



North Carolina Criminal Law

AT THE UNC SCHOOL OF GOVERNMENT

October 22, 2024

Juvenile Remediation to Attain Capacity to Proceed: New NC Law

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A new law governing capacity to proceed in delinquency cases is set to take effect beginning with offenses committed on or after January 1, 2025. **Part V. of Session Law 2023-114** creates a juvenile capacity standard and establishes procedures to be used when capacity to proceed is challenged. You can find a description of much of the new law in my **blog** from September. This post explains the juvenile remediation process that will be available under the new law for certain cases in which a juvenile is found to lack capacity to proceed.

What is Remediation?

Remediation is defined as “[s]ervices directed *only* at facilitating the attainment of capacity to proceed for a juvenile who the court finds is incapable to proceed. Such term may include mental health treatment to reduce interfering symptoms, specialized psychoeducational programming, or a combination of these interventions.” **G.S. 7B-2401.1(6)** (emphasis added).

Remediation is analogous to restoration, a process found in criminal systems. However, juvenile systems are often in need of a uniquely juvenile process because the root cause of juvenile incapacity may differ from the root causes of incapacity in the criminal system. **Ivan Kruh, Neil Gowensmith, Amanda Alkema, Kristin Swenson & Derrick Platt (2022): Community-Based Remediation of Juvenile Competence to Stand Trial: A National Survey, International Journal of Forensic Mental Health, DOI: 10.1080/14999013.2021.2007431**. Unlike the criminal system, under the new law, developmental immaturity will be one of the things that can form the basis of juvenile incapacity to proceed. **G.S. 7B-2401**.

Therefore, S.L. 2023-114 included a new **G.S. 7B-2401.4** to create a uniquely juvenile remediation process.

As described by Dr. Kimberly Larson and Dr. Thomas Grisso in **Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers**, remediation for juveniles may include remedial psychiatric services focused on treatment of symptoms for youth with mental health needs and/or remedial capacity education services that focus on improving the juvenile's factual and rational understanding of the proceedings and their ability to work effectively with their attorney. The educational component is not a clinical service and does not have to be delivered by a mental health professional. The new statute allows for one or both components of remediation to be ordered. The services ordered must be based on the recommendations from the forensic evaluation. G.S. 7B-2401.4(b).

The Division of Juvenile Justice is responsible for the provision of remediation psychoeducational programming and for working with community partners to secure any additional services recommended in the forensic evaluation report. G.S. 7B-2401.4(g). This means that any mental health services recommended in the forensic evaluation report will need to be secured through the existing mental health service system.

When Can Remediation be Ordered?

Remediation can only be ordered following a finding by the court that the juvenile 1) is incapable to proceed and 2) is substantially likely to attain capacity in the foreseeable future. G.S. 7B-2401.4(b). Thus, remediation is only an option following a capacity hearing. Additionally, the use of remediation is at the court's discretion and is only allowed when there is some basis for finding that the juvenile is substantially likely to attain capacity in the foreseeable future. The statute does not expressly define the period of time that constitutes the foreseeable future. However, as detailed below, the statute does establish timeframes for remediation that may offer some insight.

How Long Can Remediation Last?

There is no specifically required minimum timeframe for remediation. The statute does provide the maximum amount of time that remediation can last. This concept that a juvenile cannot be indefinitely required to comply with remediation comports with U.S. Supreme Court jurisprudence holding that indefinite confinement of a defendant who has been found incapable to proceed

is unconstitutional. **Jackson v. Indiana, 406 U.S. 715 (1972)**. While many juveniles will likely receive remediation in a community-based setting due to the least restrictive environment requirement described below, the maximum timeframes ensure that juveniles are not indefinitely confined in secure custody or involuntary commitment to engage in remediation.

As shown in the chart below, the maximum time allowed for remediation depends on the most serious offense alleged in the petition. G.S. 7B-2401.4(f). If the question of capacity was raised during a probation violation proceeding, the offense underlying the probation disposition serves as the most serious offense for determining the maximum time allowed for remediation.

Most serious offense	Remediation time limit
First-degree murder, forcible rape, statutory rape, forcible sexual offense, or statutory sexual offense	The sooner of 36 months from the finding of incapacity or the maximum jurisdiction of the juvenile court.
Any other Class B1 – E felony	The sooner of 12 months from the finding of incapacity or the maximum jurisdiction of the juvenile court. A 12 month extension can be granted for good cause; however remediation can never extend beyond the sooner of 24 months from the finding of incapacity or the maximum jurisdiction of the juvenile court.
Class F – I felony or misdemeanor	The sooner of 6 months from the finding of incapacity or the maximum jurisdiction of the juvenile court. A 6 month extension can be granted; however, remediation can never extend beyond the sooner of 12 months from the finding of incapacity or the maximum jurisdiction of the juvenile court.

Where Does Remediation Take Place?

Remediation must occur in the least restrictive environment considering the juvenile's best interests and public safety. G.S. 7B-2401.4(c). The court is required to consider the following eight factors when determining where remediation will occur.

1. Whether there is probable cause for the allegations.
2. The nature of the incapacity.
3. The age or developmental maturity of the juvenile.
4. The nature and seriousness of the allegations.
5. The availability and appropriateness of community-based programming.
6. The need for supervision and the level of supervision or alternatives available in the community, such as family, custodians, guardians, and community-based programs.
7. Prior treatment or intervention provided to the juvenile.
8. Any other relevant factors. G.S. 7B-2401.4(c).

Court orders that require remediation must include written findings of fact regarding the least restrictive environment for remediation services. G.S. 7B-2401.4(e)(1).

A youth may be held in secure custody during remediation only if 1) the court finds that secure custody is the least restrictive environment after considering the statutory factors above and 2) the juvenile otherwise meets criteria for the issuance of a secure custody order under **G.S. 7B-1903**.

It is also possible to order involuntary commitment during remediation if the following four requirements are met. G.S. 7B-2401.4(d).

1. The basis for the juvenile's incapacity to proceed is mental disorder, intellectual disability, neurological disorder, or traumatic or acquired brain injury.
2. The court finds that the juvenile is substantially likely to attain capacity.

3. The court finds that all available less restrictive alternatives are inappropriate.
4. The court enters an order for the juvenile to be assessed for involuntary commitment according to the criteria for involuntary commitment in Part 7 of Article 5 of Chapter 122C of the General Statutes.

The length of an involuntary commitment cannot exceed the maximum time period allowed for remediation, as described above. G.S. 7B-2401.4(e)(2).

What Happens in Court During Remediation?

Remediation Reports to the Court

The remediation service provider must provide a report to the court at least every 90 days. G.S. 7B-2401.4(g). The report must be sent to the clerk of superior court and be addressed to the attention of the presiding judge. The report must include

1. dates services were provided to the juvenile,
2. a summary of the juvenile's attendance and participation, and
3. information about the juvenile's progress in the areas that were relevant to the finding of incapacity, including education regarding court procedures and stabilization or improvement of symptoms leading to functional impairment. G.S. 7B-2401.4(g).

The report cannot include any statement or disclosure made by the juvenile about the commission of an offense that could result in juvenile or criminal prosecution. The remediation provider is also prohibited from including any incriminating statements from their notes and summaries. In addition, any incriminating statements made by the juvenile during remediation is inadmissible in any juvenile or criminal proceeding against the juvenile. G.S. 7B-2401.4(g).

Remediation Review Hearings

The court is required to hold a remediation review hearing within 30 days of receiving a remediation progress report to review the remediation services. G.S. 7B-2401.4(g). The hearing can be informal, and the court is allowed to consider all remediation progress reports and any evidence, including hearsay, that is relevant, reliable, and necessary to determine if remediation services should continue or if reassessment of capacity is warranted. The juvenile and their parent, guardian, or

custodian must have an opportunity to present evidence and to advise the court concerning the remediation services.

How Does Remediation End?

The statute provides two pathways for remediation to end.

Pathway 1.

The court can determine that a reassessment of capacity is warranted during the remediation review hearing. G.S. 7B-2401.4(h). If the court makes that determination, the court must order a new forensic evaluation. The statute creates a preference for the appointment of the same forensic evaluator who conducted the initial forensic evaluation for the youth when possible. The remediation provider is explicitly prohibited from conducting the forensic evaluation. A determination that reassessment of capacity is warranted indicates that the juvenile may have attained capacity, making remediation unnecessary. The court would therefore also terminate the remediation order.

Pathway 2.

Remediation can also end if the service provider determines that the juvenile has likely completed the requirements of remediation services. The remediation provider is required to provide written notice to the court, the prosecutor, and the juvenile's attorney within two business days of making this determination. G.S. 7B-2401.4(i).

The provider must also send any remediation reports to the court and the juvenile's attorney after providing written notice of program completion. G.S. 7B-2401.4(i). The court can authorize release of the reports to the prosecutor after 1) providing the juvenile reasonable notice and opportunity to be heard, and 2) determining that the information is relevant and necessary to the hearing of the matter and is unavailable from any other source. If the reports contain medical, mental health, substance abuse, or HIV related information the court must also comply with federal confidentiality law when allowing release of the reports to the prosecutor.

The case must be returned to court within 30 days after the completion of remediation services for review or further proceedings. G.S. 7B-2401.4(i). While the statute does not provide a specific procedure for this return to court, use of the

word ‘review’ may indicate that the procedure provided for the remediation review hearing also applies to this proceeding.

What Happens After Remediation Ends?

The end of remediation does not automatically mean that the prosecution of the case proceeds. Prosecution can only proceed if the juvenile has attained capacity. Therefore, if there is reason to believe that the remediation process resulted in the juvenile’s attainment of capacity, a new capacity hearing will be necessary.

Pathway 1 described above specifically anticipates this possibility and provides clear procedure for ordering a new forensic evaluation. Pathway 2 is silent as to a new forensic evaluation, referencing only “further proceedings.” Despite this discrepancy, the procedure in G.S. 7B-2401.2(h) requiring a hearing to determine capacity when the question of capacity is raised applies. Therefore, a capacity hearing will be required to determine if the juvenile attained capacity to proceed. A new forensic evaluation will be needed for the parties to litigate the question of whether the juvenile has attained capacity to proceed..

If the court determines, as a result of the new capacity hearing, that the juvenile has attained capacity, then prosecution of the matter can resume. If the court determines that the juvenile continues to lack capacity to proceed and that the juvenile is not likely to attain capacity in the foreseeable future, the case must be dismissed. G.S. 7B-2401.5(b). The possibility of involuntary commitment could be pursued according to G.S. 7B-2401.5(a).

The statute also seems to leave space for the court to determine that a juvenile who lacks capacity to proceed is no longer substantially likely to attain capacity in the foreseeable future at a remediation review hearing. If that occurs, then the same provisions regarding dismissal and involuntary commitment contained in G.S. 7B-2401.5 apply.

There is a lot to digest in this part of the new juvenile capacity law. As always, I welcome your feedback and questions. You can reach me at **greenes@sog.unc.edu**.