

Opinion No. 79-08

February 27, 1979

OPINION OF: Jeff Bingaman, Attorney General

BY: Michael A. Kauffman, Assistant Attorney General; Janice M., Ahern, Assistant Attorney General

TO: Dr. Charles Becknell, Secretary, Criminal Justice Department, 113 Washington Avenue, Santa Fe, New Mexico 87503

CHILDREN'S CODE

Children in need of supervision (CHINS) may be held in police custody until suitable facilities are located, but not longer than twenty-four hours. CHINS may not be held in a jail facility or with children alleged to be delinquent.

QUESTIONS

Under what circumstances and for how long may children in need of supervision (CHINS) be held in police custody before transfer to a facility as contemplated by Section 32-1-25(E) NMSA 1978?

CONCLUSIONS

See Analysis.

ANALYSIS

Under current New Mexico law, a police officer may take a child into custody pursuant to a court order, an arrest warrant, or if he has reasonable grounds to believe that the child has committed a delinquent act; or if the child is ill, injured or in immediate danger from his surroundings; or if he has reasonable grounds to believe that the child has run away from his parents, guardian or custodian. Section 32-1-22 NMSA 1978. As children are not taken into custody by a police officer unless the above criteria are met, the police officer should be able to determine whether he has custody of a child alleged to be neglected, delinquent, or in need of supervision and he must treat the child accordingly. As used in the Children's Code, Sections 32-1-1 **et seq.** NMSA 1978, "custody" means custody by law enforcement officers, and "detention" means custody by detention officers. Commentary, Rule 25, Rules of Procedure for the Children's Court (formerly Rule 26). The above distinction is a very fine one but it becomes significant when determining the consideration that must be accorded to CHINS.

A child may be held in custody for a period not to exceed twenty-four hours. Prior to the expiration of the twenty-four hour time period, the officer must: (1) release the child to

his parent, guardian, or custodian; (2) release the child with a written promise to appear; (3) take the child to probation services or a detention facility; or (4) take the child to a medical facility if medical attention is apparently needed. Section 32-1-23 NMSA 1978; Rule 24, Rules of Procedure for the Children's Court (formerly Rule 25). The purpose of allowing a twenty-four hour custody hold is to aid the officer when the child is part of an active investigation and to consider the possibility of the options set forth under the rule. The twenty-four hour custody hold does not pose a problem if there is probable cause that the child has committed a delinquent act, and the facility used for holding the child meets the standards of Section 32-1-25(C) NMSA 1978.

A problem does arise, however, if the child is allegedly a CHINS because there is no provision in the Code for detaining a CHINS in an approved jail facility. A CHINS may be detained only in a facility enumerated by Section 32-1-25(E), **supra**, which provides:

"E. A child alleged to be a child in need of supervision or a neglected child may not be detained in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses, or for the detention of children alleged to be delinquent children, except as specified for a child in need of supervision under Subsection B of this section, but may be detained in the following shelter care facilities:

(1) a licensed foster home, or a home otherwise authorized under the law to provide foster or group care; or

(2) a facility operated by a licensed child welfare services agency; or

(3) any other suitable place, other than a facility for care and rehabilitation of delinquent children to which children adjudicated as delinquent children may be confined under Section 32-1-34 NMSA 1978, designated by the court, and which meets the standards for detention facilities under the Children's Code."

When a CHINS is taken into custody the child must remain in the physical custody of the officer. The officer should ascertain the identity of the child and determine if the child is to be detained as required under Rule 24, **supra**. If detention is necessary, the officer should immediately begin efforts to comply with Section 32-1-25(E). Under no circumstances may a CHINS be held in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent children. This prohibition includes jail lock-up, drunk tanks or county jails. Consistent with the policy of Section 32-1-25(E), every effort should be made to expedite transfer of physical custody of the CHINS to a suitable shelter care facility.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General