



Senate Bill 808 also proposes to include a youthful offender offense as follows: a) criminal sexual contact of a minor, b) attempt to commit any listed youthful offender offense, and c) attempt to commit first degree murder, for which a juvenile.

Finally, this bill proposes to change the procedure for a probation revocation to allow the judge to hear and consider hearsay in determining whether the child committed a probation violation.

### Significant Issues

According to the Office of the Attorney General:

1. At first glance, the new material proposed in this bill seems to implicate the due process rights of a child accused of a crime. Under the due process clause of the United States Constitution, a person who is not competent to stand trial cannot be detained, or committed, and ordered to receive treatment to attain competency for a longer period of time than is reasonable under the circumstances. Jackson v. Iniana, 406 U.S. 715 (1972). Our Supreme Court has held that, in the context of the treatment of adult criminal defendants, it is reasonable to order involuntary commitment for the maximum length of time the defendant would serve in prison if found guilty of the charges, as long as the defendant continues to be incompetent to stand trial and continues to be dangerous. State v. Rotherham, 122 N.M. 246 (1996).

It appears that the specific, detailed procedures outlined in this bill are an attempt to ensure that a child's due process rights are not violated, while also ensuring that charges against a child are not dismissed until the court is sure that (1) treatment to competency is not possible, or (2) the child is dangerous (presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA 1978).

This bill mirrors somewhat, although not exactly, the procedures outlined for adults found incompetent to stand trial in the Mental Illness and Competency Code (Sections 31-9-1 to -1.5 NMSA 1978). The New Mexico Supreme Court has found that statute to be constitutional.

2. The second sentence of Subsection (A)(1) is confusing. The purpose of that section appears to be to require the trial court to stay the proceedings until the child's competency has been determined and to provide that the time limitation for commencing the adjudicatory proceeding be stayed. This purpose could be accomplished with more clear language in the second sentence, such as the following: "A stay under this section shall stay the time limitation for commencing an adjudicatory proceeding."
3. Subsection (B)(2) is likewise confusing. This subsection allows the court to order an incompetent child detained and involuntarily committed pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act (CMHDDA). However, the CMHDDA itself contains specific procedures and criteria for the involuntary commitment of a child, some of which may conflict with the procedures or criteria proposed in this Section. The purpose of this Section appears to be to allow the court to order involuntary commitment for treatment to competency, while assuring that the child receives

the same rights and treatment to which he would be entitled under the CMHDDA. This would be better accomplished with the following language: "order the child detained in the custody of the department and involuntarily committed to an institution for the treatment of developmentally disabled or mentally disordered juveniles until further order of the court. A child detained pursuant to this section shall enjoy all the substantive rights set forth in the Children's Mental Health and Developmental Disabilities Act."

4. Subsection (E)(3) allows the court to continue its original treatment order (order for treatment to attain competency) if the court finds, after hearing, that the child is incompetent, but is dangerous (presents a serious threat of inflicting great bodily harm on another or of committing criminal sexual penetration or criminal sexual contact). However, the original treatment order may, but does not have to, provide for conditions of release or involuntary commitment. Since this section would apply to a child found to be dangerous, the court should be allowed to amend the original order to add conditions of release or involuntary commitment if the original order did not provide for that. Thus, this paragraph should be amended to state: "the child is incompetent to proceed and that the child is not making progress toward attaining competency and that the child continues to present a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA 1978, the court shall continue its original treatment order, or enter an order for treatment to attain competency and conditions of release or involuntary commitment, as provided in Subsection (B) of this Section." For the same reason, the same change should be made to Subsection (F)(3)(a).
5. Currently, Section 32A-2-21 provides for the disposition of a mentally disordered or developmentally disabled child in a delinquency proceeding. This bill proposes to repeal Subsection (G), which is the section that currently deals with incompetent juveniles, and replace it with the New Material. If that is done, then Section 32A-2-21 would not apply to incompetent juveniles. However, as it reads in this bill, it would apply to an incompetent juvenile who is developmentally disabled or mentally disordered. This could create a conflict over which section would apply. Therefore, Subsection (A) of Section 32A-2-21 should be amended to read as follows: "If in a hearing at any stage of a proceeding on a delinquency petition the evidence indicates that the child is or may be developmentally disabled or mentally disordered, but is not incompetent to stand trial, the court may:"

## FISCAL IMPLICATIONS

There are no direct fiscal implications to the state. However, there will be secondary costs associated with the courts deciding these matters and the facilities to which the children judged incompetent and/or dangerous will be committed.

## AMENDMENTS

As discussed above, the following amendments to the New Material proposed in this bill are recommended:

1. (A)(1): if the child's competency is questioned, the court shall stay further proceedings until the issue is determined. A stay under this section shall stay the ~~The~~ time limitation for commencing an adjudicatory proceeding ~~shall be stayed for the period of time the proceedings are stayed pursuant to this section;~~ and

2. (B)(2): ~~order the child detained and initiate proceedings for the involuntary commitment of the child pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act. If the child is placed for residential treatment or habilitation pursuant to the provisions of that act, the department shall retain legal custody during the period of involuntary placement or until further order of the court in the custody of the department and involuntarily committed to an institution for the treatment of developmentally disabled or mentally disordered juveniles until further order of the court. A child detained pursuant to this section shall enjoy all the substantive rights set forth in the Children's Mental Health and Developmental Disabilities Act.~~
  
3. (E)(3): the child is incompetent, that the child is not making progress toward attaining competency toward attaining competency and that the child continues to present a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA 1978, the court shall continue its original treatment order, or shall enter a new order for treatment to attain competency that includes conditions of release or involuntary commitment, as provided in Subsection (B) of this Section; provided that the question of the child's competency shall be reviewed again not later than six months from the original determination of incompetency; or . . .

In addition, Section 32A-2-21(A) should be amended as follows:

If in a hearing at any stage of a proceeding on a delinquency petition the evidence indicates that the child is or may be developmentally disabled or mentally disordered, but is not incompetent to stand trial, the court may: . . .