that Nebraska would apply the plain and direct meaning of the unambiguous words in the statute.[52] SORA specifically applies to people who have been found guilty of or pleaded guilty to a

[44] A.W. v. Nebraska, 865 F.3d 1014, 1016 (8th Cir. 2017).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 1016-17.
[49] *Id.* at 1017.
[50] *Id.* at 1015-16.
[51] *Id.* at 1021.
[52] *Id.* at 1017.

specific list of sex crimes, or crimes involving sexual conduct, or equivalent crimes elsewhere.[53] It also mandates that any person who "[e]nters the state and is required to register as a sex offender under the laws of another . . . jurisdiction of the United States" must register with Nebraska's sex offender registry.[54]

A.W. was required under Minnesota law to register with the Minnesota Predatory Offender Register.[55] Nebraska argued that A.W.'s status under Minnesota law triggered Nebraska's SORA, and thus required A.W. to register as a sex offender in Nebraska.[56] In reaching its conclusion to the contrary, the Eighth Circuit noted Nebraska law does not define delinquency adjudications as criminal proceedings and that determinations arising from delinquency adjudications do not result in a conviction or a criminal record.[57] The Eighth Circuit concluded that an adjudication of delinquency is "a judicial finding that a juvenile has engaged in conduct that *would* be a violation of a criminal law *if* the juvenile were an adult."[58]

Nebraska's choice of law rules dictate that the Eighth Circuit need not address Minnesota's interpretation and intent of using the term "sex offender" because it only considers the term's plain meaning.[59] To find the plain meaning, the court looked to the Black's Law Dictionary definition of the words "offense," "sexual offense," and "guilt."[60] These definitions were compared with definitions found in other dictionaries to determine that a sex offender is "ordinarily understood as a person who has been convicted of a crime involving unlawful sexual conduct."[61]

Ultimately, the Eighth Circuit held an adjudicated youth is not a sex offender under the language and intent of Nebraska's SORA, and accordingly affirmed the District Court's order granting summary judgment in favor of A.W. and his guardians.[62]

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[53] *Id.*
[54] *Id.* (quoting NEB. REV. STAT. § 29-4003(1)(a)(iv) (2018)).
[55] *Id.*
[56] *Id.* at 1017-18.
[57] *Id.* at 1018.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 1019.
[61] *Id.*
[62] *Id.* at 1019-20.

UNITED STATES COURT OF APPEALS, NINTH DISTRICT

🕮 *R.E.B. v. Haw. Dep't of Educ.*
870 F.3d 1025 (9th Cir. 2017)
Report by Riley Doyle

In *R.E.B. v. Hawaii Department of Education*, the 9th Circuit considered whether a student protected by the Individuals with Disabilities Education Act ("IDEA") was denied a free appropriate public education ("FAPE"), and further, the extent to which "transition services" must be provided.[63] Student J.B. attended the Pacific Autism Center ("PAC"), a private school for students with autism.[64] While J.B. was attending PAC, the Hawaii Department of Education ("DOE") developed an Individualized Education Plan ("IEP") for J.B.'s transition from PAC to public kindergarten.[65] J.B. believed his IEP to be inadequate for several reasons and brought a due process complaint.[66]

The DOE claimed the case was moot because J.B. received relief beyond what was originally requested.[67] J.B. initially sought reimbursement of PAC tuition only for the 2012–13 school year, but the DOE reimbursed J.B.'s tuition at PAC from 2012 until 2015.[68] The 9th Circuit ruled that since J.B. sought reimbursement for transportation and compensatory education in addition to reimbursement for tuition, relief could still be granted, so the case was not moot.[69]

J.B. argued the DOE violated the IDEA by refusing to address concerns surrounding the transition from a private school to a public school.[70] The 9th Circuit held that where transition services are necessary for disabled children to "be educated and participate" in new academic environments, transition services must be included in order to satisfy the IDEA's "supplementary aids and services" requirement—including

[63] R.E.B. v. Haw. Dep't of Educ., 870 F.3d 1025, 1027 (9th Cir. 2017).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

transitions from private schools to public schools.[71] For J.B., concerns for the transition centered on offsetting changes in the number of peers around him and in daily routines.[72] The 9th Circuit ruled that by failing to address these concerns, the DOE violated the IDEA.[73]

Further, J.B. believed the DOE violated the IDEA by failing to specify the Least Restrictive Environment in the IEP.[74] J.B.'s IEP contained only the vague statement that J.B. would receive specialized instruction in his general education, failing to detail "the anticipated frequency, location, and duration" of the proposed specialized instruction.[75] The lack of clarity improperly delegated the determination of J.B.'s placement to teachers outside the IEP process and made the language too vague to enable J.B. to use the IEP as a blueprint for enforcement.[76]

The 9th Circuit held the DOE also failed to adequately address the *Rachel H.* factors, which require discussion of: "'(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [J.B.] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [J.B.].'"[77] The lack of sufficient discussion infringed on J.B.'s father's opportunity to participate in the IEP process and was a denial of a FAPE.[78]

J.B also argued the IDEA required the DOE to specify in the IEP that J.B.'s one-on-one aide would have the same qualifications as a contracted skills worker.[79] The 9th Circuit held that because the DOE had not agreed to provide such an aide and there was no statutory language supporting J.B.'s claim, there was no such requirement for the DOE.[80]

Finally, J.B. claimed the DOE violated the IDEA by failing to specify Applied Behavioral Analysis ("ABA") as a methodology for teachers working with J.B.[81] The court held that since the IEP team discussed ABA at length and recognized it was integral to J.B.'s education,

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[71] *Id.* at 1027-28.
[72] *Id.* at 1028.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* (quoting Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. ex rel Holland, 14 F.3d 1398, 1404 (9th. Cir. 1994)).
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at 1029.

it needed to be specified in the IEP rather than left up to individual teachers' discretion.[82] The IEP's failure to specify ABA was thus a denial of a FAPE.[83]

Ultimately, the 9th Circuit held the DOE needed to address concerns about transitioning from a private school to public school,[84] specify the Least Restrictive Environment,[85] adequately address the *Rachel H.* factors,[86] and specify ABA as the methodology used in the IEP.[87] The DOE did not have to specify that J.B.'s one-on-one aide would have the same qualification as a contracted skills worker.[88] The case was "remand[ed] to the district court for determination of the appropriate remedy."[89]

[82] *Id.*
[83] *Id.*
[84] *Id.* at 1028.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 1029.
[88] *Id.* at 1028.
[89] *Id.* at 1029.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NORTH CAROLINA

🕮 *Reyes v. McCament*
No. 3:16-CV-00749, 2017 U.S. Dist. LEXIS 135052 (W.D.N.C. 2017)
Report by Riley Doyle

Mariela Reyes, born in El Salvador, entered the United States when she was sixteen years old and was subsequently apprehended in Texas on May 29, 2013, by the United States Customs and Border Protection.[90] The United States Department of Health and Human Services Office of Refugee Resettlement ("ORR") released Mariela into the custody of her father, Maximilaiano Ponce, in North Carolina.[91] A year-and-a-half later, Ponce filed an ex parte motion seeking temporary emergency custody of Reyes, which was granted in early October 2014.[92] The same day the juvenile court issued the Order Granting Ex Parte Temporary Custody, Reyes filed a Petition for Special Immigrant with United States Citizenship and Immigration Services ("USCIS") requesting special immigrant juvenile immigration status ("SIJ").[93] Four days after filing, Reyes turned eighteen years old and was no longer a minor.[94] USCIS ultimately denied Reyes' SIJ petition because of the temporariness of the emergency custody order.[95] Reyes then filed a motion for Judgment Nunc Pro Tunc, which was granted.[96] Based upon this new ruling, Reyes appealed the USCIS decision with USCIS's Administrative Appeals Office, but was denied because there was no qualifying court order and even on the merits she would not be eligible for SIJ status.[97]

Reyes argued in the District Court that USCIS failed to abide by statutory and other regulations when deciding her petition.[98] The burden of proof was on Reyes to demonstrate her eligibility for SIJ by a

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[90] Reyes v. McCament, No. 3:16-CV-00749, 2017 U.S. Dist. LEXIS 135053 (W.D.N.C. 2017), at *2.
[91] *Id.*
[92] *Id.*
[93] *Id.* at *3-*4.
[94] *Id.*
[95] *Id.* at *5.
[96] *Id.* at *6.
[97] *Id.* at *8-*9.
[98] *Id.* at *12.

preponderance of evidence.[99] She argued the Court should waive USCIS' decision because it was "(1) 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,' (2) in excess of statutory jurisdiction authority, or limitations, or short of statutory right; or (3) the agency undertook action 'without observance of procedure required by law.'"[100]

The Court held the USCIS decision was not "arbitrary or capricious," and that USCIS's decision was "supported by applicable law and the record. . . ."[101] The Court further held neither the Order Granting Ex Parte Temporary Custody nor the Ex Parte Order for Judgment Nunc Pro Tunc were sufficiently final to warrant SIJ status.[102]

Reyes was unable to demonstrate how USCIS's interpretation of controlling statutes and regulations resulting in its decision either exceeded its authority or made an ultra vires eligibility requirement.[103] USCIS is entitled to Auer "deference in its interpretation of the statutes and regulations" it administers, so Reyes would have had to establish a plainly erroneous or inconsistent interpretation.[104]

Finally, Reyes was unable to convince the court to apply the Full Faith and Credit Clause to a USCIS adjudication.[105] Citing precedent, the Court found that USCIS did not need to give Reyes full faith and credit.[106] The Court also noted full faith and credit was due only in courts, not in agencies such as the USCIS.[107] Because none of Reyes' claims were found to be legitimate, the court found in favor of USCIS and granted its Motion for Judgement on the Record. [108]

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[99] *Id.*
[100] *Id.* at *13-*14.
[101] *Id.* at *16.
[102] *Id.* at *21-*22, *26.
[103] *Id.* at *31.
[104] *Id.* at *30.
[105] *Id.* at *32.
[106] *Id.* at *32-*33.
[107] *Id.* at *32.
[108] *Id.* at *34.

CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

🕮 *In re Trejo*
216 Cal. Rptr. 3d 855 (Cal. Ct. App. 2017)
Report by Annie Youchah

Gilbert Trejo's petition for a writ of habeas corpus sought to clarify how California's youth offender parole provisions must be enforced.[109] In 1979, when Trejo was seventeen years old, he was charged with second-degree murder.[110] The following year he was convicted and sentenced to fifteen years to life.[111] In 1982, when he was twenty years old, he pled guilty to possession of a deadly weapon in prison and received a four-year sentence to be served consecutively with his 15 years to life sentence.[112]

In June of 2015, the Board of Parole Hearings ("Board") found Trejo suitable for parole under California Penal Code section 3051, which includes specific parole provisions for youthful offenders based on their age at the time of the offense.[113] The Board's decision to grant Trejo parole became effective November 2, 2015, but the Board found Trejo must serve his four year term for the possession of a deadly weapon charge before release.[114] The Board calculated Trejo's earliest release date as November 2, 2018.[115] Trejo filed his petition for a writ of habeas corpus in Marin County Superior Court, arguing that he was entitled to release on November 2, 2015 under California Penal Code section 3051 because he committed his in-prison offense while he was still younger than 23 years old, as is required to be eligible under the youth offender parole program.[116] The trial court denied his petition on the grounds that section 3051 did not apply to consecutive sentences for in-prison offenses.[117] The Court of Appeal disagreed, stating that section 3051, subdivision (h), explicitly excludes in-prison offenses committed after the age of twenty-three, indicating the statute does apply to in-prison offenses committed before the age of twenty-

[109] In re Trejo, 216 Cal. Rptr. 3d 855, 857 (Cal. Ct. App. 2017).
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 857-58.
[117] *Id.* at 857.

three.[118]

The Court of Appeal went on to further say that section 3051 accounts for in-prison offenses by requiring that a defendant's suitability for release be considered in their parole hearings.[119] If the prisoner is considered too dangerous in light of his in-prison offenses, he will be denied parole.[120] The Board argued that Trejo's parole is inappropriate as he did not serve the full sentence.[121] The Court of Appeal clarified that flexibility in the length of a sentence a youthful offender serves is the purpose of section 3051, as the statute is intended to allow the Board to take the offender's youth at the time of the offense into account in deciding when they can be paroled, regardless of sentence length or the existence of consecutive sentences.[122]

Given this reasoning, the Court of Appeal determined that Trejo's continued imprisonment past November 2, 2015 was unlawful, and as such he was to be released, with the time served after that date deducted from the length of his parole period.[123]

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[118] *Id.* at 864-65.
[119] *Id.* at 867-68.
[120] *Id.* at 868.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 870.

CALIFORNIA COURT OF APPEAL, SECOND DISTRICT

🕮 *People v. Pineda*
222 Cal. Rptr. 3d 269 (Cal. Ct. App. 2017)
Report by Lilly Dagdigian

At the age of seventeen, defendant Armando Pineda, Jr. shot and killed a neighbor in Los Angeles.[124] At the time of the crime, "California law allowed prosecutors to file murder charges against a defendant over 16 years old directly in a criminal court of jurisdiction. . . rather than a juvenile court."[125] In October 2014, using this "direct file" procedure, the Los Angeles District Attorney charged Pineda with murder as an adult in criminal court.[126] After a six-day trial, the jury found Pineda guilty of second degree murder, with enhancements for personal use of a firearm.[127] The court sentenced the Pineda to fifteen years to life for the second degree murder conviction, and a consecutive twenty-five years to life based on the enhancements.[128] He timely appealed on October 28, 2015.[129]

Just over a year after Pineda was convicted, California voters in the November 2016 general election approved the Public Safety and Rehabilitation Act of 2016 ("the Act"), which went into effect the following day, November 9, 2016.[130] The Act amended California Welfare & Institutions Code section 707 to eliminate prosecutors' discretion to file charges directly against certain juvenile defendants in a court of criminal jurisdiction.[131] Had Pineda been charged after the Act took effect, he would have been entitled to a fitness hearing in juvenile court, at which point a judicial officer would determine whether or not to transfer the case to criminal court.[132] However, the language of the Act is silent as to whether it should apply to convictions sustained prior to its enactment.[133]

In an opinion by Justice Lamar Baker, the Court of Appeal held that

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[124] People v. Pineda, 222 Cal. Rptr. 3d 269, 270-271 (Cal. App. Ct. 2017).
[125] *Id.* at 272; *see also* CAL. WELF. & INST. CODE § 707 (b)(1), (d)(1) (2000), *amended* by Public Safety and Rehabilitation Act of 2016.
[126] *Pineda*, 222 Cal. Rptr. 3d at 271.
[127] *Id.* at 275.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 276.

the Act applies to every minor to whom it can constitutionally apply, including those like Pineda whose convictions are not yet final.[134] The court referred to five published Court of Appeal opinions which ruled on the breadth of the Act's retroactivity.[135] The majority of these opinions held that the Act does not apply retroactively for a juvenile convicted before the Act took effect, regardless of whether the conviction is final.[136] The California Supreme Court has granted review to all but one of these cases, and will soon provide ultimate resolution to the question.[137]

The Court of Appeal acknowledged that as a general rule, legislative changes only apply prospectively.[138] However, Justice Baker, writing for the majority, applied the same reasoning as *In re Estrada*, 408 P.2d 948 (1965), which held that when a statute is amended so as to lessen punishment, the legislature (or in this case, the voting populace) has decided that the former penalty was too harsh and intends for the new lighter penalty to be applied to every case constitutionally allowed.[139] The Court of Appeal concluded that the Act is properly seen as a measure to reduce punishment for crimes, given that juvenile courts focus far less on punishment than courts of criminal jurisdiction.[140] *Pineda* was remanded to juvenile court with directions to conduct a fitness hearing.[141]

Justice Sandy Krieger disagreed with the majority in a partial dissent.[142] He noted that two recent California-voter-enacted statutes, Propositions 36 and 47, contained express retroactivity provisions which let the electorate know that the proposed changes would affect judgments.[143] Given that the Act is silent in this regard, Justice Krieger concluded voters were not presented with the issue and therefore made no choice on the matter, and he would affirm the trial court's judgment.[144]

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 277.
[139] *Id.*
[140] *Id.* at 279.
[141] *Id.* at 280.
[142] *Id.* (Krieger, J., dissenting).
[143] *Id.* (Krieger, J., dissenting).
[144] *Id.* (Krieger, J., dissenting).

CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT

🕮 *Ed H. v. Ashley C.*
221 Cal. Rptr. 3d 911 (Cal. Ct. App. 2017)
Report by Lilly Dagdigian

Appellants Ed and Yvonne H., paternal great-grandparents, appealed an order denying their petition for visitation with their great-grandchildren.[145] Appellants contended the trial court erred in finding they lacked standing to join as parties seeking visitation.[146]

Ed and Yvonne's granddaughter-in-law, Ashley, and her two children lived with appellants from August 2009 to July 2013, during which time they helped care for the children.[147] In September 2013, Ashley filed for divorce from Ed and Yvonne's grandson, Zachary.[148] Ashley was awarded "sole legal and physical custody" of the children while Zachary was awarded "reasonable visitation."[149] However, in March 2015, Ashley filed for a domestic violence restraining order, alleging that Zachary threatened her.[150] The court granted the restraining order and terminated Zachary's visitation with his children.[151] As a result, Ed and Yvonne's visits also ceased at this time.[152]

In December 2015, Ed and Yvonne filed a request for joinder and petition for independent great-grandparent visitation pursuant to California Family Code sections 3100, 3102, 3103, and 3104.[153] They reasoned that due to their long-standing and substantial relationship with their great-grandchildren, visitation was in the children's best interest.[154] Ashley opposed the motion, arguing that due to her restraining order against Zachary, "contact with Ed and Yvonne was hindered once Zachary moved into [their] home."[155] She argued that visitation with Ed and Yvonne might

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[145] Ed H. v. Ashley C., 221 Cal. Rptr. 3d 911, 914 (Cal. Ct. App. 2017).
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 915.

cause her children fear and anxiety because of their fear of Zachary, and their association of Zachary with Ed and Yvonne.[156] Finally, she asserted Ed and Yvonne lacked standing to be joined because they were not grandparents, and therefore the court had no subject matter jurisdiction.[157]

In response, Ed and Yvonne argued they are entitled to seek visitation as non-parents under California law generally, and further that the court has "discretion under section 3100 to grant visitation to non-parents who have an interest in the child's welfare."[158] They also argued that section 3014 could be applied to the instant case because common dictionary usage demonstrates the word "great" is merely an adjective describing a type of grandparent, and therefore a great-grandparent is equivalent to a grandparent.[159] Finally, they argued that "they could seek visitation as de facto parents."[160]

The Superior Court of San Diego County noted that joinder is an entirely statutory matter, and no statutory right to join exists for great-grandparents.[161] The court denied Ed and Yvonne's request based upon lack of subject matter jurisdiction due to appellants' lack of standing.[162] On review, the Court of Appeal affirmed, noting that the issue of whether great-grandparents fall within the purview of California Family Code section 3104 is one of "first impression" in California.[163] The Court of Appeal agreed with the trial court that "the plain and ordinary meaning of 'grandparent,'" "a parent's parent," must be applied.[164] In so concluding, the Court of Appeal identified similar strict constructions of "grandparent" visitation in other jurisdictions excluding great-grandparents from the definition.[165]

The court also rejected Ed and Yvonne's arguments that they should be granted visitation as non-parents under California Family Code section 3100, holding that section 3100 only applies when a joint custody order is involved; here Ashley was already granted full legal and physical custody.[166] Lastly, the court rejected the argument that Ed and Yvonne are

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[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at 916.
[160] *Id.* at 915.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 919.
[164] *Id.*
[165] *Id.* at 919-20.
[166] *Id.* at 922.

entitled to visitation as de facto parents of their great-grandchildren, as the de facto parent doctrine is limited to "proceedings that require assessment of and input from custodial alternatives."[167] Even if Ed and Yvonne could establish de facto parent status, it does not confer visitation rights.[168]

🕮 *In re I.V.*
217 Cal. Rptr. 3d 535 (Cal. Ct. App. 2017)
Report by Kenneth Kauffman

I.V. was sentenced to probation by the juvenile court for misdemeanor vandalism.[169] I.V.'s terms of probation required that he attend a day center school to address poor academic performance and truancy.[170] Because the juvenile court did not consider his current individualized education program (IEP), I.V. challenged the day center requirement under California Rules of Court, Rule 5.651.[171] The Court of Appeal found that the juvenile court acted within its discretion when it evaluated I.V.'s needs based on the information before it and without consideration of a current IEP when the probation department had been unable to obtain the current IEP from the school.[172] That is, "[t]he court [is] not obligated to procure [an] IEP in order to make findings under rule 5.651(b)(2)" when other information indicates that an IEP may not be necessary.[173]

Rule 5.651 requires that, prior to a disposition hearing, the juvenile "court must ensure that, to the extent the information was available, the social worker or probation officer provided [the court certain] information … [including whether the child has] physical, mental, or learning related disabilities or other characteristics indicating a need for developmental services or special education and related services … [and indicating whether the child] is receiving special education and related services or any other services through a current [IEP]"; the minor's current IEP must also be included.[174] The juvenile court must then evaluate whether the child's physical, educational, mental health, and developmental needs (including special education and related services) are met and, if not, what additional

[167] *Id.* at 923.
[168] *Id.* at 925.
[169] In re I.V., 217 Cal. Rptr. 3d 535, 538 (Cal. Ct. App. 2017).
[170] *Id.* at 539-40.
[171] *Id.* at 541.
[172] *Id.* at 542.
[173] *Id.* at 543.
[174] Cal. Rule of Ct. 5.651(c); In re I.V., 217 Cal. Rptr. 3d at 542.

actions are necessary to meet those needs.[175]

In I.V.'s case, the juvenile court received the probation department's report which stated that I.V. had an IEP of an unknown date, that he entered special education during his elementary years but did not take advantage of the services, and that, despite the department's request, his high school registrar did not include a copy of I.V.'s current IEP when it provided his school records.[176] The juvenile court also had a psychologist's report stating that I.V. was performing in the average range, with no significant strengths or weaknesses; that he did not have a learning disorder; that his cognition appeared normal and intact; that his memory was good and his insight and judgment were fair; and that he was diagnosed with disruptive behavior disorder but was stable and symptom free.[177]

Finding that the juvenile court had broad discretion to select appropriate conditions of probation, the Court of Appeal held that abuse of discretion is the appropriate standard of review.[178] Because, unlike in *In re Angela M.*, the juvenile court here reasonably could have concluded from the psychologist's report that an IEP was not necessary and because it explicitly relied on the information before it to justify the placement condition, the juvenile court did not abuse its discretion.[179] Rule 5.651 does not specify upon which information the court must base its findings.[180] The Court of Appeal also noted that the burden of producing the IEP then fell on I.V. and that the juvenile court left I.V. an avenue for reconsideration if that information was provided.[181]

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[175] Cal. Rule of Ct. 5.651(b)(2).
[176] In re I.V., 217 Cal. Rptr. 3d at 539.
[177] *Id.*
[178] *Id.* at 542.
[179] *Id.* at 543 (citing In re Angela M., 111 Cal. App. 4th 1392, 1399 (2003)).
[180] *Id.* at 544.
[181] *Id.*

FLORIDA COURT OF APPEAL, THIRD DISTRICT

🕮 *Cormier v. Fla. Dep't of Children and Families*
219 So. 3d 197 (3rd Dist. 2017)
Report by Taylor Foland

Cormier v. Florida Dep't of Children and Families considers whether Florida's Education and Training Voucher ("ETV") requirements enumerated in the Child and Family Services Plan 2015-2019 ("CFSP") are preempted by the federal Chafee Act.[182] Florida's Third District Court of Appeals determined that the Chafee Act, which provides funding to programs for foster youth, does not prescribe specific criteria for distributing its aid.[183] Instead, the act allows states to develop their own requirements, subject to approval by the Department of Health and Human Services ("DHHS").[184] Since Florida's ETV requirements had been approved by DHHS, they were not in conflict with the Chafee Act.[185]

In 2013, the Department of Children and Families ("DCF") removed the appellant, Colesha Cormier, from her father's home due to alleged physical abuse, and consequently entered the dependency court system.[186] Six weeks after entering the system, Cormier turned eighteen and aged out of the foster care system. Cormier never had a dependency hearing because her eighteenth birthday occurred before her scheduled hearing date.[187] Roughly a year later, Cormier applied for ETV benefits through DCF's care agency, Our Kids of Miami-Dade/Monroe, Inc.[188] Her application was denied because she did not meet the eligibility requirements under Florida law.[189] A DCF hearing confirmed the denial of benefits and Cormier timely appealed.[190]

In order to be eligible for Florida's ETV benefits, the applicant must have spent at least six months in foster care prior to his or her eighteenth

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[182] Cormier v. Fla. Dep't of Children and Families, 219 So. 3d 197, 200 (Fla. Dist. Ct. App. 2017).
[183] *Id.* at 200.
[184] *Id.*
[185] *Id.* at 198.
[186] *Id.*
[187] *Id.*
[188] *Id.* at 199.
[189] *Id.*
[190] *Id.*

birthday.[191] In addition, applicants must meet various other requirements such as application deadlines, age restrictions, and proof of enrollment.[192] Cormier alleged the Chafee Act preempts these qualifications because it states that funding for education and training vouchers are for "youths who have aged out of foster care."[193] The court held this language does not impose general eligibility requirements; instead, the Chafee Act expressly endows states with the responsibility of creating a funding plan to be approved by the DHHS.[194] The DHHS approved Florida's CFSP, which included the requirement contested by Cormier.[195] Therefore, although the requirement narrows the general standard of youth eligible for benefits, it does so within the statutory language of the act and under the approval of the DHHS.[196] Finding no conflict between the Chafee Act and Florida's approved ETC requirements, the appellate court affirmed the DCF's denial of benefits to Cormier.[197]

[191] *Id.* at 200.
[192] *Id.*
[193] *Id.* at 199.
[194] *Id.* at 200.
[195] *Id.*
[196] *Id.*
[197] *Id.*

PENNSYLVANIA SUPERIOR COURT

🕮 *In re L.T.*
158 A.3d 1266 (Pa. Super. Ct. 2017)
Report by Annie Youchah

In February 2016, four-month-old D.T. was hospitalized after a traumatic brain injury resulting from abuse by his father, N.T.[198] Upon learning of this abuse, Children and Youth Services (CYS) placed D.T. and his sixteen-month-old sister, L.T., in protective custody.[199] D.T. died as a result of his brain injuries in July 2016.[200] L.T. was placed with her maternal grandmother, and A.Z., L.T.'s mother, was permitted to visit L.T. once a week.[201] The initial hearing set the children's permanency goal to reunification, and a review hearing was set for June 1, 2016.[202]

At the review hearing, the juvenile court determined that L.T.'s safety and wellbeing were at risk because of A.Z.'s alleged irresponsibility and immaturity, and thus changed L.T.'s permanency goal from reunification with her mother to adoption.[203] On appeal, A.Z. argued the juvenile court erred in making this determination because (1) her family had only been under CYS supervision for two months, which was an insufficient amount of time for such a determination, and (2) the juvenile court did not show that the change in permanency goal from reunification to adoption was in L.T.'s best interest.[204] A.Z. based her first argument on the fifteen to twenty-two month timeline set forth in advisory literature from the Office of Children and Family Services, but the court rejected this argument.[205] The appellate court held the timeline was not required and there was no specific amount of time during which a family must receive services before changing the permanency goal for the child.[206] However, as to her second argument, the court agreed that the juvenile court did not demonstrate that changing the reunification goal to adoption was in L.T.'s best interest, and

[198] In re L.T., 158 A.3d 1266, 1268 (Pa. Super. Ct. 2017).
[199] *Id.* at 1269.
[200] *Id.* at 1268.
[201] *Id.*
[202] *Id.*
[203] *Id.* at 1280.
[204] *Id.* at 1271.
[205] *Id.* at 1278.
[206] *Id.* at 1279.

in fact asserted that allowing A.Z. to work towards reunification was best for L.T.[207]

In making this determination, the appellate court concluded the juvenile court abused its discretion when it changed from the permanency goal of reunification to adoption.[208] In reaching this conclusion, the appellate court reasoned that A.Z. shared a close bond with L.T. and the juvenile court did not prove that it was in L.T.'s best interest to have her goal changed to adoption.[209] The appellate court reversed the juvenile court's order that changed L.T.'s placement goal.[210]

[207] *Id.* at 1282-83.
[208] *Id.* at 1271.
[209] *Id.* at 1283.
[210] *Id.* at 1285-86

KENTUCKY LEGISLATION

🕮 S.B. 120
2017 Reg. Sess.
Report by Lacia Japp

On April 10, 2017, Kentucky governor Matt Bevin, signed Senate Bill 120 ("S.B. 120") into law.[211] Among other issues, S.B. 120 amended the Kentucky Sexual Offense Registry requirements so that juveniles adjudicated in other states are not required to register in Kentucky.[212] The bill passed in the Kentucky Senate with a 35 - 1 vote on February 24, 2017, and was received in the Kentucky House of Representatives on February 27, 2017.[213] On March 15, 2017 the House passed the bill with a vote of 85 - 9.[214] The Senate passed its concurrence to the House Committee's version unanimously, and the President of the Senate and the Speaker of the House both signed the bill March 29, 2017.[215] The bill became law on April 10, 2017 with Governor Bevin's signature.[216]

The aim of S.B. 120 was to make it easier for adjudicated persons to re-enter society, thus limiting the cycle of recidivism by not requiring juveniles to register as sex offenders.[217] As such, S.B. 120 will be retroactively applied to juveniles that have already been adjudicated for a sexual offense outside of Kentucky.[218] Under this policy, juveniles that move to Kentucky for employment purposes and those that enter the state as a student will not have to register as sex offenders if they have a prior adjudication for a sexual offense in another state.[219]

In another important development, the bill was amended while being

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[211] *17RS SB120*, KENTUCKY LEGISLATURE, http://www.lrc.ky.gov/record/17rs/SB120.htm (last visited Apr. 6, 2018).
[212] S.B. 120, 2017 Reg. Sess. (Ky. 2017).
[213] KENTUCKY LEGISLATURE, *supra* note 1.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] Don Ball, Opinion, *House Can Help Turn Kentuckians Away From Crime By Approving SB 120*, LEXINGTON HAROLD LEADER (Feb. 28, 2017), http://www.kentucky.com/opinion/op-ed/article135512713.html.
[218] S.B. 120, 2017 Reg. Sess. (Ky. 2017).
[219] *Id.*

discussed by the House of Representatives to include a requirement that the Department of Kentucky State Police establish a child abuse registry.[220] The registry would only include child abuse offenders convicted under certain statutes for offenses against victims who were younger than 18 years old.[221] Along with these requirements, the amendment allotted a portion of the expungement fees that the state collects to establishing and maintaining both the registry for child abuse offenders and the registry for sex offenders.[222]

In summary, this bill keeps juveniles who have been adjudicated in other states for a sexual offense off the sex offender registry, but implements a new registry for child abuse offenders. It is important to destigmatize juveniles entering the state to enable them to pursue new opportunities that will deter recidivism among adjudicated juveniles. On the other hand, it is important to make the public aware of offenders who have abused children as a deterrence to future abusers and a safety precaution to children who might otherwise be put unknowingly around adults with a history of child abuse. Both sections of the bill help improve child welfare.

[220] *Id.*
[221] *Id.*
[222] *Id.*

ILLINOIS LEGISLATION

🕮 H.B. 3817 (S.B. 2021)
2016-2017 Leg., Reg. Sess.
Report by Taylor Foland

Representative Elaine Nekritz and Senator Michael Hasting sponsored amendments to H.B. 3817 (S.B. 2021) – the Youth Opportunity and Fairness Act – signed by Governor Rauner on August 24th, 2017.[223] The amendments bring Illinois state law in line with the recommended American Bar Association standards for youth justice.[224] H.B. 3817 seals juvenile records from the general public, mandates more consistent and systematic expungements of juvenile records, and reduces potential effects of infractions on the futures of those in the juvenile justice system.[225]

Prior to the current amendment, H.B. 3817 allowed the general public to access juvenile records at the discretion of the presiding judge.[226] Sections pertaining to this issue have been stricken and in their place are express instructions barring general public access to juvenile records.[227] Furthermore, sealed records may only be obtained by "authorized parties," with a court order, provided they are used for a "good cause".[228]

The amendments also seek to reconfigure the way Illinois courts expunge juvenile records.[229] Northwestern University's Bluhm Legal Clinic found that in the past decade, less than 0.3 percent of juvenile records were expunged due to procedural blockades.[230] Amendments to H.B. 3817 provide for automatic expungement of all juvenile records on or before the first of January of each year if the individual meets certain threshold requirements (e.g. time since last offense or classification of offense).[231] Moreover, the need to retain portions of a juvenile's record does not bar

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[223] H.B. 3817, 2016-2017 Leg., Reg. Sess. (Ill. 2017).

[224] Elizabeth Monkus, *Youth Opportunity and Fairness Act*, CHICAGO APPLESEED FUND FOR JUSTICE (Apr. 7, 2017), http://www.chicagoappleseed.org/youth-opportunity-and-fairness-act/.

[225] H.B. 3817, 2016-2017, Leg., Reg. Sess. (Ill. 2017).

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] Lee Edwards, *Juvenile Justice Reform Gets a Shot in the Arm With New Act*, CHICAGO DEFENDER (Sep. 18, 2017), https://chicagodefender.com/2017/09/18/juvenile-justice-reform-gets-a-shot-in-the-arm-with-new-act/.

[230] H.B. 3817, 2016-2017, Leg., Reg. Sess. (Ill. 2017).

[231] *Id.*

expungement of the rest.[232]

Lastly, in an effort to mitigate long lasting damages based on interactions with the law prior to one's eighteenth birthday, the bill prevents juvenile adjudications from imposing civil disabilities ordinarily imposed by or resulting from an adult conviction on the youths in question, unless specifically authorized by law.[233] This precludes one's juvenile record from influencing civil service applications and appointments, holding public office, or obtaining a license from a public authority.[234]

[232] *Id.*
[233] *Id.*
[234] *Id.*

UTAH LEGISLATION

🕮 H.B. 123
2017 Gen. Sess.
Report by Elizabeth Scott

Utah House Bill 123 ("H.B. 123") was introduced to the state legislature by Marc K. Roberts and Todd Weiler.[235] H.B. 123 amended definitions and punishments for juvenile offenses and established a new provision criminalizing adolescents sexual activity.[236] H.B. 123 unanimously passed the Utah House of Representatives on February 28, 2017 and unanimously passed the Utah Senate on March 9, 2017.[237] The bill was signed into law by Utah Governor Gary Herber on March 25, 2017 and went into effect on May 9, 2017.[238]

The main focus of the bill was the creation of a new provision governing the act of unlawful sexual activity between adolescents.[239] Utah Criminal Code Section 76-5-401.3, "Unlawful adolescent sexual activity," targets adolescents between the age of twelve and eighteen who engage in sexual activity with another adolescent. [240] It excludes crimes such as rape, forcible sodomy, and aggravated sexual assault that are punishable under other sections of the Utah Criminal Code.[241]

Rather than targeting adolescent sexual activity as a whole, the bill primarily focuses on adolescents who are engaged in sexual activity with younger adolescents.[242] The new provision establishes different levels of offenses, ranging from Class C misdemeanors to third degree felonies, depending on the age of the offender and the age of the other adolescent.[243] Only one offense punishes an adolescent who engages in sexual activity with another adolescent who is the same age or slightly older, and this is

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[235] H.B. 123, 2017 Gen. Sess. (Utah 2017), *available at* https://le.utah.gov/~2017/bills/static/HB0123.html.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *See id.*
[243] *Id.*

limited to adolescents who are twelve to thirteen years old.[244] Comparatively, there are six offenses punishing an adolescent who has sex with another adolescent who is at least two years younger, and one offense punishing an adolescent who has sex with an adolescent who is a year younger.[245] The higher level offenses are reserved for older offenders who engage in sexual activity with a significantly younger partner.[246]

The bill does not specify jail time or fines associated with these offenses.[247] Adolescents charged under Section 76-5-401.3 are not eligible for non-judicial adjustment or referral to youth court.[248] However, perhaps in an attempt to mitigate the long-term impact of a conviction, adolescents who are convicted under this law, unlike with other sexual offenses, do not have to register as a sex offender.[249]

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[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*; *see also* Utah Criminal Code, Title 77, Chapter 41, Section 106.