

NATIONAL JUVENILE DEFENDER CENTER

# ACCESS Denied:

A NATIONAL SNAPSHOT OF STATES'  
FAILURE TO PROTECT CHILDREN'S  
RIGHT TO COUNSEL

MAY 2017

NJDC

GAULT  
at  
50

DEFENDING  
CHILDREN'S  
RIGHTS

## ACKNOWLEDGEMENTS

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# About the National Juvenile Defender Center

The National Juvenile Defender Center (NJDC) is a nonprofit, nonpartisan organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. Through community building, training, and policy reform, NJDC provides national leadership on juvenile defense issues with a particular focus on remedying the deprivation of children's rights in the justice system. NJDC's reach extends to urban, suburban, rural, and tribal areas, where we elevate the voices of youth, families, and juvenile defense attorneys to encourage positive outcomes and meaningful opportunities for children caught in the juvenile court system.

Established in 1997, NJDC has worked in every state to document, challenge, or reform policies and practices that disrupt children's constitutional right to counsel. NJDC identifies needs and gaps in juvenile court systems and develops strategies to strengthen the juvenile defense bar and uphold children's legal protections. We continually build on and expand our services to the juvenile defense and broader justice communities, including providing specialized training and technical assistance; assessing and evaluating juvenile defense systems; promulgating national juvenile defense standards and tailoring them for states and localities; developing strategies to end racial and ethnic disparities in the juvenile justice system; and enhancing recognition of juvenile defense as a distinct and specialized practice of law nationwide.

NJDC is committed to providing juvenile defense attorneys with the resources and opportunities necessary to grow their legal, advocacy, and leadership skills. NJDC also advocates for juvenile court systems that are equitable and responsive to the needs of children, and it seeks to ensure that any reforms of the juvenile justice system include the protection of children's rights — most notably, the right to counsel.

Because juvenile defense systems are diverse in size and structure across the states and territories, NJDC established nine regional centers to stay continually engaged with front line juvenile defense attorneys and changing policies and practices. Our team in Washington, D.C., partners with the volunteer directors of NJDC's regional centers to prioritize projects, develop and strengthen juvenile defense communities, and share information. Together, the national office and regional centers are powerful allies in ensuring children's access to high-quality, specialized juvenile defenders.

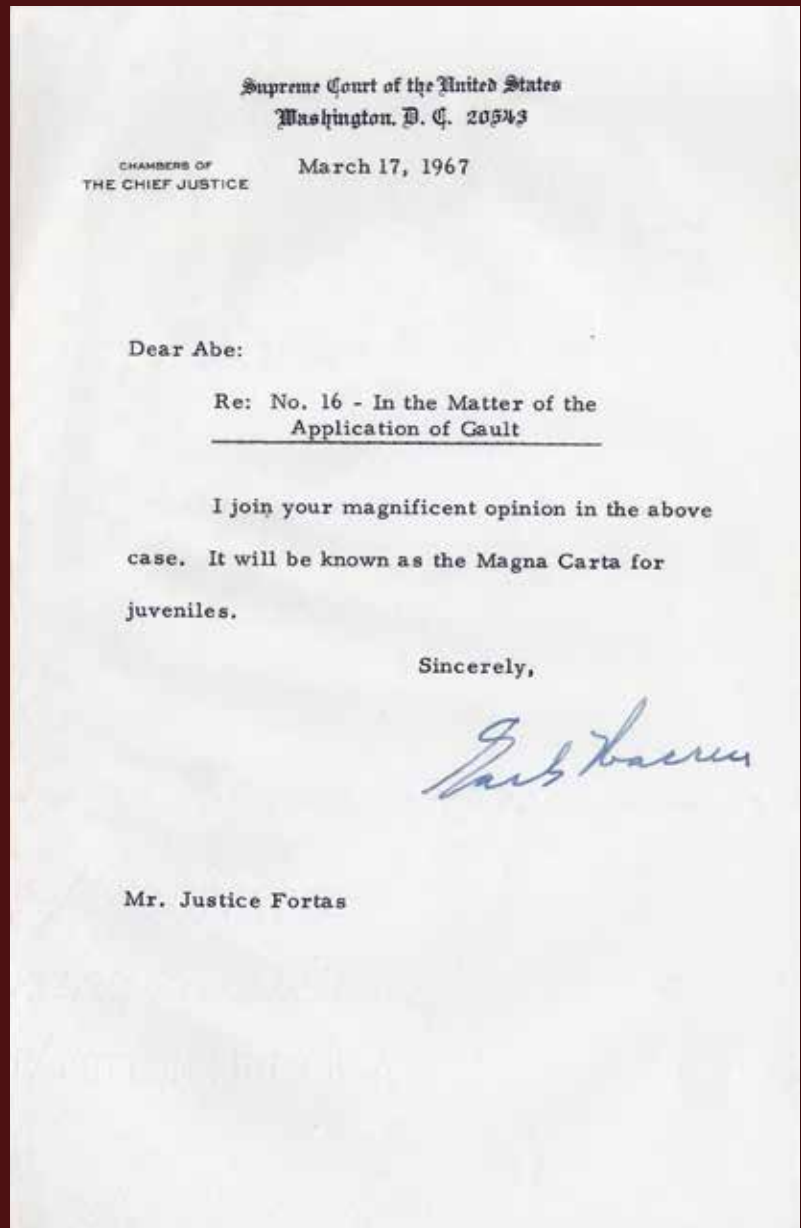
# Gault at 50 Campaign

The National Juvenile Defender Center launched the *Gault* at 50 Campaign to commemorate the 50th anniversary of *In re Gault*, the United States Supreme Court decision that affirmed children's right to counsel.

Five decades later, the promise of *Gault* remains unfulfilled. Through a dual approach of policy reform and public awareness, NJDC and its partners seek to ensure every child can access skilled, high-quality legal representation. The *Gault* at 50 Campaign aims to expose the fault lines in juvenile defense systems and tap into a sense of collective urgency to empower juvenile defenders, judges, advocates, legislators, and the general public to become catalysts for change.

Join the *Gault* at 50 Campaign and learn about efforts in your state to promote and protect children's right to counsel. Together, we can reshape the legacy of *Gault* and realize the guarantees of justice for all young people.

Please visit [www.gaultat50.org](http://www.gaultat50.org) to get involved today.



IN THIS SPECIAL NOTE, CHIEF JUSTICE EARL WARREN AGREES TO JOIN JUSTICE ABE FORTAS' "MAGNIFICENT OPINION" IN THE *GAULT* CASE. Courtesy of Abe Fortas Papers (MS 858). Manuscripts and Archives, Yale University Library.

# Introduction

*“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him.”*

- *In re Gault*, 387 U.S. 1, 36 (1967).

Rewind to the 1960s, six decades after the first juvenile court was founded in 1899. Children were needlessly locked up; they experienced flagrant abuse in facilities, with virtually no hope for redress; and they slogged through the juvenile court system without a voice and without an attorney to fight for their interests or their innocence.

The seismic flaws in juvenile court were clear: The absence of judicial checks and balances, as well as formal procedure, left children entirely at the mercy of a punitive system. In 1967, the United States Supreme Court ruled in *In re Gault* that there are no substitutes for standards of justice — even for young people.<sup>1</sup> Children are entitled to due process rights and protections, including “the guiding hand of counsel” in court proceedings.<sup>2</sup>

Fifty years after the landmark decision, state laws and practices still do not honor the constitutional rights of youth. *Access Denied: A National Snapshot of States’ Failure to Protect Children’s Right to Counsel* (the Snapshot) surveys children’s access to representation in the United States today and exposes gaps in procedural protections — gaps that perpetuate inequality, racial and economic disparities, and the fracturing of families and communities.

As the Snapshot reveals, though every state has a basic structure to provide attorneys for children, few states or territories adequately satisfy access to counsel for young people.<sup>3</sup> Not because it is impossible, but because ensuring access to counsel for children — and predominantly children of color, who are disproportionately arrested and charged in the juvenile justice system — is, seemingly, not yet a priority for most states.<sup>4</sup> This withholding of protections violates the Constitution and dangerously undercuts young people’s dignity, their faith in the workings of a fair and democratic society, and their ability to pursue their dreams and succeed.

<sup>1</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>2</sup> *Id.* at 36.

<sup>3</sup> See *generally State Assessments*, NAT’L JUVENILE DEFENDER CTR., <http://njdc.info/our-work/juvenile-indigent-defense-assessments/> (last visited Apr. 11, 2017).

<sup>4</sup> See JOSHUA ROVNER, THE SENTENCING PROJECT, *DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM* (2014), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf>; NAT’L CTR. FOR JUVENILE JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 157-59* (2014); DEV. SERVS. GRP., INC., U.S. DEP’T OF JUSTICE, OFF. OF JUVENILE JUST. AND DELINQUENCY PREVENTION, *DISPROPORTIONATE MINORITY CONTACT* (2014), [http://www.ojjdp.gov/mpg/litreviews/Disproportionate\\_Minority\\_Contact.pdf](http://www.ojjdp.gov/mpg/litreviews/Disproportionate_Minority_Contact.pdf); *Fact Sheet: What is R.E.D.?*, W. HAYWOOD BURNS INST., <http://www.burnsinstitute.org/what-is-red/fact-sheet/> (last visited Apr. 26, 2017).

“As the Snapshot reveals, though every state has a basic structure to provide attorneys for children, few states or territories adequately satisfy access to counsel for young people.”

Children must have attorneys when facing prosecution. Juvenile defenders tether the courts to the Constitution; they ensure children’s rights are not shortchanged, and they resist attempts by the courts to unnecessarily drive youth deeper into the justice system. The rulings of *Gault* demand a child’s voice in court, and juvenile defenders create space for young people’s participation in the proceedings.

As states make important moves toward addressing racial and ethnic disparities; the disproportionate representation of lesbian, gay, bisexual, transgender, queer/questioning, and gender non-conforming (LGBTQ-GNC) youth; the mass criminalization of youth; and the poor treatment of children in prison,<sup>5</sup> they must also acknowledge — and welcome — the role of the juvenile defense attorney in dismantling such injustices. Juvenile defenders are on the front lines of court to fight for fairness and equity at every step in the proceedings against children.

Defense representation for youth is indispensable. Unfortunately, state laws and practices largely tell a different story.

## METHODOLOGY

The Snapshot is based on a state-by-state analysis of the statutes that govern children’s access to counsel and interviews with juvenile defenders about how statutes and court rules translate into practice.<sup>6</sup> The interviews were conducted with attorneys in urban and rural areas to explore differences in practices and resources. In total, 70 interviews were completed across all 50 states, the District of Columbia, and Puerto Rico.<sup>7</sup> Findings discussed in the Snapshot reflect these 52 jurisdictions. Throughout the report, the term “states” is inclusive of the District of Columbia and Puerto Rico.

The structures of juvenile defense systems vary widely across the country and present real challenges to producing national surveys. Some states have established a centralized public defender organization responsible for all juvenile defense representation, others use a combination of public defender offices and appointed counsel or contract attorneys, and a small number rely solely on appointed counsel or contract attorneys for all juvenile defense representation.<sup>8</sup> Oversight of defense attorneys also varies between and within states, creating differences in standards of representation.<sup>9</sup> In light of these disparities, one attorney’s practice in a particular courtroom, county, or city is not necessarily reflective of all attorneys within that state.

Though not inclusive of perspectives from the more than 3,000 counties across the 50 states, the District of Columbia, and the U.S. territories, the Snapshot is an important step toward documenting and understanding whether the guarantees of due process — and specifically the right to counsel — are fulfilled for children nationally.

<sup>5</sup> See, e.g., W. HAYWOOD BURNS INST., *STEMMING THE RISING TIDE: RACIAL AND ETHNIC DISPARITIES IN YOUTH INCARCERATION & STRATEGIES FOR CHANGE* (2016), [http://www.burnsinstitute.org/wp-content/uploads/2016/05/Stemming-the-Rising-Tide\\_FINAL.pdf](http://www.burnsinstitute.org/wp-content/uploads/2016/05/Stemming-the-Rising-Tide_FINAL.pdf) [hereinafter *STEMMING THE RISING TIDE*]; ANGELA IRVINE ET AL., *IMPACT JUSTICE & THE NAT’L CTR. FOR LESBIAN RIGHTS, LESBIAN, GAY, BISEXUAL, QUESTIONING, AND/OR GENDER NONCONFORMING AND TRANSGENDER GIRLS AND BOYS IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM: A PRACTICE GUIDE* (2017), [http://impactjustice.org/wp-content/uploads/2017/02/CPOC-Practice-Guide\\_Final.pdf](http://impactjustice.org/wp-content/uploads/2017/02/CPOC-Practice-Guide_Final.pdf) (finding that 19 percent of detained youth in California are LGBTQ/GNCT, and 90 percent of these youth are youth of color); Bianca Wilson et al., *Disproportionality and Disparities Among Sexual Minority Youth in Custody*, J. YOUTH & ADOLESCENCE (2017); MOVEMENT ADVANCEMENT PROJECT & CTR. FOR AMERICAN PROGRESS, *UNJUST: HOW THE BROKEN JUVENILE AND CRIMINAL JUSTICE SYSTEMS FAIL LGBTQ YOUTH* (2016), <http://www.lgbtmap.org/file/lgbt-criminal-justice-youth.pdf>; BARRY HOLMAN & JASON ZIEDENBERG, *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES*, JUSTICE POLICY INSTITUTE (2006), [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf).

<sup>6</sup> Additional court rules and case law may impact each of the issues discussed in the Snapshot but were not exhaustively researched, and thus statewide court rules are only included based on references provided during interviews.

<sup>7</sup> All interviews were conducted via telephone between November 2016 and April 2017.

<sup>8</sup> Twenty-two states have a statewide system for juvenile defense representation. The remaining 30 states have localized systems where public defense services are provided by county governments or through judicial circuits comprised of county groups. Even within these statewide systems, the degree of oversight and advice varies. See *The Fragmented State of Juvenile Indigent Defense*, NAT’L JUVENILE DEFENDER CTR. (2016), <http://njdc.info/wp-content/uploads/2016/10/The-Fragmented-State-of-Juvenile-Indigent-Defense.pdf>.

<sup>9</sup> While 19 states maintain full oversight over their defense systems, 17 states maintain only partial oversight and 16 states have no oversight whatsoever. See *id.*

# National Snapshot Findings

Fifty years after the United States Supreme Court affirmed children’s right to counsel in juvenile court, youth continue to be denied basic protections — both in law and practice. While some areas in the United States are steadily improving access to counsel for children, by and large, the promise of justice remains elusive.

State laws cannot alone measure access to and quality of public defense representation for children.<sup>10</sup> Interviews and analysis for the Snapshot revealed that even in states with strong statutory requirements for children’s legal representation, practices within those states fall short of their constitutional obligation. In a handful of jurisdictions, the law is blatantly violated. More commonly, vague statutes permit partial or complete discretion as to how and when appointments of juvenile defenders are made. This situation leads to disparate outcomes for children depending on the individual judge, the individual attorney, and the town or city where a child is arrested. The absence of clear laws mandating access to counsel for children may exacerbate the already pervasive racial disparities in the juvenile justice system.<sup>11</sup>

The realization of rights for children is connected to the strength of a jurisdiction’s public defense system, the availability of funding and resources, and the specialization of attorneys who practice in juvenile court. Not surprisingly, then, access to justice for children is often contingent upon where a child lives or is arrested.

The Snapshot is composed of five sections: eligibility for a “free” attorney, early appointment of counsel, costs of counsel, waiver of counsel, and post-disposition representation. Each section includes an analysis of the relevant laws and practices and concludes with examples of statutes demonstrating some states’ progress toward ensuring legal protections for children. When these five pillars of the right to counsel are fulfilled, together they embody meaningful access to justice for children.

<sup>10</sup> The term “public defense” is meant to be inclusive of all forms of publicly funded defense representation of children: public defenders, appointed counsel, contract attorneys, conflict attorneys, law clinics, and others.

<sup>11</sup> Youth of color are more likely to be arrested, prosecuted, sentenced, and incarcerated than their white peers. In 2013, Black youth were more than four times as likely as white youth to be incarcerated, Native American youth were more than three times as likely, and Latino youth were almost twice as likely. *STEMMING THE RISING TIDE*, *supra* note 5, at 5.



## KEY FINDINGS:

### I. CHILDREN IN THE UNITED STATES ARE NOT GUARANTEED LAWYERS

Only 11 states provide every child accused of an offense with a lawyer, regardless of financial status.

### II. CHILDREN DO NOT GET ATTORNEYS UNTIL IT IS TOO LATE

No state guarantees lawyers for every child during interrogation, and only one state requires it under limited circumstances.

### III. CHILDREN MUST PAY FOR THEIR CONSTITUTIONAL RIGHT TO COUNSEL

Thirty-six states allow children to be charged fees for a “free” lawyer.

### IV. CHILDREN’S RIGHTS ARE NOT SAFEGUARDED BY THE STATES

Forty-three states allow children to waive their right to a lawyer without first consulting with a lawyer.

### V. CHILDREN’S ACCESS TO COUNSEL ENDS TOO EARLY

Only 11 states provide for meaningful access to a lawyer after sentencing, while every state keeps children under its authority during this time.

ELIGIBILITY FOR A “FREE” ATTORNEY:



# Children in the United States are Not Guaranteed Lawyers



Only 11 states provide every child accused of an offense with a lawyer, regardless of financial status.<sup>12</sup>

## DOMINIQUE'S STORY

One night in rural Tennessee, 14-year-old Dominique<sup>13</sup> went out with her friends and got caught up in typical teenage misbehavior: drinking alcohol and vandalism. A little while later, Dominique was picked up by the police and taken to the station where she was held in a jail cell overnight.

The next morning, Dominique had to face a judge at the local juvenile court. Her father, who met her at court, filled out an “affidavit of indigency” — in other words, an application to determine whether Dominique financially qualified for a public defense attorney. The judge ruled that her father’s income was just over the financial threshold and therefore she did not qualify. The judge denied Dominique a lawyer and announced that if she wanted an attorney to represent her, she would need to hire one. Dominique’s father

worked overtime to support their family and could not afford the cost of a private attorney.

When the hearing ended, the judge refused to let Dominique go home with her father even though the charges were misdemeanors. She remained behind bars for another full week. When Dominique returned to court — again, without a lawyer — the judge released her on house arrest and set a future court date.

Dominique lost her right to counsel because the court erroneously determined her family had the financial means to pay for private counsel. The judge’s decision caused Dominique to navigate the system alone, without an attorney to stand up for her rights and interests at any stage along the way.

“[The lack of a presumption of eligibility] continues to be a huge problem — I might get a call from a detention center that a kid with no attorney has been there a week asking for help, but if they don’t meet the standard for eligibility, [I] can’t represent them.”

- JUVENILE DEFENDER

“Sometimes, a child is denied a lawyer because of one simple question: Is the child financially eligible for a public defender?”

Far too many youth appear in juvenile court without an attorney at their side. The reasons vary but are often linked to policies and practices favoring paternalism over due process protections.

Sometimes, a child is denied a lawyer because of one simple question: Is the child financially eligible for a public defender?

Young people generally do not have incomes independent of their parents,<sup>14</sup> yet they are often required to substantiate a certain financial status to trigger their constitutional right to counsel.

The Supreme Court ruled in *Gault* that youth accused of delinquent acts must be full participants in court proceedings — not mere spectators.<sup>15</sup> To participate means to take part, and juvenile defenders are the *only* court actors who unequivocally ensure children have a voice when the court decides how their cases — and futures — will unfold. Onerous, arbitrary, and unclear eligibility determinations prevent children from accessing their right to representation. And thus, their right to be heard.

## PRESUMPTION OF FINANCIAL ELIGIBILITY

The constitutional right to counsel is guaranteed to the child alone, but the vast majority of states consider the income and assets of parents in deciding whether to honor the child’s right to counsel.<sup>16</sup>

Only 11 states have a statewide presumption that children are automatically eligible for an attorney based on their status as children, irrespective of financial status.<sup>17</sup> Some of these states include provisions that if the court determines parents are able to pay for private counsel, the court can order they do so at any time.

<sup>12</sup> See *infra* note 17 and accompanying text.

<sup>13</sup> Names and identifying information have been changed to protect confidentiality.

<sup>14</sup> The use of the term “parents” throughout the report is intended to include parents, guardians, relatives, and other caregivers.

<sup>15</sup> *In re Gault*, 387 U.S. 1, 38 n.65 (1967).

<sup>16</sup> See Telephone Interviews with Juvenile Defenders in: Alabama (Jan. 09, 2017); Alaska (Dec. 20, 2016 & Jan. 30, 2017); Arizona (Dec. 20, 2016); Arkansas (Feb. 23, 2017); California (Feb. 22, 2017); Colorado (Jan. 12, 2017); Connecticut (Jan. 12, 2017); the District of Columbia (Jan. 19, 2017); Florida (Jan. 19, 2017); Georgia (Dec. 13, 2016); Hawaii (Mar. 9, 2017); Idaho (Feb. 22, 2017); Illinois (Jan. 4, 2017); Iowa (Dec. 21, 2016); Kansas (Feb. 16, 2017); Kentucky (Mar. 9, 2017); Maine (Dec. 13, 2016); Maryland (Dec. 14, 2016); Michigan (Dec. 14, 2016); Minnesota (Feb. 9, 2017); Mississippi (Jan. 11, 2017); Missouri (Dec. 15, 2016); Nebraska (Dec. 14, 2016); Nevada (Dec. 19, 2016 & Jan. 13, 2017); New Hampshire (Jan. 19, 2017); New Jersey (Dec. 8, 2016 & Jan. 30, 2017); New Mexico (Jan. 13, 2017 & Jan. 25, 2017); New York (Jan. 17, 2017); North Dakota (Feb. 3, 2017); Oklahoma (Feb. 9, 2017); Oregon (Jan. 18, 2017); Puerto Rico (Dec. 21, 2016); Rhode Island (Dec. 19, 2016); South Carolina (Jan. 13, 2017); South Dakota (Feb. 22, 2017); Tennessee (Feb. 23, 2017); Texas (Feb. 10, 2017); Utah (Feb. 17, 2017); Virginia (Jan. 12, 2017); West Virginia (Jan. 27, 2017); Wyoming (Dec. 9, 2016). See also NAT’L CONFERENCE OF STATE LEGISLATURES, INDIGENT DEFENSE, COUNSEL & OTHER PROCEDURAL ISSUES: JUVENILE JUSTICE GUIDEBOOK FOR LEGISLATORS 4 (2011), <http://www.ncsl.org/documents/cj/jjguidebook-indigent.pdf>.

<sup>17</sup> DEL. CODE ANN. tit. 29, § 4602(c) (West 2016) (“Any person under the age of 18 arrested or charged with a crime or act of delinquency shall be automatically eligible for representation by the Office of Defense Services”); LA. CHILD. CODE ANN. art. 320(a) (2010) (“For purposes of the appointment of counsel, children are presumed to be indigent.”); MASS. S.J.C. RULE 3:10(h)(iv) (2016) (defining as indigent “a juvenile, a child who is in the care or custody of the Department of Children and Families, or a young adult”); MONT. CODE ANN. § 47-1-104 (4)(b)(ii)-(iii) (West 2013) (providing that every youth charged in delinquency proceedings “is entitled by law to the assistance of counsel at public expense regardless of the person’s financial ability to retain private counsel”); N.C. GEN. STAT. ANN. § 7b-2000(b) (2001) (“All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency.”); OHIO ADMIN. CODE 120-1-03(B)(4) (2017) (“An applicant is presumed indigent and thus entitled to the appointment of counsel at state expense [when] [t]he applicant is a child . . . . In determining the eligibility of a child for appointed counsel, the income of the child’s parent, guardian, or custodian shall not be considered.”); 42 PA. STAT. AND CONS. STAT. ANN. § 63371(b)(1) (West 2012) (“[I]f a [child] has a right to be represented by counsel or is provided counsel at the discretion of the court under this section and counsel is not knowingly and voluntarily waived, the court shall refer the [child] to the state public defender and counsel shall be appointed by the state public defender . . . without a determination of indigency.”); IND. CODE ANN. § 31-32-4-2 (West 2017) (providing that the court “shall appoint counsel for the child at the detention hearing” if not earlier, and “may appoint counsel to represent any child in any other proceeding”). *But see* IND. CODE ANN. § 33-40-3-6(a) (West 2017) (providing that a guardian may be charged for the representation if it is later determined the guardian is financially able).

Where it exists, the presumption of eligibility has the laudable effect of children accessing counsel more quickly and more frequently.

Notably, several of the 11 states with a presumption of eligibility have passed legislation or changed court rules in recent years.<sup>18</sup> Such progress affirms the notion that the fulfillment of a child's rights must not be contingent on any situation — financial or familial — that exists beyond the control of the child.

However, the vast majority of states have no presumption of eligibility for children in law or in practice. Determinations of whether children receive a lawyer are typically made on a case-by-case basis.

Requiring young people's access to an attorney to hinge on their families' financial status raises several serious concerns: (1) The investigation into parents' incomes can be lengthy — not to mention invasive — and, in some cases, is ongoing while children are held behind bars without access to an attorney; (2) the investigation can stir fear in families that they may be forced to hire an attorney they cannot afford, which can influence a child's decision to waive counsel as a means of forgoing the investigation altogether;<sup>19</sup> (3) some parents have incomes that fall just above the eligibility threshold, but they are not truly capable of paying for counsel, leaving the child without representation; (4) some parents who are ineligible may decide not to hire an attorney, even if they can afford one, forcing the child to navigate the system alone;<sup>20</sup> and (5) if parents incur the cost of representation, there is potential for conflict between the juvenile defender's loyalty to the child and perception of loyalty to the parents — either from the attorney or family.<sup>21</sup>

To fully safeguard children, the juvenile court system must deem every young person eligible for an attorney regardless of financial status.

## PROCESS FOR DETERMINING FINANCIAL ELIGIBILITY

Where there is no presumption of eligibility, state and local standards vary on how to qualify youth for a public defense attorney. Eligibility determinations are generally conducted by court personnel, public agencies, or public defender offices and are usually based on some percentage of the federal poverty guidelines. On average, that percentage hovers at 125 percent.<sup>22</sup>

<sup>18</sup> See, e.g., DEL. CODE ANN. tit. 29, § 4602(c) (West 2016); LA. CHILD CODE ANN. art 320(a) (2010); MASS. S.J.C. RULE 3:10(h)(iv) (2016); 42 PA. STAT. AND CONS. STAT. ANN. § 6337.1(b)(1) (West 2012).

<sup>19</sup> INTERBRANCH COMM'N ON JUVENILE JUSTICE, REPORT ON LUZERNE COUNTY (2010), <http://www.modelsforchange.net/publications/307>; *Reform Trends*, JUVENILE JUSTICE INFORMATION EXCHANGE, <http://jjie.org/hub/juvenile-indigent-defense/reform-trends/> (last visited Apr. 10, 2017); *Lessons from Luzerne County: Promoting Fairness, Transparency and Accountability*, JUVENILE LAW CENTER, <http://jlc.org/resources/publications/lessons-luzerne-county-promoting-fairness-transparency-and-accountability> (last visited Apr. 10, 2017).

<sup>20</sup> Wealthy children are almost never prosecuted in the juvenile justice system. See Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J. L. & POL'Y 53 (2012).

<sup>21</sup> Kenneth King, Patricia Puritz & David Shapiro, *The Importance of Early Appointment of Counsel in Juvenile Court*, in NAT'L CTR. FOR STATE COURTS, TRENDS IN STATE COURTS: 2014 (2014), [http://njdc.info/wp-content/uploads/2014/08/The-Importance-of-Early-Appointment-of-Counsel-in-Juvenile-Court\\_King\\_Puritz\\_Shapiro.pdf](http://njdc.info/wp-content/uploads/2014/08/The-Importance-of-Early-Appointment-of-Counsel-in-Juvenile-Court_King_Puritz_Shapiro.pdf) [hereinafter King et al., *The Importance of Early Appointment*].

<sup>22</sup> *Indigency Requirements, Juvenile Defense, Juvenile Justice Geography, Policy, Practice and Statistics*, NAT'L CTR. FOR JUVENILE JUSTICE, <http://www.jjgpps.org/juvenile-defense#indigency-requirements> (last visited Apr. 5, 2017).

## 2017 Poverty Guidelines for the 48 Contiguous States and the District of Columbia<sup>23</sup>

PERSONS IN FAMILY/ HOUSEHOLD <sup>24</sup>	POVERTY GUIDELINE 100%	POVERTY GUIDELINE 125%
1	\$12,060	\$15,075
2	\$16,240	\$20,300
3	\$20,420	\$25,525
4	\$24,600	\$30,750
5	\$28,780	\$35,975

In some jurisdictions, the financial eligibility process takes up to a week,<sup>25</sup> assuming the family is able to gather the necessary materials; in others, it is far shorter. One juvenile defender in Louisiana said there are no forms; a child is simply asked if he or she receives free or reduced-price lunch at school, and if so, counsel is appointed.<sup>26</sup> This, despite the fact that Louisiana is one of the 11 states that has a law presuming all children are automatically eligible.

But defenders do not always know how children are determined eligible. Outside of the few areas where public defender offices have the authority to conduct the screenings, defense attorneys are largely left in the dark. As one juvenile defender in North Dakota said, “I don’t know what the process is . . . there is some sort of presumption for detained kids . . . but it is a mysterious force.”<sup>27</sup>

The eligibility determination process robs attorneys of their already limited time to build relationships with their clients and start case preparation; it instills anxiety in the child or family that the child may not receive counsel at all; and it often stigmatizes families when they’re forced to provide varying levels of documentation, including proof of receipt of government benefits from other agencies.

## DISCRETION IN ELIGIBILITY DETERMINATIONS

One of the greatest concerns in states that do not have a presumption of eligibility for children is the unbridled discretion that differs from courtroom to defender office to county.

Examples of such discrepancies are revealed in the findings of the United States Department of Justice’s investigation into the St. Louis County Family Court. The 2015 report noted, “The Family Court does not utilize uniform procedures to determine financial eligibility for representation by the public defender or assigned counsel . . . [T]he four judges and commissioners in St. Louis County use markedly different income guidelines to determine financial eligibility.”<sup>28</sup>

<sup>23</sup> FEDERAL REGISTER, ANNUAL UPDATE OF THE HEALTH AND HUMAN SERVICES POVERTY GUIDELINES (2017), <https://www.federalregister.gov/documents/2017/01/31/2017-02076/annual-update-of-the-hhs-poverty-guidelines> (rates are slightly higher for Hawaii and Alaska; a two-person household is \$18,670 for Hawaii and \$20,290 for Alaska).

<sup>24</sup> Add \$4,180 for each additional person.

<sup>25</sup> See Telephone Interview with Juvenile Defender in Colorado (Dec. 12, 2016).

<sup>26</sup> See Telephone Interview with Juvenile Defender in Louisiana (Dec. 15, 2016).

<sup>27</sup> See Telephone Interview with Juvenile Defender in North Dakota (Feb. 3, 2017).

<sup>28</sup> See U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE ST. LOUIS FAMILY COURT, ST. LOUIS, MISSOURI 19 (2015), <https://sites.ed.gov/underservedyouth/files/2017/01/Report-Investigation-of-the-St-Louis-County-Family-Court.pdf>.

Further, the report found that if the court “determines that a child does not qualify for public defender representation but the child’s parent is nevertheless unable to retain private counsel, the Court will appoint a lawyer and order the parent to pay a ‘retainer’ against future legal fees.”<sup>29</sup> No guidelines existed for setting the fees, and the Department of Justice discovered an extensive range in the amounts parents were charged, starting at \$150 and going as high as \$2,000.<sup>30</sup> Not surprisingly, the absence of uniform procedures is listed in the findings as a contributing factor to the high rates of children who waived their right to counsel in St. Louis County.

Arbitrary eligibility determinations also contribute to the disparate treatment of children of color, who are more likely than their white peers to be denied their right to an attorney — and thus, denied access to important constitutional protections.<sup>31</sup>

Children should be deemed eligible for a juvenile defender by virtue of their status as children.<sup>32</sup> There are rumblings of reform as jurisdictions across the country begin to lift this burden off youth, but a presumption of eligibility must take hold as an evolving standard of justice.<sup>33</sup>

“Children should be deemed eligible for a juvenile defender by virtue of their status as children.”

## AUTOMATIC ELIGIBILITY STATUTES

**Delaware:** “Any person under the age of 18 arrested or charged with a crime or act of delinquency shall be automatically eligible for representation by the Office of Defense Services.”<sup>34</sup>

**North Carolina:** “A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings . . . All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency.”<sup>35</sup>

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 3-4 (“[I]n certain phases of the County’s juvenile justice system, race is – in and of itself – a significant contributing factor, even after factoring in legal variables (e.g., nature of the charge) and social variables (e.g., age). In short, Black children are subjected to harsher treatment because of their race.”); U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT, SHELBY COUNTY, TENNESSEE 3, 22, 30 (2012), [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv\\_findingsrpt\\_4-26-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv_findingsrpt_4-26-12.pdf) (“Black children are disproportionately represented in almost every phase of the juvenile justice system . . . [and analysis] suggest[s] that race was an improper motivating factor in determining how a child proceeds through the system.”).

<sup>32</sup> NAT’L JUVENILE DEFENDER CTR., DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES 16 (2016) [hereinafter DEFEND CHILDREN].

<sup>33</sup> See, e.g., *Reform Trends*, JUVENILE JUSTICE INFORMATION EXCHANGE, <http://jjie.org/hub/juvenile-indigent-defense/reform-trends/> (last visited Apr. 10, 2017) (Louisiana passed legislation in 2010 providing that all youth are presumed indigent for the appointment of counsel in juvenile court. North Carolina passed legislation establishing a presumption of indigency and requiring that an attorney be appointed for all youth in delinquency proceedings, unless they have already retained counsel. Pennsylvania, in the wake of the “kids for cash” scandal, adopted court rules presuming all youth are indigent. The rules require an attorney be appointed for any youth who have not retained counsel prior to any hearing. While the presumption of indigency can be rebutted—if the court receives financial evidence to the contrary, for example—the court cannot take into account the financial resources of the parent or guardian.)

<sup>34</sup> DEL. CODE ANN. tit. 29 § 4602(c) (2016).

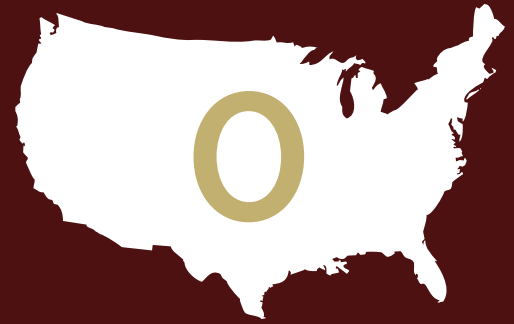
<sup>35</sup> N.C. GEN. STAT. ANN. § 7B-2000(a)-(b) (West 2001).

EARLY APPOINTMENT OF COUNSEL:

# Children Do Not Get Attorneys Until It Is Too Late







No state guarantees lawyers for every child during interrogation, and only one state requires it under limited circumstances.<sup>36</sup>

## ANTHONY'S STORY

Anthony,<sup>37</sup> a 17-year-old from southern Illinois, was abruptly handcuffed and arrested one evening at his family's home. The police officers refused to tell Anthony or his family why they placed him under arrest. Once at the station, Anthony was locked in isolation with no access to an attorney or family member.

Anthony has an IQ of 60, with cognitive abilities roughly equivalent to a nine- or 10-year-old child. His vulnerability — which the officers were fully aware of — did not deter them from proceeding with the interrogation. They never informed Anthony of his right to an attorney or his right to remain silent, but nonetheless persuaded him to sign a sheet of paper that said he knowingly and voluntarily waived his rights.

Eventually, Anthony learned the reason for his arrest: the police suspected him of committing an armed

robbery. The interrogation lasted for over two hours. The officers refused nearly 35 times to acknowledge Anthony's assertions of innocence. They told him 42 times the police had evidence of his guilt, including eyewitnesses. Such evidence did not exist.

Over the course of the interrogation, Anthony repeatedly broke down into sobs, pleaded for his mother, and threatened to kill himself. The pressure still did not relent. One officer told Anthony to "man up."

Desperate to go home, Anthony finally confessed to a crime he did not commit. He was charged as an adult and faced up to 45 years in prison. Anthony sat behind bars for nine months until the court reviewed videotapes of the interrogation and dropped the charges. He never would have lost a year of his life to the anguishing ordeal if the court had appointed Anthony a lawyer from the start.

"A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic."

- *HALEY V. OHIO*, 332 U.S. 596, 599-600 (1948).

“States should recognize interrogation as a critical stage of juvenile proceedings requiring a publicly funded defense lawyer to protect children from potential abuses of authority.”

The Supreme Court ruled in *Gault* that children facing the loss of liberty must have “the guiding hand of counsel at every step in the proceedings against [them].”<sup>38</sup> That means young people should be appointed an attorney at the earliest possible moment; otherwise, the right to counsel is “as good as nonexistent.”<sup>39</sup>

When is the early appointment of counsel early enough? Statutory language varies across states. Some determine the triggering event for access to a lawyer to be when children appear in court for the first time — shaking their attorney’s hand as the judge calls the room to order. Elsewhere, children might find themselves detained for days before having the opportunity to speak with a lawyer. In none of these instances does the system appoint counsel early enough for all youth. One state, however, recently passed legislation requiring appointment of counsel for youth during interrogation, but only under certain circumstances.<sup>40</sup>

## APPOINTMENT PRIOR TO INTERROGATION

The Supreme Court long ago noted the inherent imbalance of power when children face police interrogation.<sup>41</sup> The unfair power dynamics are exacerbated for youth of color by racially disparate policing, as evidenced by significant research and Department of Justice investigations.<sup>42</sup> States should recognize interrogation as a critical stage of juvenile proceedings requiring a publicly funded defense lawyer to protect children from potential abuses of authority.

When children are questioned at a police station, they are often pressured to talk to authorities for an indefinite amount of time. They are typically seated in small, enclosed rooms where they are made to feel intimidated or as if they are complicit in wrongdoing. And the youth are usually alone.

Attorneys should be automatically appointed at this stage. Without access to a lawyer, children are unjustly exposed to law enforcement officers who use coercive tactics leading to false confessions or disclosures of information, in violation of their rights, which can be used against children in court.<sup>43</sup>

<sup>36</sup> See *infra* note 40 and accompanying text.

<sup>37</sup> Names and identifying information have been changed to protect confidentiality.

<sup>38</sup> *In re Gault*, 387 U.S. 1, 36 (1967).

<sup>39</sup> King et al., *The Importance of Early Appointment*, *supra* note 21, at 11.

<sup>40</sup> 705 ILL. COMP. STAT. § 405 / 5-170 (2017) (providing that any child younger than 15 and accused of enumerated serious offenses must be represented by counsel during the entire custodial interrogation).

<sup>41</sup> *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948).

<sup>42</sup> See, e.g., JOSHUA ROVNER, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS, THE SENTENCING PROJECT (2016), <http://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/>; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY’S OFFICE, NORTHERN DISTRICT OF ILLINOIS, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 143 (2017), <https://www.justice.gov/opa/file/925846/download>; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 63, 65, 67, 87, 101 (2016), <https://www.justice.gov/opa/file/883366/download>.

<sup>43</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (noting that the inherent coercion of custodial interrogation “is all the more troubling — and . . . all the more acute — when the subject . . . is a juvenile”). See Joshua A. Tepfer, Laura H. Nirider, & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 4 (2010) (exploring the reasons that youth are particularly vulnerable to false confessions); Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1161-62 (1980) (finding that “juveniles younger than fifteen . . . failed to meet both the absolute and relative (adult norm) standards for comprehension . . . . The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements and, compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights” and that the level of comprehension of youth 16 and older was comparable to that of adults, but still inadequate).

Young people are particularly susceptible to manipulative strategies, like exaggerating evidence, fabricating witness testimony, and lying, all of which are permissible — and often common practice — during interrogation.

Youth may also waive their rights in response to unrealistic or short-term incentives.<sup>44</sup> For example, children might “confess” because they believe a law enforcement officer who falsely promises they will be able to go home as soon as they tell the officer “what happened.”

Regardless of whether charges have been filed against a young person, if that child is in the custody of law enforcement and has not yet retained a private lawyer, a public defense attorney should be appointed to offer guidance and protect against deceptive interrogation methods.

## APPOINTMENT OF COUNSEL FOR CHILDREN NOT IN CUSTODY

At a minimum, children must have lawyers who have sufficient time to prepare before their client's first appearance in front of a judge. This is often not the case.

In many states, children are introduced to their attorney in the courtroom, mere moments before facing the judge.<sup>45</sup> Under these circumstances, juvenile defenders described the need to regularly postpone hearings to build in meaningful time for consultation with their clients.<sup>46</sup>

States like New York and Kentucky resolved this issue by instituting appointment systems that notify juvenile defenders of children who are scheduled for their first appearance later that day, providing attorneys at least some extra time to meet with them before court.<sup>47</sup>

## APPOINTMENT OF COUNSEL FOR CHILDREN IN CUSTODY

Appointment of counsel prior to the first court appearance is more likely to occur for children held in detention. After years of work across states to decrease youth detention and incarceration rates, juvenile defenders and justice advocates have successfully ensured that children in a number of states have access to their lawyers in advance of detention hearings.<sup>48</sup> However, practices vary significantly, and some youth meet their lawyer at the detention hearing<sup>49</sup> while others wait in detention for days before ever seeing a lawyer.<sup>50</sup>

<sup>44</sup> See, e.g., *Dassey v. Dittmann*, 201 F.Supp. 3d 963, 993-1007 (E.D. Wis. 2016) (finding Brendan Dassey's confession involuntary because of the investigators' use of false promises); *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004). See generally INT'L ASS'N OF CHIEFS OF POLICE, REDUCING RISKS: AN EXECUTIVE'S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION 4 (2012), <http://www.theiacp.org/portals/0/pdfs/reducingrisksanexecutiveguidetoeffectivejuvenileinterviewandinterrogation.pdf>.

<sup>45</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Alabama (Jan. 9, 2017); New Hampshire (Jan. 19, 2017); New Mexico (Jan. 13, 2017 & Jan. 25, 2017); North Carolina (Dec. 14, 2016); Oregon (Jan. 18, 2017); Rhode Island (Dec. 19, 2016); Tennessee (Feb. 23, 2017).

<sup>46</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Colorado (Jan. 12, 2017); Kansas (Feb. 16, 2017); Nevada (Dec. 19, 2016); Utah (Feb. 17, 2017).

<sup>47</sup> See, Telephone Interviews with Juvenile Defenders in: Kentucky (Mar. 9, 2017); New York (Jan. 17, 2017).

<sup>48</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Colorado (Jan. 12, 2017); the District of Columbia (Jan. 19, 2017); Kentucky (Mar. 9, 2017); Louisiana (Dec. 15, 2016); Nevada (Jan. 13, 2017); New Jersey (Jan. 30, 2017); Oregon (Jan. 23, 2017).

<sup>49</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Hawaii (Mar. 9, 2017); Minnesota (Feb. 9, 2017); New Hampshire (Jan. 19, 2017); Tennessee (Feb. 23, 2017).

<sup>50</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Arkansas (Feb. 23, 2017) (within three business days); Delaware (Jan. 18, 2017) (within ten days); Missouri (Dec. 15, 2016) (within three business days); North Carolina (Jan. 4, 2017) (within five days).

## TIMING AND CIRCUMSTANCES OF THE FIRST MEETING

First impressions matter. When the attorney and child meet, it is crucial for the attorney to address two fundamental objectives: (1) Ensure the child understands the charges, the possible consequences facing the child, case options and strategies, and who is who in the courtroom; and (2) begin to build trust, confidence, and a good rapport with the young client.<sup>51</sup>

“... juvenile defenders rarely have enough time or enough privacy to engage in a thoughtful and productive dialogue with new clients.”

However, juvenile defenders rarely have enough time or enough privacy to engage in a thoughtful and productive dialogue with new clients. Attorneys report that client interviews vary in length from less than five minutes to 30 minutes.<sup>52</sup> Defenders from at least five jurisdictions said their meetings cannot always take place in private — forcing a potential breach of the ethical duty of confidentiality — because they lack the basic necessities of time and physical space.<sup>53</sup> Where attorneys report having adequate time to meet with a child before court, it is overwhelmingly attributed to flexible judges and court staff.

For children detained prior to their first court appearance, some jurisdictions notify attorneys at least a few hours<sup>54</sup> before the detention hearing, usually allowing time for a preliminary conversation. Depending on how far in advance notice is given and how far the detention facility is located from court, this notice may or may not realistically provide adequate time to prepare.

Practice also varies widely for youth released prior to their first court appearance. In some jurisdictions, the summons to court includes the contact information for the child’s attorney, or the attorney is notified in advance in order to facilitate contact with the child. In others, children are expected to show up to court with no information about their lawyer and are only given the time and date of the court appearance. Scenarios like these often mean that attorneys have five minutes or less to meet with their clients before a hearing.<sup>55</sup> One juvenile defender in Arkansas said that on busier days, some lawyers conduct group meetings with their clients because there is not enough time to meet with each child individually.<sup>56</sup> This means no case-specific or child-specific information can be discussed or prepared for court without violating confidentiality.

<sup>51</sup> NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, § 2.1: ROLE OF JUVENILE DEFENSE COUNSEL AT INITIAL CLIENT CONTACT [hereinafter NJDC STANDARDS].

<sup>52</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Montana (Dec. 13, 2016); New York (Jan. 25, 2017); Tennessee (Feb. 23, 2017); Utah (Feb. 17, 2017); Washington (Jan. 19, 2017).

<sup>53</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Colorado (Jan. 12, 2017); Delaware (Dec. 12, 2016); Indiana (Jan. 21, 2017); Massachusetts (Dec. 13, 2016); Virginia (Jan. 12, 2017). See also MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2016).

<sup>54</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Alabama (Jan. 9, 2017); Colorado (Dec. 12, 2016); New Mexico (Jan. 13, 2017).

<sup>55</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: New Mexico (Jan. 25, 2017); Utah (Feb. 17, 2017).

<sup>56</sup> See Telephone Interview with Juvenile Defender in Arkansas (Feb. 23, 2017).

In several states, instead of the court, the public defender’s office has the responsibility of initiating the appointment of counsel for children.<sup>57</sup> In most of these states, juvenile defenders have the opportunity to meet with clients before court appearances.<sup>58</sup> The intake process conducted by a public defender’s office allows time for an initial interview and results in a higher likelihood that defenders can build rapport with the child and better prepare for the initial hearing. Such successes suggest that defender offices are best situated to appoint lawyers for children.

Among the most problematic barriers in relationship building between an attorney and a child are interviews that take place over the phone or video.<sup>59</sup> Such technologies severely inhibit advocacy and the ability to develop the trust necessary to adequately represent children.<sup>60</sup> Any time limits or physical constraints may additionally contribute to ineffective communication with youth, particularly youth with intellectual or developmental disabilities.<sup>61</sup>

## EARLY APPOINTMENT OF COUNSEL STATUTE

**Illinois:** “[A] minor who was under 15 years of age at the time of the commission of [certain enumerated offenses] must be represented by counsel throughout the entire custodial interrogation of the minor.”<sup>62</sup>

<sup>57</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Colorado (Jan. 12, 2017) (the public defender office notifies alternate defense counsel); Delaware (Jan. 18, 2017) (the office of conflict counsel notifies conflict attorneys); the District of Columbia (Jan. 19, 2017) (the Public Defender Service makes initial conflict attorney appointment selections that are later approved by the court); Maryland (Dec. 14, 2016) (public defender office appoints counsel); North Dakota (Feb. 3, 2017) (public defender office appoints counsel).

<sup>58</sup> See Telephone Interviews with Juvenile Defenders in: Colorado (Jan. 12, 2017); Delaware (Jan. 18, 2017); Iowa (Jan. 21, 2017); North Dakota (Feb. 3, 2017) (all interviews noted meetings in advance but half noted that those meetings were occasionally only feasible by telephone given geographical challenges of detention facilities far away).

<sup>59</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Arkansas (Feb. 23, 2017) (first meeting by phone); Colorado (Jan. 12, 2017) (first meeting by videoconference); North Dakota (Feb. 3, 2017) (first meeting by phone).

<sup>60</sup> See, e.g., Joel V. Oberstar et al., *Cognitive and Moral Development, Brain Development, and Mental Illness: Important Considerations for the Juvenile Justice System*, 32 WM. MITCHELL L. REV. 1051 (2006); Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J. L. REFORM 695, 702 (2002); David A. Davis, *Talking Heads—Virtual Reality and the Presence of Defendants in Court*, FLA. BAR J. at 30 (2001) (suggesting that a client appearing in court by video will not connect well with counsel and “may believe his lawyer is merely processing his case without any real connection”).

<sup>61</sup> Michele LaVigne et al., *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, 15 U.C. DAVIS J. JUV. L. & POL’Y 37 (2011).

<sup>62</sup> 705 ILL. COMP. STAT. ANN. § 405 / 5-170(a) (West 2017).

COSTS OF COUNSEL:



# Children Must Pay for Their Constitutional Right to Counsel



Thirty-six states allow children to be charged fees for a “free” lawyer.<sup>63</sup>

## JONATHAN’S STORY

At age 13, Jonathan<sup>64</sup> was arrested and charged with simple assault after an altercation erupted with his father at their home.

In New Hampshire, children or their families are required to pay a \$275 fee for a public defender in juvenile court. Jonathan, who did not have an income of his own, needed his father to agree to cover the costs in order to access an attorney.

His father refused. During the first court appearance, Jonathan waived his constitutional right to counsel and pled guilty to the charge.

The court placed Jonathan on probation and sent him home. He had trouble satisfying the order and was later arrested for a number of probation violations. The court did not inquire as to why Jonathan was

struggling; eventually, the judge simply sought to have him locked up.

The state requires an attorney to be present if the court is considering detaining a child. Jonathan was appointed a juvenile defender who quickly learned that Jonathan’s home life was not only unstable, but dangerous: his father was abusive and had been for a long time. What the court perceived to be unruly behavior was, in fact, the result of fear at home and severe trauma.

The juvenile defender brought Jonathan’s story to light; the judge dismissed the case and sought help and support for Jonathan. His juvenile defender said the case never would have spiraled so deep into the system had Jonathan not faced the \$275 barrier to receive representation.

“[The courts] are leaching the poor left and right.”

- JUVENILE DEFENDER

Based on findings of the Snapshot, the “blessings of liberty” so eloquently outlined in the Constitution are not protected for all people. For some, liberty can only be accessed for a price.

Even though the Supreme Court ruled attorneys are not a luxury but a fundamental right for children,<sup>65</sup> juvenile defense representation comes at a cost in many places across the nation. Expenses range from \$10 for an application fee to over \$1,000 for an attorney’s services — an attorney who is supposed to be appointed at public expense.<sup>66</sup>

“For some, liberty can only be accessed for a price.”

## FEES AND COSTS ASSOCIATED WITH APPOINTMENT AND REPRESENTATION

Thirty-six states have some type of financial cost that may be imposed on children or their families to access what is supposedly the right to free counsel.<sup>67</sup> This cost may be an application fee, a public defender fee, a specific type of case fee, reimbursement or partial reimbursement of attorney fees, or some combination thereof.

Anecdotally, where any of these fees exist, there are huge discrepancies in how often or whether they are enforced. Some jurisdictions report the fees are always waived; others report they are always enforced. Often, whether or not a family is charged for defense counsel depends on a particular judge or county.

Based on research and interviews, nine states have an application, processing, or administrative fee ranging from \$10 to \$50.<sup>68</sup> In other words, families must pay to prove they do not have enough money for a lawyer. In addition to the application fees, there are “public defender fees”: flat fees for a juvenile case or specific types of juvenile cases (misdemeanors versus felonies), as well as fees for different proceedings (hearings, trials, and others). These flat fees range from \$25 to over \$750.<sup>69</sup> For example, once a child is deemed eligible for a public attorney in Massachusetts (a state that recently passed a court rule deeming children eligible for a public defender regardless of family income), the child can still be charged a \$300 public defender fee.<sup>70</sup> In the neighboring state of New Hampshire, the fee starts at \$275 and increases based on the severity of the charge.<sup>71</sup>

<sup>63</sup> See *infra* note 67 and accompanying text.

<sup>64</sup> Names and identifying information have been changed to protect confidentiality.

<sup>65</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963); *In re Gault*, 387 U.S. 1 (1967).

<sup>66</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Alabama (Jan. 18, 2017) (\$500 per case); Maine (Dec. 13, 2016) (\$60 per hour or \$300-\$500 per case); New Hampshire (Jan. 19, 2017) (\$275 or more per case); New Mexico (Jan. 13, 2017) (\$10 application fee); New Mexico (Jan. 25, 2017) (\$10 application fee; cost for an attorney assessed on a sliding scale, which could cost \$1,000 for a full case); Oklahoma (Feb. 9, 2017) (\$100-\$500 per case); South Dakota (\$94 per hour); Wisconsin (Dec. 12, 2016) (\$240 per misdemeanor case, \$460 per felony case).

<sup>67</sup> See Telephone Interviews with Juvenile Defenders in: Alabama (Jan. 9, 2017); Arizona (Dec. 20, 2016); Arkansas (Feb. 23, 2017); California (Feb. 22, 2017); Colorado (Jan. 12, 2017); Delaware (Jan. 18, 2017); Florida (Jan. 19, 2017); Georgia (Dec. 13, 2016); Idaho (Feb. 22, 2017); Iowa (Dec. 21, 2016); Kansas (Feb. 16, 2017); Kentucky (Mar. 9, 2017); Louisiana (Dec. 15, 2016); Maine (Dec. 13, 2016); Maryland (Dec. 14, 2016); Massachusetts (Dec. 13, 2016); Michigan (Dec. 14, 2016); Nebraska (Dec. 14, 2016); Nevada (Dec. 19, 2016); New Hampshire (Jan. 19, 2017); New Jersey (Dec. 8, 2016 & Jan. 30, 2017); New Mexico (Jan. 13, 2017 & Jan. 25, 2017); North Carolina (Dec. 14, 2016); North Dakota (Feb. 3, 2017); Ohio (Dec. 20, 2016 & Jan. 26, 2017); Oklahoma (Feb. 9, 2017); Oregon (Jan. 18, 2017); South Carolina (Jan. 13, 2017); South Dakota (Feb. 22, 2017); Tennessee (Feb. 23, 2017); Texas (Feb. 10, 2017); Utah (Feb. 17, 2017); Virginia (Jan. 12, 2017); Washington (Dec. 20, 2016 & Jan. 19, 2017); Wisconsin (Dec. 12, 2016); Wyoming (Dec. 9, 2016).

<sup>68</sup> See Telephone Interviews with Juvenile Defenders in: Florida (Jan. 19, 2017) (\$50); Georgia (Dec. 13, 2016) (\$50); Maryland (Dec. 14, 2016) (\$25); Nevada (Dec. 19, 2016) (\$20); New Mexico (Jan. 13, 2017 & Jan. 25, 2017) (\$10); Ohio (Dec. 20, 2016 & Jan. 26, 2017) (\$25); Oregon (Jan. 18, 2017) (\$25); South Carolina (Jan. 13, 2017) (\$40); Tennessee (Feb. 23, 2017) (\$50).

<sup>69</sup> See Telephone Interviews with Juvenile Defenders in: Alabama (Jan. 9, 2017) (\$350); Arizona (Dec. 20, 2016) (up to \$400); Arkansas (Feb. 23, 2017) (\$200-\$500); Colorado (Jan. 12, 2017) (\$25); Delaware (Jan. 18, 2017) (\$100); Florida (Jan. 19, 2017) (\$50-\$100 or more); Kentucky (Mar. 9, 2017) (\$150); Louisiana (Dec. 15, 2016) (\$45 minimum); Massachusetts (Dec. 13, 2016) (\$300); Nebraska (Dec. 14, 2016) (\$65); New Hampshire (Jan. 19, 2017) (\$275 for juvenile case, more for felony); New Jersey (Jan. 30, 2017) (\$75-\$750 or more); Oklahoma (Feb. 9, 2017) (\$100-\$500); Oregon (Jan. 18, 2017) (up to \$700); Tennessee (Feb. 23, 2017) (up to \$200); Texas (Feb. 10, 2017) (\$25-\$100); Virginia (Jan. 12, 2017) (\$120); Washington (Dec. 20, 2016) (\$100-\$400); Wisconsin (Dec. 12, 2016) (if parent not a victim in the case, \$240 for misdemeanors and \$460 for felonies).

<sup>70</sup> MASS. S.J.C. RULE 3:10(h)(iv) (2016).

<sup>71</sup> Telephone Interview with Juvenile Defender in New Hampshire (Jan. 19, 2017).



Even an attorney's hourly fees may be charged to the family either partially or in full. Defenders report that rates vary from \$50 to \$94 per hour across the states,<sup>72</sup> and some states have no limits on the maximum amount families can be charged for public defender services.

## CONSEQUENCES OF FEES AND COSTS

Forcing children and families to pay for legal representation by a publicly funded defense attorney is a cruel abuse of power that directly affects families' livelihoods. In some jurisdictions where a fee is charged but the family does not have the money to pay, the court can order a lien — or form of security on the debt — against a family's property or income.<sup>73</sup> Additionally, children may feel pressure to waive their right to an attorney if they perceive legal representation to be a financial burden on their family; for example, instances in which parents are put in the untenable position of deciding between protecting their child's liberty and paying their rent.

The right to counsel for children is meant to balance the scales of justice; to ensure that every child, no matter their circumstance, is cloaked within the protections of the Constitution. Charging fees for a publicly funded attorney — the very advocate through whom such protections become accessible — renders the right to counsel meaningless for children.

## COSTS OF COUNSEL LEGISLATION

**California (proposed):** California is considering legislation to repeal certain juvenile court costs that are currently charged to children and families, including the costs of a publicly funded juvenile defender.<sup>74</sup>

The legislation, if approved, would amend various provisions related to fees for children, and specifically amend SEC. 7. Section 332 (h) of the Welfare and Institutions Code eliminating attorney fees levied by counties and the courts.

<sup>72</sup> Telephone Interviews with Juvenile Defenders in: California (Feb. 22, 2017) (\$60 per hour); Maine (Dec. 13, 2016) (\$60 per hour); New Jersey (Jan. 30, 2017) (\$50 per hour); North Carolina (Jan. 14, 2017) (\$55-\$70 per hour); South Dakota (Feb. 22, 2017) (\$94 per hour).

<sup>73</sup> See S.D. CODIFIED LAWS § 26-7A-32A (2017); U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE ST. LOUIS FAMILY COURT, ST. LOUIS, MISSOURI 19 (2015), <https://sites.ed.gov/underservedyouth/files/2017/01/Report-Investigation-of-the-St-Louis-County-Family-Court.pdf>; Telephone Interview with Juvenile Defender in New Jersey (Jan. 30, 2017).

<sup>74</sup> At the time of writing, S.B. 190 was under consideration by the California State Legislature. S.B. 190, 2017-2018 Reg. Sess. (Ca. 2017).

WAIVER OF COUNSEL:

A young girl with a scarf looking thoughtfully to the side.

# Children's Rights Are Not Safeguarded by the States



Forty-three states allow children to waive their right to a lawyer without first consulting with a lawyer.<sup>75</sup>

## MICAH'S STORY

Micah,<sup>76</sup> a 15-year-old in Alabama, won \$100 in a game of dice with his neighborhood friends. While visiting relatives in another part of the state later that week, Micah went to a local store to pick up snacks and sodas for the family. He handed the \$100 bill to the cashier. Within minutes, store security and law enforcement officers had surrounded Micah. Unbeknownst to him, the bill was counterfeit.

Micah was detained and charged with a felony. His mother met him for his first court appearance, scheduled nearly 72 hours after his arrest. Micah lined up outside of a courtroom with 25 other youth, all of whom were shackled, handcuffed, and wearing jumpsuits. Micah and his mother watched children and their parents file into the courtroom one after the other.

When Micah was called, he faced the juvenile court “referee” (a court official who fills in as judge) with his mother. No attorney was present, nor was he informed of his right to counsel. The hearing began and ended in a matter of minutes: Micah was adjudicated delinquent and his case was transferred back to his hometown for sentencing.

That’s where he met his juvenile defender, who noticed in reviewing Micah’s case file that he was denied his right to a lawyer. As Micah’s mother told his attorney, “We didn’t know there was any other alternative.” Concerned about what he saw, the attorney looked further into the practices in the county where Micah was arrested. Children in custody were routinely waiving their right to counsel without any idea they were doing so.

“Children who waive their right to counsel often end up in far worse positions than if they were automatically given an attorney from day one. It’s not only unfair but grossly naïve to expect children to navigate this system alone.”

- JUVENILE DEFENDER

“As of July 2015,  
only three states had  
publicly available data  
regarding whether  
appointed counsel  
was waived.”

Juvenile defenders are arbiters of justice for children. Yet a majority of states allow children to waive their right to counsel without ever speaking with an attorney. Moreover, studies show that far too many children do not understand the role of their lawyer, how defense attorneys are positioned to protect them, or the consequences of forgoing representation.<sup>77</sup>

Insight into the frequency and reasoning behind waiver of counsel is limited and likely under-representative of the crisis because courts generally do not collect or report this data.<sup>78</sup> As of July 2015, only three states had publicly available data regarding whether appointed counsel was waived.<sup>79</sup> However, defenders in some states noted that waiver of counsel is occurring, and it is occurring at higher rates in rural and remote areas.<sup>80</sup>

## ATTORNEY CONSULTATION PRIOR TO WAIVER

Only eight states require that children always consult with an attorney before waiving their right to counsel.<sup>81</sup> Of the remaining 44 states, several require consultation under specific circumstances; for example, when a child is charged with a felony or a child is under a certain age.<sup>82</sup> While this demarcation between categories of youth likely reflects legislatures' attempts to require counsel where children are at greater risk, it is a false distinction. Children of all ages who are charged with any manner of offenses have the right to counsel and should unequivocally understand what that right entails.

<sup>75</sup> See *infra* note 81 and accompanying text (naming the eight states that do not allow children to waive their right to a lawyer without first consulting with an attorney).  
<sup>76</sup> See also *infra* note 83 and accompanying text (listing Illinois as the only state that has an absolute prohibition on waiver).

<sup>77</sup> Names and identifying information have been changed to protect confidentiality.

<sup>78</sup> U.S. Dep't of Justice, Statement of Interest for N.P. et al. v. Georgia, No. 2014-CV-241025 at 1 (Ga. Super. Ct. 2014); M. Dyan McGuire et al., *Do Juveniles Understand What an Attorney is Supposed to Do Well Enough to Make Knowing and Intelligent Decisions About Waiving Their Right to Counsel?: An Exploratory Study*, J. APPLIED JUVENILE JUSTICE SERV. 2, 19 (2015).

<sup>79</sup> ANDREW WACHTER, JUVENILE JUSTICE GEOGRAPHY, POLICY, PRACTICE & STATISTICS, INDEFENSIBLE: THE LACK OF JUVENILE DEFENSE DATA (2015), <http://njdc.info/wp-content/uploads/2015/09/Indefensible-The-Lack-of-Juvenile-Defense-Data.pdf> (noting that the lack of data on waiver of counsel may be due to a formerly low demand for this information, an assumption that children are always provided with attorneys, and a de-prioritization of this particular data).

<sup>80</sup> *Id.* (noting that only California, Indiana, and Pennsylvania had publically available data on whether children waived their right to counsel).

<sup>81</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Missouri (Dec. 15, 2016); Nevada (Jan. 13, 2017); New Hampshire (Jan. 19, 2017); Oklahoma (Feb. 9, 2017); Oregon (Jan. 23, 2017); Washington (Dec. 20, 2016).

<sup>82</sup> FLA. R. JUV. P. R. 8.165(a) (2016) (“Waiver of counsel can occur only after the child has had a meaningful opportunity to confer with counsel regarding the child’s right to counsel, the consequences of waiving counsel, and any other factors that would assist the child in making the decision to waive counsel.”); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20(b)(3) (West 2008) (“the court may not accept [a] waiver unless . . . [t]he child is in the presence of counsel and has consulted with counsel”); MINN. JUV. DEL. R. PROC. 3.04(1) (2015) (“The child must be fully and effectively informed of the child’s right to counsel and the disadvantages of self-representation by an in-person consultation with an attorney, and counsel shall appear with the child in court and inform the court that such consultation has occurred.”); N.J. STAT. ANN. § 2A:4A-39(b)(1) (West 2013) (a child “may not waive any rights except in the presence of and after consultation with counsel”); N.Y. FAM. CT. ACT § 249-a (2011) (a child “shall be presumed to lack the requisite knowledge and maturity to waive the appointment of an attorney [which] may be rebutted only after an attorney has been appointed” and there is a hearing on the record in which the attorney participates and in which the consequences of waiver of counsel are addressed); TEX. FAM. CODE § 51.09(1) (West 2015) (requiring that “the child and the attorney are informed of and understand the right and the possible consequences of waiving [counsel]”); VT. FAM. PROC. R. 6.1(d)(3)(B) (requiring “that the attorney has investigated the relevant facts and law, consulted with the client and guardian ad litem” before a child waives a constitutional right); WASH. JUV. CT. R. 7.15(a)(1) (2008) (not allowing waiver unless “the juvenile has been advised regarding the right to counsel by a lawyer who has been appointed by the court or retained”).

<sup>83</sup> See, e.g., ALASKA STAT. § 47.12.090(a) (2016) (where “it has been alleged that the minor has committed an act that would be a felony if committed by an adult, waiver of counsel may not be accepted unless the court is satisfied that the minor has consulted with an attorney before the waiver of counsel”); KY. REV. STAT. ANN. § 610.060(2) (a) (West 2008) (“no court shall accept a plea or admission or conduct an adjudication hearing involving a child accused of committing any felony offense . . . or any offense, including the violation of a valid court order, for which the court intends to impose detention or commitment as a disposition unless that child is represented by counsel”); OHIO JUV. PROC. R. 3(C) (2012) (“[I]f a child is charged with a felony offense, the court shall not allow any waiver of counsel unless the child has met privately with an attorney”); VA. CODE ANN. § 16.1-266(C)(3) (2017) (“[a] child who is alleged to have committed an offense that would be a felony if committed by an adult, may waive such right only after he consults with an attorney”).

Three states have a prohibition against waiver of counsel under most circumstances, but in the limited instances where it may be possible to waive, two of the three states do not require consultation with an attorney before that waiver.<sup>83</sup> Other states prohibit waiver of counsel under certain conditions, including conditions related to age, type of offense, competency, and the possibility of confinement.<sup>84</sup> Such limitations protect against waiver under the identified case scenarios but do not broadly safeguard children from making uninformed decisions regarding waiver.

It must be noted that in a majority of states where children are statutorily required to consult with an attorney, young people are waiving their right to counsel infrequently, if at all. The two outlier states are Florida and Texas, where attorneys reported that some jurisdictions allow routine waiver and often violate state statutes by permitting such waiver without prior appointment of counsel.<sup>85</sup> Half of the attorneys interviewed for the Snapshot reported that in practice and to their knowledge, waiver is not happening frequently or at all.<sup>86</sup> The others reported that at least in some counties — often more rural counties — waiver of counsel is routine, facilitated by the court, and directly correlated with attorneys not being automatically appointed. One attorney in Michigan reported observing four unrepresented children waive their right to an attorney, enter guilty pleas, and be fingerprinted in violation of state law, illustrating how children are taken advantage of when defense attorneys are not present to protect their rights.<sup>87</sup>

## PARENTAL CONSULTATION PRIOR TO WAIVER

Defense representation requires legal training as well as experience navigating and understanding the complexities and consequences of juvenile court. No matter how supportive parents may be of their child, the responsibilities of a specialized juvenile defender cannot be fulfilled by a child's parents in a court proceeding. However, some states allow parental consultation to substitute for attorney consultation prior to a child's waiving counsel.<sup>88</sup> These statutes disregard the necessity of legal expertise, confuse the role of the attorney and parent, and do not adequately protect children's right to counsel.

<sup>83</sup> Illinois completely prohibits waiver of counsel. 705 ILL. COMP. STAT. ANN. § 405 / 5-170(b) (West 2017). ("In a judicial proceeding under this Article, a minor may not waive the right to the assistance of counsel in his or her defense."). Both Oklahoma and Pennsylvania prohibit waiver of counsel in most circumstances. OKLA. STAT. ANN. tit. 10A § 2-2-301(C) (West 2013) (requiring that "the court shall appoint an attorney . . . regardless of any attempted waiver by the parent or other legal custodian of the youthful offender or child of the right of the youthful offender or child to be represented by counsel"); 42 PA. STAT. AND CONS. STAT. ANN. § 6337.1(c) (West 2012) (acknowledging that a child 14 or older may waive the right to counsel, except in delineated hearings, and allowing waiver if the court decides the child understands the consequences); PA. R. JUV. CT. PROC. NO. 152(a)(1)-(3), (c) (West 2017) (delineating additional hearings for which a child cannot waive the right to counsel). It should be noted that attorneys in several other jurisdictions reported a culture of courts not allowing youth to waive counsel, but there is no statutory or rule provision addressing the waiver issue. See, e.g., Telephone Interviews with Juvenile Defenders in: the District of Columbia (Jan. 19, 2017); North Carolina (Dec. 14, 2016 & Jan. 4, 2017); New Mexico (Jan. 13, 2017 & Jan. 25, 2017).

<sup>84</sup> See, e.g., LA. CHILD. CODE ANN. art. 810(d)(2) (2004) ("The child shall not be permitted to waive assistance of counsel . . . [i]n proceedings in which he is charged with a felony-grade delinquent act."); GA. CODE ANN. § 15-11-475(c) (West 2014) ("[I]f a child's liberty is in jeopardy, he or she shall be represented by an attorney."); IDAHO CODE ANN. § 20-514(6)(a)-(g) (West 2013) (prohibiting waiver if a child is under 14; is in the custody of the department of juvenile corrections; is facing felony charges or charges of a "sexual nature;" or in proceedings regarding waiver of juvenile court jurisdiction, competency, or recommitment); MONT. CODE ANN. § 41-5-1413 (West 2005) ("Neither the youth nor the youth's parents or guardian may waive the right to counsel after a petition has been filed if commitment to the department for a period of more than 6 months may result from adjudication."); N.H. REV. STAT. ANN. § 169-B:12(II)(d), (e) (2015) (prohibiting waiver of counsel in certain delineated felonies).

<sup>85</sup> Telephone Interviews with Juvenile Defenders in: Florida (Dec. 19, 2016); Texas (Feb. 10, 2017).

<sup>86</sup> Telephone Interviews with Juvenile Defenders in: Alaska (Dec. 20, 2016 & Jan. 30, 2017); Arizona (Dec. 20, 2016); California (Feb. 1, 2017 & Feb. 22, 2017); Connecticut (Jan. 12, 2017); Delaware (Dec. 21, 2016 & Jan. 18, 2017); the District of Columbia (Jan. 19, 2017); Illinois (Jan. 4, 2017); Iowa (Dec. 21, 2016); Kansas (Feb. 16, 2017); Louisiana (Dec. 15, 2016); Maine (Dec. 13, 2016); Maryland (Dec. 14, 2016); Massachusetts (Dec. 13, 2016); Minnesota (Feb. 9, 2017); Montana (Dec. 13, 2016); New Jersey (Dec. 8, 2016 & Jan. 30, 2017); New Mexico (Jan. 13, 2017 & Jan. 25, 2017); New York (Jan. 17, 2017 & Jan. 25, 2017); North Carolina (Dec. 14, 2016 & Jan. 4, 2017); Pennsylvania (Jan. 6, 2017); Puerto Rico (Dec. 21, 2017); Rhode Island (Dec. 19, 2016); South Carolina (Jan. 13, 2017); Vermont (Jan. 27, 2017); Virginia (Jan. 12, 2017); Washington (Jan. 19, 2017); West Virginia (Jan. 27, 2017); Wisconsin (Dec. 12, 2017).

<sup>87</sup> Phone Interview with Juvenile Defender in Michigan (Apr. 4, 2017).

<sup>88</sup> See, e.g., ARK. CODE ANN. § 9-27-317(a)(3) (2009) (requiring that "the parent, guardian, custodian, or attorney" agree with waiver); IND. CODE ANN. § 31-32-5-1(2) (West 2017) (allowing waiver by counsel, by the child, or by the parent if "meaningful consultation has occurred between [the parent] and the child"); LA. CHILD. CODE ANN. art. 810 (2004) (allowing waiver where "[t]he child has consulted with an attorney [or] parent"); N.H. REV. STAT. § 169-B:12(II)(a)-(b) (2015) (allowing waiver where a child is "represented by a non-hostile parent").

“The juvenile defender is the only person who is ethically bound to work for the child’s stated interests and who can fully explain the benefits of having an attorney.”

At times, parents may also have interests that conflict with the child’s. Parents could be called as witnesses against the child, have to pay for the attorney, or be wary of taking time off work to attend court hearings. These pressures and others can lead parents to believe their child should simply waive their rights and plead guilty in the hopes of moving the case forward. The juvenile defender is the only person who is ethically bound to work for the child’s stated interests and who can fully explain the benefits of having an attorney.

## OTHER REQUIREMENTS PRIOR TO WAIVER

When a child waives counsel, at least 18 states require courts to document the waiver in writing or on the record,<sup>89</sup> and two states require the courts to conduct an individualized hearing to inquire into a child’s understanding of the decision to waive counsel.<sup>90</sup> Despite these protections, young people still give up their right to counsel, suggesting that the best strategy to curb high rates of waiver is early and automatic appointment of counsel to ensure children have an opportunity for meaningful consultation.<sup>91</sup> Documentation is nonetheless important for making a record for appeal but does not appear by itself to limit judicial acceptance of uncounseled waiver.

<sup>89</sup> ARIZ. JUV. CT. R. P. 10(D) (2001) (waiver must be “in writing or in the minute entry of the court”); ARK. CODE ANN. § 9-27-317(h)(1) (2009) (waiver must be “in writing and signed by the [child],” unless made “in the presence of the court”); COLO. REV. STAT. ANN. § 19-2-706(2)(c) (West 2014) (“The court may accept a waiver of counsel by a juvenile only after [a] finding on the record . . . .”); FLA. R. JUV. P. R. 8.165 (2016) (requiring that the waiver be “in writing” and that “[t]he assigned attorney . . . verify on the written waiver and on the record that the child’s decision to waive counsel has been discussed with the child and appears to be knowing and voluntary”); IDAHO CODE ANN. § 20-514(6)(d) (West 2013) (“Any waiver of the right to counsel by a juvenile under this act shall be made in writing [and] on the record . . . .”); IND. R. CRIM. PROC. 25(C) (West 2017) (“[A]ny waiver of the right to counsel shall be made in open court, on the record and confirmed in writing, and in the presence of the child’s attorney.”); KY. REV. STAT. ANN. § 610.060(2)(b)(1) (West 2008) (requiring that the court “[c]onduct a hearing about the child’s waiver of counsel” before allowing waiver); LA. CHILD. CODE ANN. art. 810(B) (2004) (“[W]aiver . . . shall be evidenced by a writing reciting the requirements [of waiver] and signed by the child and the adult consulting with the child and filed in the record or by a verbatim transcript of the proceedings . . . .”); MASS. S.J.C. § 3.10(3) (2016) (“If the party elects to proceed without counsel, the party shall sign a written waiver and the judge shall certify in writing that the party executed the waiver in the judge’s presence after the judge informed the party of the right of counsel.”); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20(b)(4) (West 2008) (requiring that the court consider the requirements of waiver “in open court and on the record”); MICH. COMP. LAWS ANN. § 3.915(A)(3) (West 2017) (“The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made.”); MINN. JUV. DELINQ. PROC. R. 3.04(1) (2017) (“Any waiver shall be in writing or on the record.”); N.H. REV. STAT. ANN. § 169-B:12(II-a), (II-c) (2015) (requiring the court to make “case-specific written findings with regard to each of the required conditions for waiver” if the child has not consulted with counsel, and requiring the court make “[a] verbatim record . . . of all proceedings conducted [regarding waiver]”); OHIO JUV. PROC. R. 3(D) (2017) (“Any waiver of the right to counsel shall be made in open court, recorded, and in writing.”); 42 PA. STAT. AND CONS. STAT. ANN. § 63371(b)(3) (West 2012) (requiring that the court “determin[e] that the waiver is knowingly, intelligently and voluntarily made after having conducted a colloquy with the child on the record”); TENN. R. JUV. P. 205(a)(2)(C) (2016) (“The waiver [must be] confirmed in writing by the child.”); TEX. FAM. CODE ANN. § 51.09(4) (West 2015) (requiring that “the waiver is made in writing or in court proceedings that are recorded”); VA. CODE ANN. § 16.1-266(C)(3) (West 2016) (“The waiver shall be in writing, signed by both the child and the child’s attorney and shall be filed with the court records of the case.”). See also DEL. FAM. CT. R. CRIM. P. 44(a) (2017) (“A waiver of the right to counsel by a child shall be in writing *unless* made in Court on the record or made in the presence of the child’s custodian.”) (emphasis added).

<sup>90</sup> KY. REV. STAT. ANN. § 610.060(2)(b)(1)-(2) (West 2008) (requiring a hearing at which the court must make findings of fact); N.Y. FAM. CT. ACT § 249-a (2015) (requiring presumption to be rebutted at a hearing in which the attorney participates).

<sup>91</sup> See Telephone Interviews with Juvenile Defenders in: Arkansas (Feb. 23, 2017); Colorado (Jan. 12, 2017); Florida (Jan. 19, 2017); Idaho (Feb. 22, 2017); Kentucky (Mar. 9, 2017); Michigan (Dec. 14, 2016); Ohio (Jan. 26, 2017); Tennessee (Feb. 23, 2017); Texas (Feb. 10, 2017) (states requiring waiver be in writing or on the record and still experiencing waiver).



## WAIVER OF COUNSEL STATUTES

**Maryland:** “[A] child may not waive the right to the assistance of counsel in a proceeding under this subtitle . . . [except] if a child indicates a desire to waive the right to the assistance of counsel, [and] (i) [t]he child is in the presence of counsel and has consulted with counsel; and (ii) [t]he court determines that the waiver is knowing and voluntary.”<sup>92</sup>

**Minnesota:** “The child must be fully and effectively informed of the child’s right to counsel and the disadvantages of self-representation by an in-person consultation with an attorney, and counsel shall appear with the child in court and inform the court that such consultation has occurred.”<sup>93</sup>

<sup>92</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20(b)(1), (3)(i)-(ii) (West 2008).

<sup>93</sup> MINN. JUV. DEL. R. PROC. 3.04(1) (2015).

POST-DISPOSITION REPRESENTATION:

# Children's Access to Counsel Ends Too Early

A man with a beard and short hair is sitting on a dark-colored couch in a living room. He is wearing a dark hoodie with a logo on the chest. He has a thoughtful expression, looking slightly to the right. The room is dimly lit, with a lamp visible in the background. The overall tone is somber and reflective.





Only 11 states provide for meaningful access to a lawyer after sentencing, while every state keeps children under its authority during this time.<sup>94</sup>

## JUAN'S STORY

For six months, Juan,<sup>95</sup> a young Cuban-American, was housed in juvenile prison. He spoke no English, and the facility staff spoke no Spanish. At the time, a class-action suit was filed against the prison for abuse and neglect of children. The guards, who were under scrutiny because of the pending lawsuit, separated Juan from his Spanish-speaking peers out of fear that Juan and the other youth were plotting retaliation against the guards. For those six months, Juan sat in complete social isolation.

After a juvenile defender learned of his case from a nonprofit watchdog organization, she went to visit him. Their first conversation was translated through a social worker. Juan cried the entire time. He had received no support, no services, and no social interaction in the six months he was behind bars.

The attorney learned that upon Juan's arrival, facility staff were notified that he only spoke Spanish. They made no accommodations — in effect setting him up to fail the court-ordered programming he was required to complete as a condition of his release.

Juan's attorney filed a motion to review his placement. When the case was brought before a judge, Juan was released on probation. He returned home to his family, where he received community-based services. The juvenile defender said she doesn't know how long Juan would have stayed in detention had she not been introduced to him. "[It was] a needle-in-a-haystack chance that we could help him escape such a terrible situation," she said.

"Juvenile facilities are surrounded by a legal moat, and the drawbridge is totally up. No one can cross to learn what's going on inside. How many children are lost, beaten, bullied, and abused? If public defenders were allowed to do regular post-disposition advocacy, these injustices would come to light."

- JUVENILE DEFENDER

Children still need a lawyer after sentencing in juvenile court. Whether a child is placed in a facility, on probation, or is struggling with the consequences of a juvenile court record, access to a lawyer, for many youth, is the only hope they have for ensuring fair and just treatment while under court or state supervision.

The sentencing phase, or post-disposition, may be the longest and most difficult phase of the delinquency process.<sup>96</sup> Without an attorney, youth and their families are left alone to fight for the child's success, safety, and timely release from the system.<sup>97</sup> When youth have an attorney during this critical time, they are more likely to feel that the process is fair and to experience positive outcomes.<sup>98</sup>

While a few jurisdictions have statutory language that indicates a comprehensive scope of post-disposition representation, statutes in the majority of states afford youth a limited right to counsel — or no right to counsel — during most stages of post-disposition.

Post-disposition lawyering encompasses a wide range of in- and out-of-court advocacy and includes but is not limited to the following:

- Appeals.
- Probation/parole review or revocation hearings.
- Motions to terminate probation early or modify conditions of probation.
- Fees and fines stemming from court involvement.
- Conditions of confinement, such as solitary confinement, physical or sexual abuse, and administrative grievances.
- Institutional disciplinary hearings.
- Access to family while in confinement.
- Ensuring that probation and parole officers are providing opportunities that promote youth success.
- Access to educational, medical, or psychological services while in confinement or on probation.
- Limiting access to and distribution of juvenile records by moving to seal, expunge, or purge the records.
- Deregistration from offender registries.
- Eliminating legal and other barriers to community reentry plans.<sup>99</sup>

<sup>94</sup> Deciphering when and how well a statute provides for access to counsel after disposition can be complicated. For purposes of this Snapshot, a statute is deemed to provide "meaningful" access to counsel post-disposition if it either explicitly provides for the right to counsel after disposition or if the breadth of the right can be read to allow for significant post-disposition representation. CAL. RULES OF CT. R. 5.663(c) (2007) ("A child is entitled to have the child's interests represented by counsel at every stage of the proceedings, including post-dispositional hearings. Counsel must continue to represent the child unless relieved by the court on the substitution of other counsel or for cause."); COLO. REV. STAT. ANN. § 19-2-706(2)(d) (West 2014) (guaranteeing a right to counsel until the "court's jurisdiction is terminated"); GA. CODE ANN. § 15-11-475(a) (West 2014) (providing for counsel "at all proceedings" under the delinquency code); IDAHO CODE ANN. § 20-514(2)(c) (West 2013) (providing counsel at appeals and "any other post-adjudication or review proceeding that the attorney or the juvenile considers appropriate . . ." and which the court deems is not frivolous); KAN. STAT. ANN. § 38-2306(a)-(b) (West 2017) (providing a right to counsel at "every stage of the proceedings" and requiring that "[a]n attorney appointed for a juvenile shall continue to represent the juvenile at all subsequent court hearings"); KY. REV. STAT. ANN. § 31.110(2)(a) (2014) (providing a right "[t]o be represented in any . . . post-disposition proceeding . . ."); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20(a) (West 2008) (providing a right to counsel at "at every stage of any proceeding under this subtitle"); MISS. CODE ANN. § 43-21-201 (West 2017) (providing a right to counsel at "at all stages of the proceedings including, but not limited to, detention, adjudicatory and disposition hearings and parole or probation revocation proceedings") (emphasis added); NEV. REV. STAT. ANN. § 62D.030(1) (West 2013) ("[T]he child is entitled to be represented by an attorney at all stages of the proceedings."); N.M. STAT. ANN. §32A-2-14(H) (West 2009) ("[T]he child shall be represented by counsel at all stages of the proceedings on a delinquency petition, including all post-dispositional court proceedings."); P.R. LAWS ANN. tit. 34, § 13.6 (2013) (providing a right to counsel "in every procedure").

<sup>95</sup> Names and identifying information have been changed to protect confidentiality.

<sup>96</sup> *Protecting Rights, Promoting Positive Outcomes: Post-Disposition Access to Counsel*, NAT'L JUVENILE DEFENDER CTR. (2014), <http://njdc.info/wp-content/uploads/2014/10/Post-Disposition-HR-10.13.14.pdf>.

<sup>97</sup> DEFEND CHILDREN, *supra* note 32, at 13.

<sup>98</sup> See Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1476-83 (2009). See also DEFEND CHILDREN, *supra* note 32, at 13.

<sup>99</sup> DEFEND CHILDREN, *supra* note 32, at 13.

Without exception, all juvenile defenders interviewed for this report recognized their own limitations in providing post-disposition representation, even though all expressed eagerness to fulfill their obligations as counsel. However, systemic barriers prevent attorneys from providing the necessary scope of post-disposition representation. This denial of due process manifests as dangerous outcomes for children.

Access to counsel post-disposition affords youth critical protections against a system that incarcerates Black youth four times more frequently than white youth, Native American youth three times as frequently, and Latino youth almost twice as frequently.<sup>100</sup> The reality of disparate punishment for youth of color alone signals the unquestionable necessity for defense counsel. Defenders noted significant racial disparities in their jurisdictions, particularly in relation to which clients were more likely to be locked up following violation of probation hearings.<sup>101</sup>

## VARIATIONS IN POST-DISPOSITION LAW

Idaho, Kentucky, and New Mexico statutorily outline an explicit, comprehensive right to post-disposition advocacy for children.<sup>102</sup> Although no state has a complete statutory prohibition on access to counsel post-disposition, a few states severely limit post-disposition representation.<sup>103</sup>

These outliers aside, states generally have varied and complicated statutory requirements regarding a child's right to counsel after sentencing. However, the most common types of proceedings where statutes provide for an explicit right to counsel are probation modification or violation of probation proceedings. At least 25 states have statutes that include a right to counsel at such hearings.<sup>104</sup>

Beyond these typical provisions, the right to counsel after sentencing varies considerably from state to state. The disparity is due in part to continuing disagreement over the legal needs of children during this phase. For example, some jurisdictions provide post-disposition advocacy at court hearings but deny children who are incarcerated access to an attorney, even to address grievances of abuse or otherwise brutal treatment.

“The reality of  
disparate punishment  
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defense counsel.”

<sup>100</sup> STEMMING THE RISING TIDE, *supra* note 5, at 5.

<sup>101</sup> See, e.g., Telephone Interviews with Juvenile Defenders in: Alaska (Dec. 20, 2016 & Jan. 30, 2017); Arizona (Dec. 20, 2016); Connecticut (Jan. 12, 2017); Illinois (Dec. 14, 2016); Indiana (Dec. 21, 2016); Iowa (Dec. 21, 2016); Maine (Dec. 13, 2016); Maryland (Dec. 14, 2016); Michigan (Dec. 14, 2016); Nevada (Dec. 19, 2016 & Jan. 13, 2017); New Jersey (Dec. 8, 2016); New York (Jan. 25, 2017); North Dakota (Feb. 3, 2017); Ohio (Dec. 20, 2016 & Jan. 26, 2017); Wisconsin (Dec. 12, 2016).

<sup>102</sup> See IDAHO CODE ANN. § 20-514(2)(c) (West 2013); KY. REV. STAT. ANN. § 31.110(2) (2014); N.M. STAT. ANN. § 32A-2-14(H) (West 2009).

<sup>103</sup> FLA. STAT. ANN. § 985.439(3) (West 2014) (providing post-disposition counsel only “[i]f the child denies violating the conditions of probation or post-commitment probation”); MO. REV. STAT. § 211.211(6) (West 2016) (stating if no appeal is taken, services of counsel are terminated following the entry of an order of disposition); N.H. FAM. DIV. R. 3.11 (2011) (if a post-dispositional motion is filed within 30 days, representation ends 30 days after the court rules on the motion).

<sup>104</sup> Statutes and court rules providing for the right to counsel at probation modification and violation of probation hearings can be broken down into six categories. The first category is statutes and court rules that only provide counsel for proceedings in which some type of modification of placement, custody, or probation is at stake. See D.C. SUPER. CT. JUV. R. 44(a)(1) (2009); IOWA CODE ANN. § 232.11(1)(a)-(g) (West 2016); MICH. CT. R. 3.944(C)(1)(b) (2016); MICH. CT. R. 3.945(B)(2), 3.946(C)(2), 3.950(E)(1)(c)(iii), 3.952(B)(2), 3.987(C)(3) (2003); W. VA. R. JUV. P. 5(b)(1) (2016). The second is statutes and court rules with explicit rights for the preceding category plus appeals. See MINN. JUV. DELINQ. R. PROC. 3.02(4) (2003); MINN. STAT. ANN. § 611.25(a)(3) (2012); N.Y. FAM. CT. ACT §§ 354.2, 360.3(4) (2010); OKLA. STAT. ANN. tit. 10A § 2-2-301, 2-2-503(F)(3), 2-2-504(D) (West 2017); 42 PA. STAT. AND CONS. STAT. ANN. § 63371(b)(3)(vi) (West 2012); PA. R. JUV. CT. PROC. 512(C)(4) (2012); WIS. STAT. ANN. §§ 938.357(3), (5), 809.30(2) (West 2016). The third is statutes and court rules including probation or parole revocation hearings and appeals only. See ARIZ. REV. STAT. § 8-235(D) (West 2017); ARIZ. JUV. CT. R. PROC. 32 (2017); ARK. CODE ANN. § 9-27-339(c) (West 2009); ARK. CODE ANN. § 9-27-343 (West 2017); LA. CHILD. CODE ANN. art. 848 (1992); LA. CHILD. CODE ANN. art. 913 (1995); TEX. FAM. CODE § 51.10 (2015). The fourth is statutes and court rules including revocation or violation hearings only. See ALASKA DELIN. R. 24 (1997); COLO. REV. STAT. ANN. § 19-2-1002(8) (West 2014); 705 ILL. COMP. STAT. § 405 / 5-720(3) (West 2016); N.C. GEN. STAT. ANN. § 7B-2516(a)(2) (West 2015); N.H. REV. STAT. ANN. § 170-H:10-a(1) (2013); OHIO R. JUV. PROC. 35(B) (1994); S.C. CODE ANN. § 63-19-1830 (2008); TENN. R. JUV. PROC. 212(a) (2016); VT. STAT. ANN. tit. 33, § 5267 (West 2017); NEB. REV. STAT. §§ 43-421(B), 43-286(5)(b)(ii) (2013). *But see* NEB. LEGIS. 8 (2017). The fifth is statutes and court rules that only provide counsel at violation of probation hearings if the child denies the allegation. See FLA. STAT. ANN. § 985.439(3) (West 2013). The sixth is statutes and court rules which include revocation hearings, appeals, and “general post-disposition matters.” See MISS. CODE ANN. § 43-21-201(1)-(5) (West 2017); N.M. STAT. ANN. § 32A2-14(H) (2009).

State statutes and court rules that provide for or limit post-disposition representation fall under four general categories, those that: (1) Explicitly grant a broad right to counsel in all juvenile post-disposition matters;<sup>105</sup> (2) explicitly grant a broad right to counsel at all stages of delinquency proceedings, and are read to include the post-disposition stage;<sup>106</sup> (3) only provide for the right to counsel at select post-disposition hearings or events;<sup>107</sup> and (4) are silent on the right to counsel post-disposition.<sup>108</sup>

## POST-DISPOSITION REPRESENTATION LIMITATIONS

Despite growing recognition of the importance of post-disposition representation, there are still immense challenges in every locality to achieving meaningful access to counsel during this stage. Such challenges include high caseloads that force post-disposition practice to take a back seat to pretrial matters unless a crisis arises or a client or family member proactively contacts the attorney; a lack of programming or resources for clients in rural areas; and no compensation for post-disposition advocacy because the attorney contracts do not explicitly include post-disposition advocacy, flatly prohibit it, or defense attorneys are removed from the case after disposition.

## POST-DISPOSITION REPRESENTATION IN PRACTICE

Even where states have statutory language supporting post-disposition access to counsel, few have implemented the protections in practice.

Some states have post-disposition units or positions within public defender offices.<sup>109</sup> Dedicated post-disposition units appear to be successful because they enable defenders to have the broadest reach across a state and to provide the most sweeping advocacy. Of course, capacity and resources remain a problem in most states, even for those offices with such positions and units. Defender offices that are significantly under-resourced but still have post-disposition staff available might represent children in facilities only; others rely on special grant funding to cover post-disposition positions.

In a handful of jurisdictions, nonprofit organizations or law school clinics are able to provide post-disposition advocacy that is otherwise unavailable through public funding.<sup>110</sup> Unfortunately, these programs are few and far between, have concentrated caseloads, and generally serve one local court rather than an entire state.

<sup>105</sup> See CAL. RULES OF CT. R. 5.663(c) (2007); IDAHO CODE ANN. § 20-514(2)(c) (West 2013); KY. REV. STAT. ANN. § 31.110(3) (2014); MISS. CODE ANN. § 43-21-201 (West 2017); N.M. STAT. ANN. § 32A-14(H) (West 2009).

<sup>106</sup> See COLO. REV. STAT. ANN. § 19-2-706(2)(d) (West 2014); GA. CODE ANN. § 15-11-475(a) (West 2014); KAN. STAT. ANN. § 38-2306(a)-(b) (West 2017); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20(a) (West 2008); NEV. REV. STAT. ANN. § 62D.030(1) (West 2013); P.R. LAWS ANN. tit. 34, § 13.6 (2013).

<sup>107</sup> See ALASKA DELIN. R. 24 (1997); ARIZ. REV. STAT. ANN. § 8-235(D) (2017); ARIZ. JUV. CT. R. P. 32 (2016); ARK. CODE ANN. § 9-27-339(c) (West 2009); ARK. CODE ANN. § 9-27-343 (West 2017); DEL. FAM. CT. R. CRIM. PROC. 38-2 (2017); D.C. SUPER. CT. JUV. R. 44(a)(1) (2009); FLA. STAT. ANN. § 985.439(3) (West 2013); HAW. REV. STAT. §§ 571-87(a), 571-54 (West 2016); 705 ILL. COMP. STAT. ANN. § 405 / 5-720(3) (West 2016); IND. R. CRIM. P. 25(B)(3)(2017); IOWA CODE ANN. § 232.11(1)(a)-(g) (West 2016); LA. CHILD. CODE ANN. art. 848, 913 (2010); ME. REV. STAT. ANN. tit. 15, § 3404 (West 2017); MICH. CT. R. 3.944 (2016); MICH. CT. R. 3.944(C)(1)(b), 3.945(B)(2), 3.946(C)(2), 3.950(E)(1)(c) (iii), 3.952(B)(2), 3.987(C)(3) (2003); MO. REV. STAT. § 211.211(6) (West 2016); MO. REV. STAT. § 211.211(6) (West 2016); MINN. JUV. DEL. R. PROC. 3.02(4) (2003); MINN. STAT. ANN. § 611.25(a)(3) (West 2012); N.C. GEN. STAT. ANN. § 7B-2516(a)(2) (West 2015); N.H. REV. STAT. ANN. § 170-H:10-a(1) (2013); N.H. FAM. DIV. R. 3.11 (2011); N.Y. FAM. CT. ACT §§ 354.2(4), 360.3 (2010); OHIO R. JUV. PROC. 35(B) (1994); OKLA. STAT. ANN. tit. 10A, §§ 2-2-301; 2-2-503(F)(3), 2-2-504(D) (West 2017); OR. REV. STAT. ANN. § 419A.211(1) (West 2017); 42 PA. STAT. AND CONS. STAT. ANN. § 63371(b)(3)(vi) (West 2012); PA. R. JUV. CT. PROC. 512(C)(4) (2012); S.C. CODE ANN. § 63-19-1830 (2008); S.D. CODIFIED LAWS § 26-8C-15(3) (2016); TENN. R. JUV. PROC. 212(a); TEX. FAM. CODE § 51.10 (2015); UTAH R. JUV. PROC. 52(f) (2008); UTAH CODE ANN. § 78A-6-1109 (1953); VT. STAT. ANN. tit. 33, § 5267(a)(2) (West 2017); W. VA. R. JUV. PROC. 5(b)(1) (2016); WIS. STAT. ANN. §§ 938.357(3)(5), 809.30(2) (2016); WYO. STAT. ANN. § 14-6-222(a) (West 2017); NEB. REV. STAT. §§ 43-421(5) (2013), 43-286(5)(b)(ii) (2014). But see NEB. LEGIS. 8 (2017) (proposed legislation expanding the right to counsel post-disposition).

<sup>108</sup> Alabama, Connecticut, Massachusetts, Montana, New Jersey, North Dakota, Rhode Island, Virginia, and Washington do not have statutes that specifically articulate a right to counsel post-disposition.

<sup>109</sup> For example, Connecticut, Kentucky, Massachusetts, Maryland, Ohio, and Vermont provide at least some post-disposition representation through units or positions with public defender offices.

<sup>110</sup> For example, Kansas, Louisiana, New Jersey, and the District of Columbia provide at least some post-disposition representation through nonprofit organizations or law school clinics.

Few states are set up to comply, even in part, with national standards for post-disposition representation.<sup>111</sup> The right to post-disposition counsel must be statutorily articulated in broad and explicit terms to cover all aspects of ethically required advocacy after sentencing.<sup>112</sup> States must also intentionally invest in the capacity of the juvenile defense bar through training, resources, and increases in dedicated staff who will ensure children's safety, well-being, and success.

## POST-DISPOSITION REPRESENTATION STATUTES

**Idaho:** "A juvenile . . . is entitled [t]o be counseled and defended at all stages of the matter beginning with the earliest time and including revocation of probation or recommitment . . . and [t]o be represented in any other post-adjudication or review proceeding that the attorney or the juvenile considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding."<sup>113</sup>

**New Mexico:** "The child and the parent, guardian or custodian of the child shall be advised by the court or its representative that the child shall be represented by counsel at all stages of the proceedings on a delinquency petition, including all post-dispositional court proceedings."<sup>114</sup>

<sup>111</sup> Not only does the American Bar Association (ABA) require early appointment of counsel, but it also encourages continuity of representation from intake through post-disposition. The National Council of Juvenile and Family Court Judges' Guidelines echo the ABA's recommendation regarding early appointment, explaining that "[i]n a juvenile delinquency court of excellence, counsel is appointed prior to the detention or initial hearing, and has time to prepare for the hearing." JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 3.1(A) (INST.FOR JUDICIAL ADMIN. / AM. BAR ASSO'N, ED., 1980); NAT'L COUNCIL FOR JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES (2005) ("Juvenile delinquency court administrative judges are responsible to ensure that counsel is *available* to every youth at every hearing, including post-disposition reviews and reentry hearings."). See also NJDC Standards, *supra* note 51, §§ 1.4, 7.1, 7.5 (2012) (stating that prompt advice and action can protect many important rights of clients, that counsel should stay in regular contact with a client, and that counsel must represent clients following disposition).

<sup>112</sup> See, e.g., CAL. RULES OF CT. R. 5.663(c) (2007) ("A child is entitled to have the child's interests represented by counsel at every stage of the proceedings, including post-dispositional hearings. Counsel must continue to represent the child unless relieved by the court on the substitution of other counsel or for cause."); IDAHO CODE ANN. § 20-514(2)(c) (West 2013) ("[T]o be represented in any other post-adjudication or review proceeding that the attorney or the juvenile considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding."); KY. REV. STAT. ANN. § 31.110(3) (West 2014) ("A youth has a right "to be represented in any . . . post-disposition proceeding that the attorney and the [youth] considers appropriate. However, if the counsel appointed . . . with the court involved, determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.").

<sup>113</sup> IDAHO CODE ANN. § 20-514(2) (West 2013).

<sup>114</sup> N.M. STAT. ANN. 32A-2-14(H) (2009).

# Recommendations for Reform

## ELIGIBILITY FOR A “FREE” ATTORNEY

- Automatically deem youth eligible for a publicly funded juvenile defender by virtue of their status as children, regardless of financial circumstances.

## EARLY APPOINTMENT OF COUNSEL

- Appoint children a qualified juvenile defender before any interrogation.
- Appoint children a qualified juvenile defender well in advance of the first hearing or court appearance.
- Require data collection and monitoring of early appointment of counsel.

## COSTS OF COUNSEL

- Abolish all costs and fees associated with a child’s access to a publicly funded juvenile defender.

## WAIVER OF COUNSEL

- Prohibit waiver of counsel unless and until a child has the opportunity to consult with a qualified juvenile defender about the implications of waiving their right.
- Require data collection and monitoring of any waiver of counsel.

## POST-DISPOSITION REPRESENTATION

- Establish an explicit right to counsel for all post-disposition matters.
- Ensure continuous appointment of counsel until a child’s case is closed and the child is no longer under any type of juvenile court or state supervision in the matter.
- Require data collection and monitoring of post-disposition access to counsel.

# Conclusion

*“Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”*

*- In re Gault, 387 U.S. 1, 12 (1967).*

No jurisdiction in the United States wholly fulfills the constitutional promise of justice for children.

As the Snapshot illustrates, every state must meet standards in law and in practice to ensure that juvenile defense representation for youth is timely, free, specialized, and continuous throughout a child’s court involvement. Some states come closer than others to achieving the liberties articulated in *Gault*, but absent any one of the five pillars of the right to counsel discussed in the Snapshot, the integrity of the entire system suffers.

Juvenile courts are intended to balance accountability with growth and intervention with opportunity. When young people are unrepresented, they lose their voice in the courtroom and the chance to participate in the construction of their own future. Denial of the right to counsel disrupts — and even demeans — their lives, contradicting the most basic tenets of the courts’ original vision. The system becomes focused on what is efficient, not what is fair or right or will lead to the most successful outcomes for children.

Yet where one community excels in upholding justice for children under one of the five pillars, another can learn from its example. The Snapshot serves to deepen readers’ understanding of how children’s right to counsel is delivered — or, conversely, is tragically discarded — by exploring the many statutes and practices as they exist across the country.

Beyond the Snapshot’s troubling findings about young people’s access to counsel, extraordinary work is being done to honor the rights and dignity of children. There is hope and reason to forge ahead. With creativity and collaboration, every state and territory will satisfy children’s constitutional right to counsel. It is time to fulfill the promise.

No jurisdiction in  
the United States  
wholly fulfills the  
constitutional promise  
of justice for children.  
It is time to fulfill  
the promise.

**Please contact the National Juvenile Defender Center at [inquiries@njdc.info](mailto:inquiries@njdc.info)**  
if you are interested in receiving a hard copy of this report or if our team can  
assist you in assessing, analyzing, or improving children's access to counsel  
and juvenile defense services in your state.





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