

TITLE 8 SOCIAL SERVICES
CHAPTER 10 CHILD PROTECTIVE SERVICES
PART 7 PROTECTIVE SERVICES LEGAL

8.10.7.1 ISSUING AGENCY: Children, Youth and Families Department (CYFD), Protective Services Division (PSD).
[8.10.7.1 NMAC - Rp, 8.10.7.1 NMAC, 3/31/2010]

8.10.7.2 SCOPE: Protective services employees and the general public.
[8.10.7.2 NMAC - Rp, 8.10.7.2 NMAC, 3/31/2010]

8.10.7.3 STATUTORY AUTHORITY: Children, Youth and Families Department Act, Section 9-2A-7 D, NMSA 1978; New Mexico Children’s Code, Section 32A-1-1, NMSA 1978 (Cum. Supp. 2009); and New Mexico Children’s Court Rules SCRA 10-1 et seq.
[8.10.7.3 NMAC - Rp, 8.10.7.3 NMAC, 3/31/2010]

8.10.7.4 DURATION: Permanent.
[8.10.7.4 NMAC - Rp, 8.10.7.4 NMAC, 3/31/2010]

8.10.7.5 EFFECTIVE DATE: March 31, 2010, unless a later date is cited at the end of a section.
[8.10.7.5 NMAC - Rp, 8.10.7.5 NMAC, 3/31/2010]

8.10.7.6 OBJECTIVE: To establish parameters for the provision of legal services for children at significant risk of abuse or neglect and children in the custody of CYFD.
[8.10.7.6 NMAC - Rp, 8.10.7.6 NMAC, 3/31/2010]

8.10.7.7 DEFINITIONS:

A. “Adjudication hearing” is the hearing that occurs within 60 days of service on the respondents at which the court determines whether the child is abused or neglected.

B. “Adjustment of status” is the application or procedure to obtain lawful permanent residency.

C. “Affidavit” means a sworn statement of facts and accompanies the petition for an ex-parte order. It is signed by any person who either has personal knowledge of the facts or has been informed of them and believes them to be true.

D. “Best interest of the child” is the standard that reflects the protection of the child from abuse and neglect. In motions to terminate parental rights and for permanent guardianship cases, the term encompasses stability and permanency in placement.

E. “Case planning issues” include placement decisions, permanency planning goals and treatment recommendations.

F. “Children’s Code” refers to the New Mexico Children’s Code, Section 32A-1-1, et. seq., NMSA 1978.

G. “Children’s court attorneys” are the attorneys who have been given the authority and the responsibility to represent protective services division (PSD) in child abuse and neglect and family in need of services proceedings.

H. “Child’s attorney” is a trained attorney appointed by the court to represent the child who is fourteen (14) years of age or older; also referred to as “youth attorney.”

I. “Citizenship and immigration services (CIS)” is the bureau within the department of homeland security responsible for processing immigrant related services and benefits, including special immigrant juvenile status (SIJS) and adjustment of status petitions.

J. “Constitutionally protected liberty interest,” in terms of the parent-child relationship, refers to the right of parents to the care, custody and nurture of their children; a parent’s constitutionally protected liberty interest includes retaining custody of one’s children and, thus, a state may not interfere with a parent’s custodial rights absent due process protections.

K. “Custodian” refers to an adult with whom the child lives who is not a parent or guardian.

L. “Custody hearing” is the hearing at which the court determines if probable cause exists for the child to remain in PSD’s custody pending adjudication.

M. “Date child enters foster care” means the earlier of 60 days from the date of removal of the child

or the date of the adjudication of child abuse or neglect.

N. “**Disposition**” means the court hearing which establishes custody and where the court may adopt a treatment plan for the child and family.

O. “**Emergency custody**” exists when a child is removed from the parent’s home based upon a determination by law enforcement that the child is in need of protective custody or based upon an ex parte custody order.

P. “**Ex parte custody order**” is an order issued by the court pursuant to an ex parte affidavit that grants emergency custody to PSD.

Q. “**Fictive kin**” means a person not related by birth, adoption or marriage with whom the child has an emotionally significant relationship.

Q. “**Foreign national**” or “**alien**” means a person who is not a United States citizen.

R. “**Guardian ad litem**” is a trained attorney appointed by the court to represent and protect the best interests of the child in a neglect and abuse proceeding when the child is less than 14 years old.

S. “**Immigration and customs enforcement (ICE)**” refers to the bureau within the department of homeland security that carries out investigation and enforcement functions. ICE has no authority over SIJS.

T. “**Indian child**” refers to an unmarried person who is

- (1) under the age of 18 years old;
- (2) a member of an Indian tribe or is eligible for membership in an Indian tribe; and
- (3) the biological child of a member of an Indian tribe.

U. “**Infant**” means a child less than one year of age.

V. “**Juvenile court**” under federal immigration law, means a court with jurisdiction under state law to make determinations over the care and custody of children. In New Mexico, the term used is children’s court rather than juvenile court.

W. “**Lawful permanent resident**” refers to a foreign national or alien with permission to live and work indefinitely in the United States, but who cannot vote (also known as a “green card holder”).

X. “**Legal custody**” means a legal status created by order of the children’s court or other court of competent jurisdiction or by operation of the New Mexico Children’s Code, Section 32A-4-1 et seq or 32A-3B-1 et seq, NMSA 1978, that vests in a person, department or agency the:

- (1) right to determine where and with whom a child shall live;
- (2) right and duty to protect, train and discipline the child and to provide the child with food, shelter, personal care, education and ordinary and emergency medical care;
- (3) right to consent to major medical, psychiatric, psychological and surgical treatment and to the administration of legally prescribed psychotropic medications pursuant to the Children’s Mental Health and Developmental Disabilities Act; and
- (4) right to consent to the child’s enlistment in the armed forces of the United States.

Y. “**Party**” in a neglect and abuse proceeding is any individual named in the petition or subsequently granted that status in the case by the court.

Z. “**Periodic review**” is a court hearing where the court reviews the treatment plan (case plan) and may modify the plan or adopt a new plan.

AA. “**Permanency hearing**” is a court hearing where the court reviews the progress made in the case, determines the permanency plan for the child and creates orders to expedite the achievement of permanency for the child.

BB. “**Permanency review hearing**” is a court hearing held within three months of the permanency hearing when the court has adopted a permanency plan of reunification and a transition plan or a court hearing held within 60 days of the permanency hearing when the court has adopted a permanency plan other than reunification and has determined that reasonable efforts have not been made to identify or locate relatives or fictive kin or reasonable efforts have not been made to conduct home studies on appropriate relatives or fictive kin interested in providing permanency for the child.

CC. “**Petition**” means the document filed with the court setting forth the allegations of abuse or neglect and relief sought.

DD. “**Protective services division (PSD)**” refers to the protective services division of the children, youth and families department, and is the state’s designated child welfare agency.

EE. “**Protective supervision**” is ordered by the court to allow PSD to visit the child in the home where the child resides, inspect the home, transport the child to court-ordered diagnostic examinations and evaluations and obtain information and records concerning the child.

FF. “**Reasonable medical judgment**” means a medical judgment that would be made by a reasonably

prudent physician, knowledgeable about the case and treatment possibilities with respect to the medical conditions involved.

GG. “Relative” means a person related to another person by blood within the fifth degree of consanguinity or through marriage by the fifth degree of affinity.

HH. “Respondent” refers to a parent, guardian or custodian of a child named in an abuse or neglect proceeding.

II. “Special immigrant juvenile status (SIJS)” refers to a status created by federal law that helps abused, neglected or abandoned a foreign national child in the juvenile court system to become lawful permanent residents where reunification and return to the country of origin are not viable options.

JJ. “Stipulation” is an admission or a plea of no contest by the respondent to one or more of the allegations in the petition.

KK. “Trial home visit” means the period of time, not to exceed six months, in which a child with a plan of reunification resides with the parent or guardian while services are provided to the child and family to address risk factors and ensure safety of the child.

LL. “Undocumented foreign national” or “undocumented alien” refers to a foreign national or alien without lawful immigration status in the United States. This includes persons who may have entered without legal permission or entered legally and overstayed his or her visa.

MM. “United States citizen” refers to a person born in the United States, Guam, Puerto Rico or the U.S. Virgin Islands, or a person, who “naturalizes,” i.e., becomes a United States citizen upon an application after five (5) years of being a permanent resident. This also generally includes children born abroad to United States citizen parents.

NN. “Use immunity” means that the in-court testimony, statements made in the course of court ordered psychological evaluation or treatment program, records, documents or other physical objects produced by a respondent who has been granted use immunity status by the court shall not be used against that respondent in a criminal prosecution.

OO. “Withholding medically indicated treatment” means the failure to respond to a child’s life-threatening condition by providing treatment which, in the treating physician’s reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions.

[8.10.7.7 NMAC - Rp, 8.10.7.7 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.8 PURPOSE OF PROTECTIVE SERVICES LEGAL POLICIES: The purpose of child protective legal services is to represent PSD’s position in court with regard to the permanency plans for children, protect children through legal intervention and facilitate permanency in relevant cases.

[8.10.7.8 NMAC - Rp, 8.10.7.8 NMAC, 3/31/2010]

8.10.7.9 THE CHILDREN’S COURT ATTORNEY:

A. Role of the children’s court attorney: The children’s court attorney shall provide information, interpretation of law and general assistance to PSD in the provision of child protective services and presents PSD’s recommendations in a court of law.

B. Attorney-client relationship: The primary decision-maker on the case shall be the PSD worker for the purpose of the attorney-client relationship.

C. Differences of opinion: When the children’s court attorney, PSD worker and supervisor cannot agree on the most appropriate course of action, the issues shall be resolved between the managing children’s court attorney and county office manager. The protective services director shall be the final arbiter in a decision.

D. Attorney-client privileged communications: Written and verbal communications concerning PSD business between a children’s court attorney and a PSD worker is privileged. Privileged communications may not be disclosed to a third party outside the department unless a specific decision with the appropriate approval has been made to waive such privilege.

E. No conversations concerning settlement or disposition shall occur in the absence the children’s court attorney representing PSD in the case.

(1) Direct contact between PSD workers and respondent’s counsel is limited to the exchange of routine information, such as, time for visitation and the name of psychologist to perform evaluation.

(2) PSD routinely informs the guardian ad litem or child’s attorney about important decisions relating to the child.

[8.10.7.9 NMAC - Rp, 8.10.7.9 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.10 GENERAL PROVISIONS:

A. Confidentiality and access to abuse and neglect records: Protective services records and information incident to, or obtained as a result of an abuse or neglect investigation or proceeding are confidential and can only be inspected pursuant to a valid court order, except by those entities specifically entitled to access under the New Mexico Children’s Code.

(1) When allowing access to an authorized entity, all attorney-client privileged information and all identifying information on the reporting source shall be stricken.

(2) Protective services records or information shall not be released pursuant to a subpoena because subpoenas do not reflect a determination by a children’s court judge that the requesting party has a legitimate interest in the case or the work of the court.

B. PSD uses the best interest of the child as the standard to make decisions regarding planning and managing child protective services cases. Protection and the best interest of the child are of paramount concern, followed by the treatment needs of the family.

C. Change of venue or transfer of legal cases: A motion to change venue shall not initiate absent approval of the sending and receiving county protective services offices. Venue shall not be changed on cases where a consent decree has been entered or adjudication has not occurred.

D. Child support: PSD shall make a report for the collection of child support to the child support enforcement division for all children in custody.

E. Home studies in domestic relations cases: There shall be no legal authority for courts to order PSD to conduct home studies in New Mexico domestic relations cases to which PSD is not a party.

(1) Children’s court attorneys shall object to requests for orders to conduct home studies in New Mexico domestic relations cases.

(2) PSD shall respond to a request for a home study as an abuse or neglect report, and screens and investigates in accordance with protective services policy.

F. Immigration status: Whenever the court adjudicates that a child is abused or neglected, PSD shall determine the child’s immigration status.

[8.10.7.10 NMAC - Rp, 8.10.7.12 NMAC, 3/31/2010]

8.10.7.11 PROCEDURAL PRINCIPLES:

A. PSD shall comply with the provisions of the New Mexico Children’s Code and the children’s court rules.

B. Emergency custody given to PSD by law enforcement shall not be extended.

C. When protective supervision has been ordered, the child shall not be removed from their home absent emergency custody granted by law enforcement, or by an order of the court.

D. Legal custody includes the right to place a child. If PSD has legal custody, the court shall only order a specific placement when PSD has abused its discretion in the placement or proposed placement of a child.

E. Allegations of abuse or neglect shall be made for each individual named as a respondent in a petition. To perfect PSD’s custody, both parents may be named as respondents. If there are no allegations as to one parent, then that parent may generally receive custody.

F. A father who does not have parental rights to the child, i.e. a constitutionally protected liberty interest, may be excluded from the petition.

G. A custodian may be named as a respondent.

H. If allegations of abuse or neglect are proven as to only one child, and PSD makes the decision that other siblings in the household are at risk and should be placed in PSD custody, then the children’s court attorney utilizes New Mexico case law to seek custody of those at-risk children.

I. A hearing on custody pending an adjudicatory hearing shall be held within 10 working days of the filing of the petition. A judgment granting custody to PSD remains in force for an indeterminate period not to exceed two years. If custody is still required to protect the child, then PSD shall request an extension of custody prior to the expiration.

J. An adjudicatory hearing shall be held in regard to the abuse or neglect of each parent. The time frame shall run separately based on the respective dates of service on each parent.

K. Parties shall not extend the time frame for “commencing” the adjudicatory hearing by agreement. Parties may seek an extension by filing a petition with the children’s court judge or the supreme court, as specified in Children’s Court Rules 10-343 (Adjudicatory hearing; time limits; continuances).

L. Prior to the adjudicatory hearing and permanency hearing, PSD shall meet with the other parties and shall attempt to settle issues attendant to the hearing and proposed treatment plan that serves the child’s best

interest.

M. Cases in which the child is removed from the home:

(1) In the first court order that sanctions the removal of a child from the home, PSD shall seek a judicial determination that continuing in the home would be contrary to the child's welfare, or that placement would be in the best interest of the child.

(2) PSD shall seek to obtain, within 60 days from the date the child is removed, a judicial determination that reasonable efforts were made, or were not required, to prevent removal.

(3) If feasible, both judicial determinations shall be sought simultaneously.

N. In those cases where a child remains in voluntary foster care longer than 180 days, PSD shall obtain a judicial determination prior to the one hundred eightieth (180th) day that the child's placement in voluntary foster care is in the best interest of the child.

O. At the first judicial review, PSD shall report the child's immigration status to the court.
[8.10.7.11 NMAC - Rp, 8.10.7.13 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.12 LITIGATION CONSIDERATIONS:

A. PSD shall make reasonable efforts to prevent removal of the child and, when removal is necessary, PSD shall make reasonable efforts to reunify the child, and to finalize the child's current permanency plan.

B. Reasonable efforts to prevent a child's removal from home, or to reunify the child and family shall not be required if PSD obtains a judicial determination that such efforts are not required because:

(1) a court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as set forth in the New Mexico Children's Code; or

(2) the parent or custodian has been convicted, by a court of competent jurisdiction, of murder or voluntary manslaughter of another child of the parent, or of aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or voluntary manslaughter, or convicted of a felony assault that results in serious bodily injury to the child or another child of the parent.

C. The child or youth participates in court proceedings in their case unless it is determined not to be in the child's or youth's best interest. At the permanency hearing, the child is consulted, in an age-appropriate manner, about the permanency plan developed for the child.

D. PSD shall pursue obtaining use immunity when PSD's reunification efforts may conflict with a criminal prosecution.

E. The PSD worker is PSD's primary witness on case planning issues.

F. PSD shall give the children's court attorney advance notice of all witnesses, expert or otherwise, to be called to allow sufficient time to secure subpoenas and service by the sheriff's department or contracted process servers. PSD shall reimburse for expert testimony, time and travel according to established guidelines. Payments which exceed the established guidelines shall be approved by the chief children's court attorney.

G. In a case where a parent has a recognizable mental or physical disability, PSD shows how services provided were designed to address the disability within the context of the parenting plan.

H. PSD shall seek to obtain judicial determinations that are made on a case-by-case basis, and in which the court states the specific reasons for its determination.

I. When a court rules against PSD on a significant issue, the children's court attorney shall initiate a discussion with the child's worker and the appellate attorney to determine whether there are grounds to appeal and the ramifications of the appeal on the department.

[8.10.7.12 NMAC - Rp, 8.10.7.18 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.13 STIPULATION: Settlement of a child abuse or neglect case at the adjudicatory stage involves a stipulation (admission or plea of no contest) as to the case-specific underlying factual basis of the allegation. In most cases, a stipulation to a lesser charge when there is an allegation of sexual abuse or severe physical abuse is unacceptable based on treatment issues and protection of other potential victims. The managing children's court attorney shall approve any exceptions.

[8.10.7.13 NMAC - Rp, 8.10.7.14 NMAC, 3/31/2010]

8.10.7.14 APPOINTMENT OF GUARDIAN AD LITEM (GAL) OR CHILD'S ATTORNEY: PSD shall request that a GAL be appointed to represent and protect the best interests of the child in a abuse or neglect proceeding when the child is less than 14 years old. PSD shall request that an attorney be appointed to represent the child 14 years of age or older.

[8.10.7.14 NMAC - Rp, 8.10.7.17 NMAC, 3/31/2010]

8.10.7.15 DOCUMENTATION TO COURT:

- A.** PSD shall complete and provide reports to the court and other parties as required by law.
- B.** The children’s court attorney shall provide documentation and evidence so that the court may make specific factual findings in determinations of:
 - (1) reasonable efforts to prevent removal;
 - (2) reasonable efforts not required to prevent removal;
 - (3) reasonable efforts to finalize the permanency plan in effect; or
 - (4) reasonable efforts to place siblings together unless joint placement would be contrary to the safety or well-being of any of the siblings, and whether siblings not jointly placed together have been provided reasonable visitation or other ongoing contact unless contrary to the safety or well-being of any of the siblings.
- C.** The children’s court attorney shall provide the court with a documented description of the child’s current foster care placement, and whether it is appropriate in terms of the educational setting and proximity to the school the child was enrolled in at the time of the placement, including plans for travel for the child to remain in the school in which the child was enrolled at the time of placement, if reasonable and in the child’s best interest.
- D.** The children’s court attorney shall document to the court the compelling reasons for seeking placement in the legal custody of PSD under a planned permanent living arrangement as the child’s permanency plan when PSD has considered reunification, adoption, permanent guardianship, or placement with a fit and willing relative, or fictive kin and has concluded these are not the most appropriate permanent plans for the child.
- E.** If the court adopts a permanency plan other than reunification, the children’s court attorney shall provide documentation and evidence so the court may make a specific factual finding in determinations of reasonable efforts to identify and locate relatives or fictive kin, and to conduct home studies on relatives or fictive kin expressing an interest in providing permanency for the child.
- F.** The Children’s Code refers to three types of transition plans, with varying requirements depending on the case for review by the court.
 - (1) The transition plan designed to assist the youth in living independently: This plan, as defined in the Children’s Code, Subsection I of Section 32A-4-2 NMSA 1978, is an individualized written plan based on the unique needs of the youth outlining services to be provided to increase the youth’s independent living skills. PSD considers this plan the youth’s life skills plan. The youth’s life skills plan is required for each youth 16 years of age and older, and shall be included in the youth’s pre-dispositional report as required in Children’s Code, Paragraph (11) of Subsection B of Section 32A-4-21 NMSA 1978. The youth’s life skills plan shall also be included in the youth’s case plan, and reviewed by the court at every judicial review or permanency hearing. (See youth services policy, 8.10.9.11 NMAC.)
 - (2) The youth transition plan designed to assist the youth in transitioning to adult living: This plan, as described in the Children’s Code, Subsection B of Section 32A-4-25.2 NMSA 1978, is required prior to the youth reaching age of 17. The plan is developed collaboratively at a transition meeting by the youth, the youth transition specialist, the youth’s youth attorney, and whomever else the youth chooses to invite. The plan shall identify a youth’s needs, strengths and goals in the areas of safety, housing, education, employment or income, health and mental health, local opportunities for mentors and continuing support services. In accordance with the Children’s Code, Section 32A-4-25.3 NMSA 1978, the transition plan shall be reviewed and ordered by the court at the discharge hearing (see herein at 8.10.7.19 NMAC), the first hearing scheduled after the child’s seventeenth (17th) birthday and at every subsequent review and permanency hearing (See youth services policy, 8.10.9.12 NMAC).
 - (3) The transition home plan designed to achieve successful reunification of a child: A transition home plan shall be developed and presented to the court at the time of the permanency hearing when PSD is proposing the court adopt a permanency plan of reunification. The transition home plan shall identify the steps that must be taken to achieve the child’s successful transition home (see herein at 8.10.7.18 NMAC and the Children’s Code, Subsection C of Section 32A-4-25.1 NMSA 1978). [8.10.7.15 NMAC - Rp, 8.10.7.19 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.16 RIGHTS OF PARENTS AND RESPONDENTS:

- A.** Parent’s rights: Mothers, fathers who are married to the child’s mother, and adoptive parents have a constitutionally protected liberty interest in rearing the child. Additionally, those unmarried biological fathers who participate in the child’s life as a parent have a similar constitutionally protected liberty interest. At the inception of the case, PSD identifies those parents with protected rights.
- B.** PSD shall inform parents of their rights at the commencement of the investigation.

C. The court shall inform the respondent of their rights at the respondent's first appearance. Under Children's Court Rule 10-314, those rights include:

- (1) notice of the allegations of the petition;
- (2) the right to trial on the petition;
- (3) the right to be represented by an attorney; and
- (4) the possible consequences if the allegations of the petition are found to be true.

D. Biological fathers who participate in the child's life have a constitutionally protected liberty interest and shall be accorded all of the notice and reasonable efforts protection under the Children's Code. Those biological fathers who do not participate in the child's life have no protected liberty interest and shall not be entitled to notice of the protections offered under the Children's Code.

E. PSD shall attempt to obtain a sworn statement from the mother on the identity of the father, or shall place the mother on the stand and ask questions concerning the father's identity.

F. PSD shall check the putative father registry if the mother does not identify any person as the father.

[8.10.7.16 NMAC - Rp, 8.10.7.15 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.17 NOTIFYING RELATIVES:

A. PSD shall exercise due diligence to identify and notify adult relatives of a child's removal within 30 days of the removal. The notice shall inform relatives or fictive kin of their option to become a placement resource for the child.

B. If the parent is unable or unwilling to provide the PSD worker with names and contact information of relatives or fictive kin, the children's court attorney shall inform the court and ask the court to question the parents about relatives or fictive kin. The children's court attorney shall include in the court order that the parents will provide names of relatives or fictive kin, for possible relative or fictive kin placement, to PSD and attorneys of record five days from the date of the hearing.

C. At the permanency hearing, when the court adopts a plan other than reunification, the children's court attorney shall request the court determine whether or not the department has made reasonable efforts to identify and locate, and conduct home studies of any appropriate relative expressing an interest in providing permanency for the child.

[8.10.7.17 NMAC - N, 3/31/2010; A, 5/25/2021]

8.10.7.18 PERMANENCY HEARING REQUIREMENTS:

A. A permanency hearing shall be commenced within six months of the initial judicial review of a child's dispositional order or within 12 months from the date a child enters foster care, whichever occurs first.

B. If the court adopts a permanency plan of reunification at the permanency hearing, the court shall adopt a transition home plan for the child, and schedule a permanency review hearing within three months. If a child is reunified, the subsequent hearing may be vacated.

C. If the court adopts a permanency plan other than reunification at the permanency hearing, the court shall determine whether or not PSD has made reasonable efforts to identify and notify all grandparents, other relatives or fictive kin. The court shall also determine whether or not the department has made reasonable efforts to conduct home studies on any appropriate relatives or fictive kin interested in providing permanency for the child. If the court finds reasonable efforts have not been made to identify and locate relatives or fictive kin or to conduct home studies on relatives or fictive kin, the court shall schedule a permanency review hearing within 60 days to determine whether an appropriate relative or fictive kin placement has been made. If a relative or fictive kin placement is made, the subsequent hearing may be vacated.

D. The court shall hold permanency hearings every 12 months when a child is in the legal custody of PSD.

E. PSD shall provide the resource family of a child and any pre-adoptive parent(s), relative(s) or fictive kin providing care for the child with timely notice of permanency hearings and notice of their right to be heard in permanency hearings and permanency review hearings. The right to be heard does not confer the right to standing as a party to the case.

F. The children's court attorney shall ensure that PSD's report to the court for the permanency hearing documents that PSD has considered out-of state, as well as in-state permanent placements for the child.

G. If the child is in an out-of-state placement at the time of the permanency hearing, the children's court attorney shall request a finding that the out-of-state foster care placement continues to be appropriate and in the child's best interests.

[8.10.7.18 NMAC - Rp, 8.10.7.30 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.19 DISCHARGE HEARING AND CONTINUED JURISDICTION OF THE COURT:

A. The discharge hearing is the last review or permanency hearing held prior to the youth's eighteenth (18th) birthday at which the court shall review the youth's transition plan (see herein at Paragraph (2) of Subsection F of 8.10.7.15 NMAC) and shall determine whether or not PSD has made reasonable efforts to provide the youth with information and assistance as required in the Children's Code, Section 32A-4-25.3, NMSA 1978 (See youth services program, 8.10.9.17 NMAC).

B. If the court determines reasonable efforts were not made and that termination of jurisdiction would be harmful to the young adult, the court may continue to exercise its jurisdiction for a period not to exceed one year from the youth's eighteenth (18th) birthday. The young adult may consent to continued jurisdiction of the court. The court may dismiss the case at any time after the youth's eighteenth (18th) birthday for good cause.

[8.10.7.19 NMAC - N, 3/31/2010]

8.10.7.20 NOTICE AND OPPORTUNITY TO BE HEARD AT REVIEWS: PSD shall give notice to all parties, the child's guardian ad litem or youth attorney if 14 years or older, the child's court appointed special advocate, the contractor administering the citizen review board, the child's resource family, pre-adoptive parents, or relative or fictive kin caregiver, of the time, place and purpose of any judicial review hearing held pursuant to the Children's Code, Subsections A or B of Section 32A-4-25 NMSA 1978, including hearings held after a termination of parental rights has occurred. Notice to the child's resource family, pre-adoptive parents, or relative or fictive kin caregiver shall include notice of the right to be heard at the review hearing. Such notice does not confer the right to standing as a party to the case.

[8.10.7.20 NMAC - Rp, 8.10.7.31 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.21 TERMINATION OF PARENTAL RIGHTS:

A. The children's court attorney shall attend the change of plan staffing when PSD is considering recommending to the court that a child's plan be changed to adoption. PSD shall pursue a motion to terminate parental rights within 45 days of the PSD staffing establishing a plan of adoption for the child, or when it is clinically indicated.

B. In the case of a child who has been in foster care 15 of the most recent 22 months, PSD shall pursue a motion to terminate parental rights by the end of the fifteenth (15th) month in foster care, unless the child is being cared for by a relative or fictive kin, or PSD has documented compelling reason(s) for not filing; or PSD has not provided to the family those services deemed necessary for the safe return of the child within the time period in the case plan. PSD calculates the 15 of the most recent 22 month period from the date the child entered foster care, uses a cumulative method of calculation when a child experiences multiple exits from and entries into foster care during the 22 month period, and excludes trial home visits and runaway episodes in calculating the 15 months. If there are compelling reasons for not seeking to terminate parental rights, those reasons shall be documented in the case plan.

[8.10.7.21 NMAC - Rp, 8.10.7.22 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.22 RELINQUISHMENT OF PARENTAL RIGHTS:

A. Relinquishments may only be taken in furtherance of a plan of adoption, or in cases where a severance of the parent-child relationship is therapeutically necessary for the child's emotional or physical well-being.

B. The children's court attorney shall create a record in the district court that the relinquishment is voluntary, and that no promises were made to the parent, no fraud was involved, that the parent understands the consequences and the finality of the decision, and unless the adoption is open, the court shall not enforce any agreements regarding contact with the child.

C. No one may relinquish parental rights to PSD without PSD's consent.

D. In any case involving an Indian child, the relinquishment shall only be taken in state court if the parent is domiciled off-reservation. Otherwise, the tribal court has exclusive jurisdiction.

(1) PSD shall make a record concerning the parent's domicile prior to the relinquishment being taken.

(2) PSD shall not accept the relinquishment of an Indian child until 10 days after the birth of the child.

E. PSD shall not accept the relinquishment of a child within until 48 hours after the birth of the child.

F. Unconditional relinquishments are preferred. Conditional relinquishments must be for good cause and approved by the court.

(1) PSD may accept a conditional relinquishment when the relinquishing parent(s) designates an adoptive parent(s) whose homestudy has been approved, or when the relinquishment contemplates the termination of parental rights of the other parent.

(2) PSD shall not accept a conditional relinquishment with the condition that the relinquishing parent shall be a post-adoption contact.

[8.10.7.22 NMAC - Rp, 8.10.7.23 NMAC, 3/31/2010]

8.10.7.23 PERMANENT GUARDIANSHIP: PSD may move the court for an order establishing a permanent guardianship for the child.

[8.10.7.23 NMAC - Rp, 8.10.7.24 NMAC, 3/31/2010]

8.10.7.24 MEDICAL NEGLECT:

A. PSD shall respond to reports of medical neglect of children (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions) and shall take the necessary legal action to protect those children.

B. The term withholding medically indicated treatment shall not apply in the following circumstances:

(1) the child is chronically and irreversibly comatose;

(2) the provision of such treatment would merely prolong dying or otherwise be futile in terms of the survival of the child; or

(3) the provision of such treatment would be virtually futile in terms of survival of the child and the treatment itself under such circumstances would be inhumane.

C. Nothing in section shall limit existing protection available under state law regarding medical neglect of children over one year of age.

[8.10.7.24 NMAC - Rp, 8.10.7.20 NMAC, 3/31/2010]

8.10.7.25 REMOVING CHILD FROM LIFE SUPPORT SYSTEMS:

A. PSD shall seek parental consent to removing a child in PSD custody from life support systems.

B. When parents refuse consent, the children's court attorney shall request an emergency court setting on the issue and give notice to the parents.

C. PSD shall keep the guardian ad litem or youth attorney fully informed and shall seek their concurrence with PSD's recommendation.

[8.10.7.25 NMAC - Rp, 8.10.7.21 NMAC, 3/31/2010]

8.10.7.26 MENTAL HEALTH: Anytime a child in the custody of PSD is in need of placement in a mental health facility, the children's court attorney shall file an appropriate pleading with the district court.

[8.10.7.26 NMAC - Rp, 8.10.7.25 NMAC, 3/31/2010]

8.10.7.27 FAMILY IN NEED OF COURT-ORDERED SERVICES: PSD shall decide when it is appropriate to file a family in need of court-ordered services petition, in accordance with the Children's Code, Section 32A-3B et seq. NMSA 1978. Services to the child or family may be ordered when the child or family has refused services, or appropriate and available services have been exhausted and any of the following circumstances exist:

A. The child, subject to compulsory school attendance, is absent from school without an authorized excuse more than 10 days during a school year.

B. The child has been absent from the child's place of residence for 12 hours or more without consent of the parent, guardian or custodian.

C. The child refuses to return home and there is good cause to believe the child will run away from home if forced to return to the parent, guardian or custodian.

D. The child's parent, guardian or custodian refuses to allow the child to return home and a petition alleging neglect of the child is not in the child's best interests.

[8.10.7.27 NMAC - Rp, 8.10.7.26 NMAC, 3/31/2010]

8.10.7.28 INDIAN CHILD WELFARE ACT (ICWA): The Indian Child Welfare Act of 1978 (25 U.S.C.

1901 et seq.), hereinafter referred to as “ICWA”, was enacted to protect the best interests of Indian children and preserve tribal integrity by reducing the destruction of Indian culture caused by the removal of children from Indian homes and environments. The ICWA provides that the states and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children.

A. A tribe has exclusive jurisdiction over any child custody proceedings, as defined in 25 U.S.C. 1903, involving a child who resides or is domiciled within the tribe’s reservation.

B. If a child is a ward of the tribal court, the tribe retains exclusive jurisdiction even if the child’s residence changes to a location off-reservation. PSD acts in an emergency to protect the child, when the child is temporarily off-reservation. PSD shall notify the tribe as soon as possible and facilitates a transfer of the case to the tribe.

C. When a child is domiciled or resides off the reservation, the state and the tribe both have jurisdiction.

D. When an Indian child is the subject of an abuse or neglect, family in need of court ordered services, or adoption action under the New Mexico Children’s Code, the tribe may intervene.

E. PSD supports requests to transfer to tribal court absent good cause to the contrary, objection by either parent or declination by the tribal court. Good cause not to transfer the proceeding may exist in any of the following circumstances:

(1) The proceeding was at an advanced stage when the request to transfer was received and the entity making the request did not file the request promptly after receiving notice of the hearing.

(2) The Indian child is over 12 years of age and objects to the transfer.

(3) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(4) The parents of a child over five years of age are not available and the child has had little or no contact with the child’s tribe or members of the child’s tribe.

F. PSD shall receive and investigate reports of child abuse or neglect in conformance with ICWA and as outlined in PSD policy on intake and investigations.

G. If a child taken into custody is an Indian child and is alleged to be neglected or abused, PSD shall notify the child’s tribe in accordance with ICWA.

H. PSD shall conform to the placement preferences set forth in ICWA and in the Children’s Code, Section 32A-4-9 NMSA 1978.

I. PSD shall honor the request of a parent of an Indian child to remain anonymous insofar as it relates to the parent’s extended family, as specified by the parent. However, PSD shall tell the parent about the requirement to notify the tribe, and explains to the parent that PSD cannot guarantee anonymity on the part of the tribe.

[8.10.7.28 NMAC - Rp, 8.10.7.27 NMAC, 3/31/2010]

8.10.7.29 SPECIAL IMMIGRANT JUVENILE STATUS (SIJS):

A. In those cases in which a child is a foreign national child without legal permanent residency in the United States, and if the permanency plan does not include reunification with at least one parent and PSD does not recommend that the child be returned to the country of origin, PSD shall determine whether the child may be eligible for SIJS under federal law. Under federal law, in addition to legal requirements of being under court jurisdiction and the court making the necessary judicial determination, a child must be in the United States, unmarried and under the age of 21.

B. If the child is eligible for SIJS, PSD shall move the court for a SIJS order containing a judicial determination that the child is deemed unable to reunify with one or both parents due to abuse, neglect or abandonment, and that it is not in the child’s best interest to return to the country of nationality or last habitual residence. PSD’s motion shall include a statement of the express wishes of the child, as expressed by the child or the child’s guardian ad litem or attorney.

C. If it has been determined that it is in the child’s best interest to file a petition for SIJS and an application for adjustment of status, then within 60 days after an entry of the SIJS order, PSD shall file a petition for SIJS and an application for adjustment of status on behalf of the child.

D. The court order for SIJS must be filed and accepted by the court prior to the child turning age 18.

E. The children’s court attorney shall request court jurisdiction and set review hearings pending the granting of SIJS. The children’s court attorney shall provide judicial review reports for a child for whom the court has granted the SIJS order, and shall advise the court of the status of the petition and application process concerning the child.

F. The court's jurisdiction terminates upon the final decision of the federal authorities, however the court may not retain jurisdiction of the case after the child's twenty first birthday.
[8.10.7.29 NMAC - Rp, 8.10.7.28 NMAC, 3/31/2010; A, 5/25/2021]

8.10.7.30 CONSULAR NOTIFICATION:

A. Foreign national child: When PSD is given custody of a foreign national child, that is, a child who is not a citizen of the United States, PSD shall notify that child's foreign national consulate in writing, without delay, after obtaining custody. When PSD is given custody of a child who has at least one parent who is a foreign national of any country other than Mexico, PSD shall notify the appropriate foreign consulate except in cases in which notification may create a risk to the child's safety or may impede the goal of reunification of the child with their family.

B. Mexican national child: When PSD is given custody of a Mexican national child, that is, a child who is a national of Mexico or has at least one parent who is a national of Mexico, PSD shall notify the Mexican consulate without delay.

[8.10.7.30 NMAC - N, 3/31/2010; A, 5/25/2021]

HISTORY of 8.10.7 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the State Records Center and Archives under:

SSD Rule #410.0000, Protective Services to Children, filed 11/10/1981;
SSD 4.0.0, Child Protective Services - Definition and Goal Statement, filed 8/22/1986;
SSD 4.0.0, Child Protective Services - Definition and Goal Statement, filed 3/28/1989;
SSD 4.1.0, Child Protective Services - General Provisions, filed 8/22/1986;
SSD 4.1.0, Child Protective Services - General Provisions, filed 1/29/1987;
SSD 4.1.0, Child Protective Services - General Provisions, filed 6/18/1987;
SSD 4.1.0, Child Protective Services - General Provisions, filed 3/28/1989;
SSD 4.1.0, Child Protective Services - General Provisions, filed 9/14/1989;
SSD 4.1.0, Child Protective Services - General Provisions, filed 9/18/1990;
SSD 4.2.0, Child Protective Services - General Guidelines, filed 8/22/1986;
SSD 4.2.0, Child Protective Services - General Guidelines, filed 3/28/1989;
SSD 4.3.0, Child Protective Services - Department Responsibilities, filed 8/22/1986;
SSD 4.3.0, Child Protective Services - Department Responsibilities, filed 11/18/1987;
SSD 4.3.0, Child Protective Services - Department Responsibilities, filed 6/13/1988;
SSD 4.3.0, Child Protective Services - Department Responsibilities, filed 3/28/1989;
SSD 4.3.0, Child Protective Services - Department Responsibilities, filed 3/20/1990;
SSD 4.3.0, Child Protective Services - Department Responsibilities, filed 9/18/1990.

History of Repealed Material:

8 NMAC 10.7, Child Protective Legal Services, filed 6/16/1998 - Repealed effective 2/14/2001.
8.10.7 NMAC, Child Protective Legal Services, filed 2/1/2001 - Repealed effective 11/15/2005.
8.10.7 NMAC, Child Protective Legal Services, filed 11/1/2005 - Repealed effective 3/31/2010.