2017 Utah Juvenile Justice Legislation

April 24, 2017

HB 101, HB 145, HB 197, HB 199, HB 283, SB 32, SB 54, SB 75, SB 85, SB 89, and SB 91

These bills are all child welfare amendments that have to do with adoption and a few other things; HB 199 is interesting in that it is aimed at curtailing rehoming. Look them up if you're interested; the rest of this legislative update focuses on delinquency-related legislation.

HB 123

This bill affects what is essentially voluntary sexual activity between minors (some of which is currently considered legally nonconsensual due to age regardless of whether it is engaged in voluntarily). It's hard to explain this bill. Its origins appear to be the Salt Lake public defender getting together with sympathetic legislators to try to codify a broad interpretation of the *In Re. Z.C.* Utah Supreme Court decision, and slap at juvenile prosecutors for supposedly overcharging. The main thrust of the legislation originally seemed to be to make it not rape of a child to have sex with someone under 14 if it's essentially voluntary sex and there isn't much of an age difference. The bill also tries to cut some slack to people who committed sex offenses as minors but weren't caught until after they turned 21, and so ended up being prosecuted in district court. There were wildly varying versions of this bill changing throughout the session, and then toward the end of the session the Speaker of the House got some people together and rammed through yet another variation. The Speaker reportedly had the opinion that school or teenagehood or whatever is a bubble of its own little world where minors do things like have sex, and we don't really want to get involved in that in most cases. So apparently we still cite minors for tobacco, because of what a cigarette can do to them, but the legislature doesn't want to do as much to dissuade sexual activity, which must be much more innocuous than smoking a cigarette. With the existing 76-5-401 "Unlawful Sexual Activity with a Minor" code section now only applying to offenders over 18, the current structure of stair step increases in offenses depending on age differences will be replaced on May 9 with on odder structure that only tries to limit some things. What replaced most of section 401 is Utah Code 76-5-401.3, called "Unlawful Adolescent Sexual Activity." Thrown together as this legislation was, it's hard to tell when the "Rape of a Child" statute applies to some conduct and when this new section does. It's hard to tell exactly what the intent of the legislation is. Just read it, and be aware that it spells out eight different permutations in which minors of ages 12–17 could have voluntary sex that will be illegal under this section starting next month (fourteen is no longer a magic number in the Utah Code) instead of under the old law, and it tells you what level of offense each type of sexual interaction is.

These are not offenses that can be nonjudicialed or sent to youth court (it's unclear on how the no-youth-court part applies if it happens in a school once HB 239 goes into effect). If a permutation isn't listed, it's probably legal if it's consensual sex (rape is mostly still rape). The nutshell:

- 17 year old with a 12 or 13 year old=third degree felony level offense
- 16 year old with 12 year old=third degree felony level offense
- 16 year old with 13 year old=class A misdemeanor level offense
- 14 year old or 15 year old with 12 year old=class A misdemeanor level offense
- 17 year old with 14 year old=class B misdemeanor level offense
- 15 year old with 13 year old=class B misdemeanor level offense
- 12 year old or 13 year old with 12 year old or 13 year old=class C misdemeanor level offense
- 14 year old with 13 year old=class C misdemeanor level offense

HB 239

This is the biggest change in Utah's juvenile justice system in decades. It seems to be based on the wildest fantasies of the Salt Lake public defenders, married with the opinions of one of the many outside groups that tries to export one-size-fits-all reforms to the various states, sold to an unholy alliance of libertarian legislators who hate the government doing anything, liberal legislators who hate cops and prosecutors and love doing touchy feely things, and conservative legislators who are supposedly for law and order but more than that hate spending tax money unless they're getting perfect results, all figuring they're each getting something out of this so let's all pretend to buy the propaganda about this being good for children, and pass it. The aforementioned propaganda is the notion spread by a badly flawed working group report released late last year claiming, based on bogus data and bad logic, that juvenile court actively hurts minors, and that science has suddenly determined that the best thing for minors is to spare them from juvenile court intervention (something that coincidentally also happens to give each of the aforementioned interest groups just what they most want). Ideology never requires truth, and that proved to be the case with the working group report. Of course, it may well be true that the juvenile courts in Salt Lake hurt minors, but this legislation doesn't just affect them, it affects us all.

The best way to understand the 5,108 lines of HB 239 is to do a thought experiment. If you wanted to destroy the juvenile justice system in Utah by passing a law, how would you do it? Your first thought might be to simply pass a law eliminating juvenile court. But that wouldn't work. The voters would notice, and there would be an uproar. Few people want there to be no justice system at all for kids. What about leaving the juvenile justice system in place, but utterly eviscerating it so that it cannot put any pressure on delinquent minors to change? Yes, that

would do it. As long as it was sold with a "reform" tag, the voters probably wouldn't be sophisticated enough to notice what was really going on; the legislators certainly aren't. By coincidence, that's exactly what HB 239 tried to do, which illustrates why it was so dangerous. The original version of HB 239 would have kept most offenses committed in school from being referred to juvenile court, and kept truancy from going to juvenile court; schools would essentially have had to become their own police and court system, since SROs and juvenile court would have been prohibited from having anything to do with most offenses occurring at school (technically, schools could have chosen to handle even murder charges, prohibiting them from going to court). It would have made it difficult to put minors into detention. It would have dramatically limited fines and community service hours and restitution that could be imposed to very low, token amounts. It would have eliminated intensive probation and other mid-level interventions. It would have restricted who could be put in JJS custody, and greatly limited the amount of time anyone could spend in JJS custody. It would have closed Observation and Assessment, Genesis, and other JJS programs (some of which are already closing). And here is perhaps the most interesting thing: it would have prohibited judges, probation, JJS, etc. from doing anything if minors simply refused to comply. If a minor refused to pay a fine, the court would not have been able to hold her in contempt and lock her up. If a minor refused to participate in a program, JJS would not have been able to keep her because only seat time would have mattered rather than cooperation. The original bill took great pains to prohibit any ability to actually enforce court orders, because it viewed that as a main way minors get locked up unfairly. Think about that. A system that can perhaps give someone ten hours of community service for all the charges before the court, but can't do anything if they refuse to do the hours, is a system that will quickly become known as a complete joke. It would not take Utah's minors long to figure out that such a juvenile court has no teeth, that without consequences there is no accountability (a word that some deluded employees in the system have actually been criticizing in recent years). The result would have been that Utah would have turned into a monster factory.

Fortunately, there was a small uprising against the legislation, although a lot of it was about money (counties not wanting to pay for free attorneys for everyone including rich minors, or to a lesser extent not wanting to pay for prosecutors to do extensive new screening, and eventually some schools figuring out what was about to happen to their budgets). The final bill was moderated some. Schools will not have as much work, courts will be able to impose limited contempt penalties, and so forth. But it is still a bad bill that will create significant problems out in the real world, and that will prove a boondoggle when the state has to spend money to reopen closed facilities and rehire workers once actual offenses in the community (as opposed to what the system will choose to count) start rising. What we are left with is this:

HB 239 Changes Taking Effect on May 9, 2017

The Commission on Criminal and Juvenile Justice (CCJJ) will begin monitoring how the juvenile courts implement the legislation. It doesn't appear that the juvenile judges are much concerned about the separation of powers issue here. In fact, they want to "embrace" the so-

called reforms so very badly that many of them are implementing the changes long before they even become law, in some cases intentionally violating existing law to do so.

DHS is supposed to begin transferring money supposedly saved by this legislation into front end programs. These imagined savings sound a lot like how JRI was supposed to result in massive amounts of savings in the adult system that would then go to fund substance abuse treatment for all the former felons now getting no punishment because they were supposed to get treatment instead. Hold it, now, didn't that actually not ever happen?

HB 239 Changes Taking Effect on August 1, 2017

Schools

Some delinquency offenses occurring at school will no longer be referred to juvenile court. Infractions, status offenses, and class C misdemeanor-level offenses that occur at school will not be referred to the police or to juvenile court. Instead, these will be dealt with by mobile crisis outreach teams (MCOTs, a supposedly evidence-based intervention that few people have heard of), or other restorative justice programs (it's ironic to call them "restorative justice," since restorative justice is victim focused, and HB 239 definitely is not), or a JJS receiving center (transportation would be an interesting issue, and receiving centers—which are different from truancy centers in that they are JJS run temporary shelters—will likely not be amenable to seeing many of these minors), or youth courts (but youth no longer have to admit anything, or waive self-incrimination, to participate). It appears that this applies only to offenses that enrolled students commit in their own schools. Most misdemeanor offenses will be reported to school administration rather than to law enforcement, and except for the offenses that schools alone are to handle under HB 239, non person misdemeanors will be referred to juvenile court by school administration at the administration's option. There had better be a pretty good police-style reports sent in as part of those referrals! Have your school district's attorney and administration get on this, because although the initial version of the bill was much worse for schools, the final version will still make demands of school districts, and schools need to be familiar with the changes to Utah Code §§ 53A-11-911 and -1302 in particular. It's really unclear what role SROs will have in terms of dealing with assaults, drugs, etc. in schools. Hopefully they will essentially be considered as authorized by the school administration under HB 239 to investigate and refer minors to juvenile court. Expecting school officials to be conversant with things like the difference between class C and class B misdemeanors is rather silly; it's not their job to be cops or lawyers. There are other oddities all through HB 239, one of which is that compliance officers at schools will not be able to issue tobacco citations, but if a tobacco citation is issued (and it's hard to say who would be doing that) then the school will handle it. One wonders why school officials would be investigating alcohol and drug offenses and assaults, instead of using SROs, although the parameters of this are open to question; mandatory reporting laws for relevant offenses are still in place. There will be a truly bizarre provision in Utah Code § 78A-6-

603(7) suggesting that for offenses referred from schools, prosecutors might do the PI; it is safe to assume that will not be happening in Utah County.

Habitual disruptive student behavior citations will be eliminated, which is good, as they were just a source of confusion that few people even knew about.

Truancy referrals, which have been used frequently, will no longer be made to juvenile court (compulsory education prosecution of some parents remains). School officials or law enforcement can take truant minors to truancy centers. Referral to DCFS for truancy is discouraged, and in practice it would be hard to get DCFS to do anything anyway.

DCFS

Although in the course of a delinquency case the judge can order that DCFS look into providing in home services, the juvenile court will not be able to order that a minor go into DCFS custody as part of delinquency disposition.

Normal Delinquency

Nonjudicial adjustments will be required for infractions, status offenses, and misdemeanor-level offenses referred to juvenile court if there are fewer than three prior nonjudicials and more than three prior unsuccessful nonjudicial attempts (it will be interesting to see how that "and" is interpreted, and how "unsuccessful" is interpreted). This is when nonjudicials are required; they can optionally be done forever, though, if a minor is considered low risk (keep in mind that the Mountainview High stabber who tried to murder several students was afterward assessed as low risk). If a supposedly validated risk and needs assessment says that a minor is high risk, or if the minor is a moderate risk and the referral is for a class A misdemeanor-level violation of Title 76, Chapter 5 (assault provisions) or Title 76, Chapter 9, Part 7 (mostly lewdness provisions but also intoxication), then the intake PO will be able to ask the prosecutor to screen the case to decide whether it should be petitioned or dismissed rather than having the PO do a PI. POs will be able to nonjudicial other kinds of cases as well on occasion, but the Utah County Attorney's office suggests in the strongest possible terms that it would be extremely unwise for a PO to try to nonjudicial a murder charge. POs will not be able to refuse to offer a nonjudicial because a minor cannot afford to pay as determined by a sliding scale to be developed in 2018, or for that matter because a minor declines to admit guilt. That's a hoot! Nonjudicial fees can still be up to $250, but that will be limited in 2017 to ability to pay under a sliding scale to be developed statewide by 2018. If a minor declines to enter into or fails to comply with a nonjudicial agreement, then the prosecutor will be able to look at the case and decide whether to petition it, send it back for another try at a nonjudicial, or dismiss; petitioning the case cannot be done because a minor failed to pay a nonjudicial fine or fee. Judges will be able to send petitioned cases back for nonjudicial adjustment. There is some ongoing debate over whether prosecutors will begin drafting petitions for everything that needs to be petitioned, or only some petitions.

Detention will no longer take minors for any three or more non status misdemeanors in a single episode, but can take minors on single misdemeanors designated as holdable misdemeanors, of which there is a list. Minors who could go to detention may also go to receiving centers instead. Credit for good time in detention will become automatic, not requiring a judge's order. On a side note, holding standards for keeping minors in adult facilities will be developed by CCJJ, not JJS. As of this week, Slate Canyon detention is still obeying the law regarding not implementing the new detention standards early, because existing law requires them to obey existing law. The police may not know that, though, because for the first time ever Slate Canyon only had two minors in detention, a condition that leaves right thinking people aghast.

Observation and Assessment will be eliminated as a residential thing (although that was already in process). There will be so-called in home O&A.

Dispositions are changing, although the major changes do not go into effect until 2018; that said, our local juvenile judges are already implementing the 2018 reduced sanctions as they pertain to things like community service hours and fines (which they could do even without HB 239, since the hours and fines they impose are largely up to them). Starting in August of 2017, driver license suspensions will be optional and will apply primarily to minors 16 or older at adjudication who were in actual physical control of a vehicle when committing a substance abuse offense ("actual physical control" is defined broadly in Utah case law). It's a sloppy fix, but at least it finally corrected most of the draconian suspension provisions of the recent past. Some of our local judges have already decided not to suspend beginning immediately, which violates existing law, and being flagrantly illegal shows an utterly despicable contempt for the rule of law. "Substance abuse" has become "substance use disorder," and if an initial screening indicates that it is called for, judges will be able to order a screening and assessment for an initial substance abuse charge (an assessment for a second charge is not required); some of this goes into effect this year, and some next year, and it's another effort to come up with ways to limit what happens to minors so that juvenile court will intrude less upon their lives. Restitution is to be for "material loss" as newly defined; whether that's constitutional might become a good question. The sentencing matrix has apparently died without a peep.

State Supervision (intense probation/intermediate sanctions) will be eliminated.

Genesis will be eliminated (although that was already in process), as will other forms of residential work restitution programs.

JJS is supposed to offer only evidence-based programs (whenever you hear phrases like "evidence-based" or "data driven" or "best practices," you know you're talking to a con artist; also, when you look up HB 239's definition of "evidence based" it's apparent that HB 239 itself isn't evidence-based, that few if any new programs can ever be implemented under the new definition, and that dressing up nutty reforms with phrases like "evidence-based" doesn't change the fact that lipstick on a chicken doesn't really dress up the chicken very well). JJS is supposed

to switch to nonresidential community placements (that's either an oxymoron, or JJS will just stop calling JJS custody "community placement"), and independent living, using the least restrictive placement possible. Judges placing minors in JJS custody are supposed to specify the criteria underlying the commitment. Restitution can be a consideration for placement or parole. Parole revocation is to be done in compliance with a system of appropriate responses that doesn't have to be developed until 2018, and revocation will require a hearing and proper findings. Community placements aren't for paroled minors. The division's director has been diligently assuring the legislature that JJS will do everything it can to save money by essentially doing as little intervention as possible, so it'll be an interesting time to be a JJS employee.

Warrants will no longer be possible for the welfare of the minor, or for status offenses or truancy. Judges can issue warrants in such cases that direct that a minor be returned home or to a shelter or to court.

Serious Youth Offender Cases, etc.

Of the three ways to transfer minors to the adult system to be tried as adults (direct file, the SYO process, and certification), direct file will change so that only aggravated murder and murder will be direct file offenses, not the charges on a list of specific other offenses (the same list as the SYO list) committed after having been in secure. Note that the SYO Act was gutted previously.

Police

See most of the above sections. And don't complain to me that nothing is happening to little criminals. I testified at the capitol against this thing, and warned others to contact their legislators. We got steamrollered, and this is what we have to live with until the pendulum swings the other way. For now, victims are going to have to get used to the fact that once HB 239 goes into effect most offenders will probably never see a judge, and those who do will often only get a whopping ten hours of community service or occasionally a few months in JJS custody.

HB 239 Changes Taking Effect on July 1, 2018

Normal Delinquency

The AOC and JJS are supposed to come up with a statewide system of guidelines guiding imposition of nonjudicial resolutions, custody, etc. The jargon is a system of "appropriate responses." No one but the bureaucrats knows what that means. Comrades! This is the brave way forward! We must embrace it!

Detention admission is going to require not just the meeting of the new admissions standards, and providing a probable cause statement that meets JJS guidelines (which has long been required), but also the use of a new detention risk assessment. Detention staff will be able to put someone in a less restrictive place if the minor does not qualify for detention (the statute says

that's detention staff's job, not the police officer's, which isn't actually a change in that respect). At a detention hearing the judge will consider the minor's risk to the community, but not the welfare of the minor, in determining whether the minor should be held. So, if the minor is likely to get herself killed upon release, that's not a reason to keep her anymore. To keep a minor in detention the minor must be a risk to the public, and there can't be a less restrictive place to put the minor. Every judicial district will be expected to have home detention options, and home detention is to be prioritized over detention. Regarding postadjudication detention, there will still be the possibility for an order of 30 days detention as a sanction, but it will only be 30 days for the entire adjudication (it's cumulative), and preadjudication detention will count toward the 30 days. So, for example, in the unlikely situation in which there has already been 30 days preadjudication detention, then there couldn't be postadjudication detention as a sanction. Detention orders will not be able to be suspended, because we are not supposed to be encouraging minors to behave through any means that holds something over their heads. A minor awaiting JJS custody can be held for 7 days regardless of preadjudication detention. Apart from the above, if at adjudication a minor needs to be held in detention pending a placement, the wait in detention should be for no more than three business days. There is already statutory language about this, but it has been tightened up. It will be possible for there to be a seven day extension upon written request and for good cause, but after that there will have to be reports from JJS every 48 hours showing clear and convincing need to extend the detention stay while awaiting placement in a placement. Yes, there are confusing, contradictory provisions here.

The very rare driver license suspensions or driver license seizures for any traffic violation that happens to set off a judge will now require that there had been actual physical control, which may not be much of a change.

Disposition is to be based on a risk screening, and on a risk and needs assessment if the risk screening calls for it. In addition, at the end of the court's jurisdiction over a minor who has received a risk and needs assessment, there is supposed to be another risk and needs assessment; good luck getting minors to stick around for that. Judges are not supposed to put minors into substance use disorder treatment unless there has been an assessment that calls for that, and such an assessment requires there first being a screening that calls for an assessment; also, there are no more mandatory drug hours. Community service (compensatory service) hours for minors under 16 will be a max of 24, and for minors 16 and older will be a max of 36. However, those are maximums. The presumption is 5–10 hours, and it looks like judges are frequently going to impose only 10 hours of community service on minors. Fines for minors under age 16 will be $180 max, and for minors 16 and older will be $270 max. The rate of conversion of fines to hours will be at the minimum wage rate, not at the current lower rate. These amounts are per episode, not per offense, so multiple offenses in one episode could result in a cumulative order of just 10 hours. Although not required by statute, as a practical matter it might be best to have separate petitions per episode (or ideally separate hearings) to maintain clarity on which offenses

are part of a single episode. Hours and fines are to be considered together in terms of making sure the overall mix is reasonable. Restitution is separate. There will be no more mandatory substance abuse hours or graffiti hours. Weapons restrictions cannot be placed on a minor's family. DNA requirements still exist, and reimbursement is secondary to payment of restitution. Placement in a nonsecure hospital, etc. is OK for treatment. Residential placements cannot be granted custody. Judges will not be able to suspend their orders, with the exception that JJS nonsecure custody can be stayed up to three months on the condition a minor not reoffend, but that exception requires lifting the stay at an adjudication during the term of the stay, so how likely is that?

Restitution can still be ordered, for material loss or for anything a minor agrees to pay; it may be that HB 239 does not favor restitution for treatment, although it does allow restitution for medical treatment. Prosecutors are supposed to submit a restitution request at disposition or within three months; in Utah County that will be a change if we go that direction instead of agreeing cooperatively with probation and the court's victim coordinator to work on that as we do now. The judge will not have to order restitution if a minor lacks the ability to pay. Courts should prioritize restitution over fines and community service hours. A judge will not be able to put a minor in detention or in a placement to coerce them to pay restitution. Court ordered restitution can be considered in release from a placement or parole; JJS is not to determine restitution amounts. Jurisdiction can be terminated without full restitution having been paid, if restitution is reduced to a judgment, although what good that does in an open question. Civil cases in which restitution is collected will be credited against juvenile court ordered restitution, and vice versa.

Probation will consist of intake probation and formal probation, which are defined. Probation orders are supposed to be individualized to address specific assessed needs, and not have undefined "control conditions" in the orders that are viewed by HB 239 as an evil because they could lead to contempts if a minor were to violate them, as by refusing to go to school or be home at night or avoid gang members or whatnot. We wouldn't want kids to have to behave in a reasonable manner, as it's better for them to be raised feral as the defense bar insists. When a minor is put on probation, the court will establish a presumptive length of probation and set reviews, and the length of probation will be reexamined at each review. Intake probation presumably lasts 3 months, and formal probation presumably lasts 4–6 months. Probation will be terminated when the presumptive time arrives, unless there is a need for continued treatment per a licensed service provider, or a reoffense, or hours or fines owing. There's a lot of bureaucratic gobbledygook surrounding these requirement that I lack to stomach to set out here.

JJS non secure custody (community placement) will be able to be ordered if nonresidential options are not feasible, with JJS providing dispositional recommendations to the court, and JJS coming up with a care plan. Going into JJS custody will require that a minor be adjudicated for a felony, and if not, for a misdemeanor but that there be five prior misdemeanor or felony episodes or a prior misdemeanor episode involving use of a dangerous weapon. JJS custody will not be

used as a sanction for contempts, infractions, status offenses, etc. There will be a review set and a presumptive length of custody, with length of stay reexamined and reset as necessary at each review; presumptive length is 3–6 months, and aftercare is 3–4 months. Statewide standards will be developed with guidelines for lengths of stay, incentives to shorten stays, and so forth. Successfully completing a program will require completing goals, not just putting in seat time as the original version of HB 239 said. Custody will terminate at the presumptive time unless a licensed service provider says more time is needed, or the minor reoffends, or hours or fines are owing. JJS will be able to continue to provide educational or rehabilitative services for a minor up until 21 if both JJS and the minor agree, and there is a grace period for the minor to change her mind if she initially declines. JJS is supposed to use performance-based contracts.

JJS secure care cannot be ordered for contempt, infractions, status offenses, and the like, and going into secure requires being a risk of harm to others, and being adjudicated for a felony, and if not, for a misdemeanor but that there be five prior misdemeanor or felony episodes or a prior misdemeanor episode involving use of a dangerous weapon. The judge no longer just turns things over to the Youth Parole Authority, but they split responsibility in some hard to figure out ways (the legislative drafting is a bit sloppy in this area, among others, as by saying both that the court and YPA can terminate custody). Apparently the judge will send someone to secure for a presumptive length of time of 3–6 months; the YPA will be expected to see a minor within 45 days rather than 90 to establish a presumptive length of commitment. Successfully completing a program will require completing goals, not just putting in seat time as the original version of HB 239 said. Not completing may result in an extension, as may reoffending. JJS is to contract for parole programs, for minors released from secure. Parole rescission or revocation hearings will have a lot of bureaucratic requirements. Being AWOL tolls time on parole. Parole is presumptively to be 3–4 months. Minors on parole can have JJS custody extended because of uncompleted hours. CCJJ will track extensions of time in secure beyond the presumptive length of stay. Note that the presumptive time frames for months in secure do not apply to minors sent to secure for committing any of the offenses that also make up the list of serious youth offender offenses (the ten deadly sins); a minor who commits an offense that is on that list may stay in secure for years.

Contempt can have consequences after all, following amendments to HB 239, but not many consequences: judges will be able to put minors in detention for up to 72 hours. Such orders cannot be stayed.

Collections will no longer be transferred to the office of state debt collection. Juvenile court orders will not extend beyond age 21 for collection of fines or restitution anymore.

There is no provision in this bill for judges to send a minor out to cut a willow switch.

Summary of some of the new presumptions going into effect mostly in 2018:

- Nonjudicial adjustment: required for many misdemeanors if there isn't much history or risk (see statute for details); $250 max but a sliding scale is coming
- Fines: Under 16, max of $180; over 16, max of $270; these are cumulative per episode
- Community service (compensatory service): Under 16, max of 24 hours; over 16, max of 36 hours; however, 5–10 hours is the statutorily preferred amount; these are cumulative per episode
- Intake probation: 3 months
- Formal probation: 4–6 months
- JJS custody (community placement): 3–6 months; aftercare: 3–4 months
- JJS secure confinement: 3–6 months; parole after secure: 3–4 months

All of this might be an incorrect interpretation of the law. I have attached a long handout of information from CCJJ that I got last week, and another from the Board of Juvenile Court Judges, so you will have additional perspectives.

Paul Wake