



Chapter 4

LEGAL CONSIDERATIONS FOR DIVERSION PROGRAMS

SUMMARY

This chapter presents legal background, concepts, and considerations that need to be addressed by any prospective or current diversion program. Where possible, “legalese” has been replaced with plain English. Knowing that there will always be situations that make a practitioner question whether or not he/she is acting correctly, we have also included a common sense legal checklist. And, as always, when in doubt, check with a lawyer.

This is an introduction to some of the major legal issues that should be considered in the design of juvenile diversion programs. The emphasis is on the need to protect individual due process rights with specific suggestions on how to avoid difficulties later on by using clear, written guidelines at the outset.

Again, it is not possible to present any single best approach or to answer every legal question. There is a general trend in juvenile law toward greater adherence to due process rights in juvenile proceedings, as evidenced by changes in New Hampshire's juvenile code. However, due process and innovative diversion options do not need to be contradictory.

Designing a program to maximize the benefits of restorative justice, contain costs and still protect youths' rights need not be as difficult as it may sound. Concepts found in the Fourteenth Amendment, such as "due process" or "equal protection", when applied to diversion programs really mean that youth must be treated fairly and in a non-discriminatory manner. Programs must put in place procedures to minimize the potential for abuse. Fortunately, programs that treat youth fairly, provide procedures to rectify grievances, and motivate through positive reinforcement rather than coercion, not only meet constitutional mandates but also, we suspect, most effectively serve youth. More than the specific recommendations and information in this handbook, the most important advice we can provide is to seek assistance from professionals currently involved with juvenile justice issues including successful diversion programs, judges, JPPO's, other court personnel, and local attorneys. Having such individuals available as members of a board of directors or advisory board or through less formal arrangements may avoid problems you may encounter in this area.



Basic Guiding Principles

These basic principles can help you design a program that serves youth while protecting their constitutional rights:

- A. A youth's right and ability to reenter the formal juvenile justice system needs to be maintained. Diversion is a method of helping youth by maximizing positive intervention and minimizing exposure to the juvenile justice system. It is not a method of circumventing procedures designed to protect a youth's constitutional rights and should not be confused with the adult concept of *plea-bargaining*. At any stage in the diversion process, the youth has the right to return to court for a formal adjudicatory hearing and should be aware of that

right and to the extent possible, should be able to exercise that option without being penalized for having attempted diversion.

- B. Confidentiality should be maintained throughout. The laws of New Hampshire require that juvenile proceedings remain confidential and private (RSA 169-B:34,35). Diversion programs may inadvertently jeopardize confidentiality and stigmatize youth by involving the community volunteers who may be unaware of the privacy requirements. Training for those who participate in diversion programs should emphasize the need to maintain confidentiality.
- C. Diversion options should be non-punitive and should not restrict a youth's liberty. When individuals are subjected to punishment and/or loss of liberty, the Constitution requires strict procedural safeguards. Programs should avoid alternatives such as fines, humiliating experiences, and removal from the home. Restitution is generally acceptable but should be specifically related to the offense in order to avoid the appearance of being punitive.

Legal Considerations in Program Design

The following discussion covers points of constitutional and state law that need to be considered when designing the diversion process of any program.



Question: At what stage should diversion take place?

- A. **Prior to arrest (pre-incident)**—Programs working with pre-incident youth may be considered to be diversionary insofar as the youth may otherwise end up in court but they function more as prevention rather than diversion, with an emphasis on preventing any involvement with the juvenile justice system. However, since participation is voluntary, it should be made clear to the youth that no negative consequences will result should he/she refuse to participate or dropout.
- B. **Post-arrest, prior to filing of delinquency petition (pre-adjudication)**—New Hampshire law specifically allows juveniles who have been arrested to be diverted prior to the filing of a delinquency petition. Most researchers feel that diversion at this stage is most effective. Legally, it does not seem necessary to provide a lawyer for the youth and it is probably permissible to file the petition should the diversion program prove unsuccessful. Programs should ensure:
 - a. No coercion is used to get the youth to choose this alternative.
 - b. The parents or guardians must be present and both the youth and the parents should be informed that the youth has a constitutional right to a fair adjudicatory hearing at any time he/she so chooses.
 - c. A youth who requests a lawyer should be allowed to obtain one or have one appointed since the request usually indicates a feeling of coercion or confusion about the process or the consequences of the decision.
- C. **After the petition has been filed, prior to an adjudicatory hearing (pre-adjudicated)** New Hampshire law also allows diversion to take place at this stage. It is somewhat less preferable than the previous alternative since the youth is now at the arraignment stage of

the process. Again, participation must be voluntary and the youth now has a constitutional right to counsel although he/she may waive that right. Any such waiver should be knowing, intelligent, and voluntary.

- D. **Post adjudicatory hearing (adjudicated)**—If diversion occurs at this stage, it is essentially a disposition alternative. Because the youth has been in court, the benefits of diversion have largely been lost. There is now a record of delinquency, extensive involvement with the courts, and no reduction in cost to the system. Nevertheless, the court may still make use of the services and framework available through diversion programs. Since the youth has been so ordered by the court, involvement in such programs is not voluntary at this stage.



Question: Who is eligible and is actually offered diversion?

Diversion programs are traditionally meant for those juveniles who would otherwise be subjected to the juvenile court process. The Constitution requires that no restriction be placed on juveniles unless there is a reasonable belief that it is more likely than not that the youth committed the illegal act or acts. Even when such a belief exists, police officers, probation officers and judges often feel that a warning and release is most appropriate for some youth. When it is likely such an option would be chosen if no diversion alternatives existed, the youth should be diverted.

The needs of your own community and the services you are able and willing to provide will define your target population. Determination of who shall be offered the opportunity to take part in diversion should be based on objective criteria and should be readily available to juveniles along with their parents and attorneys. Criteria that can help you avoid arbitrary, discriminatory, or biased selection include:

- A. Criteria should be limited to factors that relate to the availability of the appropriate resources and the likelihood of success in the diversion program. Examples:
 - 1. **Acceptable Criteria**—Age, nature and seriousness of offense, previous record, stability of family or home situation, availability of appropriate services and previous experience with available programs.
 - 2. **Unacceptable Criteria**—Race, religion, national origin, family income and sex (along with anything that might incidentally reflect those characteristics such as residential location).
- B. There should be a formal procedure of appeal and review for youths who are denied the diversion alternative. The appeal should be to an impartial body not directly involved in the original decisions.



Question: What happens after completing the diversion program?

Once the youth has successfully complied with the requirements of the diversion program, he/she should be subject to no further court involvement. The charges are dropped and any court records expunged. If the youth re-offends at a later date, the diversion staff must have a procedure for refusing the referral. In reality, most youth and their families will be honest enough to admit that they have been in diversion before. What may not be readily apparent or admitted is if the youth has been in diversion elsewhere.



Question: What are the consequences of not completing the diversion program?

In those instances where the youth fails to complete the program or re-offends, matters become rather complex. The program administrators and their referral source(s) must have an agreed upon procedure. Most programs send the case back to the referral source with documentation for the reason(s) for failure and a recommended course of action. Some programs have avoided potential complications by establishing procedures whereby those who are diverted may not be brought back into formal juvenile process regardless of the outcome. Since the purpose of the program is to benefit the youth, the threat of further court action may well be unnecessary. If the youth is to be subjected to further court action, greater attention must be paid to the due process rights. The following provides some guidelines:

- ☞ **Pre-incident**—Involvement in the program is voluntary, and failure to continue may not result in further action.
- ☞ **Pre-adjudication**—It is probably permissible to file a petition following an unsuccessful attempt at diversion, if procedures are fairly established and followed. If a petition has already been filed, the arraignment process can probably go forth.
- ☞ **Adjudicated**—Diversion at this point is actually a component of disposition. As such, a youth who fails to comply may be in contempt of court and liable to further court proceedings.

However, the youth must understand the criteria for success and failure when committing to diversion. Some of those criteria include:

- ☞ **Written contract**—Prior to volunteering for diversion the youth should be informed in writing that he/she may be returned to court under certain conditions.
- ☞ **Time limitations**—Requirements should be objective, specific and capable of completion in a relatively short time. The courts have recently limited diversion to 90 days. For instance, restitution to the victim or attendance at a specified number of counseling sessions are probably permissible. "...successful completion of a counseling program..." is probably not.
- ☞ **Formal review**—There should be a formal grievance procedure so that the youth who feels he/she complied or failed to do so for circumstances beyond his/her control has a chance to be heard. Review should be by an impartial and detached body.

Waiver Of Legal Rights

Once a charged juvenile has been arraigned (RSA 169-B:13- See Appendix 5) or the juvenile alleged to be "...in need of services" has made an initial appearance (RSA 169-D:11) certain legal rights come into play. At that point youth have the right to counsel and to an adjudicatory hearing

within 21 or 30 days, depending on the offense alleged and whether the youth is detained in the interim (See RSA 169-B:12 and 169-D:12 for right to counsel and RSA 169-B:14 and 169-D:13 for the time limitations on hearings.) The juvenile may waive these rights, but any such waiver should follow strict procedural safeguards.

Waiver of Right to Counsel

New Hampshire RSA's 169-B:12 and 169-D:12 set out conditions for waiver of counsel. They include:

- **For Delinquents**—that the youth be represented by a non-hostile parent, guardian or custodian;
- **For Children in Need of Services**—that the petition was not filed by the parent, guardian or custodian;
- Both the youth and the parent, guardian or custodian agrees to the waiver;
- In the court's opinion, the waiver is made competently, voluntarily and with a full understanding of the consequences; and
- Detention does not occur at any point in the proceedings.

In the case of diversion programs in which the youth may be returned to court for failure to successfully comply with the conditions of diversion, problems may arise. Even with counsel, the youth and parents may have difficulty understanding the consequences of the decision to attempt diversion. These suggestions may be helpful:

- ☞ It may be preferable to have counsel present for the decision to waive counsel;
- ☞ Extra care should be taken to ensure that the youth and parents understand the issues and possible consequences;
- ☞ The youth should be aware of the right to counsel at any point should he/she change his/her mind;
- ☞ Should the youth return to court following an unsuccessful attempt at diversion, counsel should be appointed; and
- ☞ The youth should not face detention in any subsequent proceeding on the same offense.

Waiver of Right to Speedy Trial

The statutory requirements of a hearing within specified periods of time are equivalent to the right to speedy trial for adults. As such, the juvenile may waive it. In those instances where diversion takes place after arraignment such a waiver may be required. This issue can be avoided by diverting earlier in the process.



In Summary: A Checklist To Help Determine If You Are Acting Legally

There is no simple way to categorize the legal rights of juveniles, particularly in the diversion area. Common sense and attention to fair treatment will often be your best guide. When you must make decisions but need more information, we recommend you ask yourself the following questions. If

you can answer yes to all of them, you are probably on firm legal ground. When in doubt, always seek legal advice.

- ❑ Are all decisions based on objective, written criteria?
- ❑ Is there an impartial review process available to the youth for any decisions he/she may find unfavorable?
- ❑ Is the decision to attempt diversion voluntary?
- ❑ Is the youth aware of the right to return to court for a fair adjudicatory hearing at any time?
- ❑ Is the youth aware of right to counsel?
- ❑ Is there a contract signed by the youth and diversion personnel setting forth procedures, requirements, rules and options?
- ❑ Have all waivers of rights, where applicable, been obtained following proper procedures?

A Note on Court Approval

RSA 169 requires that diversion programs be court approved. Exactly what that implies is not yet clear. Does it mean approval of administrative procedures or approval of the substance of the diversion alternatives, or both? Can the court delegate the authority to approve programs to a court diversion officer? To a police diversion officer? To a citizen committee? What should be the criteria for approval of procedures and substance? Answers to these questions will have to be worked out as new diversion programs are developed and older ones face the test of use.

Currently, some programs receive their referrals straight from the police or schools and have little court involvement. While this may indirectly shield the program from the need for court approval, in the long run it acts as a detriment to full community support and significantly narrows the potential sources for referrals. Many programs have worked with their juvenile judge and drafted an *official* letter, signed by the court, signifying approval of the program. This recognition can be useful for funding and community support.