

Ohio

**Justice Cut Short:
An Assessment of Access to
Counsel and Quality of
Representation in Delinquency
Proceedings in Ohio**

American Bar Association
Juvenile Justice Center
National Juvenile Defender Center

and

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Children's Law Center, Inc.

with the assistance of:

Juvenile Justice Coalition, Inc.

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PROCEEDINGS IN OHIO**

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Table of Contents

EXECUTIVE SUMMARY

INTRODUCTION

CHAPTER ONE - RISK FACTORS FOR OHIO YOUTH.....	1
I. INTRODUCTION	1
II. CHILD POVERTY	1
III. CHILDREN'S HEALTH	2
IV. MENTAL HEALTH.....	2
V. SUBSTANCE ABUSE.....	4
VI. EDUCATION.....	4
VII. CHILD ABUSE AND NEGLECT	6
VIII. VIOLENCE	6
IX. GIRLS IN OHIO'S JUVENILE JUSTICE SYSTEM.....	7
X. TRENDS.....	9
CHAPTER TWO - THE ROLE OF DEFENSE COUNSEL IN DELINQUENCY PROCEEDINGS IN OHIO	11
I. DUE PROCESS AND THE JUVENILE JUSTICE SYSTEM.....	11
II. ORGANIZATION OF THE JUVENILE COURTS IN OHIO.....	12
III. DEVELOPMENT OF THE OHIO INDIGENT DEFENSE SYSTEM	12
IV. THE RIGHT TO COUNSEL IN DELINQUENCY AND UNRULY PROCEEDINGS IN OHIO.....	13
V. THE ROLE OF DEFENSE COUNSEL IN DELINQUENCY PROCEEDINGS.....	15
CHAPTER THREE - ASSESSMENT FINDINGS	25
I. ACCESS TO COUNSEL	25
II. QUALITY OF REPRESENTATION ISSUES	29
III. THE ROLE OF LAW SCHOOL EDUCATION	51
CHAPTER FOUR - THOUGHTS FROM INCARCERATED YOUTH.....	53
I. DEMOGRAPHIC.....	53
II. ACCESS TO COUNSEL	53
III. QUALITY OF REPRESENTATION	54
IV. CLIENT SATISFACTION	55
V. BEYOND THE COURTROOM	57
CHAPTER FIVE - PROMISING PRACTICES AND PROGRAMS.....	59
CHAPTER SIX – RECOMMENDATIONS.....	62

EXECUTIVE SUMMARY

INTRODUCTION

In 1995, a national assessment regarding access to counsel and the quality of representation in juvenile delinquency proceedings was conducted by the American Bar Association, Juvenile Justice Center, in collaboration with the Juvenile Law Center, Inc. in Philadelphia, and the Youth Law Center, Inc. in Washington, D.C. The findings were published in *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. The study laid the foundation for closer examination of access and quality issues regarding representation of juveniles in this country, and recommended that each state assess its indigent defense system to ensure adequate protections for poor children in the justice system.

In 2002, the Central Juvenile Defender Center, through the Children's Law Center, Inc. in Covington, Kentucky, in conjunction with the ABA National Juvenile Defender Center and the Juvenile Justice Coalition, Inc. embarked upon a statewide study of Ohio's indigent juvenile defense system. The study included extensive surveying of judges, magistrates and defense attorneys, and detention center superintendents, and interviews with hundreds of youth incarcerated throughout Ohio in the adult prison system, Ohio Department of Youth Service facilities, and community corrections facilities. Even more importantly, the methodology utilized a team of highly trained and experienced attorneys recommended by the ABA Juvenile Justice Center to conduct site visits to juvenile courts throughout Ohio to observe proceedings, interview key participants and provide demonstrative and anecdotal data for the report.

The study, which utilizes the ABA protocol for assessing indigent juvenile defense services, was designed to assess three major areas: 1) whether indigent youth have access to counsel in Ohio juvenile courts, 2) the quality of representation being provided to youth throughout Ohio, and 3) structural and other systemic barriers that impact upon access and quality, including a number of substantive issues faced by juvenile courts in this state. The findings and recommendations of the study, as attached in draft form to this report, are compelling and indicative of a system plagued with poor policies and practices, lack of funding, and perhaps most important, lack of any real leadership to effect positive reforms on behalf of poor children and youth in our courts.

SIGNIFICANT FINDINGS

Among the most significant findings outlined in the report are:

- **Numerous obstacles exist for Ohio's poor children to obtain lawyers in the juvenile justice system.**

It has become a tolerated if not accepted practice that large numbers of poor youth waive their right to an attorney in Ohio, even during the most critical stages of proceedings, without proper colloquies from judges and magistrates. While many factors contribute to this high waiver rate, it is most commonly the result of the lack of any defense counsel visibility, the

failure of attorneys to understand their role as advocates, the lack of understanding on the part of youth and parents about the process, the prevalence of a culture that devalues the defense bar as an important part of the system, and funding constraints.

- **Zealous representation from well-trained attorneys in the juvenile justice system seems to be the exception rather than the rule for indigent youth in Ohio.**

The quality of representation for youth who are assigned counsel varied by jurisdiction, but overall there was a lack of meaningful representation at the arrest or detention hearing stage, little pre-trial or trial advocacy, and appellate and post-disposition work were extremely limited or non-existent in many jurisdictions. Of particular concern is that critical issues in Ohio's juvenile justice system such as mental health, special needs for female offenders, and lack of prevention and alternative programming are not being addressed adequately by defense counsel.

- **Numerous systemic barriers hamper effective representation to children.**

Effective representation is hampered by the state's appointment process, including the lack of qualifications of attorneys handling cases, lack of clarity in determining eligibility, and the timing of appointment. Many attorneys are unclear about the role they play in a delinquency proceedings, and often juvenile courts in Ohio function without the routine presence of prosecutors or defense attorneys. The Office of the Ohio Public Defender has limited administrative oversight or authority over local practices, thus resulting in substantial discrepancies how programs are structured and funded. Lack of compensation, lack of training, and inconsistency in technology and other support systems for attorneys is also pervasive.

- **Ohio lacks leadership on juvenile justice issues that can effectively ensure that the rights of children are protected.**

An overall void in leadership concerning the rights and needs of children in the juvenile justice system is pervasive in Ohio, and has resulted in a failure to address many of the substantive issues facing children in Ohio courts. In particular, the study's findings suggest the existence of a significant over-dependence upon probation services, overdependence upon detention and incarceration for treatment or punishment, criminalization of mentally ill children, high rates of disproportionate minority confinement, and a "schoolyard to jail yard" pipeline on school related conduct.

Youth interviewed for the study were quite vocal about their experiences with attorneys in the justice system. Those youth with private attorneys reported much better experiences than those with public defenders or appointed counsel. Youth were most concerned that attorneys spent little time with them or on their case, and often did not follow through on any preparation or defense for the young person. As one young girl noted, *"I always waive my right to an attorney because it's easier and quicker than waiting for somebody who won't care about my case anyhow."*

RECOMMENDATIONS

The report concludes with a series of recommendations for the Governor, Legislature, and judicial branch, as well as local counties and defender organizations, Executive Branch agencies, and Ohio law schools and bar associations. Among these recommendations are:

I. THE GOVERNOR AND LEGISLATURE:

Should enact and implement an unwaivable right to counsel for all children and youth for every stage of delinquency and unruly proceedings, including probation revocation hearings where loss of liberty is a possible outcome;

Should enact and implement due process protections for children and youth found incompetent or criminally insane in conformity with the recommendations made by the Ohio Sentencing Commission; and,

Should enact and implement a juvenile defense delivery system for the State of Ohio that ensures:

- Adequate funding and resources for salaries, contractual rates, expert services, case support, and ancillary services; and,
- Provides ready access to and quality representation by trained and competent defense counsel.

II. THE JUDICIARY:

Should ensure that all jurists handling juvenile matters receive ongoing training in juvenile matters;

Should encourage leadership among the judiciary on juvenile justice issues; and

Should require training and education of attorneys appointed to represent indigent youth that focused on the special needs of juveniles in the justice system.

III. LOCAL COURTS AND COUNTIES:

Should institute systems for the appointment of counsel to all children and youth at the earliest possible time in all delinquency and unruly cases where loss of liberty is a possible outcome;

Should ensure that Ohio's juvenile defender system is sufficiently and adequately funded, including costs for appointed counsel, expert services, investigative resources and ancillary services;

Should develop and implement standardized procedures for the eligibility and appointment of counsel for children and youth, including, but not limited to, minimum practice

requirements to be eligible for appointment, requirements of ongoing professional education in juvenile law and related issues, periodic review of attorney performance, and equitable distribution of appointments;

Should engage in a thorough and ongoing review of detention practices, including the role of defense counsel, to prevent the overuse and abuse of detention; and,

Should address the issues of disproportionate minority representation in the juvenile justice system in real and meaningful ways, including the collection and dissemination of data related to race in every aspect of the system.

IV. OFFICE OF THE OHIO PUBLIC DEFENDER:

Should provide increased opportunities for all juvenile defense attorneys to participate in meaningful and intensive training on relevant issues facing children and youth in the system, including child development issues, motion practice, dispositional advocacy, detention advocacy, trial skills, competency and capacity litigation, education advocacy, and post-disposition advocacy;

Should provide and promote leadership among the entire juvenile defense bar and take a leadership role on substantive juvenile law issues such as bindover and serious youthful offender trends, disproportionate minority confinement issues, mental health issues, girls issues and school-based referrals to juvenile court;

Should increase appellate and other post-dispositional advocacy initiatives;

Should provide strong legislative advocacy on right to counsel issues and other substantive issues involving children and youth in the justice system; and,

Should develop and implement a strategic plan, including staffing, support, resources, training, expert services and adequate funding, for the formation of state public defender offices and/or standardized appointment procedures in every county.

V. LOCAL PUBLIC DEFENDER OFFICES:

Should implement a system which ensures that every child and youth will consult with counsel at all critical stages of juvenile proceedings and that every child, youth, parent and guardian have all necessary information concerning the importance of representation prior to decisions of waiver being made;

Should directly address the overuse and abuse of detention within the juvenile justice system through increased detention advocacy, ensuring due process in all proceedings available to children and youth, and effective advocacy on behalf of alternatives to secure detention;

Should implement a system of representation:

- that provides juvenile defense practitioners with adequate and ongoing training in child development issues, motion practice, disposition advocacy, detention advocacy, basic and advanced trial skills, competency and capacity litigation, education advocacy and appellate work;
- that provides structured mentoring to all attorneys inexperienced in juvenile law practice and procedure;
- that provides ready and available access to client information, sample motions and pleadings, caseload data, and current level of resources;
- that allows adequate appellate advocacy on behalf of all children and youth in the system;
- that provides a fair and standardized policy to address conflicts of interest among clients within the system;
- that tracks and sets caseload and workload limits for all counsel handling juvenile matters.

Should provide leadership on juvenile justice issues in local communities to further educate the public on issues such as bindover and serious youthful offender trends, disproportionate minority representation, mental health issues, girls' issues and school-based referrals to juvenile court.

VI. BAR ASSOCIATIONS:

Should take a greater role in the further development and implementation of a fair and just juvenile justice system;

Should take an active role in ensuring that there are sufficient continuing legal education offerings for juvenile law practitioners; and

Should ensure that practice standards are met by practitioners and the juvenile justice system supported by adequate funding and resources.

VII. OHIO LAW SCHOOLS:

Should examine the nature and content of law school courses related to juvenile practice to ensure appropriate educational opportunities are provided to law students that can support high standards in juvenile court practice; and,

Should provide prestigious internships, externships and fellowship opportunities to public interest organizations such as juvenile defender units, juvenile law centers, and juvenile justice policy initiatives to attract quality students into the juvenile practice area.

INTRODUCTION

This assessment of access to counsel and quality of representation in Ohio delinquency proceedings is part of a national movement to continually review indigent defense delivery systems and evaluate how effectively attorneys in juvenile court are fulfilling constitutional and statutory obligations to their clients. This study is designed to provide broad information about the role of defense counsel and the delinquency system, identify structural or systemic barriers to more effective representation of youth, to identify and highlight promising practices within the system, and make viable recommendation for ways in which to improve the delivery of defender services for youth in the justice system.

A) DUE PROCESS AND DELINQUENCY PROCEEDINGS

The bedrock elements of due process were recognized as essential to delinquency proceedings by the United States Supreme Court in a series of cases.¹ Through the most sweeping of these cases, *In re Gault*, the Court focused attention on the treatment of youth in the juvenile justice system, spurring the states in varying degrees to begin addressing the concerns noted in the Court's decision. Evincing concerns over safeguarding the rights of children, Congress enacted the Juvenile Justice and Delinquency Prevention Act in 1974. This Act created the National Advisory Committee for Juvenile Justice and Delinquency Prevention. The National Advisory Committee was charged with developing national juvenile justice standards and guidelines. Published in 1974, these standards require that children be represented by counsel in all proceedings arising from a delinquency action from the earliest stage of the process.²

Beginning in 1971, and ensuing over a ten-year period, the Institute for Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards promulgated twenty-three volumes of comprehensive juvenile justice standards.³ The structure of the project was as intricate as the volumes of standards it produced: the Joint Commission consisted of twenty-nine members and four drafting committees supervised the work of thirty scholars who were assigned as reporters to draft individual volumes. The draft standards were circulated widely to individuals and organizations throughout the country for comments and suggestions before final revision and submission to the ABA House of Delegates. Adopted in full by 1981, these standards were designed to establish the best possible juvenile justice system for our society, not to fluctuate in response to transitory headlines or controversies.

¹ See, *Kent v. United States*, 383 U.S. 541 (1966) (due process attaches to hearings on transfer from juvenile to adult jurisdiction); *In re Gault*, 387 U.S. 1 (1967) (due process attaches to delinquency hearings); *In re Winship*, 397 U.S. 358 (1970) (standard of proof in delinquency proceedings is beyond a reasonable doubt); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (right to a jury trial is not a fundamental due process right in delinquency proceedings); *Breed v. Jones*, 421 U.S. 519 (1975) (double jeopardy protections are part of delinquency proceedings); and *Schall v. Martin*, 467 U.S. 253 (1984) (preventive detention of children charged with delinquent acts is constitutional).

² See, National Advisory Committee for Juvenile Justice and Delinquency Prevention, *3.312 Representation by Counsel – For the Juvenile*, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice) July 1980.

³ *Standards Relating to Counsel for Private Parties*, IJA/ABA JUV. JUST. STDS. ANN. (1996).

Upon reauthorizing the Act in 1992, Congress re-emphasized the importance of lawyers in juvenile delinquency proceedings, specifically noting the inadequacies of prosecutorial and public defender offices to provide individualized justice. Also embedded in the reauthorization were the seeds of a nationwide assessment strategy.

In the fall of 1993, the American Bar Association Juvenile Justice Center, in conjunction with the Youth Law Center and the Juvenile Law Center, received funding from the federal Office of Juvenile Justice and Delinquency Prevention to initiate the Due Process Advocacy Project. The intent of the project was to build the capacity and effectiveness of juvenile defenders through increasing access to lawyers for young people in delinquency proceedings and enhancing the quality of representation those lawyers provide. As part of the Due Process Advocacy Project, the collaboration produced *A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*⁴ in 1995 the first national assessment of the state of representation of youth in juvenile court and an evaluation of training, support, and other needs of practitioners. Since that time, juvenile defender assessments have been published covering the states of Texas, Louisiana, Kentucky, Virginia and Georgia, with investigations ongoing and reports being prepared in several other states.

B) THIS STUDY AND ITS METHODOLOGY

The partners in this project conducted this assessment using information collected from a variety of sources. The study's primary goal is to ensure excellence in juvenile defense and promote justice for youth in Ohio's juvenile justice system. Specific objectives identified by the partners include:

- 1) To assess the ability of youth in Ohio to have access to counsel in delinquency and unruly proceedings
- 2) To assess the quality of indigent representation being provided to youth in Ohio
- 3) To determine significant substantive issues affecting the juvenile defense bar that impact upon resource allocation, funding and other barriers to effective representation
- 4) To highlight promising practices in Ohio among the indigent defense bar

The information in this report was obtained through a number of sources, including surveys with judges, magistrates and juvenile defense attorneys, interviews with youth and parents, interviews and surveys with detention center administrators, observation of juvenile court proceedings, and interviews with local practitioners and other "key stakeholders" working in the juvenile justice field. A more detailed description of these sources follows.

⁴ Puritz, Burrell, Schwartz, Soler, Warboys. *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, ABA JUV. JUST. CTR. (Dec. 1995).

- SURVEYS OF JUDGES AND ATTORNEYS

Surveys were sent to nearly 350 juvenile court judges and magistrates handling delinquency and unruly cases, from which approximately 26 responded. Likewise, nearly 600 attorneys serving as public defender and/or appointed counsel were sent surveys, although many were no longer handling juvenile cases. Approximately 22% of those handling juvenile cases responded.

- INTERVIEWS WITH INCARCERATED YOUTH IN DETENTION AND TREATMENT FACILITIES

Surveys were conducted in-person with 538 incarcerated youth in facilities operated by the Ohio Department of Youth Services, the Madison Correctional Institution, operated by the Ohio Department of Rehabilitation and Corrections, and six community corrections facilities (CCF's), operated by local counties. The breakdown is as follows:

Madison Correctional Institution (adult prison)	-	61
Department of Youth Services (males)	-	189
Department of Youth Services (females)	-	127
Community Corrections Facilities (mixed)	-	161

The juvenile respondents represent 73 counties or about 83% of Ohio's 88 counties. The highest percentages came from Cuyahoga 11.3%, Hamilton 9.1%, Montgomery 7.6%, and Summit 7.4%. The combined total from Ohio's six urban centers is 45.2%.

Of the youth interviewed, the average age was 16 years, and all were under the age of 18. Fifty-one (51%) percent interviewed were Caucasian, with more than 40% being African-American, and roughly 3% were of other racial origins. Of those interviewed, approximately three-fourths were male, and one-fourth female. Most were tried as juveniles, although 12.5% were tried as adults and housed at the Madison Correctional Institute, the adult prison housing youth with adult sentences.

- SITE VISITS TO JUVENILE COURTS

Finally site-visits were conducted in 12 Ohio counties, chosen with consideration given to geographic region, population characteristics, income levels, commitment rates, and other factors. This included the urban counties of Hamilton, Franklin, Cuyahoga, Lucas and Montgomery, small urban counties of Trumbull, Allen, Butler and Washington, and the rural counties of Defiance, Adams and Vinton.

Site visits included observation of juvenile court proceedings and interviewing the key stakeholders. Interviews were conducted with professionals in these counties, including judges, magistrates, administrators, officers, RECLAIM employees, defenders and private defense attorneys, prosecutors, school personnel, detention personnel, child protection workers, and county probation staff. Investigators for this process also interviewed youth and parents, and

observed scores of juvenile court hearings, including detention hearings, plea hearings and trials, motion hearings, dispositions and bindovers.

- KEY STAKEHOLDER SURVEYS

A final step in the assessment methodology was interviews with key juvenile justice stakeholders across the state who could provide historical perspective about the status of Ohio's juvenile justice system, the role of the indigent defense system in this system, and emerging challenges for defenders in being a key participant in this system. Interviews were conducted with individuals both inside and outside of the defender system with involvement in juvenile justice. This included a mix of judges, defenders, prosecutors, child advocates, juvenile justice and policy experts, and other state agency representatives

C) PARTNERS FOR THE PROJECT

The project has been a collaborative effort between the Juvenile Justice Coalition, Inc. (JJC) of Ohio, the Central Juvenile Defender Center (through the Children's Law Center, Inc.) in Covington, Kentucky, and the National Juvenile Defender Center through the ABA Juvenile Justice Center in Washington, D.C.

The Juvenile Justice Coalition was formed in 1990 as the Ohio Coalition for Better Youth Services. The organization supports the equitable treatment of Ohio youth in the least restrictive setting consistent with public safety for each child in the juvenile justice system, and the increased use of community-based alternatives to incarceration in order to reduce Ohio's reliance on institutional placements of youth in the juvenile justice system.

The National Juvenile Defender Center was established as a project of the Juvenile Justice Center of the American Bar Association in Washington, D.C. The Center was created to respond to the critical need to build the capacity of the juvenile defense bar and to enhance access to counsel and quality of representation for children in delinquency proceedings throughout the country. The National Juvenile Defender Center provides juvenile defense attorneys a more permanent capacity to address practice issues, improve advocacy skills, build partnerships, exchange information and participate in the debate over juvenile crime. Among the priorities of the National Juvenile Defender Center is to promote state assessments of indigent defense systems. The Center has created a protocol for such assessments and has initiated and/or participated in such assessments in a number of states, including Kentucky, Louisiana, Texas, Georgia, Arkansas and Virginia.

The third partner in this project is the Central Juvenile Defender Center (CJDC), a project of the Children's Law Center, Inc. in Covington, Kentucky, and a regional affiliate office for the National Juvenile Defender Center. CFDC includes in its service area the states of Ohio, Kentucky, Tennessee, Arkansas, Missouri, Nebraska, and Kansas. The CJDC provides training, technical assistance and resource development on juvenile justice issues within its region, and has identified indigent defense assessments as a regional priority.

The report is focused on the provision on juvenile defense services to poor youth in Ohio; however, its authors begin with an examination of the status of youth in this system to outline for the reader basic demographics and secondary data important to the report's context. Chapter 1 begins with an overview of the characteristics of Ohio's youth, with particular emphasis on high risk factors such as education, poverty, etc., etc., etc. . . .

Chapter 2 of this report provides readers with an overview of the role of juvenile defenders within the juvenile court process in Ohio, as well as the structure of the court system and the administrative agencies mandated to provide services to juveniles. Also included in this chapter is a synopsis of Ohio juvenile law as it pertains to the various stages of proceedings.

Chapter 3 of this report contains a summary of information obtained through the various methods for this assessment report. The results of survey data from judges and attorneys across the state are combined with the information obtained from site visits to local juvenile courts in various jurisdictions. It details the study's findings regarding barriers that limit access to counsel and the quality of representation, and other systemic barriers that effect representation. Also included in this chapter is a discussion of the role of law school education and the implications of this in the indigent defense community.

The extensive interviews with youth incarcerated throughout the state provided researchers with a wealth of information regarding their perceptions and advice on representation of youth in the juvenile justice system. These findings and thoughts from youth are contained in Chapter 4.

Throughout the study, investigators made note of promising practices and programs relative to the representation of indigent youth. While the study cannot identify these practices in all parts of the state, a sampling of them is included in Chapter 5.

Finally, Chapter 6 is a summary of findings and recommendations made by the partners, with assistance from project investigators. These recommendations encompass all three branches of government, as well as other mediums that impact upon juvenile justice practices. It is hoped that these recommendations will be used as the basis for various reform initiatives to improve access to and the quality of representation for poor children in Ohio.

CHAPTER 1

RISK FACTORS FOR OHIO'S YOUTH

I. INTRODUCTION

The lack of resources to treat children with mental illness, public schools in academic emergency, a mortality rate from child abuse higher than the national average, and a high poverty rate are among the factors which contribute to a heavy reliance on the juvenile justice system in Ohio. Environmental factors have become reliable indicators of involvement in the kind of behavior which leads to entanglement with the juvenile justice system. Increasingly, it is not as much the criminality of the behavior but the lack of alternatives for children with severe emotional and behavioral problems, children who have been expelled from school, and children whose families cannot provide adequate care which brings them into the juvenile justice system. This chapter will provide an environmental scan of those factors that contribute to Ohio's ranking as the 5th highest rate of incarceration of juveniles in the United States.¹

Basic census data provides some context to a consideration of the condition of children in Ohio. According to the 2000 census, Ohio has 3,217,955 children under the age of 19 which constitute almost 30% of the state's population.² Despite projected growth in the national population, one third of the states, including Ohio, are expected to experience a decline in their juvenile populations between 1995 and 2015. Ohio's juvenile population is projected to decline 6%; only 4 states are anticipated to exceed that loss.³

The racial demographics for Ohio are less diverse than the national population. According to a 1999 report of the OJJDP, the U.S. juvenile population was 79% white. Ohio's juvenile population was 84% white, 15% was African American, 1% was Asian, and 2% was of Hispanic origin.⁴ Juveniles are slightly more diverse than the at-large population in Ohio. Of 11,353,140 Ohioans, 85% of the total population is white, 11.5% is African American, 1.2% is Asian, and 1.9% is of Hispanic origin.⁵

II. CHILD POVERTY

In 1999, 16% of Ohio's children lived in poverty, slightly better than the 19% national rate. Of those children in poverty, 7% of Ohio's children are living in extreme poverty in a family with income at less than 50% of the poverty level which is also slightly better than the 8% national rate. More than one in seven Ohio children lives in poverty; among Ohio children under age 5, almost one in five lives in poverty. In 26% of Ohio's families with children neither parent has full-time, year-round employment.⁶

**More than
one in seven
Ohio
children
live in
poverty.**

¹ OJJDP Statistical Briefing Book. Online <http://ncjrs.org/ojstatbb/html/qa252.html>. 20 January 2002

² U.S. Census Bureau. DP-1 Profile of General Demographic Characteristics 2000. <http://factfinder.census.gov/home/en/datanotes/exps/flu.htm>.

³ OJJDP Statistical Briefing Book. Online <http://ncjrs.org/ojstatbb/html/qa252.html>.

⁴ http://www.childrensdefense.org/fs_census2000_pop.htm.

⁵ Id.

⁶ Children's Defense Fund-*Ohio Briefing Guide for Ohio Policymakers, Child Poverty in Ohio* 2001. www.cdfohio.org/reports/BriefingGuides/Chpoverty.pdf.

Poverty rates vary widely among different regions of Ohio. While the child poverty rate in most of eastern and northwestern Ohio (e.g. Fulton, Williams, and Defiance counties) hovers between 6-10%, the southernmost fringe of the state (e.g. Scioto, Lawrence, and Pike counties) experience child poverty rates of 26-29%.⁷ Of the 20 poorest counties, 19 are rural or small towns in Appalachia. Nearly 20% of Ohio's Appalachian children live in poverty, higher than the 16% for the rest of the state's youth population.⁸ In Ohio's major metropolitan counties, the child poverty rates generally exceed the national average. The child poverty rates in Hamilton County (Cincinnati), Franklin County (Columbus), and Lucas County (Toledo) range between 16-20%. In Cuyahoga County (Cleveland) the child poverty rate is between 21-25% and ranks among the 10th worst of big cities in the United States.⁹

III. CHILDREN'S HEALTH

Health concerns are another indicator of the well being of Ohio's children. Beginning at birth, Ohio's infant mortality rate is the 15th highest in the country at 8%. Ohio also does poorly on rankings for low birth weight. In 1998, almost 8% of births in Ohio are low-birth weight (less than 5.5 lbs.), an increase from 7.1% in 1990 with 26 states ranking better than Ohio.¹⁰ Babies born at low birth weight face a higher risk of premature death and other physical and learning disabilities.

Health insurance for children is better than the national average. According to statistics from 1999, 9% of children in Ohio are without coverage while the national average is 14%. A more serious problem is the overall shortage of health professionals in Ohio. Of 88 counties, almost 10% have been designated as Health Professional Shortage Areas by the U.S. Department of Health and Human Services.¹¹

IV. MENTAL HEALTH

Reforms in the law in Ohio in 1988 led to the closing of state mental hospitals for children with the last hospital closed in the mid 1990's. At the same time, changes in the insurance industry resulted in the closing or reduction of inpatient psychiatric units in private hospitals and community mental health programs. The lack of parity in insurance reimbursement for mental health treatment in comparison to other medical coverage has also resulted in a shortage of mental health professionals in both the private and public sector. Almost 25% of the counties in Ohio have been designated as Mental Health Professional

The Cincinnati Children's Hospital Medical Center reported that psychiatric emergency room visits have increased 109% in the last 3 years to over 3,000 in 2002, the highest of all children's hospital emergency rooms in the country.

Report prepared by Cincinnati Children's Hospital
September 2002

⁷ Children's Defense Fund-*Ohio Briefing Guide for Ohio Policymaker, Child Poverty in Ohio*. Retrieved from www.cdfohio.org/reports/BriefingGuides/ChPoverty.pdf.

⁸ Id.

⁹ Data from U.S. Census Bureau, Census 2000.

¹⁰ Children's Defense Fund, Washington, D.C., *Yearbook 2000: The State of America's Children*. Retrieved from <http://www.cdfohio.org/ohiodata/vitalstats/main.htm>.

¹¹ U.S. Department of Health and Human Services Health Resources and Services Administration, Health Professional Shortage Areas, Data Extract as of 12/17/02 Retrieved from <http://www.bphc.hrsa.gov>.

Shortage Areas by the U.S. Department of Health and Human Services. The future is not promising as Medical Education Payments to teaching hospitals are expected to be cut by 15% or \$800 million nationally. It is estimated that 40,000-50,000 child psychiatrists are needed in the United States to address the need but there are only about 9,000 trained psychiatrists currently in practice.¹²

As resources for children's mental health services continue to shrink, the numbers of children in need of help is increasing. The recent White House Conference on Mental Health estimated that one in ten children and adolescents suffer from mental illness severe enough to cause impairment.¹³ The Cincinnati Children's Hospital Medical Center reported that psychiatric emergency room visits have increased 109% in the last three years to over 3,000 in 2002, the highest of all children's hospital emergency rooms in the country. Due to the shortage of psychiatric inpatient facilities, the hospital has seen a 181% increase in the number of patients in need of acute psychiatric care having to be housed in medical beds elsewhere in the hospital.¹⁴

Although the juvenile courts and juvenile correctional facilities do not keep records on the number of children with mental health diagnoses in the normal course of their business, almost all of the judges, attorneys, probation officers, and correctional staff interviewed as part of this study estimated that 40-70% of the youth in their respective systems suffered from mental illness. This is consistent with a 1994 OJJDP study which found that 73% of juveniles screened at admission to a juvenile correctional facility had mental health problems and 57% reported having prior mental health treatment or hospitalization.¹⁵ According to the National Mental Health Association, girls in the juvenile justice system exhibit even higher rates of mental health problems than their male counterparts.¹⁶

The shortage of mental health treatment has resulted in the reliance on the juvenile justice system to care for those whose behavior is unmanageable in the home or in the community. Although incarceration in a juvenile correctional facility provides a structured and secure setting, correctional staff interviewed for this study was unanimous in their opinion that there is not sufficient funding or staffing to provide adequate mental health treatment in the facilities. Further, correctional staff described limits on Medicaid coverage for those who are committed to the custody of the Ohio Department of Youth Services. The result is that the only resident medical staff typically available on the premises of a correctional facility is a general practice nurse. Other complications of the Medicaid regulations in Ohio about which correctional staff and parole officers expressed concern is the lack of a coordinated system of

“Please tell the judges and the politicians that most of these kids are not criminals. We are not so much a correctional facility as we are a mental health facility because there is nowhere else to send them.”

*Superintendent Of Ohio Juvenile
Correctional Facility For Adjudicated
Felons*

¹² Report prepared by Cincinnati Children's Hospital Medical Center for Mindpeace, September 2002.

¹³ White House Conference on Mental Health, June 7, 1999. Retrieved from <http://www.nimh.nih.gov/whitehouse/myths.asp>.

¹⁴ Report prepared by Cincinnati Children's Hospital Medical Center for Mindpeace, September 2002.

¹⁵ *Conditions of Confinement: Juvenile Detention and Correctional Facilities*, OJJDP, August 1994.

¹⁶ *Mental Health and Adolescent Girls in the Justice System*, National Mental Health Association, 2002. Retrieved from <http://www.nmha.org/children/justjuv/girlsjj.cfm>.

transition of care when a child is released and a lag time of up to a year before benefits are resumed to allow medication or follow-up care for a child upon release from the facility.

V. SUBSTANCE ABUSE

Drug abuse violations accounted for 203,900 juvenile arrests in the U.S. in 2000.¹⁷ Alcohol related offenses, including driving under the influence, liquor law violations, and public drunkenness, amounted to more than 200,000. Without factoring in the influence of drugs or alcohol in arrests on other charges, arrests for substance abuse constituted 16% of all juvenile arrests.¹⁸ In Ohio, arrests of juveniles for drug abuse violations in 2000 numbered 5,715, second only to arrests for theft. The third highest arrest rate of juveniles was 3,716 for liquor law violations and an additional 318 for driving under the influence.¹⁹

Marijuana use by juveniles in Ohio is increasing in juveniles from ages 10 to 12. Among Ohio fourth graders surveyed in 2001, approximately 3% reported past year use of inhalants. Club drugs such as ecstasy and LSD have been increasing in popularity among teens and young adults in Ohio.²⁰

Students Reporting Past Year Drug Use, by Drug Type and Grade, Ohio 2001

Drug	6thGrade	8thGrade	10thGrade	12thGrade
Marijuana	2.5%	13.4%	30.1%	36.6%
Cocaine	0.9	2.2	4.7	6.4
Stimulants	1.1	3.0	6.6	7.3
Depressants	1.2	3.3	7.3	7.6
Inhalants	3.4	5.0	5.0	4.2
Hallucinogens	0.9	2.4	5.5	7.8
Heroin	0.8	1.6	2.8	3.2
Steroids	1.2	2.0	3.1	3.0
MDMA	0.9	3.1	6.4	8.9
OxyContin	1.1	2.4	5.2	5.7

➤ Approximately twenty-two percent of seniors reported past month use of marijuana.

from Office of National Drug Control Policy, State of Ohio Profile of Drug Indicators, October, 2002

VI. EDUCATION

According to the Ohio Department of Education's rankings of school districts in Ohio, all but one of the largest eight urban school districts is in academic emergency based upon the proficiency test results of 2001. Of 27 standards tested at four grade levels Academic Emergency is based upon passing seven or less of the tests across the district. A total of 12 districts are

¹⁷ Statistical Briefing Book OJJDP, 2000 Online <http://ncjrs.org/ojstatbb/html/qu250html>.

¹⁸ Id.

¹⁹ Office of National Drug Control Policy, *Drug Policy Information Clearinghouse*, October 2002. Retrieved at <http://www.ondep@ncjrs.org>.

²⁰ Id.

currently in Academic Emergency. An additional 38 school districts are in Academic Watch based upon achieving only 8-12 of the standards across the district.²¹

Proficiency test results show that there is a significant disparity in the educational attainment of minority youth. The average difference in passing rates between African-American students and white students ranges from 18 percentage points in 10th grade to 38.6 percentage points in sixth grade.²²

There is also a disproportionate suspension rate for black pupils.²³ Nationally, about 13% of enrolled black youths were suspended in 1998, compared with 5% of whites.²⁴ Although official records were not maintained by the courts or juvenile justice systems surveyed for this study, interviews with judges, prosecutors, defense counsel, and probation officers confirmed their experience with disproportionate enforcement of disciplinary actions and charges arising from zero tolerance school policies against minority students. In March 2002, the Cincinnati Enquirer reported that African-Americans in Cincinnati Public Schools received 85% of the suspensions in 2001, though they make up less than 71% of the district's population.²⁵ The rate for expulsions of black students was 88% or 704 of the 800 expulsions ordered.²⁶ Former Cincinnati Public School Superintendent, Dr. Steven Adamowski, attributed the disparity to poverty more than racial prejudice. According to Dr. Adamowski, "Children in poverty bring more serious issues to school. It spans the gamut from nutrition to mental health issues to everything else."²⁷

Graduation rates for the state are officially reported at 81%.²⁸ However, the Buckeye Institute for Public Policy Solutions factored in additional considerations including the dropout rate of those who should have been in the graduating class. With these additional variables, the graduation rate for the state in 2001 is 76%.²⁹ Even without consideration of the dropout rate and the other variables in the calculation by the Buckeye Institute, the official graduation rate reported by the Ohio Department of Education for the large urban districts include 51% in Cincinnati, 56% in Dayton, 34% in Cleveland, and 62% in Columbus.³⁰ The percentage of teens (ages 16-19) who were high school dropouts in 2000 was 8.3% ranking it 23rd among the states and slightly better than the national average of 10%.³¹

“[T] he General Assembly has not focused on the core constitutional directive of DeRolph I: ‘a complete systematic overhaul’ of the school funding system.... Today we reiterate that that is what is needed, not further nibbling at the edges.”

DeRolph v. State

²¹ Ohio Department of Education *State of Ohio Report Card 2002*. Retrieved at http://www.ode.state.oh.us/reportcard/State_Report_Card.

²² Id.

²³ Mrozowski, Jennifer. “*Suspension Rate Higher for Black Pupils Here.*” Cincinnati Enquirer. March 12, 2002.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Ohio Department of Education. Retrieved at <http://www.ode.state.oh.us>.

²⁹ Greene, Jay P. and Hall, Joshua C. “*High School Graduation Rates in Ohio.*” The Buckeye Institute for Public Policy Solutions. 2002. Retrieved at <http://www.BuckeyeInstitute.org>.

³⁰ Ohio Department of Education. Retrieved at <http://www.ode.state.oh.us>.

The inequity of resources for public education is one of the most serious challenges in Ohio. In a study conducted by Education Week in 1999, Ohio scored a D- for state equalization efforts in school funding.³² The issue has been before the Supreme Court since 1991 in *DeRolph v. State*.³³ The fourth ruling on the case was issued on December 11, 2002. Although the Court had given the legislature the opportunity to overhaul the state system of property tax based school funding in a prior opinion, Justice Pfeifer, writing for the majority, found that “the General Assembly has not focused on the core constitutional directive of DeRolph I: ‘a complete systematic overhaul’ of the school funding system.... Today we reiterate that that is what is needed, not further nibbling at the edges.”³⁴

VII. CHILD ABUSE AND NEGLECT

During the year 2000, investigations by public children’s agencies in Ohio reported that more than 51,000 Ohio children were victims of maltreatment.³⁵ Of these children, 53% were neglected, 28% suffered physical abuse, 14% experienced sexual abuse, and 5% were subject to psychological/emotional abuse or neglect.¹ Victims included slightly more females (52%) than males (48%).³⁶

There is a strong correlation between child abuse and juvenile delinquency, especially among girls. About 40-73% of girls in the juvenile justice system are believed to have been sexually and/or physically abused as compared to 23-24% of girls in the general population. Girls who are abused or neglected are twice as likely to be arrested as girls who are not abused (20% vs. 11.4%) and have a continuing risk of arrest for violence as adults. Ohio’s rate of child fatalities from maltreatment exceeds the national average.³⁷ According to a study done by the Ohio Department of Rehabilitation and Corrections at intake of prisoners in 2000, 22.3% of the females had been physically abused as a child in comparison to only 7.6% of the males. The impact of child sexual abuse appeared to have been even more negative with 24.6% of the females having been sexually victimized by contrast to only 4.3% of the males.³⁸ A study reported by the US Department of Health and Human Services Children’s Bureau in 1999 found that Ohio’s rate of child fatalities from maltreatment was 1.90 deaths per every 100,000 children age 0-18. The national average was 1.62 child deaths due to maltreatment.³⁹

VIII. VIOLENCE

³¹ KidsCount Data Book. Annie E. Casey Foundation. 2000. Retrieved at <http://www.aecf.org>.

³² *Resources: Equity Education Week on the Web 2002*. Retrieved at <http://www.edweek.org/sreports/qc02/reports/equity-t1/htm>.

³³ *DeRolph v. State*, 97 Ohio St.3d (2002).

³⁴ *Id.*

³⁵ Ohio FACSIS Family and Children Information System. Retrieved at <http://www.state.oh.us/odjfs/can/campaign.pdf>.

³⁶ *Id.*

³⁷ Widom, Cathy Spatz Ph.D. “*Childhood Victimization and the Derailement of Girls and Women to the Criminal Justice System*” Research on Women and Girls in the Justice System. U.S. Department of Justice, National Institute of Justice. 1999 Retrieved at <http://www.ncjrs.org/pdffiles1/nij/180973.pdf>.

³⁸ Ohio Department of Rehabilitation and Correction 2000 Intake Study. Retrieved at <http://www.drc.state.oh.us/web/Reports/Intake2000.pdf>.

³⁹ *Child Maltreatment*. U.S. Department of Health and Human Services Children’s Bureau, 1999.

A child or teen in the United States is killed by gunfire every three hours; in Ohio gunfire takes the life of a child or teen once every five days.⁴⁰ Children are at a much greater risk of being the victims than the perpetrators of violent crime. Juveniles make up 12% of all crime victims reported to police, including 71% of all sex crimes. One out of every 18 victims of violent crime, and one of every three victims of sexual assault is under age 12. And despite recent declines, the teen homicide rate is about 10% higher than the average homicide rate for all Americans.⁴¹ The arrest rates for juveniles in Ohio further reflect less violence among youth than the national average. According to an OJJDP report based upon FBI statistics in 1999, the violent crime index rate was 248 arrests per 100,000 juveniles. The national average was 366 arrests for violent crimes per 100,000 juveniles.⁴²

Gang membership has recently been shown to be a factor in delinquency. The OJJDP published an extensive report based upon several studies which found that gang members account for a disproportionate share of delinquent acts, especially violent offenses.⁴³ The report also found that Ohio had the fourth largest number of gang-problem cities with significant gang activity in 86 Ohio cities. Former Ohio Attorney General Betty Montgomery studied gang activity in Ohio and found that there are at least 714 criminal gangs in Ohio with more than 13,000 members, 90% of whom are under the age of 18. Of the 488 Ohio law enforcement agencies surveyed, 89% responded that gang members were involved in violence and 66% used weapons.⁴⁴ As the recognition of the growing problem of gangs is recent, 83% of the Ohio law enforcement agencies surveyed by the Attorney General had no gang unit or officer.⁴⁵

IX. GIRLS IN OHIO'S JUVENILE JUSTICE SYSTEM

Judges, attorneys, probation officers, and correctional facility staff interviewed throughout Ohio expressed concern about the growing number of girls in the juvenile justice system and the shortage of gender specific prevention and treatment programs. Although little data about girls in the juvenile justice system in Ohio has been formally studied, the study found fewer correctional alternatives for girls in the state.

While the total number of females committed to the Ohio Department of Youth Services decreased 6.7% from 267 in 2000 to 249 in 2001, most counties reported an increase or stable number of girls appearing in court, primarily on status offenses. The national arrest rate for girls increased twice as much as the arrest rate for boys between 1993 and 1997, with disproportionate rates of arrest of girls for status offenses.⁴⁶ The annual report of the juvenile court in Cleveland below reflects a closer rate of arrests of boys and girls but a substantial disparity in those cases

⁴⁰ Children's Defense Fund Action Council, State of Ohio. 2002 Retrieved at <http://www.childrensdefense.org/states/profile-oh.pdf>.

⁴¹ *Facts on Youth, Violence and Crime*. Children's Defense Fund. February 2000. Retrieved at http://www.childrensdefensefund.org/ss_ydfs?viocrim.php.

⁴² *Law Enforcement and Juvenile Crime*. OJJDP National Report Series Bulletin December 2001. Retrieved at http://www.ncjrs.org/html/ojjdp/nrs_bulletin/nrs_2001.

⁴³ Howell, James C. Ph.D. *The Growth of Youth Gang Problems in the United States 1970-98*, OJJDP. April 2001. Retrieved at http://www.ncjrs.org/html/ojjdp/ojjdprpt_yth_gng_prob_2001/acknowledgments.html.

⁴⁴ Ohio Attorney General's 2000 Gang Survey. Retrieved at www.ag.state.oh.us/juvenile/2000gangstats.htm.

⁴⁵ Id.

⁴⁶ *Female Juvenile Offenders, Women in Criminal Justice, A Twenty Year Update*. U.S. Department of Justice. 1998. Retrieved at <http://www.ojp.gov/reports/98Guides/wcjs98/wcjspdf.pdf>.

prosecuted against the girls. Almost two thirds of the status offenses charged against boys were handled unofficially while more than one half of the status offenses charged against the girls were prosecuted on the official court docket.

DELINQUENCY AND UNRULY

Cases Filed and Associated Charges	Male	Female	Total
Official Delinquency Cases:	6,699	1,707	8,406
Bypassed Delinquency Cases:	395	175	570
Total Delinquency Cases:	7,094	1,882	8,976
Charges in Delinquency Cases:	11,917	2,835	14,752
Official Unruly Cases:	432	528	960
Bypassed Unruly Cases:	1,123	980	2,103
Total Unruly Cases:	1,555	1,508	3,063
Charges in Unruly Cases:	1,776	1,794	3,570
Individual Offenders:	5,584	2,643	8,227
Total Delinquency and Unruly Cases:	8,649	3,390	12,039
Total Delinquency and Unruly Charges:	13,693	4,629	18,322

from Cuyahoga County Juvenile Court Report, 2001.

The high rate of arrest and prosecution of girls for status offenses has been linked to an escalation in involvement in the criminal system. In a study conducted at intake in 2000 by the Ohio Department of Rehabilitation and Corrections, almost 38% of adult females had been arrested as juveniles.⁴⁷ The rate of admission of women to adult prisons has continued to increase and is projected to grow 22% from 2001 to 2011 as compared to a 7% rate of growth for adult males.⁴⁸

The risk factors for Ohio's girls include many of those faced by Ohio's boys but which seem to affect girls more negatively. School failure is the single most significant indicator of girl's involvement in the juvenile justice system.⁴⁹ The risk of becoming an offender is increased three times for a girl with poor grades or expulsion from school.⁵⁰ Given the poor quality of public education in most of the large urban school districts in Ohio, an increase in involvement by girls in the system is predictable.

The risk of becoming an offender is increased three times for a girl with poor grades or expulsion from school.

Mental illness is also more common in girls in the juvenile

⁴⁷ Ohio Department of Correction and Rehabilitation 2000 Intake Study. Retrieved at <http://www.drc.state.oh.us/web/Reports/Intake2000.pdf>.

⁴⁸ Ohio Department of Correction and Rehabilitation Population Projections, February 2002. Retrieved at http://www.drc.state.oh.us/web/Reports/proj_feb2002.pdf.

⁴⁹ *Guiding Principles for Promising Female Programming, An Inventory of Best Practices*, OJJDP, October, 1998. Retrieved at <http://ojjdp.ncjrs.org/pubs/principles/contents.html>.

⁵⁰Id.

justice system than boys.⁵¹ In the first study of post traumatic stress disorders in female juvenile offenders which was reported in the *Journal of the American Academy of Child and Adolescent Psychiatry* in 1998, 48.9% were experiencing symptoms at the time of the study.⁵² Female offenders were 50% more likely to suffer from PTSD than male offenders which were linked to the fact that girls are more likely to be victims of violence and boys were more likely to be witnesses.⁵³ Although the Ohio correctional facilities did not formally collect or report information about mental illness, correctional staff and juvenile justice personnel interviewed during this study estimated that 40-60% of the girls in their facilities suffered from mental illness and/or mental retardation including psychosis, bi-polar disorder, mood disorders, depression and suicidal behavior. Very limited resources exist within the juvenile justice system or in the community to address these disorders.

Teen pregnancy is another significant risk factor leading to involvement by girls in the juvenile justice system. The teen birth rate in Ohio in 1999 was 25 per 1,000 girls ages 15-17. This marks a decrease from 34 per 1,000 in 1990 and is better than the national average of 29 births per 1,000 girls.⁵⁴ However, few resources remain in Ohio to assist girls with family planning and pregnancy, and correctional staff reported that approximately 8% of the girls incarcerated at the Ohio Department of Youth Services correctional facility in June 2002, were serving sentences for offenses related to their attempts to dispose of unwanted babies.

X. TRENDS

Improvements in education are among the most promising for Ohio's children. Although there are still twelve school districts in Academic Emergency in 2002 including all but one of the large urban school districts, this marks significant progress from 69 schools in academic emergency in 2000.⁵⁵ More schools have been ranked Effective, from 30 in 2000 to 136 in 2002.⁵⁶ A statewide facility improvement program and the potential for a new school funding system in response to the recent Supreme Court ruling in the *DeRolph* case may equalize educational opportunities for Ohio's youth.

Mental health for children is also receiving attention from jurisdictions throughout the state. In several counties including Stark, Butler and Clermont, collaborations among agencies have created coordinated systems of care to improve the access and delivery of mental health services for children and similar initiatives are underway in Lucas and Hamilton counties. There are also active advocacy efforts to influence the legislature to pass new laws to improve parity for mental health reimbursement including the introduction of H.B. 33.

⁵¹ Mental Health and Adolescent Girls in the Justice System, National Mental Health Association, Retrieved at <http://www.nmha.org/children/justjuv/girlsjj.cfm>.

⁵² Cauffman, E. et. al *PTSD Among Female Juvenile Offenders*. *Journal of American Academy of Child and Adolescent Psychiatry*, 37 (1998).

⁵³ Id.

⁵⁴ KidsCount Databook 2002 Online. Retrieved at <http://www.aecf.org/cgi-bin/KC2002/CGI?Action+Profile&Area=Ohio>.

⁵⁵ Ohio Department of Education. Retrieved at <http://www.ode.state.oh.us/faq/>.

⁵⁶ Id.

Rehabilitation facilities have been developed through funding by the Ohio Department of Youth Services RECLAIM program to keep young offenders in their own communities. The sites visited for this study were generally staffed by energetic and innovative professionals who were devoted to rehabilitation within their programs as well as comprehensive aftercare programming. In the CCF in Toledo, a small staff to resident ratio included social workers who begin working with the youth's home school and arrange community supports including mental health services while the child is still incarcerated. Family is required to participate in counseling once a week. For those families who live too far to travel, the facility has small living quarters to house overnight family stays. Except for those with serious mental illness, the Toledo CCF reported a low recidivism rate.

Although many of the indicators constitute clear risk factors for involvement in the juvenile justice system, the high arrest rate in Ohio is not only a reflection of the social and economic factors in Ohio. The politics of the state are also a major factor which brings children into the system. The legislature's lowering of the age for commitment to the Ohio Department of Youth Services and for transfer to the adult system is among the recent changes in the law. Many of the judges and court personnel who were surveyed and interviewed described their jurisdictions as "law and order" courts and defended their practice of incarcerating females on status offenses to protect them from getting pregnant.

CHAPTER 2

THE ROLE OF DEFENSE COUNSEL IN DELINQUENCY PROCEEDINGS IN OHIO¹

This section of the report discusses the major stages of a delinquency case and the role of counsel at each stage. Although there are many different approaches that a juvenile defense attorney may take at different stages of the proceedings, throughout the case counsel's role remains that of an advocate for the client's interests, as expressed by that client.

This discussion is an overview. It does not purport to cover in depth every aspect of representation of juveniles charged with delinquency.² Rather, it illustrates the processes and complexities of representation in juvenile court, and demonstrates the ways in which high caseloads, inadequate resources and substandard practice deprive young people of effective representation. This chapter also includes references to national standards as established by the ABA/IJA, as well as Ohio statutory and caselaw citations relevant to each stage of the proceeding in a delinquency action.

I. DUE PROCESS AND THE JUVENILE JUSTICE SYSTEM

In the landmark 1963 case *Gideon v. Wainwright*, the United States Supreme Court held that the constitutional right to counsel requires the appointment of an attorney to represent a poor person charged with a felony offense.³ A few years after *Gideon*, the Supreme Court recognized the constitutional nature of the juvenile court's delinquency process in *In re Gault* when it specifically stated that juveniles facing delinquency proceedings have the right to counsel under the Due Process Clause of the United States Constitution.⁴ *Gault* found that juveniles facing "the awesome prospect of incarceration" need counsel for the same reasons that adults facing criminal charges need counsel.⁵ These principles were reaffirmed a few years later when the Supreme Court declared, "[w]e made it clear in [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile court . . .," and held that juveniles were constitutionally entitled to proof "beyond a reasonable doubt" during an adjudication for a crime.⁶

The introduction of advocates theoretically altered the tenor of delinquency cases. Juveniles accused of delinquent acts were to become participants in the proceedings, rather than spectators. Thus, attorneys representing juveniles charged with delinquency must be prepared to assist clients to "cope with problems of law, to make skilled inquiry in the facts, to insist upon

¹ With permission from the author, this chapter has substantially been taken from the ABA Juvenile Justice Center, *A Call for Justice*, Chapter 2: The Role of Defense Counsel in Delinquency Proceedings, (December 1995), 29-40, with edits and revisions to incorporate Ohio law and practice.

² For an excellent and exhaustive discussion of the role of counsel in delinquency proceedings, see Randy Herts, et al., *Trial Manual for Defense Attorneys in Juvenile Court v.1-2*, American Law Institute/American Bar Association, Committee on Continuing Professional Education (1991) (hereinafter Herts, *Trial Manual*).

³ 372 U.S. 335 (1963).

⁴ 387 U.S. 1, 20 (1967).

⁵ *Id.* at 36.

⁶ *In re Winship*, 397 U.S.358, 365-366 (1970).

regularity of the proceedings, and to ascertain whether [the client] . . . has a defense and to prepare and submit it.”⁷ *Gault* recognized that a system in which the children’s interests are not protected is a system that violates due process.

II. ORGANIZATION OF THE JUVENILE COURTS IN OHIO

Ohio’s juvenile justice system is based upon a system where counties throughout the state function with a great deal of autonomy. Since Ohio’s 88 juvenile courts are of statutory rather than Constitutional origin, much discretion is left to the counties as to how juvenile courts are structured. The result is great regional variance in how juvenile justice is administered.

Some counties merge their juvenile court into the domestic relations division, while others merge it with the probate division of the Court of Common Pleas. Nine Ohio counties, including Hamilton and Cuyahoga, make juvenile court its own division.⁸ Juvenile proceedings are presided over by a judge or magistrate. Juvenile court judges are elected, and they have the power to appoint magistrates as needed to accommodate the docket. Judges determine the order of reference and powers that a magistrate may have.⁹ An individual has the right to appeal a magistrate’s decision to the Common Pleas court.¹⁰

Ohio’s juvenile courts have exclusive original jurisdiction concerning any child alleged to be a juvenile traffic offender or a delinquent, unruly, abused, neglected, or dependent child and, based on and in relation to the allegation pertaining to the child, concerning the parent, guardian, or other person having care of a child who is alleged to be an unruly or delinquent child for being an habitual or chronic truant.¹¹ Hearings in juvenile delinquency matters are public, although the court may exclude the general public from its hearings in a particular case if the court holds a separate hearing to determine whether that exclusion is appropriate.¹²

III. DEVELOPMENT OF THE OHIO INDIGENT DEFENSE SYSTEM

Criminal defendants in Ohio, both adult and juvenile, have a constitutional right to court appointed attorneys if they are financially unable to retain private counsel, a right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. This right extends from the time judicial proceedings are initiated, through sentencing and appeal. The right to counsel in post-dispositional proceedings for juveniles is not explicitly set forth in Ohio’s constitution or statutes, but has been recognized by the State Public Defender and the Ohio Department of Youth Services pursuant to the holding in *John L. v. Adams*.¹³

The Ohio Public Defender Commission was created in January of 1976 pursuant to H.B. 164 of the 111th General Assembly, and is designed to provide, supervise and coordinate legal representation for persons who cannot afford to hire an attorney to represent them in criminal

⁷ See, Herts, *Trial Manual*, *supra*, note 2 at 36.

⁸ Ohio Office of Criminal Justice Services 1997, at 3.

⁹ See, OHIO JUV. RULE 40(A) and (C).

¹⁰ See, OHIO JUV. RULE 4(C)(3)(b).

¹¹ See, OHIO REV. CODE § 2151.23.

¹² See, OHIO REV. CODE § 2151.35(A)(I).

¹³ 969 F.2d 228 (1992).

court. The commission's most significant activity is the administration of a county subsidy program that provides partial reimbursement to counties for indigent defense expenditures. When the Ohio Public Defender Law was established in 1976, it required that the state reimburse counties for 50% of the costs associated with the provision of legal counsel to indigent individuals. In 1979, however, this law was amended to allow the commission to provide a proportionally reduced amount if the state is unable to fulfill the 50% goal. The last time the state hit the 50% reimbursement rate was in 1991.¹⁴

The Commission consists of nine appointed members, five of whom are appointed by the Governor, and the other four which are appointed by the Supreme Court of Ohio. The Commission appoints a State Public Defender who maintains and administers the Office of the Ohio Public Defender.

The Ohio Revised Code authorizes the State Public Defender to provide legal representation under five circumstances: 1) when an indigent adult or juvenile is charged with an offense or act for which the penalty includes the potential loss of liberty; 2) when an indigent person, while incarcerated in any state correctional institution is charged with an offense or act for which the penalty includes the potential loss of liberty; 3) when any person incarcerated in any correctional institution asserts he is unlawfully imprisoned or detained; 4) when the state public defender has provided representation and an appeal of the decision is warranted; 5) when an indigent adult or juvenile is charged with a parole or probation violation.¹⁵ Each county has the option of establishing a county public defender system, a joint county public defender system, a private appointed counsel system, contracting with the State Public Defender, or contracting with a non-profit corporation. Counties can use one or more of these options. The Administrative Division of the State Public Defender provides a County Outreach Program, whose function is to provide, upon request, a consulting service to county officials regarding their local indigent defense system. This service is free and can be requested by any county official. It also obtains information for local judges, bar association, auditors, commissioners, and county public defenders.¹⁶ There are currently 34 counties covered by county or joint county public defender offices. The State Public Defender Commission maintains and operates a branch office in Trumbull County in Warren, Ohio, and the Multi-County Branch Office covering ten counties in the south and southeastern part of the state. All other counties operate a court appointment system of representation.

IV. THE RIGHT TO COUNSEL IN DELINQUENCY AND UNRULY PROCEEDINGS IN OHIO

Every party in a juvenile court proceeding in Ohio has the right to be represented by counsel, and every child, parent, custodian or other person in loco parentis has the right to appointed counsel if indigent. In certain circumstances, the court "shall" appoint a guardian ad litem.¹⁷ If the guardian ad litem is also an attorney, that person may serve as counsel to the child

¹⁴ <http://www.ibo.state.oh.us/124ga/budget/RedbooksSenate/PUB/overview.htm>.

¹⁵ OHIO REV. CODE, § 120.06.

¹⁶ Ohio Public Defender Commission, 2000 ANNUAL REPORT, at 21.

¹⁷ OHIO JUV. RULE 4(B) notes several instances where a guardian ad litem shall be appointed by the court, such as (1) where the child has no parents, guardian or legal custodian; (2) the interests of the child and the interests of the parent may conflict, (3) the parent is under the age of eighteen years or appears to be mentally incompetent, (4) the

as well, provided there is no conflict between the roles. If a conflict exists, the court is required to appoint another person as guardian ad litem for the child.¹⁸ While the rule speaks of the right to counsel in general, it does not provide for appointed counsel in cases where that right is not otherwise provided for by the constitution or statute.¹⁹ Many courts in Ohio have held, however, that the statutory equivalent to this rule provides for court appointed counsel in all juvenile court proceedings.²⁰

A child's waiver of the right to counsel must be voluntary, knowing and intelligently made to be effective.²¹ A series of recent Ohio cases have upheld this constitutional principle as solidly recognized. For example:

- Juvenile court's limited inquiry at dispositional hearing and 14-year-old juvenile's limited responses, including court's asking whether juvenile recalled the rights explained to him at adjudicatory hearing and juvenile's response, "Um-hum," were insufficient to establish valid admission or valid waiver of right to counsel under the federal and state due process clauses.²²
- Trial court accepted 13-year-old juvenile's waiver of counsel without proper assurances that waiver was knowing, intelligent and voluntary; referee gave basic explanation to juvenile on his right to counsel at initial hearing and adjudicatory hearing, and asked juvenile to sign waiver form, but failed to inquire into any circumstances that would demonstrate that juvenile knowingly, intelligently, and voluntarily waived his right to counsel, and trial judge did not address subject of right to counsel at dispositional hearing.²³
- A trial court does not fulfill its duty to ascertain whether a juvenile knows of his right to be provided with counsel if he is indigent simply by asking the juvenile if he has received a copy of the statement of rights and whether he has any questions about those rights where: 1) the statement of rights is two pages in length; 2) single-spaced; and (3) the right of counsel if indigent is not stated until near the top of the second page; under such circumstances, the juvenile even with a parent present, is likely to sign a form he has not fully read or does not fully understand while at the same time telling a judge otherwise.²⁴
- A juvenile does not knowingly and intelligently waive her right to counsel: 1) in absence of any examination by the court regarding such right in deciding whether to

court believes the parent of the child is not capable of representing the best interest of the child, . . . (8) or the appointment is otherwise necessary to meet the requirements of a fair hearing.

¹⁸ *Id.* at (C) (1), (2) and (3).

¹⁹ *Id.* at (A).

²⁰ See, OHIO REV. CODE § 2151.352, and *Lowry v. Lowry*, 48 Ohio App. 3d 184, 549 N.E.2d 176 (1988); *In re Kriak*, 30 Ohio App. 3d 83, 506 N.E.2d 556 (1986).

²¹ *In re Johnston*, 142 Ohio App. 3d 314, 755 N.E.2d 457 (2001).

²² *In re Royal*, 132 Ohio App.3d 496, 725 N.E.2d 685 (1999).

²³ *In re Johnson*, 106 Ohio App.3d 38, 665 N.E.2d 247 (1995).

²⁴ *In re Shane*, No. 1523, 2001 WL 62550 (Ohio App. 2 Dist. Jan. 26, 2001).

- admit or deny the complaint; 2) where the complaint states that the juvenile is a delinquent child by reason of committing an act that would constitute complicity to receiving stolen property if she were an adult; and 3) where the magistrate fails to ascertain whether the juvenile understands the charge against her or the possible length of any commitment in the custody of the Department of Youth Services.²⁵
- A colloquy prior to juvenile's admission of delinquency allegations, in which the trial court informed the juvenile that she had a right to an attorney and that one would be appointed for her if she could not afford one, asked whether the juvenile wished to have an attorney, and was told "no" by the youth, was not sufficient to establish a knowing, voluntary and intelligent waiver of the juvenile's right to counsel.²⁶
 - An alleged delinquent's response of "don't think so" in response to the juvenile court judge's questions as to whether she desired the representation of counsel is insufficient to support the court's finding that the right to counsel was waived.²⁷
 - The trial court failed to adequately advise a juvenile of her right to counsel, where the court did not conduct any meaningful colloquy with the juvenile, made most of its remarks to the juvenile's mother who had filed the unruly complaint, and addressed the child only briefly, almost as an afterthought.²⁸
 - The magistrate who presided over arraignment in juvenile proceeding failed to adequately inform the juvenile of her right to counsel, magistrate discussed the right to counsel only in terms of representation if she were to proceed to trial, and gave explanation of right to counsel that was confusing, if not misleading, and could have led juvenile to believe that she was not entitled to counsel while deciding whether to admit or deny the complaint.²⁹

Clearly, the Ohio appellate courts have considered waiver of counsel and the thoroughness of the trial court colloquies in this sampling of recent opinions reversing juvenile adjudications. Whether most such cases ever reach an appellate court in Ohio, however, is of concern.

V. THE ROLE OF DEFENSE COUNSEL IN DELINQUENCY PROCEEDINGS

The job of the juvenile defense attorney is enormous. In addition to all of the responsibilities involved in presenting the criminal case, juvenile defenders must prepare "social" cases in order to assist courts in making dispositions. Attorneys must be aware of the strengths and needs of their juvenile clients and their clients' families, communities, and other social structures, and must work with their clients to present information that will lead to appropriate services and community supports and, in some cases, out-of-home placements.

²⁵ In re Doyle, No. 97-CA-0016, WL 605196 (Ohio App. 2 Dist. Oct. 3, 1997).

²⁶ In re K.J., Nos. 79612 and 79940, 2002-Ohio-2615, 2002 WL 1041818 (Ohio App.8 Dist. May 23, 2002).

²⁷ In re Nation, 61 Ohio App. 3d 763, 573 N.E.2d 1155 (1989).

²⁸ In re Rogers, 124 Ohio App. 3d 392, 706 N.E.2d 390 (Ohio App. 9 Dist. 1977).

²⁹ In re Doyle, 122 Ohio App. 3d 767, 702 N.E.2d 970 (Ohio App. 2 Dist. 1997).

In order to be effective, both in meeting charges against clients and in dealing with social and family issues, juvenile defenders must establish good relationships with their clients. This takes considerable time and effort. Young people charged with crimes are often distrustful of adults, including their own attorneys. Counsel must patiently explain and emphasize that what clients tell them is confidential. Attorneys must build relationships with clients that will enable them to share deeply personal information.³⁰

It is also vital that defenders take time to keep clients informed before and after court appearances and other significant events. Going through the system can be a confusing and frightening process. Young people often have incorrect notions of what might happen to them. Clients should be told exactly how to get in touch with counsel and when their attorney will next be in contact. Clients should be advised of what to do if rearrested and what their responsibilities are between court appearances.

1) EARLY REPRESENTATION – ARREST AND DETENTION

Arrest is the point of entrance into the juvenile justice system. Although youth may be diverted at this stage, if police determine a case should proceed, the juvenile is usually either given a court date or released or sent to a detention facility. If sent to a detention facility, generally an intake officer decides whether to hold the child. If the juvenile is held, a detention hearing must occur within a time limit set by statute. It is often at the detention hearing that juvenile clients first meet their attorneys.

For youth not detained, the first meeting with their attorney may instead be at initial court appearances. That is not because there is no role for counsel earlier in the process. In fact, early intervention by lawyers – to investigate the charges, provide legal advice, and explore alternatives to secure detention – may have a significant impact on the entire course of delinquency proceedings.

Getting arrested can be frightening, especially if children are detained. By the time youths meet with their attorneys, they may have been questioned by many adults, including police officers, intake workers, or family members. Additional adult questioning may be viewed by youth with distrust. Counsel must take the time to explain that their job is to help their clients defend against the charges. In addition to asking for information, it is vital that counsel take the time to discuss with clients what is likely to happen in court. The IJA/ABA Juvenile Justice Standards provide that during the initial stages of representation, “Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. The lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protection of their clients’ interests.”³¹

At detention hearings, judges should review all information available about current alleged offenses, any past adjudications, any prior failures to appear in court, family and other

³⁰ *Standards Relating to Counsel for Private Parties*, IJA/ABA JUV. JUST. STDS. (1980) at 3.3(a), commentary at 90.

³¹ *Id.*, at 4.1.

community ties, school records, and any other information that may be relevant. Attorneys should argue that detention should only be used for young people who are dangerous or demonstrably likely not to appear. A minister, teacher, relative or other mentor who comes to the detention hearing to offer to provide extra guidance and/or positive activities for the young person can make a big difference when the judge is considering detaining a non-dangerous youth because of lack of family supervision or truancy. Attorneys should make sure that judges have all the necessary information that would help their clients get released or placed in the most appropriate and least restrictive setting.

Effective representation and advocacy at the earliest stage of the proceedings may have a significant influence on the ultimate disposition of the case. Juveniles who are securely detained prior to adjudication – rather than released to parents or placed in community-based programs – are much more likely to be incarcerated at disposition than youth who have not been detained, regardless of the charges against them.³² Thus, it is vital that defenders explore alternatives to secure detention as early as possible. The alternatives to secure detention may be quite varied and diverse, including group homes, residential treatment facilities, house arrest or other non-secure community-based programs.

Many juveniles waive counsel at the detention hearing and admit the allegations, following a brief (and often poorly-understood) colloquy with the court. Waiver of counsel has been widely criticized. The IJA/ABA Juvenile Justice Standards specifically state that “a juvenile’s right to counsel may not be waived.”³³

In Ohio, anyone with knowledge that a child has committed a delinquent act, a juvenile traffic offense, or is an unruly, neglected or dependant child may file a sworn complaint with that juvenile court of that county.³⁴ Once the complaint is filed, notice is sent to the child, parent, guardian, or custodian. The child is then either taken into custody, given a court date and released, or placed into a diversion program.³⁵ If a child is taken into custody, that child must have their detention hearing conducted within 72 hours.³⁶ The standards regarding whether a child should remain in pretrial detention are somewhat vague; however, and require the judge to determine that there are “reasonable grounds to believe that the child committed a delinquent act and that taking the child into custody is necessary to protect the public interest and safety,” or that “there are reasonable grounds to believe that the child will not be brought before the court when required.”³⁷

2) PRE-TRIAL ADVOCACY AND PREPARATION

³² For example, looking at data on all youth arrested during 1992 for offenses against persons, of those who were detained, 23.5% were ultimately placed out-of-home, while only 5.4% of those not detained were placed out-of-home. See Jeffrey A. Butts, *Offenders in Juvenile Court 1991*, JUV. JUST. BULL. (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t. of Justice), Oct. 1994 at 5-6.

³³ *Standards Relating to Pretrial Court Proceedings*, IJA/ABA JUV. JUS. STDS, (1980) at 6.1(a).

³⁴ OHIO REV. CODE § 2151.27.

³⁵ OHIO REV. CODE § 121.37.

³⁶ OHIO JUV. RULE 7.

³⁷ OHIO REV. CODE § 2151.31 (c) and (d).

Attorneys' work during the pretrial period of juvenile cases is critical to obtaining favorable outcomes for their clients. It is during this time that attorneys must investigate the facts, obtain discovery from prosecutors, acquire additional information about their clients' personal histories, file motions on behalf of their clients, and advocate for clients at probable cause hearings and other pretrial hearings. This state of the case sets the foundation for strategies at adjudication hearings, negotiations with prosecutors, and development of appropriate dispositions.

At the pretrial stage, lawyers representing young clients must confer with them, according to the IJA/ABA Juvenile Justice Standards, "without delay and as often as necessary to ascertain relevant facts and matters of defense known to the client."³⁸ Counsel should begin investigating the charges as soon as possible, since it is at the early stage of cases that investigation is usually most fruitful. Early on, clients have the freshest memories of the incidents as well as leads to find witnesses and ideas for defense strategies. Similarly, witnesses are easier to locate and have clearer recollections of the events in question. The IJA/ABA Juvenile Justice Standards stress the duty of lawyers to conduct a prompt investigation of the facts and circumstances of the case, and to obtain information in the possession of prosecutors, police, school authorities, probation officers, and child welfare personnel.³⁹ Lawyers should also explore "social or legal dispositional alternatives" and investigate resources and services available in the community.⁴⁰

Pretrial motions may be crucial to defense efforts, and there are benefits to filing motions even when they are denied. The prosecutions' written responses and testimony given at hearings on motions may provide valuable discovery material. "Locking" witnesses into their pretrial testimony may be helpful in preparing for trials. Filing clearly meritorious pretrial motions can also strengthen clients' positions for negotiating favorable dispositions.

As is true at the arrest and detention stage, during the pretrial process there is a great danger of lost opportunities to provide effective representation. The pressure of high caseloads or the distant location of detention facilities can make it difficult for counsel to meet with clients, establish good relationships, learn more about clients' families, conduct effective investigations, file pretrial motions and consider appropriate dispositions. Overburdened defenders may rely on information from the prosecutors to assess cases, or may simply have no time for motions practice. Detained clients may have limited contact with their attorneys, and may feel abandoned and become hostile.

3) ADJUDICATION AND PLEA NEGOTIATIONS

Juvenile adjudication hearings are the equivalent of trials in the adult criminal justice system. Prosecutors must prove "beyond a reasonable doubt" that youths committed the offenses charged. Juveniles do not have a constitutional right to trial by jury⁴¹ and consequently in most jurisdictions trials are held before judges. Many defense attorneys feel that it is more difficult to

³⁸ IJA/ABA JUV. JUST. STDS., *supra*, note 30 at 4.2(a).

³⁹ *Id.* at 4.3.

⁴⁰ *Id.*

⁴¹ See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); but see also OHIO REV. CODE § 2151.35.

get an acquittal from a judge than a jury. It is, therefore, critical that counsel investigate cases thoroughly, utilize experts and other necessary resources at trial, and emphasize the heavy burden that the prosecution bears to prove guilt.

Sometimes, even if trials are not won, defenders can accomplish other goals. For example, they may present mitigating factors or other evidence that illustrates the limited role of their clients in the events at issue. That information can affect judges' decisions regarding dispositions.

The vast majority of juvenile cases result in plea bargains.⁴² Counsel must ensure that clients understand the significance of the plea and its implications for the future. Young people often feel particular pressure simply to get some resolution to the matter. Counsel must ensure that clients have a complete understanding of what it means to plead guilty, especially since following the plea, if they violate probation they are more vulnerable to incarceration, and if they are arrested again, they are more likely to have enhanced penalties or be handled in the adult system than if they were found not guilty at trial.

At the plea, judges should ask youth questions covering their mental capacity, whether the plea is voluntary, whether they understand the constitutional rights that are forfeited, and whether the admission has a factual foundation. In practice, however, guilty plea "colloquies" range in scope from extensive inquiries to a few very brief questions. Even under the best circumstances, young people have difficulty understanding what is going on. The IJA/ABA Juvenile Justice Standards state the juvenile courts should not accept pleas without determining that youth have the mental capacity to understand their legal rights and the significance of their pleas.⁴³

With caseload pressures on courts and counsel, there is a real danger that the details of the adjudication process get swept away and that young people are lost in the confusion. In busy courtrooms, attorneys may describe plea offers in brief conversations with their clients. Counsel must take the time with their clients to fully explore the plea, and alternatives to the plea, in private areas where clients have opportunities to ask questions and express their concerns.

4) DISPOSITION HEARINGS

The dispositional phase of juvenile proceedings is the primary feature that distinguishes the juvenile system from adult criminal court. The purpose of the dispositional process is to develop plans for juveniles that meet their educational, emotional and physical needs, while protecting the public from future offenses. Typically, probation officers prepare reports to the

⁴² There are two kinds of pleas. One involves an admission by the child to particular charges in return for the state's agreement to recommend to the court a specific disposition (such as probation, or commitment to a residential treatment facility). There is also an "open plea," in which the youth admits to an offense, the prosecution makes no recommendation, and disposition is left completely to the discretion of the court.

⁴³ *Standards Relating to Adjudication*, IJA/ABA JUV. JUST. STDS., (1980) at 3.1(a). The Standards further state that in determining whether the respondent has the mental capacity to enter a plea admitting an allegation of the petition, the juvenile court should inquire into, among other factors, the child's chronological age, present grade level in school or the highest grade level achieved while in school, whether the child can read and write, and whether the child has even been diagnosed or treated for mental illness or mental retardation.

court that state the circumstances of offenses, discuss youth's social and educational histories, review previous adjudications, and present other relevant information. Probation officers usually interview the juveniles and, if possible, their family members, teachers, and others who know them. Attitude may be a critical factor in the interviews: Clients who appear cooperative, concerned, remorseful, and responsible will fare much better than those who do not. Sometimes courts order, or can be asked to order, assessments of young people, such as psychiatric, psychological, educational or neurological evaluations. These evaluations will be much more useful if counsel call or write the evaluator in advance to ask him or her to identify specifically the young person's emotional, educational and other needs and to request additional information to individualize dispositional planning.⁴⁴ Counsel must be sure that clients understand the process, are not frightened, and are encouraged to cooperate.

Courts usually have very broad discretion in ordering dispositions. From less restrictive to more restrictive, potential dispositions include fines, restitution, community service, unsupervised probation while living at home, closely supervised probation at home, placement in a group home in the community, placement in a highly structured community residential program, placement in a "staff secure" (but not locked) program, and commitment to a locked institution. All of these dispositions, however, may not be available in every jurisdiction.

The IJA/ABA Juvenile Justice Standards provide that courts should order the least restrictive dispositions that satisfy the needs of both youth and society.⁴⁵ The Standards further provide that courts should also consider the individual needs and desires of youth in determining appropriate dispositions.⁴⁶

At disposition hearings, counsel should call witnesses, such as family members, teachers, or ministers, and should present other evidence, such as letters of support, education or medical records, or evidence of participation in community or church activities. Counsel should be prepared to discuss the specific individual needs of their client, what services would meet those needs, and what placement would not meet those needs and whether those needs can be met by the disposition proposed by probation. More than any other stage of the juvenile justice system, counsel should explore every possible resource during the dispositional process. The process offers many opportunities to influence the outcome of their clients' cases. The lasting impact that dispositions may have on children's lives should not be underestimated. Clients who are incarcerated may have the course of their lives permanently altered, and it is crucial that attorneys dedicate every effort to favorable dispositions.

In Ohio, the philosophy is to first avoid using court resources through "formal action" if possible.⁴⁷ If formal action is taken, however, and a child is adjudicated delinquent, judges have several options regarding disposition, including probation, commitment to a community corrections facility, community service, mandating the offender receive a high school diploma, drug and alcohol treatment/monitoring, electronic surveillance, and suspension of driving

⁴⁴ Margaret Beyer, *The Use of Evaluations in Family Court*, 5 ABA JUV. AND CH. WELF. RPTR. 170 (1987).

⁴⁵ *Standards Relating to Disposition*, IJA/ABA JUV. JUST. STDS. (1980) at 2.1.

⁴⁶ *Id.* at 2.2.

⁴⁷ OHIO JUV. RULE 9.

privileges.⁴⁸ Courts are enabled by statute to commit a child to the state Department of Youth Services,⁴⁹ but cannot specify which institution will treat the offender.⁵⁰ Judges also have the authority to compel a wide range of expert examinations of the child.⁵¹

5) POST-DISPOSITION REPRESENTATION

Representation does not end at the dispositional hearing. There are many things that can be done for clients after the dispositional hearing: direct appeals of issues arising during the pretrial process or adjudication hearings, periodic reviews of dispositions, collateral reviews of adjudications, need for particular service such as drug or mental health treatment, or challenges to dangerous or unlawful conditions of confinement. The IJA/ABA Juvenile Justice Standards recognize the responsibility of counsel to continue representation in appropriate circumstances. According to the Standards, the attorney should be prepared to counsel and render or assist in securing appropriate legal services for the client in matters arising from the original proceeding.⁵²

Moreover, the Standards provide that lawyers who represent juveniles at trial or on appeal ordinarily should be prepared to assist clients in post-disposition actions either to challenge the proceedings leading to placements or to challenge the appropriateness of treatment facilities.⁵³ “Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency or in need of supervision action, . . . including . . . other administrative proceedings related to the treatment process which may substantially affect the juvenile’s custody status or course of treatment. . . .”⁵⁴

The Standards provide that counsel should file appropriate notices of appeal and provide or arrange for representation perfecting appeals.⁵⁵ Technically, youth in juvenile court have the same appellate rights as their adult counterparts.⁵⁶ As a practical matter, however, appeals in juvenile cases are rarely taken. Many defender offices, public and private, are not organized to take appeals. High caseloads prevent trial attorneys who know the record from pursuing appeals, and many offices cannot designate particular attorneys to work solely on appeals. Moreover, appellate work in juvenile cases is rarely cost-effective for appointed counsel. In addition, in many cases institutional commitments are relatively short, compared to adult prison sentences, which limits the time to perfect appeals. Finally, appellate courts are unlikely to allow juveniles to remain free while appeals are pending.

Despite these barriers, there are strong arguments to pursue appeals in appropriate cases. Felony adjudications (especially for such crimes as sex offenses), may have important

⁴⁸ OHIO REV. CODE § 2152.19.

⁴⁹ OHIO REV. CODE § 2152.16.

⁵⁰ OHIO REV. CODE § 2152.18.

⁵¹ OHIO JUV. RULE 32.

⁵² *Standards on Counsel for Private Parties*, IJA/ABA JUV. JUST. STDS. (1980) at 10.1.

⁵³ *Id.* at 10.5.

⁵⁴ *Id.* at 2.3.

⁵⁵ *Id.* at 10.3(b).

⁵⁶ But note in Ohio, this has become somewhat unclear. See, *In re Anderson*, 92 Ohio St. 3d 63, 748 N.E.2d 67 (2001), and the subsequent *case State ex el Delgado v. Thomas*, WL 1291837 (Ohio App. 10 Dist. 2002).

implications for plea bargaining or sentencing if the youth gets in trouble in the future, either in juvenile court or adult criminal court. In addition, as states move to longer terms of commitment, there is more time to perfect appeals, and there are also more compelling reasons to challenge adjudications and dispositions.

Many states provide for periodic review of dispositions. Although in practice this is often a brief and perfunctory proceeding, it need not be. If there are grounds for release from confinement, or clients are not receiving needed services such as drug treatment or special education, or clients are in jeopardy due to lack of security or other dangerous conditions in institutions, or if home conditions have changed or community programs have opening, counsel can use dispositional reviews as opportunities to bring such matters to the attention of juvenile court judges.

In some jurisdictions, extraordinary writs such as *habeas corpus* and *mandamus* are available to challenge confinement as illegal, either because the confinement itself is unlawful (when minors, for example, are held in adult jail despite statutory prohibitions) or because juveniles have been held beyond the time permitted by statute or the conditions of confinement are harmful.

Youth may need particular services following dispositional hearings for a variety of reasons. Some dispositions make release from confinement contingent upon completion of specific programs in institutions. Thus, judges may require youth who have abused alcohol or illegal drugs to complete detoxification, treatment, and counseling before being released. In overcrowded state institutions, treatment programs are often over-subscribed and youth must wait until there are openings. Sometimes the delays in receiving treatment prevent youth from being released by the time set in dispositional orders. Such circumstances require vigorous advocacy by counsel.

In other situations, the nature of offenses, probation officers' reports, or independent evaluations indicating emotional disturbance or suicidal behavior – require particular treatment services during confinement. In addition, some youth need representation in related non-delinquency proceedings, such as school suspensions, or proceedings to provide special education services while in placement.

In cases where youth are held under dangerous or unlawful conditions, counsel may argue for release from the institution, special protection for clients or the provision of specific needed services within the institution. The IJA/ABA Juvenile Justice Standards recognize the importance of having counsel monitor conditions of confinement. The Standards state that legal representation should include litigation regarding the appropriate treatment provided under an original commitment order, the right to treatment, the non-statutory basis for reviewing the treatment provided, and perhaps most importantly, conditions of confinement violative of the due process clause.⁵⁷

⁵⁷ *Standards on Counsel for Private Parties*, IJA/ABA JUV. JUST. STDS. (1980) 2.3 commentary.

In Ohio, the appeal of any decision made by a juvenile court magistrate can be made to the Juvenile Court Judge.⁵⁸ District courts of appeal can review juvenile court cases as if they were any courts of common pleas.⁵⁹ The Ohio Supreme Court has final judicial review over the district courts of appeal. The Office of the Ohio Public Defender has authority to provide representation for youth when the state public defender has provided representation and an appeal of the decision is warranted; and when an indigent juvenile is charged with a parole or probation violation.⁶⁰

6) TRANSFER TO ADULT COURT

In certain circumstances, juveniles may be prosecuted in adult criminal court. In the past, this was reserved for extraordinary cases in which chronic and serious young offenders had demonstrated that they would not benefit from the rehabilitative services and programs available in the juvenile court. Statutes often specified a small number of the most serious crimes for which juveniles could be prosecuted as adults, and often reserved such situations for older juveniles.

In recent years, however, as concern about juvenile crime has escalated throughout the country, many states have responded by enacting legislation to automatically prosecute more juveniles in adult criminal court. This has been accomplished primarily by statutorily increasing the number of offenses for which juveniles may be prosecuted in adult court, or by lowering the minimum age at which juveniles may be prosecuted as adults.

The consequences of transfer are enormous for clients. In many states, as soon as judges order transfers to adult courts, youths are moved from juvenile detention facilities and sent to county jails. If convicted in adult court, youths may be sentenced to jail or prison and housed with adult inmates. In other states, transferred youth may be sentenced to “youthful offender” institutions in which they are housed with older juveniles and young adults.⁶¹ Although some states allow transferred youth to be placed in juvenile institutions,⁶² they are the exception rather than the rule.

At the transfer hearing, counsel should argue that although the offense is serious, the young person is still a child, would benefit from services in the juvenile system, has not had sufficient opportunity to be rehabilitated, would likely be harmed in the adult system, and that the community could be protected from the young person during treatment as a juvenile. To make an amenability argument, counsel should at a minimum: 1) describe the youth’s background, including attachment to family and positive statements from individuals who believe that he/she has potential; 2) show that the young person was not thinking as an adult at the time of the offense; 3) describe the young person’s moral development and remorse; 4) document successful juvenile interventions that have been used for similar youth; and 5) describe how this young person’s delinquent behavior could change if services met his/her needs.

⁵⁸ OHIO JUV. RULE 40.

⁵⁹ OHIO REV. CODE § 2501.02.

⁶⁰ OHIO REV. CODE, § 120.06.

⁶¹ For example, see CAL. WELF & INST. CODE § 1731.5 (West 1995).

⁶² For example, MINN. STAT. § 260.155(1) (1994).

Transferring a child to adult court in Ohio is known as a "bindover." For some offenses, bindover is mandatory, while others are at the courts discretion. Determination of whether an offense requires mandatory or discretionary bindover is based on several factors, including age of the child, severity of the offense, and if there are any prior acts of delinquency. No child younger than 14 can be bound over.⁶³

Ohio also has adopted the "serious youthful offender" category that introduces elements of trying a youth as an adult while keeping the case in juvenile court. Under this provision, a juvenile is given both a juvenile and adult sentence, with the adult sentence stayed pending a successful rehabilitation with the juvenile sentence. As with bindovers, there are both discretionary and mandatory "serious youthful offender" situations. Determining this also involves a calculus of factoring in age, severity of offense, and the prior record.⁶⁴

⁶³ OHIO REV. CODE § 2152.10.

⁶⁴ OHIO REV. CODE § 2152.11.

CHAPTER 3

ASSESSMENT FINDINGS

I. ACCESS TO COUNSEL

Perhaps the most pervasive finding in the study is that it has become a tolerated if not accepted practice that large numbers of poor youth throughout Ohio go unrepresented, even during some of the most critical proceedings that affect their liberty interest. Given the critical role that defense counsel have in the juvenile justice process, the widespread practice of allowing youth to waive the right to counsel has created a system of inequity whereby little if any advocacy exists for the rights of youth in many jurisdictions. This circumstance exists in spite of significant appellate case law within the last five years condemning the inadequacy of many waivers, and finding they are not made in a knowing and intelligent manner.

Of those youth interviewed in facilities operated by the Department of Youth Services, roughly 15% were unrepresented by counsel. The number was even higher for those youth in community corrections facilities, with nearly one in five youth having proceeded through the system without an attorney.

Although these numbers reflect an alarmingly high percentage of felony cases that result in incarceration without the benefit of counsel, it is small compared to the overall volume of waivers reported in survey data and through site visit observations. For example, only 10% of attorneys and 22% of judges/magistrates reported that counsel is appointed at the detention hearing stage in their jurisdiction. For youth not detained, only 45% of attorneys and 60% of judges indicate that counsel is appointed at the arraignment stage. Similarly, both groups report that more than half of the youth waive counsel at the detention hearing stage, and nearly as many waive the right to counsel in non-detained cases.

“Sixty to seventy percent of kids waive counsel, and these waivers are not knowing and voluntary.”

Juvenile Magistrate

Site visit investigators consistently noted the high number of waivers as well. They noted in all but two of the twelve jurisdictions reviewed that waiver of counsel was a common and pervasive practice, with as many as 80% of youth proceeding through the system without the benefit of counsel. These findings were true in urban, small urban and rural counties alike.

While the reasons for waiver of counsel are varied, attorneys note most frequently that they believe waiver occurs because youth believe that nothing bad will happen to them if they are unrepresented. Nearly one-third of attorneys reported, however, that they also believe youth are intimidated into waiving counsel. Investigators noted several other reasons, however, that have helped to create a culture whereby lawyers for poor youth are inaccessible.

1) LACK OF DEFENSE COUNSEL VISIBILITY

Courthouses are the workplace of attorneys. Investigators noted that defense counsel in some jurisdictions were simply not a visible entity within the courthouse setting. Indeed, in

some of those jurisdictions visited, neither defense counsel nor prosecutors took an active role in juvenile court proceedings, except in notably serious or contested hearings. Consequently, youth and parents did not seem to perceive that an attorney could be readily accessible to them for consultation. As one team of investigators noted, “our general theme for the jurisdiction is ‘where are all the lawyers?’” It was not unusual for investigators to report that primarily probation staff handled hearings without any lawyers on either side.

By contrast, in two of the small urban counties, a specific attorney was appointed for the day (or week) to handle any new juvenile cases that came through the system. Not surprisingly, these two counties also reported almost no instances of waiver of counsel. The attorneys were present for each and every case that came through, unless a conflict existed. In one instance, the attorney had a weekly time scheduled at the courthouse for parents and youth appointments since his office was in another county and not readily accessible to some clients.

2) FAILURE OF ATTORNEYS TO UNDERSTAND ROLE AS ADVOCATE

Perhaps one of the most disturbing trends noted by investigators and in survey data was the lack of clarity regarding the attorney’s role in juvenile delinquency proceedings. Just over 40% of attorneys responding to surveys viewed their role as representing the “best interest” of the youth rather than as the youth’s advocate. This view regarding roles was consistently noted by site visit investigators in a number of jurisdictions, and was expressed by judges, magistrates and attorneys alike. In some jurisdictions, the assignment order specifically noted that the attorney was appointed as “attorney/guardian ad litem,” even though the case was a delinquency matter.

“They view [attorneys] as just another person digging around into their background that will hurt their case in the courtroom. That’s why they don’t want a lawyer here. There don’t perceive them to be advocates, and they’re not.”

Mental Health Therapist

This confusion in role is addressed in other parts of the report as it relates to the quality of representation youth receive, but it is noted in this section to the extent it serves as a deterrent to youth seeking to have counsel appointed in their case. To illustrate this point, one of the investigators noted the case of a fourteen-year-old female defendant charged primarily with status offenses such as truancy and being unruly. She was previously placed on probation, and was charged with violating her probation with more status type behaviors, and with a new minor delinquency charge. Her hearing consisted of a report regarding her unsatisfactory ongoing conduct at home, a rather scathing report by a well meaning but clearly frustrated probation officer. When asked for comments, her attorney/guardian ad litem reiterated the negative comments made by the probation officer regarding the girl’s conduct and advocated that she be incarcerated for treatment purposes. The rather shocked young lady appeared quite miffed at her attorney’s comments, which clearly were not her own position. This example, when mentioned to another key stakeholder in that system, was noted as the primary reason youth did not want an attorney on their case. “They view them as just another person digging around into their background that will hurt their case in the courtroom.”

3) COURT CULTURE DEVALUES THE ROLE OF DEFENSE AS PLAYER

In jurisdictions where youth routinely waived their right to counsel, it was not uncommon to find a general lack of understanding about the role that defense counsel plays within the system. Investigators found in some counties that the “best interest” role was so pervasive there was no perceived value in having an attorney represent the youth. Inherent in this attitude was the perception that attorneys would have no impact upon the proceedings if they were appointed. Sadly, even many of the public defenders and appointed counsel interviewed tended to articulate this position.

The culture created in some Ohio juvenile courts seems to devalue the importance of the adversarial system for youth in lieu of a “best interest” system. Given the many severe consequences that youth in Ohio experience, this lack of advocacy is particularly disturbing. While many youth go into the system believing that they do not need attorneys, of those incarcerated youth interviewed, nearly half believed their case would have been handled differently if they had not waived this right.

It was not unusual for probation staff to report to investigators that they advised the youth what to do in court, and explained the proceedings after the fact. In some counties, defense attorneys interviewed seemed to have little understanding of what actually occurred in juvenile court. For example, in one county, several attorneys interviewed indicated that youth typically always had counsel, whereas court staff and prosecutors from the same county consistently reported that nearly 80% of youth waived this right. In another county, interviews with parents and other participants suggest that it was common for the parent and child to be instructed to see if they could “work something out with the prosecutor” before calling in a defense attorney.

“The lack of representation at the detention hearing suggests a real deficit in the scheme to protect the rights of the defendant. Perhaps even more disturbing is the apparent lack of appreciation on the part of most of the participants of the need for representation.”

Site Visit Investigator

4) INCOMPLETE OR INADEQUATE COLLOQUIES BY THE COURT DISCOURAGE YOUTH AND PARENTS FROM SEEKING COUNSEL

While all of the site visit investigators indicated that some form of colloquy was given by a judge or magistrate prior to accepting a waiver of the youth’s right to an attorney, the quality and content of such waivers varied significantly. Investigators noted some excellent examples of thorough explanations by judges and magistrates of the juvenile’s rights and the possible consequences of pleading guilty. They also noted in some cases particular care was given to ensure that youth understood the rights as explained, and that some judges would use very “kid friendly” terms to ensure this understanding.

In other cases, however, the content of the colloquy was lacking in form and substance, and confusion on the part of the juvenile and/or parent was evident. Some of the practices noted included the following: 1) failure of the judge or magistrate to ask the youth if he or she wanted an attorney, even though the right to counsel was noted; 2) failure of the judge or magistrate to

explain the consequences of admitting the charge; 3) failure of the judge or magistrate to make any determination that the youth understood the rights explained to him or her; 4) relying upon the parent to determine if the youth should be appointed counsel; 5) failure to make an adequate factual finding on the record; 6) no real opportunity for youth to ask questions about their cases and their rights; 7) failure to inform youth of the right to counsel at any stage of the proceedings even if they waived at an earlier time; and 8) the judge or magistrate's admonishment to the youth that "if you did it, you should admit it here today."

"The kids come in with their parents, who want to get this dealt with as quickly as possible, and they say, "you did it, admit it." If people were informed about what could be done, they might actually ask for help"

Public Defender

In some counties, where counsel was not readily accessible or visible to the child and parent, the tendency to want to "get things over with" by waiving counsel and entering a plea was overwhelming. Youth interviewed in facilities and in the community consistently reported that they felt pressured to enter a plea, and felt they would get a better outcome if they did so, or they would get out of detention quicker. Given the fact that there was little detention advocacy in most parts of the state, it is not surprising that youth would elect to admit to charges if they felt they could go home sooner.

5) MISPLACED RELIANCE UPON PARENTS TO ASSERT RIGHT TO COUNSEL

In spite of the law's clear mandate in Ohio that youth have the right to an attorney as a party in a delinquency action, investigators noted many instances where parents tended to dominate the decision made as to whether the youth will waive this right. Often, the interests of the parents are adverse to that of the youth, particularly in matters such as alleged domestic violence or unruly charges filed by the parents. Many youth interviewed indicated that they did not understand the proceedings, did not understand the elements of the offenses for which they were charged, but pled guilty because a parent thought they should. It was noted by some investigators that the judge or magistrate hearing the case would ask the parent if they wanted an attorney for the youth rather than asking the youth.

Parents also felt pressured in many instances to have their children waive counsel so they would not have to return to court on another day. Because in many counties, counsel was not readily available for consultation, parents were told they would have to come back for a subsequent court date if their child requested an attorney. The pressure on parents was obvious to investigators, particularly those who expressed concern about missing another day of work, or merely being further inconvenienced by the conduct of their children.

6) FUNDING CONSTRAINTS

Access to counsel is also apparently hampered by the lack of funding available for indigent defense. Although addressed more thoroughly in other sections of this chapter, the low hourly rate and fee caps imposed upon appointed counsel has been noted as a significant factor affecting the quality of representation. Similarly, with public defender offices, low pay and high caseloads have also admittedly hampered quality. It is relative, therefore, that the high rate of

waiver of counsel directly impacts upon the county's expenditures for indigent defense. Although not directly indicated by interviewees, requiring all youth to be represented and not permitting waiver would have a significant impact upon budget.

In some counties, however, judges do not permit youth to waive their right to counsel, and indigent defense costs are absorbed as an integral and necessary component of the juvenile justice system. Ironically, it was some of the poorest counties in the state visited by investigators where this practice was noted.

II. QUALITY OF REPRESENTATION ISSUES

While it is clear that many youth proceed through Ohio juvenile courts without the benefit of counsel at all, it is equally clear that many others receive ineffective assistance of counsel from attorneys who are ill-prepared, insufficiently trained, and/or overwhelmed by high caseloads, insufficient resources and low pay. This section discusses survey findings and observations made by investigators regarding advocacy efforts at each of the critical stages in the juvenile court process.

1) STAGES OF REPRESENTATION

A) ARREST AND DETENTION

The fact that so many youth go unrepresented at this early stage of the juvenile justice process has already been discussed. For those youth who are appointed counsel, however, the level of advocacy on detention issues was consistently poor throughout the counties visited. With limited exceptions, lawyers who were appointed came into the process too late to achieve any results at the hearing, and then typically did not meet with their clients until they were brought back to court for the next hearing. Most youth reported that the attorneys did not visit them in-between hearings to determine what was going on with their case, or to look at possible release options.

Investigators watched nearly 200 detention hearings across the state, noting only limited instances where an attorney was assigned prior to the hearing, and had actually reviewed the charging documents, interviewed the client, and reviewed possible release options. In fact, this was a rarity. More often than not, if the attorney was even present during the hearing, they had no information about the youth or the charges, and their role appeared perfunctory at best.

In many of the hearings, it was only the probation officer who spoke, and there was no evidentiary hearing to make a probable cause finding. Likewise, investigators noted that judges and magistrates frequently failed to make findings in the record as to the reasons youth were continued in detention. It appeared to be pre-ordained that youth would remain in detention throughout the proceedings, and attorneys interviewed often expressed the view that any advocacy efforts made to gain release were futile. Most had admittedly not made the effort, however, and seemed to accept as common practice that there was little they could do. In one instance, a public defender in a large metropolitan area reported that he had never heard of having a probable cause hearing and that if police had to be called to testify, they would not

come. He believed this would do nothing but upset the court and that the defenders would be blamed as a result.

In one county, it was noted that after a detention hearing the PD's would assign a lawyer to a case. When the child would ask what would happen next, they were simply told someone will get in touch with them before the next court date. The defender readily admitted that unless the case is very serious, they don't typically meet with the child in advance or investigate the case because the expectation is that the child will plead guilty and get probation. The investigator noted, "Everyone seemed to feel that was an acceptable outcome."

It was also common that defense attorneys were not aware of alternatives to detention programs in their communities, and failed to utilize them if they were available.

It should be noted, however, that in two of the twelve counties visited, a process was in place for youth to be assigned counsel at an early stage prior to having the detention hearing, and that at least good form, if not substance, was present. A good process, discussed further in Chapter 6, was in place in Franklin County whereby law student assistants screened every youth before the detention hearing for eligibility, and two lawyers from the public defender office were assigned for two days at a time to cover new cases coming in through detention. In those instances, most youth did receive counsel at this stage.

"A lot of times the court will "fast track" a case – that means we go from arraignment to disposition in ten seconds. It's terrible and everyone just goes along with it."

Probation Supervisor

B) PRE-TRIAL ADVOCACY

Another aspect of the study focused on how attorneys prepare and present cases, and the efforts made relative to pre-trial advocacy, including motion practice and the use of experts. There was significant discrepancies in the practices across the state in these areas, however, it was noted by nearly every investigator that this was a consistent area of weakness.

Attorneys and judges alike responding to surveys indicated that in their jurisdictions, motion practice was common 80-90% of the time, particularly motions regarding discovery and suppression issues. A much smaller percent indicated that they file motions regarding competency, and it was not uncommon to find jurisdictions where this issue is never raised. The most common reason for limited motion practice by the attorneys was noted as time constraints, followed by the informality of the process as the second most significant factor.

In reality, however, such practices did not seem too common to investigators, most of who noted that they saw little effort on the part of attorneys to make pre-trial motions, and to prepare for cases in advance. Youth likewise noted that other than promises to "talk with the prosecutor" about their cases, lawyers infrequently indicated that they would do other types of investigation, such as interviewing witnesses, or obtaining testing, and overwhelmingly youth reported that these things were not done. In fact, on the average, only about 5% of youth reported that their lawyers did indeed follow through on such representations.

C) ADJUDICATION

Not surprisingly, the vast majority of juvenile cases in Ohio are handled informally or by plea agreement. Of those attorneys responding to surveys, two-thirds reported that 10% or less of cases are taken to trial in their jurisdiction. Less than 8% of respondents noted that they try more than 25% of cases in their jurisdictions. This was consistent with the findings of the investigators, who noted that trial work was limited, and indeed nearly non-existent in some counties. It was not uncommon for defense attorneys to report that in spite of handling significant numbers of juvenile cases, they had not tried a case in years.

It was noted by nearly every investigator, however, that they encountered sincerely dedicated and well-meaning attorneys in nearly every jurisdiction visited. Many of these attorneys simply lacked even the most basic trial skills, or were brought into a culture where advocacy was not acceptable, and thus, did little to assist youth in obtaining better outcomes, or at least being zealous in defending their rights.

Of those youth interviewed, about 70% felt the attorneys did a good job of explaining what was happening to them in court, but nearly 40% felt the attorneys representing them were not even on their side.

D) DISPOSITION

One of the most critical stages in the juvenile process, advocacy for disposition hearings was similarly lacking in zealous advocacy. Less than half of the youth interviewed for this study reported that their attorneys presented their views during the disposition hearing.

Investigators also noted with consistency that advocacy was seriously lacking at the disposition stage. One contributing factor is that in some jurisdictions with full time public defender offices, there is little consistency in providing representation by the same attorney throughout the proceedings. Although it appeared that many of the public defenders do want to try and maintain single representation of some clients from arraignment to the trial and disposition, in practice, when the original attorney is not available, the clients are often passed off to another attorney who happens to be in court that day.

Investigators noted that defenders often seemed unaware of the resources available to them, or other payment options available for clients, and don't do any creative research on programs, other than routine probation. There was a heavy reliance upon probation departments to identify and develop a dispositional plan for the child. Even when attorneys were present for disposition, their impact appeared minimal. As noted by one of the investigators, "A defense attorney who develops rapport with a child and his family will be in the best position to identify and present the child's strengths and highlight the positives. A probation officer may not be able to establish the trust of the child in the way that a defense attorney *should*."

"A great attorney seeks out alternatives and presents them to the court, a good attorney explains the need of the kid to the court, a bad attorney doesn't know the kids' needs or the services."

Juvenile Court Magistrate

Youth were most vocal about the lack of insight their attorneys had about their lives. Interviews with youth included questions regarding twelve types of personal issues they may have discussed with their attorneys other than the actual charges. Nearly two-thirds of attorneys asked their clients about their prior offenses, and roughly half about possible placement options, school history, family issues or drug problems. A much smaller percentage discussed any issues relative to other factors such as counseling history, employment, mental health, special education or medical issues. In general terms, youth often felt that attorneys did not get to know much about them.

Judges and magistrates also relayed to investigators with frequency that dispositional advocacy was one of the weakest areas of defense practice. Private service providers noted this concern in several jurisdictions as well. Investigators found that judges and magistrates often expressed their frustration that attorneys did not offer more creative dispositional alternatives, and indicated that they were willing to consider other viable options for the child if recommended. Only two counties within the sample employed social workers to assist with dispositional planning. Given many of the systemic constraints discussed below in which youth find themselves in Ohio, it is particularly alarming that so little advocacy is done at this stage of proceeding.

E) APPEALS AND POST-DISPOSITION

It came as no surprise that advocacy efforts after disposition were lacking consistently throughout the state as well. While nearly half of the attorneys responding to surveys indicated that their offices handled juvenile appeals, and nearly 45% of judges responded that attorneys in their districts “sometimes” file appeals, actual appellate practice appeared in reality to be very limited. Respondents did not indicate in significant numbers that the handling of appeals would necessarily be enhanced if they had more time, more expertise, more technical assistance, or more funds. When asked how many appeals were actually handled by their offices last year on juvenile cases, 40% reported none, and another 30% reported between 1-3 were filed. Only 58% of youth reported that their right to appeal was ever explained to them, and of that number only 41% had any discussion with their attorneys regarding possible issues for appeal.

Interestingly, in one large urban defender office, a relatively new and inexperienced attorney wanted to appeal an adjudication of guilt, and sought assistance from his office as to how this would be done. Reportedly, there was not a single person who could assist him in doing this, or who was familiar with the process. The individual indicated to investigators that he tried to figure it out on his own, and eventually “winged it,” getting help from a family member who was a lawyer.

Attorneys also responded to questions regarding their involvement in matters brought back to court for review by the court. In those instances, youth were usually not able to be present for the review, and one-third of the time, attorneys did not even interview them prior to the hearing. In interviewing youth in treatment facilities, the vast majority had never had contact with their attorney after incarceration. Youth frequently reported, for instance, that they had no assistance in preparing paperwork for the “early release” option, and had no assistance of

counsel in presenting such information back to the sentencing court. Only 16% of youth reported having any contact with their attorneys after disposition.

Attorneys and judges both had significant discrepancies. However, in their response as to when representation of juveniles ends, roughly two-thirds of judges indicated that the representation ends after the dispositional hearing, and approximately 30% indicated that it was when dispositional orders were terminated. Attorneys, on the other hand, were equally divided on this issue, with 41% claiming their representation ended after the disposition hearing, and 49% indicating it was after the disposition orders ended.

It should be noted that the Ohio Department of Youth Services does provide legal representation on a limited basis to handle some post-dispositional matters for youth in the DYS facilities. Likewise, the Ohio Office of the Public Defender also provides some level of post-dispositional services; however, this is also performed with severe staffing limitations.

2) SYSTEMIC BARRIERS TO EFFECTIVE REPRESENTATION

A) THE APPOINTMENT PROCESS

The state of Ohio does not have a uniform system for the appointment of counsel for juveniles in the justice system. Each county has the authority to develop its own procedures for the appointment of counsel, either through a judicial appointment process, a county operated public defender system, or by contract with the state public defender office. There appears to be little if any state oversight of this process, except that the Ohio Public Defender office has staff that can provide technical assistance if requested by a county. Even in larger urban counties where a full time public defender office has been established, large percentages of cases are still handled through appointment, either through the public defender office or through the court.

Perhaps the most common characteristic of this system is that judges have significant discretion in many parts of the state as to how attorneys are chosen, and the rates at which they are compensated. Each judge can establish his or her own selection criteria, appointment procedures, and compensation rates and caps, provided the county approves the latter.

a) QUALIFICATIONS

Only two counties in the sample were found to have any imposed uniform qualifications for attorneys appointed to represent juveniles in delinquency cases, and no county had formalized minimum performance standards for counsel. The most common response to the issue of qualifications was “they have to have a law degree.” Although some judges indicated that they have additional requirements to ensure competence, little evidence was found to support this claim.

“Solo practitioners who have no one to bounce ideas off of make horrendous mistakes.”

Juvenile Court Judge

In one large urban county, several magistrates expressed extreme frustration at the large and unwieldy roster list, noting that an estimated 90% of them are young and inexperienced. One of the magistrates explained, “For

some [attorneys], this has become their bread and butter. They would never get felony level cases from out of the adult system.” Magistrates in this system noted that roster attorneys were required to attend specific trainings, but ironically this tended only to drive away the experienced qualified lawyers as the training was not tiered in accordance with experience levels.

In another small urban county where attorneys were appointed by the judge, it was explained by two of the appointed counsel that there were no expectations of training or other performance evaluations “If we had to do that stuff too, we’d all quit.”

b) DETERMINING INDIGENCY

A somewhat different dilemma was discovered by investigators regarding the actual determination of whether youth met the indigency requirements when they requested an attorney be appointed for them. The Ohio Public Defender office developed intake criteria and a standardized form that several courts apparently use in juvenile cases. Eligibility criteria established by the office is based on poverty guidelines as determined by the U.S. Department of Health & Human Services. The form contains personal information, including persons living within the household, monthly income and employment information, asset information, allowable monthly expenses such as child support, child care, medical and dental, and transportation costs, and monthly liabilities such as rent, food, and credit cards. The form is obviously designed for adult indigency determinations, and a “client” must sign the affidavit accompanying the form.

The interpretation that courts provided as to how this form was used varied significantly. In most of the counties sampled, the parent was required to complete the form if the youth requested counsel. In at least one county, the court determined that unless the youth had any assets, they qualified for the appointment of counsel regardless of parent income. In others, courts seem to construe the eligibility loosely since many youth had adverse interests to their parents. Of those interviewed, it was not uncommon for investigators to find that there was not a uniform interpretation as to how indigency was determined for a juvenile, or else the criteria were largely ignored.

c) TIMING OF APPOINTMENTS

While significant attention has already been given to the issue of when appointments are made by the courts, it bears noting again in this section. Too frequently, investigators encountered instances where youth were not provided with attorneys in time to provide any meaningful and effective representation.

“We’ve gotten to trial dates with no attorney present and we just pull someone from the hall.”

Probation Officer

Given the significant number of youth detained in the state of Ohio, early appointment prior to the detention hearing should be routine practice, yet in reality it is rarely found in practice. In other cases, investigators noted that they watched cases go to trial with lawyers who were literally pulled out of the hallway and expected to represent the child on the spot. This occurred even on felony matters. Appointment of counsel must be more than a perfunctory

exercise by courts. The rights of the child are not protected unless that representation is effectively rendered through the adequate timing of the appointment.

B) ATTORNEY COMPENSATION

The compensation paid to attorneys who are appointed juvenile cases varies by county, and is limited generally by hourly rates, and often by fee caps on certain types of cases. Of the twelve counties sampled, only four did not have fee caps, and these were primarily rural counties where judges indicated that they were satisfied with the amounts billed by the attorneys. The other eight counties did utilize fee caps, including a \$400 maximum on any juvenile case in one county, to a range of \$350-\$700 in another. Yet in another county, the cap was based upon whether or not the case went to trial or was pled. In that county, cases were capped at only four hours for a plea and ten hours for a trial, and attorneys were “encouraged” to donate any additional time needed on a case. The highest capped rate was noted at \$1000 for felonies and appeals.

Hourly rates for appointed counsel also varied, and are approved by the county. Of the twelve counties sampled, seven paid a rate of \$50 an hour for in-court work, and \$40 for out-of-court work. Two counties were lower than that, at \$40/\$30, two counties were higher, at \$60/\$50, and one had a flat rate of \$55 regardless of whether time was spend in court of out of court. Investigators reported that some attorneys explained the rates were so low it was not worth their effort to bill for their services. Attorneys in one county indicated that they had not been paid in several months due to budget constraints, and that this severely hampered their practice. In two large urban areas, litigation has been filed on behalf of public defenders regarding compensation issues.

“The list should focus on services to the kids Attorneys see the appointment list as an “entitlement.”

Juvenile Court Magistrate

Judges and magistrates were nearly uniform in citing low hourly rates and fee caps as a significant barrier to getting and retaining competent attorneys for juvenile court. For some appointed counsel, the volume of cases they receive is increasingly important because of the cap. As one magistrate noted, “The list should focus on service to kids – I think now it is focused on fairness to attorneys . . . Attorneys see the appointment list as an “entitlement.”

Full-time public defenders in county run offices varied as to starting salaries and salary caps. The starting salaries were as low as \$35,000 with the highest noted at \$42,000. The practice in one urban county was admittedly to pay low for a full-time salary, and allow the attorneys to do a civil practice on the side, provided there was no conflict.

C) LACK OF UNIFORM SUPPORT SYSTEMS AND USE OF TECHNOLOGY

It is clear that defenders representing juveniles throughout Ohio routinely work without an adequate system of support that includes appropriate research facilities, access to investigators, experts and/or social workers, and technology. Most of the appointed lawyers are solo practitioners with limited or no support staff. While some larger county run offices enjoyed

the use of larger office areas, modern equipment and computer technology, this was more the exception than the rule. Only 42% of attorneys' surveys indicated they had adequate computer and word processing capability, and only 25% had adequate secretarial assistance.

Attorneys responding to surveys rated their legal research capabilities poorly overall. Only about half had access to Westlaw, Lexis or other on-line research services. A little more than half indicated that they had access to relevant CLE texts in juvenile law, and just over 70% indicated that they accessed case law updates. A brief bank was available to roughly 60% of the attorneys surveyed that was considered adequate.

As to other supports, approximately two-thirds responding indicated that they had adequate access to mental health professionals as they needed them on cases, although just over one-third had access to paralegal assistance. Likewise, less than half reported adequate access to the use of investigators, and only 1 in 5 had access to law students for assistance. Access to social workers rated higher, with nearly one-half indicating their access to social work assistance was adequate, however, the question may not have been clear since investigators found only one office with any social workers on staff available to juvenile defenders.

Juvenile court differed significantly as to their ability to collect and maintain data on cases that flowed through their system, and the outcomes of such cases. All but two counties sampled provided annual juvenile court reports, including revenue and expense statements, but the content of such reports varied significantly. Some reports include payments made to the appointed counsel system, along with data on the number of cases submitted to billing.

Larger urban counties tended to have significantly more sophisticated technology and information management information systems, while in some counties it was not possible for the court to even access a child's prior record, or determine if the child had a prior record.

Related to this concern is the observation made by several investigators that attorneys in some jurisdictions had no space to speak with clients and/or their parents in private at the courthouse. While some newer courthouses were well equipped with interview rooms that were private and accessible to the attorneys and their clients, others offered no area in which an attorney could interview a client out of the earshot of others, including victims or witnesses.

D) THE ABSENCE OF EFFECTIVE ADVOCACY

Investigators noted with regularity that there was generally a lack of effective advocacy on the part of attorneys representing youth across Ohio. Whether the result of insufficient compensation on the part of the attorneys, or the other variables noted through this report, the majority of attorneys observed by investigators did not perform the most basic functions that generally serve as a prerequisite to making an informed decision about whether to plead or take a case to trial. Attorneys met their client on the day of trial for the first (and usually the last) time. Duties performed tended to be limited to reviewing the court file and spending a few minutes with the client. Other investigation, pre-trial advocacy, or disposition planning is limited and nearly non-existent in many if not most cases reviewed.

“The level of advocacy seems overall to be poor here, with families relying more on the advice of the prosecutor and her assessment of the options than defense counsel. . . It is seemingly a “service” the defense bar sees themselves playing by agreeing to represent poor children.”

Site Visit Investigator

What was likewise apparent from interviews from defense attorneys is that many care deeply about the youth they represent, and their role in the system, but are “chilled” by courts unreceptive to defense arguments or requests on behalf of children. Similarly, the lack of training in basic trial skills tended to hinder some attorneys from performing adequately in cases they were willing to challenge by trial.

Some examples typical of what investigators observed were as follows:

- A relatively new attorney assigned to a bindover case handled the hearing with no pre-trial discovery available to her, and did nothing to investigate, prepare cross-examination, or otherwise review

relevant documents or evidence in the case. She did a cursory interview with the client, and during this 35 minute hearing elicited only more damaging information regarding her client, never objected to any questionable evidence, and failed to make any closing argument or summarize the very inconsistent evidence against her client. Probable cause was found in the case.

- A 17-year-old male was charged with running away and burglary where a tricycle was stolen. He had twice been found incompetent to stand trial by another magistrate, and was apparently very low functioning. The defender was clearly confused about the prior findings, but stood mute the entire time, never speaking directly with the client, who appeared to have no idea why he was in custody. The youth was detained pending a third competency evaluation with argument from his attorney.
- A 15-year-old female was before the court for a disposition on a minor theft charge and had a prior history of truancy and running away, in addition to having two minor new offenses. The girl, very despondent, was committed to the local treatment program for 90 days after a litany of misconduct was articulated by her probation officer. The attorney/GAL not only provided no effort to articulate the young girl’s view, which was clearly in opposition, but he agreed with the probation officer, and indicated he thought the girl should be locked up. When asked about potential conflicts with this role, there was no indication by the court the case presented a conflict.

Perhaps the most significant evidence of this lack of advocacy, however, came from interviewing youth who were incarcerated. They were most vocal about the lack of contact they had with their attorneys and the fact that the attorneys did little to prepare for cases, even when they indicated that they would perform certain tasks for their clients. Sadly, this lack of advocacy translated in many cases to the youth feeling the attorney was not their advocate at all. Many service providers also expressed dismay that they had little or no contact with the attorneys

representing juvenile defendants, and felt that they could be helpful to the child's counsel if contacted.

E) LACK OF JUVENILE TRAINING

Legal training is an essential element of any juvenile defender system, yet is relatively non-existent in Ohio's system. Only the state public defender office, through the Ohio Association of Criminal Defense Lawyers (OACDL), has provided juvenile specific training for the last two years to defenders across the state. The attendance at these seminars, however, has been limited by the lack of training funds for defenders and private attorneys, and limited publicity. When surveyed about the availability and adequacy of training opportunities available to defenders, no topics were ranked as adequate by more than approximately 50% of respondents. Just over half of respondents ranked adequate the training available on dispositional planning, motion practice, and needs of female offenders. Roughly 40% ranked as adequate the training available on child development issues, mental health issues, interviewing techniques with children, and the use of community alternatives. The lowest adequate rankings were in the area of detention advocacy, special education, appeals and extraordinary writs, bindover hearings, and conditions of confinement. These ratings ranged only from 32-38%. Generally speaking, half to two-thirds of defenders feel they are not receiving adequate training in these areas.

The lack of training was apparent to investigators as well, and was noted routinely in interviews with judges, magistrates, probation staff, prosecutors, and juvenile defenders.

F) CASELOADS CLOGGED WITH CHILD CUSTODY MATTERS

Ohio's public defender offices also handle matters concerning child abuse and neglect, including representation of parents. This civil practice constitutes a large percentage of the office caseload, and has taken significant attention away from representation of children in delinquency cases. In the largest urban areas, this creates significant conflicts of interest, and results in large percentages of delinquency cases being farmed out to appointed counsel, either by the public defender office through an appointment system, or directly through the court. While it is difficult to acquire data on this issue, estimates by court staff and public defender administrators indicate that as many as half to two-thirds of the delinquency cases are handled by appointed counsel as a result of being inundated with child protection and child custody matters in their offices.

3) OTHER SYSTEMIC CHALLENGES TO DEFENDERS

A) LACK OF LEADERSHIP IN THE JUVENILE JUSTICE ARENA

While the report indicates that there are significant barriers to effective representation that directly effect what happens with youth within the courtroom, there is likewise a tremendous void in leadership within the defense bar in general in effecting change systemically on behalf of youth in the juvenile justice system. Indeed, investigators noted that there appears to be limited

leadership on juvenile justice issues in general within the judiciary, or among other state agencies charged with the care and provision of services to these youth.

Juvenile defenders in Ohio did not generally see themselves involved with issues systemically, even when they directly affected their every day practice in adverse ways. Many of the issues in this section are pervasive throughout the state, and have a direct impact upon the daily court system. The overwhelming sense that investigators had was that defenders felt unable to address these matters other than in the courtroom, or did not understand the power of their role in doing so.

As an example, investigators noted during interviews in some counties the largely disproportionate number of African American youth in the system, particularly concerning incarceration rates. Defense attorneys, both as appointed counsel and in full-time offices, were quick to point out sources for these discrepancies that they felt were inequitable. Others did the same, including judges, magistrates and probation staff. When asked what initiatives, if any, were under way to address this issue, each of the groups were clearly at a loss as to what measures could be taken, and who should take them. Similarly, there was a firm acknowledgement from most courts and the defense bar (as well as others) that minor school related cases were unnecessarily plaguing the courts, however, addressing the issues on a policy level with school administrators was seemingly beyond the scope of what any one group could envision doing.

Investigators were encouraged by the advocacy efforts of attorneys in the private bar, and within some public defender offices, on behalf of juvenile justice reforms. Unfortunately, these individuals were few and far between, and do not permeate the system thoroughly enough to make the type of impact that may be necessary for systemic reform.

B) OVER-DEPENDENCE UPON PROBATION

Probation services play a vital role in the juvenile justice system's attempts to work with youth and families in their own communities. The study interviewed dozens of probation officers across the state, and watched them work as an integral part of the court system. The role played by probation varied significantly, however, from county to county. What was clear was that in many Ohio counties, including rural, small urban and urban counties, probation staff dominates the proceedings in lieu of attorneys, both prosecutors and defense. They appear to be placed in a position of handling everything from intake and detention decisions, advising the youth in court about what to do, and making the recommendations for disposition and early release. While investigators interviewed many competent and caring probation officers, this over-dependence on their role has tipped the scales most dramatically toward a "best interest" system in delinquency cases, in lieu of ensuring due process of law for youth who face serious consequences.

Interestingly, it was the probation staff that most frequently noted problems with inadequate representation of their youth clients. Many explained they were often in the position

"The kids are at the mercy of a very bad PD system here. They are told *nada* about their brief representation by that office."

Probation Officer

of explaining to youth what had occurred in court, and what was being recommended. It was not uncommon for investigators to find probation officers who indicated that public defenders or appointed counsel never contacted them about cases, and were not involved in any recommendations or planning for detention release, disposition or aftercare. They were critical of many attorneys' failure to communicate with their clients or their families, failure to explore options for their clients, and their lack of preparation in court.

C) OVER-DEPENDENCE UPON INCARCERATION

Ohio's system of juvenile incarceration is somewhat difficult to quantify in precise terms without explaining the differing levels of loss of liberty. Youth who are tried and sentenced as adults, for instance, are held within the Ohio prison system at the Madison Correctional Institution operated by the Ohio Department of Rehabilitation and Correction. Other youth, charged with felony level offenses, are committed and placed within facilities operated by the Ohio Department of Youth Services. Still others charged with felony level offenses are committed and placed by local courts within Community Corrections Facilities (CCF's), less restrictive programs operated within the youth's community. Some counties utilize local or regional juvenile rehabilitation centers for lower level offenders, including misdemeanor level and unruly offenses (these facilities were not visited and are not included in the numbers here, however, there are more than 400 beds combined among 18 facilities of this type across the state).

Franklin County, by comparison, relies upon placing children in the custody of Franklin County Children's Services, where reportedly in December of 2001, an additional 244 probationers were in residential placement, the vast majority of which were placed out of county, or even out of state.¹ Cuyahoga County similarly maintained 136 youth in other residential placements during 2001.² Other counties reported to investigators that they utilize out of county or out of state placements for delinquent youth as well, however, it is nearly impossible to calculate this number with any accuracy on a state level.

In total, 2,344 youth were incarcerated in the adult prison system, ODYS facilities and Community Corrections Facilities for fiscal year 2002. When adding in the numbers from local or regional juvenile rehabilitation centers, Franklin County Children's Service numbers, and other out of state placements, the number is considerably higher.

At the time interviews were completed of these youth, roughly two hundred individuals were housed at Madison as a result of having been bound over as an adult, with 71 of them under the age of 18 at the time. Twenty-five percent (25%) of those under 18 were from Hamilton County, while 12.5% came from Cuyahoga County and another 12.5% from Franklin County.

Likewise, the Department of Youth Services provides statistics on the number of felony adjudications by county, as well as the number of youth by county who have been committed.

¹ The Quarterly Report for FCCS Probationers Placements, as prepared for the Franklin County Court of Common Pleas, notes that as of December 20, 2001, 244 youth on probation were in paid placements, 83% (204) of whom were placed outside of Franklin County, and 18% (45) of whom were placed out of state.

² Cuyahoga County Court of Common Pleas, Administrative Report for 2001.

The percentage of felony adjudications to commitments is also tracked by county. The report notes overall that in FY 2002, the statewide total of felony juvenile adjudications was 10,230, the smallest number in ten years, with the exception of 2001, with a total of 9,886.³ The total number of commitments was 1,825, representing 17.8% of the total felony adjudications.⁴ Some of the highest ratios by county noted in the report are as follows:

County	Adjudications	Commitments	% Adj. to Comm.
Morgan	4	5	125%
Pike	4	3	75.0%
Licking	88	54	61.4%
Darke	16	8	50.0%
Harrison	4	2	50.0%
Carroll	5	2	40.0%
Washington	44	17	38.6%
Allen	88	34	38.6%
Ashtabula	88	34	38.6%
Coshocton	35	12	34.3%
Gallia	15	5	33.3%
Highland	39	13	33.3%
Jackson	6	2	33.3%
Perry	39	13	33.3%
Mahoning	195	63	32.3%

Of the 15 counties with the highest percentage of felony adjudication to commitment, seven of them have less than twenty total adjudications per year, and as such the number of commitments in these counties are still relatively low in total. This includes Morgan, Pike, Darke, Harrison, Carroll, Gallia and Jackson, and all are rural counties. The remaining eight highest percentages are an even mix between small urban and rural counties.

The six major urban counties range significantly in their number of felony adjudications to commitments as indicated below. It should be noted, however, that these communities also utilize community corrections facilities or other residential program operated by the county or private sources for many of their placements in lieu of DYS.

County	Adjudications	Commitments	% Adj. To Comm.
Summit	738	142	19.3%
Cuyahoga	1,756	310	17.7%
Montgomery	713	121	17.0%
Franklin	674	108	16.0%
Hamilton	1,058	162	15.3%
Lucas	494	63	12.8%

Project RECLAIM, short for Reasoned and Equitable Community and Local Alternatives to the Incarceration of Minors, was piloted in 1994 in nine counties of varying populations (and subsequently implemented statewide) to reduce commitments to DYS by allowing local judges more options and alternatives for juvenile offenders. Counties receive a yearly allocation from

³ Ohio Department of Youth Services, *RECLAIM Ohio, Profile of Youth Adjudicated or Committed for Felony Offenses*, Fiscal Year 2002.

⁴ *Id.* at 3.

DYS distributed monthly based upon the average number of felony adjudications statewide and by county. Counties receive their respective share of RECLAIM dollars from a pool but from that allocation they are charged 75% of the daily costs to DYS for every day a county juvenile is a DYS resident.⁵ There is an exception for “safety beds,” that is, youth committed for specific serious offenses.

RECLAIM dollars are also spent when a court places a youth in a state-funded but locally operated community corrections facility (CCF), however, the county is only assessed 50% of the cost rather than 75%.⁶ For the 2002 fiscal year, an additional 448 total youth were housed in ten community corrections facilities.⁷ Of these facilities only four house female offenders.

a) LACK OF DETENTION ADVOCACY

No cumulative report exists in Ohio to indicate the number of youth held in secure detention across the state in a given year. The Ohio Department of Youth Services provides monitoring of detention centers for compliance with the Office of Juvenile Justice and Delinquency Prevention to ensure that the state receives formula grant dollars under the Juvenile Justice and Delinquency Prevention Act, Title II, however, these data do not necessarily reflect efforts to divert youth from detention, waiver of counsel, and overcrowding issues. Ohio has previously been out of compliance with JJDPA mandates concerning deinstitutionalization of status offenders and jail removal mandates.

The survey of detention centers completed as part of this study indicates of the 55% responding, most keep demographic and offense data on the youth admitted. All but one respondent indicated that there are written intake criteria, although the content of the form varied somewhat. Nearly all respondents indicated that youth are primarily referred to detention through police officers and by court order. There was a significant difference among counties as to the availability of alternatives to detention, and who may authorize these alternatives.

The respondents from detention centers were consistent in indicating that youth in their facilities generally did not receive counsel prior to detention hearings, and nearly two-thirds indicated that the attorneys did not meet with the clients until after the hearings were over. Waiver of counsel was noted as occurring often or very often by nearly one-third of the respondents, and another one-third indicated waiver “sometimes” occurs. Most believed that the juveniles felt nothing serious would happen to them if they waived the right to an attorney, although some indicated that this often occurs because parents encourage it or the youth believes he or she will be released sooner.

⁵ *Juvenile Justice Update, RECLAIM Ohio: Funding Formula Bolsters Development of Community-Based Alternatives while Reducing Commitments to State*, December/January 2002.

⁶ *Id.*

⁷ This number was received by ODYS and includes the Butler County Juvenile Rehabilitation Center, the West Central Juvenile Rehabilitation Center, the Hocking Valley Community Residential Center, the Oakview Group Home, Juvenile Rehabilitation Center of Northwest Ohio, Lucas County Youth Treatment Center, Perry County Group Home, North Central Ohio Rehabilitation Center, Miami Valley Juvenile Rehabilitation Center, and the Montgomery Center for Adolescent Services.

When asked about systemic barriers to effective representation, detention center respondents indicated that they felt the most significant issue was the lack of effective services for youth with mental illness and/or disabilities. The lack of detention alternatives also ranked high among these respondents, particularly for those youth with mental illnesses. While several of the respondents felt that the public defenders or appointed counsel in their jurisdiction did a good job, others were highly critical of the lack of contact the attorneys had with their clients.

“[Defenders] don’t know the kids because of self-imposed time constraints. Kids don’t know them and they think they are part of the court system.”

*Detention Center
Administrator*

The number of youth flowing through detention centers in Ohio is both significant and costly. In several of the counties sampled, a significant majority of the youth held in detention were charged with non-felony conduct. For example, Franklin County detained 4,005 youth in 2001, of which only 41% were felony charges, Allen County housed 367 youth, of which only 25% were felony charges, and Butler County housed 1,808 youth, of which only 16% were felony charges. Other counties do not provide this breakdown but have a total based upon the number of youth processed through detention services, and the number actually securely detained. For example, Cuyahoga County process 7,908 youth through its detention services and securely detained 3,930 youth in 2001 in the detention center.⁸ Hamilton County on the other hand, processed a total of 11,158 youth, diverting 5,093 into the custody of parents or shelter care, and admitting 5,947.⁹

b) CRIMINALIZATION OF MENTALLY ILL YOUTH

A frequent response from those surveyed, as well as those interviewed during site visits to juvenile courts, concerns the lack of community services available for those youth with mental health and other special needs. Not only do many of these youth suffer from mental health disorders, many have educational disabilities that adversely affect their educational progress, and/or drug and alcohol problems.

Youth in the juvenile justice system are much more likely to have both identified and undiscovered disabilities. For example:

- Youth with learning disabilities and/or an emotional disability are arrested at higher rates than their non-disabled peers¹⁰
- It is estimated that 18% of mentally retarded, 31% of learning disabled, and 57% of emotionally disturbed youth will be arrested within five (5) years of leaving high school¹¹

⁸ Statistics taken from annual reports from these counties for 2001.

⁹ Hamilton County Juvenile Court, 2001 ANNUAL REPORT, at 41.

¹⁰ Chesapeake Institute. *National Agenda for Achieving Better Results for Children and Youth with Serious Emotional Disturbance* (Washington, D.C. U.S. Department of Education, Office of Special Education and Rehabilitation Services, Office of Special Education Programs) (1994).

¹¹ Rosado, L. *Special Ed Kids in the Justice System: How to Recognize and Treat Young People with Disabilities that Compromise their Ability to Comprehend, Learn and Behave*, in UNDERSTANDING ADOLESCENTS: A JUVENILE COURT TRAINING CURRICULUM (American Bar Association Juvenile Justice Center, Juvenile Law Center, Youth Law Center) (2000).

- Studies of incarcerated youth suggest that as many as 70% suffer from disabling conditions.¹²

A number of common traits found among many disabled youth make them more susceptible for involvement in the juvenile justice system. More specifically, youth with suspected or identified disabilities are often prone, depending upon the nature of the disability, to:

- *Make poor decisions and social judgments that lead to involvement in crime*
- *Have weak or no avoidance techniques that lead to detention and eventual arrest (i.e. they are more likely to get caught)*
- *Have social skill deficits that result in harsher treatment once in the justice system, and*
- *Have learning difficulties that almost ensure increased recidivism (i.e. it is more difficult for them to "learn their lesson" and reform their ways)¹³*

There appears to be significant differences among jurisdictions in Ohio as to how these youth are handled, and whether or not appropriate resources are available. For instance, some probation staff interviewed indicate that they attempt to stop referrals at the courthouse door from being handled as a criminal matter, and instead secure appropriate educational and/or mental health services provided the offenses are able to be diverted. In other instances, however, the lack of community based services for youth with mental health problems may result in more restrictive options being used. This was identified in a number of instances, including alternatives to detention programs, individual or family counseling programs, drug and alcohol services, and programs to meet the needs of female offenders. Also noted was the fact that there is little aftercare being provided for youth returning to the community, and that mental health facilities for youth were almost non-existent across the state.

“The lack of in-patient mental health treatment is a tremendous problem – we become mental health gatekeepers by default.”

Juvenile Court Judge

The Ohio Juvenile Justice Needs Assessment prepared by the Office of Criminal Justice Services, Ohio Department of Youth Services, noted the strong need for better options for juveniles with mental health problems. According to this study,

“Nearly 95% of judges agreed or strongly agreed that there is a need for more and better options for juveniles with mental health problems, 90% of defense attorneys agreed or strongly agreed that there was a need for services for juvenile clients with disabilities or communications handicaps, and a full 91% of treatment providers believe the juveniles with mental health issues are not being effectively treated. All of the Ohio Department of Youth

¹² Leone, P. E., Zaremba, B.A., Chapin, M.S. and Iseli, C. *Understanding The Overrepresentation Of Youth With Disabilities In Juvenile Detention*. 3 D.C. L. REV. 389-401(1995).

¹³ Rosado, L. *supra*, note 11 at 12.

Services aftercare staff surveyed agreed or strongly agreed that more resources need to be devoted to violent, aggressive youth who are mentally ill or mentally retarded.”¹⁴

The ongoing need for defenders to become stronger advocates for youth with mental health needs was apparent. Not only does this mean providing aggressive advocacy in the courtroom, but it also requires taking a more visible role in guiding policies concerning mental health for youth outside of the courtroom as well.

D) OVER-REPRESENTATION OF MINORITY YOUTH

Minority youth are typically over-represented at every stage in the juvenile justice process.¹⁵ In 1999, minorities made up approximately 37% of the juvenile population in the United States, yet 63% were held in juvenile detention facilities before their adjudication or were committed to state juvenile correctional facilities.¹⁶ Disproportionate minority confinement occurs when the ratio of minorities in detention, correctional facilities, and jails exceeds the percentage of the minority population in the general population, according to the Juvenile Justice and Delinquency Prevention Act (JJDP).¹⁷ The Juvenile Justice Delinquency Prevention Act provides funds to states to improve their juvenile justice systems and services to youths who are delinquent and at risk. States participating achieve compliance with several mandates, including addressing the problem of disproportionate confinement of minority youth in secure detention and correction facilities.”¹⁸

“Based on what this justice system does to African American boys I am worried about my own little 7 year old, my little king. I don’t want the system to steal his joy.”

Juvenile Court Magistrate

Disproportionate minority confinement is an issue that has and will continue to generate considerable national attention. Building Blocks for Youth initiative, a nationwide project sponsored by the Youth Law Center, released *And Justice for Some: Differential Treatment of Minority Youth in the Justice System*, an extensive study that revealed “sharp racial disparities in the nation’s juvenile justice system.”¹⁹ This nationwide study examined each step of the juvenile justice process and found that minority youth were overrepresented at virtually every stage. Information in this report reveals a “cumulative disadvantage” of minority youth across the nation. Below are some of the key findings of this report at each phase of the juvenile justice process:

¹⁴ Office of Criminal Justice Services, Ohio Department of Youth Services, *Ohio Juvenile Justice Needs Assessment, Executive Summary* at 5.

¹⁵ BUILDING BLOCKS FOR YOUTH, (accessed April 9, 2002) <<http://www.buildingblocksforyouth.org/statebystate/kydmc.html>>.

¹⁶ *And Justice for Some*, BUILDING BLOCKS FOR YOUTH (accessed April 9, 2002), <<http://www.buildingblocksforyouth.org/justiceforsome/corrections.html>>. (hereinafter BUILDING BLOCKS).

¹⁷ *Id.*

¹⁸ Thomas, Randy, *Kentucky Disproportionate Minority Confinement Report*, COMMUNITY RESEARCH ASSOCIATED, at 4.

¹⁹ Eileen Poe-Yamagata & Michael A. Jones, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System*, BUILDING BLOCKS FOR YOUTH (2000).

- **Arrest**

The report found that in 1998, the majority of arrests of juveniles involved white youth, while African American youth were overrepresented as a proportion of arrests in 26 or 29 offense categories documented by the FBI.²⁰

- **Referral to Juvenile Court**

In 1997, while the majority of cases referred to juvenile court involved white youth, minority youth were overrepresented in the referral court.²¹

“Race is a problem. Institutional racism is rampant in our system.”

Probation Staff

- **Detention**

While white youth comprised 66% of the juvenile court referral population, they comprised 53% of the detained population. By contrast, African American youths made up 31% of the referral population and 44% of the detained population. In every offense category (person, property, drug, public order) a substantially greater percentage of African American youth were detained than white youth.²²

- **Formal Processing**

African American youth are more likely than white youth to be formally charged in juvenile court, even when referred for the same type of offense. Minority youth were overrepresented in the detained population in 43 of 44 states.²³

- **Waiver to Adult Court**

Minority youth were much more likely to be waived to adult criminal court than white youth in all offense categories.²⁴

- **Disposition**

In every offense category, minority youth were more likely than white youth to be placed out of the home (e.g., commitment to a locked institution). In all offense categories, white youth were more likely than minority youth to be placed on probation.²⁵

- **Incarceration in Juvenile Facilities**

Although minority youth are one-third of the adolescent population in the United States, minority youth are two-thirds of the over 100,000 youth confined in local detention and state correctional systems.²⁶

²⁰ See id. at 1.

²¹ See id.

²² See id. at 2.

²³ See id.

²⁴ See id.

²⁵ See id.

²⁶ See id. at 2-3.

- **Incarceration in Adult Prisons**

In 1997, 7400 new admissions to adult prisons involved youth under the age of 18. Three out of four of these youths were minorities.²⁷

In Ohio, the number of African American youth admitted to some juvenile detention facilities is alarmingly high. While the number of African American youth detained is not uniformly or consistently reported by counties in the annual reports they produce, a sampling of counties that do reported this information in 2001 follows.²⁸

County	Total # of Detention Admissions	# and % of African Amer. Youth detained		County % of African Americans
Hamilton	5,947	4,290	72.14%	23.43%
Franklin	4,005	2,181	54.45%	17.88%
Allen	367	151	41.14%	12.19%
Butler	1,808	253	14.00%	5.26%

It is also apparent that African American youth are overrepresented generally in the frequency with which they enter the juvenile justice system in Ohio. For example, the following counties represent a sampling by comparison of the number of African American youth entering the juvenile justice system as compared to their white counterparts, and in relation to their overall percentage of population for that county. A number of counties sampled do not report this information by race in the annual report they prepare.²⁹ In fact, only three of the twelve visited provided this information in 2001.

County	Total Juvenile Court Del. cases – 2001	# and % of African Amer. in juvenile court		County % of African Americans
Hamilton	7,081	4442	62.73%	23.43%
Montgomery	10,625	4679	44.03%	19.86%
Butler	3,551	477	13.43%	5.26%

In its 2002 report of Youth Adjudicated or Committed for Felony Offenses, the Department of Youth Services reports a total of statewide adjudications and commitments by race.³⁰

Race	Adjud. #	Adjud. %	Commit. #	Commit. %
Black	3,927	38.4%	855	46.8%
White	5,987	58.5%	917	50.2%
Other	316	3.1%	53	2.9%
TOTAL	10,230	100%	1,825	99.9%

²⁷ See id.

²⁸ It should be noted that several annual juvenile court reports examined from sample counties do not contain information regarding the number of youth detained by race. Specifically, these counties include Cuyahoga, Montgomery, Defiance, Lucas, and Trumbull. Detention data by race from Butler County was not included in that county's annual report; however, it was obtained from the Juvenile Detention Center staff who completed the detention survey as part of this study. Lucas County does maintain a racial breakdown on the number of terminations from Community Detention, however.

²⁹ Those counties that do not include juvenile court data on the number of offenses by race in the annual report they prepare include Cuyahoga, Franklin, Defiance, Allen, Lucas, Washington, and Trumbull.

³⁰ Ohio Department of Youth Services, *Profile of Youth Adjudicated or Committed for Felony Offenses*, (Fiscal Year 2002) at 3.

The DYS data reflects that the number of African American youth adjudicated on felony offenses is roughly three and a half times higher than the percentage of African Americans in Ohio in proportion to the total population.³¹ The rate at which African American youth are committed is even higher, representing more than four times the rate in proportion to the total population. Interestingly, African American youth make up an even higher percentage of the commitment rate than the rate of adjudication.

Similarly, statistics gathered through interviews with youth at the adult prison facility at Madison showed the same pattern. Of the 61 youth interviewed, 67.9% were African American, a number that is six times higher than the proportionate number of African Americans in the state.

Juvenile courts have not been blind to this issue in some jurisdictions. In February 2002, the Ombudsman Office of the Citizens of Cuyahoga County issued a report on juvenile justice disparities.³² The report quoted Judge Peter M. Sikora of the Cuyahoga County Common Pleas Juvenile Division, that:

“Our Court, as many others, faces moderate to severe crowding in its inadequate detention facility. Service gaps still exist for youth with significant emotional and psychological needs, and for various reasons, recidivism rates often remain high. Cases processing delays cause overuse of costly detention facilities, and minority overrepresentation remains a significant issue for the entire juvenile justice system.”³³

The report notes that the court’s annual report does not present a breakdown by race of juveniles charged and brought before the court, and that “In order for the Juvenile Court to address minority overrepresentation, it is essential that statistics on minority representation at critical points throughout the process be published.”³⁴ This recommendation suggests that “If these racial statistics were provided it would allow for more efficient and effective planning by the community, elected officials, and other key stakeholders for the deterrence of minority overrepresentation in the juvenile justice system.”

Likewise, a summary of “citizen attitude surveys” implemented during the summer of 2000 as part of the Ohio Juvenile Justice Needs Assessment, note that “African American respondents expressed a very great need for every one of the options presented for addressing troubled juveniles. The greater support among African Americans was especially large for the school resource officer concept, gang prevention programs, and helping delinquents without labeling them as troublemakers.”³⁵

³¹ U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/39000.html>. (reporting that 11.5% of Ohio population is black or African American.)

³² Citizens of Cuyahoga County Ombudsman Office, *Report on Juvenile Justice Disparity*, (2002).

³³ *Id.*, citing to “Cuyahoga County Court of Common Pleas Juvenile Division,” 2000 Annual Report.

³⁴ *Id.* at 4.

³⁵ Office of Criminal Justice Services, Ohio Department of Youth Services, *Ohio Juvenile Justice Needs Assessment, Executive Summary* at 3.

Elsewhere, investigators asked several key stakeholders within the juvenile justice system whether any initiatives were underway to address overrepresentation. While there is some recognition among judges, magistrates, probation staff, prosecutors and defense attorneys that overrepresentation exists, and indeed even suggestions that some policies and practices resulted in disparate impact, there was little question that most of these individuals did not have ready solutions as to what could be done to address the issue. Conversely, they often did not see themselves as part of the solution.

The defender community has not assumed a leadership role in local or statewide initiatives to identify and eliminate disparities in the treatment of minority youth in the juvenile justice system. Defenders in local communities are in key positions to help identify any such disparities in their own communities and determine appropriate steps to addressing local needs for this population.

E) OVER-RELIANCE BY SCHOOLS ON COURTS

In a climate where student conduct is increasingly scrutinized, national attention has been drawn to strategies to enhance safety in schools, and reduce the likelihood of violence against students and school personnel. The emergence of “zero tolerance” policies and the criminalization of school-based conduct are seen in Ohio juvenile courts, as well as across the country. As one author through the Harvard Civil Rights Project explains:

“The increase in criminal charges filed against children for in-school behavior has been one of the most detrimental effects of Zero Tolerance Policies. Students are often subjected to criminal or juvenile delinquency charges for conduct that poses no serious danger to the safety of others. What was once considered a schoolyard scuffle can now land a student in juvenile court or, even worse, in prison. In some instances this occurs regardless of age, intent, circumstances, severity of the act, or harm caused. In many instances, school districts are simply transferring their disciplinary authority to law enforcement officials.”³⁶

No national data system exists to track the number of school related delinquency petitions filed against students, or the number of crime reports filed on school based conduct, making it difficult to gauge the breadth of this problem in Ohio and elsewhere. The responses of attorneys and judges, however, as well as the comments and observations of investigators for this study, suggest that these numbers are increasing in Ohio, and cause concern among those individuals in the juvenile court system faced with determining how to handle such cases.

“There is a perception at least that when we started putting cops in schools that teachers took it as an opportunity to use the cop for disciplinary issues. . . . As a result the safe schools ordinance filings have increased significantly.”

Juvenile Court Judge

Practitioners at all levels expressed extreme frustration at the number and types of school based complaints that

³⁶ The Advancement Project and the Civil Rights Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* (June 2000).

reached the courthouse door. The pervasive view expressed by investigators after interviews with key stakeholders was that schools wanted to “dump” cases into court that could and should be handled in the classroom or in the principal’s office. While no one suggested that there is not a role for courts to play in assisting with school conduct including truancy, abuses were routinely noted whereby youth were referred to court for misconduct that was minor in nature. Of particular concern to many practitioners was the perception that many of these youth suffered from educational disabilities, and that a high number of minority youth also fell victim to such referrals.

Creative legal and policy challenges need to be aggressively pursued to change local practices that unnecessarily criminalize school conduct, and to encourage the use of effective prevention and intervention programs with youth having school related difficulties. This is particularly true since it is apparent that children of color appear to be more likely to be subjected to disciplinary actions in less serious offenses.

F) LACK OF SERVICES FOR FEMALE OFFENDERS

Girls are the fastest growing segment of the juvenile justice population, in spite of an overall nation drop in juvenile crime.³⁷ The number of male offenders, particularly those charged with violent crimes, has declined steadily since 1994 while the arrest, detention and dispositional custody of females has increased in number and percentage. Between 1988 and 1997, delinquency cases involving girls increased by 83%, with the highest percentages being for drug abuse violations, curfew and loitering, simple assault and aggravated assault.³⁸ In a recent national report on this phenomenon, the American Bar Association raises the question as to whether such growth is due in part to an increase in violent behaviors, or whether it is due to the re-labeling of girls’ family conflicts as violent offenses, changes in police practices regarding domestic violence and aggressive behavior, gender bias in the processing of misdemeanor cases, and perhaps a fundamental systemic failure to understand the unique developmental issues facing female offenders.³⁹

“An unruly girl is one of the hardest cases we have. There is a general fear that girls will do such irreparable damage to themselves before maturing that we feel a heightened need to protect them.”

Juvenile Court Judge

Girls made up only 9.9% of the DYS population in FY 2002. By comparison, some counties report much higher numbers of females charged with delinquent offenses in the annual reports they prepare. For example, Hamilton County reports that 32.5% of its juveniles charged in 2001 were female, Cuyahoga reports 20.9%, Butler County reports 35.9%, and Montgomery reports 24.3%. Remarkably, staff reported that 8% of the female population within ODYS was there on charges related to infant homicides, presenting significant treatment needs relative to the nature of this offense.

³⁷ American Bar Association, National Bar Association, *Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System*, May 2001, at 1.

³⁸ *Id.* at 2

³⁹ *Id.* at 3.

The surveys provided to judges, magistrates and attorneys attempted to examine trends in charging and dispositions relative to girls, and how this may differ from their male delinquency counterparts. For instance, 100% of the attorney surveys indicated that girls were frequently or at least “often” charged and detained on contempt for non-criminal acts, and that this occurred much more, or at least somewhat more often than with males. Likewise, this same very high rate was noted for practices that charge girls with probation violations more often than boys, and that criminalize status behavior in order to obtain services. The majority, however, did not feel girls were detained for longer periods of time, or placed outside their communities with great frequency, or more often than with males. Less than 25% of judges surveyed, however, felt that any of these practices were frequent or often employed with females, and even fewer felt that girls more frequently encountered these practices than boys.

The Ohio State Bar Association 2002 Bench Bar Conference released a report in 2002 of the result of a breakout session on juvenile justice issues that addressed girls in the system.⁴⁰ While the report noted that “a broad approach addressing the problems affecting all children is urgently necessary,” it concluded that “when the system operated ineffectively, girls may suffer more.”⁴¹ Among the findings in that report was that there is a need for more gender-specific programs for girls as new dispositional options, including educational opportunities for teenage mothers and training programs for skilled jobs.⁴²

III. THE ROLE OF LAW SCHOOL EDUCATION

There are nine law schools in Ohio, most of which offer a single course in juvenile law. Within this course offering, the material covered is typically divided between dependency and delinquency leaving only half of a semester to the study of juvenile delinquency. In almost all of the schools, the focus of the course is on constitutional issues and not on the practice issues with which defense counsel would be faced in the representation of a juvenile. Even in those schools which offer a course in juvenile law, the course is an elective and is not available every year. As juvenile law is not an area covered on the bar exam and is not regarded as a lucrative area of practice, it is typically a marginal offering with low enrollment.

Several of the schools have clinics that offer some practical experience with issues affecting juveniles. However, they are primarily devoted to the areas of dependency, education, and child custody. The Capital University Law School is the only school that offers a concentration in children’s law but the coursework relates primarily to adoption and family law as part of their Dave Thomas Center for Adoption Law. Ohio State University also has a clinical program which provides students with an opportunity to work in the juvenile law field. Most of the schools offer some flexibility with internships that may result in a student spending a semester in a juvenile public defender office, but there is no formal program sponsored by any of the law schools which provides a supervised experience or practicum in the area of juvenile delinquency.

⁴⁰ Ohio State Bar Association, *Final Report of the Breakout Session on Juvenile Justice: Addressing Girls in the System*, BENCH BAR CONFERENCE (2002).

⁴¹ *Id.* at 0.

⁴² *Id.*

Beyond law school, practicing lawyers have limited opportunities for continuing legal education to compensate for the deficits in their law school training on juvenile law. The Ohio Association of Criminal Defense Lawyers provides an annual seminar on juvenile law, at times in conjunction with the Office of the Ohio Public Defender. Until the recent formation by the Ohio State Bar Association of a Juvenile Law Committee, there was no state bar committee specifically charged with continuing legal education courses in juvenile law and such offerings were rare. The new online continuing legal education sponsored by the Ohio State Bar offered 125 programs during the last three months of 2002, none of which covered the defense of juveniles charged with crimes. There is a similar lack of continuing legal education training by bar associations throughout the state as well as a general lack of organized juvenile law committees in local bars. Even private, for profit continuing legal education companies like the WestLegalEd offerings do not include a single course in the juvenile delinquency practice area among their 1,000 online courses.

Without sufficient law school or formal continuing legal education, the only training available to lawyers practicing in the juvenile justice system is that offered by their employers or by the court in which they practice. For those representing indigent juvenile defendants in jurisdictions without a public defender office, there is usually no training or supervision available. Those lawyers who accept appointed cases are usually in private solo or small practices and report relying only on advice from their colleagues, most of whom have the same lack of training and experience. Even in those jurisdictions with staffed public defender offices, resources, staffing and time are too limited to provide formal training or to send attorneys to workshops and conferences. Several of the courts which were part of the site visits required at least three hours of training as a prerequisite to receiving appointments to represent indigent juveniles. Aside from issues of quality of the training, the hours required were too few to have an impact. The required training not only did not produce meaningful positive results, but it had an unexpected negative impact. Those few attorneys who had experience and were known as effective advocates resented the waste of their time by having to participate in the required yearly course despite their expertise. As the court would not exempt them from the requirement or provide different tracks of training, many of these attorneys withdrew from the appointment list.

The lack of training and preparation and the resulting inadequacy of counsel for juveniles was noted by almost every judge, court administrator and others interviewed during the site visits. Many who were interviewed, including some magistrates, expressed frustration about the lack of standards and accountability enforced by the judges and the lack of leadership by the bar associations or law schools to take responsibility for the improvement of the quality of the practice in this area. The magistrates described the appointed counsel as so poorly trained that “no judge in any other court would appoint them so they’re here.” The recommendations from most parties interviewed were for better preparation including the opportunity for practical experience during law school, more quality continuing legal education courses, and the enforcement of high standards of practice by the court. It was suggested that juvenile law be added to the bar exam to reinforce the importance of this area.

CHAPTER 4

THOUGHTS FROM INCARCERATED YOUTH

“The way I understand things, lawyers defend you, probation officers punish you, and public defenders just tell you what your charges are going to end up being.”

-Youth incarcerated in an Ohio CCF

During the summer of 2002, 538 incarcerated youth were interviewed individually about their experiences with their lawyers and the juvenile justice system. Interviews were conducted in the Ohio Department of Youth Services intake facilities, with male juveniles incarcerated in an adult prison, and in seven community correctional facilities. The youth were cooperative and readily provided responses to the survey questions. Staff in all of the facilities was also helpful and often eager to share their concerns about the lack of effective representation by defense counsel. Of particular concern to the staff were those youth who had been adjudicated and sentenced to correctional facilities despite their apparent incompetence based upon mental retardation or severe mental illness.

I. DEMOGRAPHICS

“Nowadays, it’s less about the color of your skin than about who you are with, and who is accusing you of doing something wrong”

-Youth incarcerated in an Ohio DYS facility

The majority of the youth interviewed were male (74%) and white (54%). The minority population was almost all African American. More than half were from urban centers with about one quarter of all youth interviewed from Cuyahoga and Hamilton counties. Almost one third were from Franklin, Lucas, Montgomery, Summit and Butler counties. Age breaks into three almost equal groups of 10-15, 16 and 17 year olds.

Although the youth were not always certain of the charges for which they were serving time as plea bargains usually resulted in charges being dropped and modified, 43% reported a crime against a person, 41% reported a crime against property, and most of the remainder were drug-related offenses.

II. ACCESS TO COUNSEL

“I think I had an attorney, but I’m not sure. There was this guy who read some stuff from a folder about me during my trial.”

-Youth incarcerated in an Ohio CCF

Most of the juveniles, 85%, reported having an attorney. Of those without counsel, 6% reported not having been advised of their right to counsel. Only 11% of the youth could recall having a waiver of counsel explained to them.

The majority of those youth who were represented by counsel had court appointed counsel (75%). Typically, the youth met with their attorneys only in court, either in the hall, the holding area or in the courtroom. Only 1% of youth met their attorney for the first time before or at the detention hearing. Half of the juveniles met their counsel at the arraignment or plea hearing and 29% met their attorney for the first time at the trial. Of those who were in detention awaiting the adjudication and/or disposition of their case, only 49% of the youth had contact with their counsel while detained. Although not formally measured on the survey, only 16% of the youth reported any contact with their counsel after the dispositional hearing.

III. QUALITY OF REPRESENTATION

“I had a public defender to start out with, but after how he was at the first hearing, my mom borrowed some money to get me a regular attorney.”

-Youth incarcerated in an Ohio CCF

Only 1% of youth met their attorney for the first time before or at the detention hearing.

The limited contact that often exists between the juvenile and their attorney is reflected in the finding that only 63% knew their attorney’s name. As the youth typically met their counsel only for a few minutes before a court hearing, little opportunity existed to form an attorney-client relationship

When asked what they talked about with their attorney, the strongest response was 92% who reported a discussion of the charges. Next in frequency was a discussion of the consequences of entering a plea of admit (85%). Almost two thirds reported that they talked about their prior offenses. Attorneys were also typically credited with explaining the options of entering a plea of admit or denying the charge and proceeding to trial (85%).

63% of juveniles knew the name of the attorney representing them.

The findings about the lack of investigation or preparation are consistent with the low frequency of contested hearings reported by the juveniles.

- Only 55% of the attorneys asked their clients about the circumstances surrounding their arrest and less than half (49%) discussed possible witnesses.
- Youth reported that only 8.5% of the attorneys interviewed witnesses, and only 2% caused any type of scientific testing to be conducted.
- Although about 20% of the youth reported that their attorneys said that they would conduct an investigation, the youth responded that only 8% did conduct an investigation.
- The highest response rate to any area of preparation reflected that in two thirds of the cases the defense counsel had a discussion with the prosecutor.

Only 22.1% of the juveniles reported any discussion of mental health issues.

One of the most frequent criticisms of counsel was their lack of interest in the juvenile beyond the charge. Less than half of the juveniles (about 45%) reported that their attorneys asked them about their school history, family issues, or drug problems. In light of the concern expressed by the correctional facilities and other juvenile court personnel about the number of juveniles who appeared to be incompetent to stand trial, it is not surprising that only 22.1% of the juveniles reported any discussion of mental health issues. Another strong indicator of possible behavioral or developmental disabilities is often a special education placement. While many of the youth interviewed had been in special education classes, only 21% of the juveniles reported being asked by their counsel about a special educational placement.

“I always waive my right to an attorney because it’s easier and quicker than waiting for somebody who won’t care about my case anyhow.”

Female in ODYS facility

Positive factors which may have been considered as mitigators in sentencing were also overlooked by counsel. The juveniles reported that only 27% asked about work history, 25% asked about community involvement or other extracurricular activities, and only 15.9% asked about an employer that could serve as a character reference. Only slightly over half (57%) felt that they had enough time with their attorney. In response to an open-ended question about advice that they would give to attorneys representing juveniles, many of the juveniles expressed a sentiment similar to the young man who urged counsel to “try to find out more about the kid.”

During the course of the proceedings, juveniles reported that their attorneys told them what was happening about two-thirds of the time. Less than two-thirds, about 61% felt that their attorneys were prepared. Juveniles also expressed frustration about their inability to have their views presented, which is consistent with the findings about the counsels’ lack of knowledge about their clients. Only 48% of the youth felt that they had the opportunity to have their side presented to the judge. Many of the youth felt that the judge was the only one in the courtroom who treated them with respect. One male youth told the interviewer that he knew *“that the judge felt bad about having to send me away. He was only doing it for my own good.”* A female reported that *“the judge was the only one who looked me in the eye.”* Many of the youth felt more supported in court by their probation officer, even when the probation officer had been the prosecuting witness, than by the defense counsel.

About 61%
felt that their
attorneys were
prepared.

After the disposition, 58% reported that their attorney explained their right to appeal. Even fewer (41%), felt that any possible appeal issues were explained. None of the juveniles reported that their counsel came to see them while they were incarcerated.

IV. CLIENT SATISFACTION

Juveniles were questioned about their overall satisfaction with their attorneys. Less than two-thirds (62%) felt that their attorney was truly on their side. Only slightly more than half (53%) felt that the system treated them fairly. Of those youth in the adult prison, 8% felt that the juvenile justice system had been fair. In measurements of attorney preparedness, defense

Less than two-thirds (62%) felt that their attorney was truly on their side.

counselors in rural jurisdictions were ranked the best at 69.9%. Defense counselors in large urban systems were the least prepared at 55%.

The most significant disparity in satisfaction ratings existed between privately retained and appointed counsel. Of all the variables studied including age of the respondents, geographic region and gender, retaining private counsel was the only strong predictor of client satisfaction.

- 81% of youth with private counsel reported that their attorney was on their side compared with 57% of appointed counsel.

In short, the juveniles reported that a paid attorney provided better representation than appointed counsel.

Youth were asked a number of open ended questions, but most importantly, investigators sought advice from them to pass along to attorneys who represent young people. Some of the advice given by these young people follows.

- “There are kids who make mistakes, but are really good kids. There’s no reason to send them to a DYS on the first offense. Judges need to be able to see who the kids are that just made a mistake.”
- “I would tell kids going through the system to get an out-of-town lawyer. In town lawyers are always friends with the judge.”
- “If someone has big money, they can get a good lawyer and get off more than people who don’t have money.”
- “Do a better job, and treat kids like they’re not stupid. Mine treated me like I was a five year old, like I didn’t understand what was going on. Stuff like this made me mad.”
- “Learn more about the facts of the case, and learn what empathy is – make yourself more concerned about the juvenile.”
- “Go back to law school and get more experience. They act like they don’t know what they are doing.”
- “Learn about stuff like early release. My lawyer didn’t know anything about it, so I had to ask the judge myself when I was in court.”
- “Take your job more seriously. This is a human life you’re dealing with.”

- “The lawyer should have talked to me more; talked to my mother more. Lawyers should fight rather than give up and say ‘this is what is going to happen’ right off the bat.”
- “Use continuances. My lawyer said he didn’t have the time to go look over everything I told him about, but I know there are continuances – I’ve gotten them in the past.”
- “I would change her. I would change what she said. I wanted her to argue harder, and stand up to the judge. I wanted her to ‘dog’ the judge – do anything to make the judge change his mind.”

V. BEYOND THE COURTROOM

More than half of the youth reported that their attorneys did not discuss ways in which the juveniles could help themselves. Although most youth reported that their probation officers helped them before incarceration and that they were receiving help within the correctional facility, they were most concerned about what would happen after their release. At the conclusion of each interview, the youth were asked about their most difficult challenge upon their release from incarceration.

Most of the boys responded that their biggest challenge would be to obey the rules of parole and to stay out of trouble. Few had any specific plans for their future or for making any changes in the circumstances which resulted in their involvement in the juvenile justice system. Their response was typically some variation of “I did the crime so I’m doing the time.”

The responses of the girls reflected more introspective consideration. Almost one-third of the girls interviewed were incarcerated on charges related to domestic violence and dysfunction. One 18-year-old who was serving her fifth felony sentence related that the staff at the ODYS facility was her only family. “They’re the only ones who really care about me,” she told the interviewer. Another 18-year-old girl who had been adjudicated on a charge of sexual abuse against a younger sibling was concerned about where she would live upon her release and the possibility that she would never see her family again. She was also worried about her future career, as she had been told that she was barred from any job involving a minor. A good student who was bound for college before her incarceration, she related that she had planned to be a teacher but would not be able to pursue that career.

Issues raised by correctional staff about the need for more involvement of counsel after disposition included concern about several youth who had to be maintained in the correctional facility beyond their sentence as they had no home to which to return. Although the child welfare agencies were charged with responsibility to find a suitable foster home or other placement for these children, several youth were identified as awaiting release several months after their sentence should have been terminated. Despite the advocacy of the correctional staff, intervention by defense counsel would have been more effective in the opinion of the correctional staff. Assistance with ensuring correct educational placements in compliance with special education law and advocacy to facilitate the resumption of Medicaid coverage for

medication, mental health and medical care upon release from the institution were also issues that should be but, according to correctional staff, rarely are taken care of by the child's defense counsel.

As important to the role of a juvenile defense lawyer as the technical skill of lawyering is the role of counsel. Often the circumstances leading to the youth's involvement in the juvenile justice system is a dysfunctional family with the parent as a prosecuting witness. Mental illness, deficient public education, poverty and other risk factors which bring the child into the juvenile justice system typically await the youth after incarceration and often result in the youth's return to the system. It is the defense counsel's responsibility to prevent children from becoming unnecessarily involved with the juvenile justice system in the first instance and to ensure that the disposition is appropriate for the child's rehabilitation and care. Youth as well as the judges and others interviewed look to defense counsel as an advocate for the child's needs. Although a few public defender offices had a social worker or other staff to assist in the preparation of dispositional plans to recommend to the court, the youth found that their attorneys usually offered nothing different than that recommended by the probation officer or the prosecutor.

*"Maybe if my attorney had ever seen a place like this, he
would have fought for me a little more."*

Youth in ODYS facility

CHAPTER 5

PROMISING PRACTICES

Despite structural and systemic barriers that limit or impede the quality of juvenile defense in Ohio, investigators observed attorneys in several parts of the state that zealously and enthusiastically represented their young clients. The team encountered attorneys who were articulate and well prepared, and clearly engaged with the juveniles they represented. These attorneys not only challenged the prosecution's case, but developed creative strategies for trial and disposition to further their client's wishes. Some attorneys challenged the system more wholesale, with involvement in juvenile law bar committees, legislative initiatives, and appointment to local committees, task forces and other local and state efforts to improve juvenile justice practice. Also noted were attorneys who promoted training opportunities for juvenile defenders, and took the lead to help train and mentor younger and less experienced lawyers with an interest in juvenile law. Investigators also made note of many attorneys and others who are deeply committed to juvenile justice work, and who want to work to make the system better for poor children. They also found local courts ensured the consistent appointment of defense counsel, and expected and enforced high standards of practice at all stages of proceeding. While it is not possible to list all of those individuals or organizations here, the partners to this project have clearly acknowledged the help they received and insight they gained from them.

Consistent with national data, defender programs and individual defense attorneys that offer high quality legal services have some or all of the following characteristics in common:

- The ability to limit or control caseloads;
- Support for entering the case early and the flexibility to represent the child in related collateral matters, such as special education;
- Access to ongoing training and resource materials;
- Adequate non-lawyer support and resources;
- Hand-on supervision and mentoring of attorneys; and
- A work environment that values the importance of a robust juvenile court practice

In other instances, project participants have been able to identify local or statewide initiatives that deserve mention here as positive practices and/or programs that support excellence in juvenile defense work.

I. FRANKLIN COUNTY PUBLIC DEFENDERS

The Franklin County Public Defender program stood above others in the quality of representation as it ensures for poor children in Columbus. As a fully staffed and technologically

advanced office, the defender program was noted by judges and magistrates as being consistently good in its advocacy efforts. This full time office includes access to social workers and investigators for its attorneys, and appears diligent in its efforts to ensure that youth have ready access to attorneys as they make their way through delinquency proceedings. In addition, the office has established a process using law students to ensure that all youth are screened for eligibility prior to detention hearings or initial appearances. In spite of the heavy volume, this process appears to be an innovative and efficient way to assist its attorneys at this early stage.

The Franklin County Public Defender office has also been involved systemically in issues such as disproportionate minority confinement, and sentencing matters. It has a defined vision and mission, and uses this to develop strategic planning. For example, its 2003 business plan has identified results and program performance measures for its juvenile defense services. This office should be acknowledged for its commitment to juvenile issues and its management of resources.

II. BAR ASSOCIATIONS

In an effort to promote excellence in juvenile defense, some bar associations encourage and promote programs to improve indigent defense services for poor children. The Ohio State Bar Association, through its role in the 2002 Bench Bar Conference, focused significant attention on juvenile justice issues and the need for reform initiatives on behalf of girls specifically, but across the board more generally. In 2002, the OSBA created the Juvenile Law Committee to work toward improvements in juvenile justice. It is also noteworthy that the Ohio State Bar Foundation, the Columbus Bar Foundation, and the Cincinnati Bar Foundation have contributed funding for this study.

Similarly, some local bar associations have had a history of sponsoring juvenile training, improved funding for appointed counsel, and working on local rules pertaining to juvenile practice. Initiatives to improve juvenile justice have been funded through some of these bar foundations.

III. POST-DISPOSITION ADVOCACY

An important element to any juvenile justice system is the ability to review and challenge incarceration status concerning the fact of, duration of, or conditions of confinement in which youth find themselves after disposition. In Ohio, the availability of appellate lawyers in juvenile cases within local jurisdictions is limited, if not non-existent. The offices of the Ohio Public Defender and the Ohio Department of Youth Services have both recognized the need and obligation of the state to provide post-dispositional advocacy for youth incarcerated within ODYS facilities. Both state agencies provide legal counsel to youth, or ensure that youth have access to the courts. While the resources devoted to appellate work and other post-dispositional challenges should be enhanced significantly, the efforts of these two agencies are a positive first step in ensuring protections for youth at this stage of the proceedings.

IV. JUVENILE TRAINING PROGRAM

The Ohio Association of Criminal Defense Lawyers (OACDL), in conjunction with the support of the office of the Ohio Public Defender, has provided an annual juvenile seminar for the last several years. This training is generally provided over a two day period, and has produced some excellent materials to update attorneys on changes in the law, as well as a number of other substantive issues concerning juveniles. The event is generally well attended and has made good use of state and national talent as trainers. Such training should be acknowledged as contributing in a positive way to the practice of juvenile defense.

CHAPTER 6 RECOMMENDATIONS

I. THE GOVERNOR AND LEGISLATURE:

Should enact and implement an unwaivable right to counsel for all children and youth for every stage of delinquency and unruly proceedings, including probation revocation hearings where loss of liberty is a possible outcome;

Should enact and implement due process protections for children and youth found incompetent or criminally insane in conformity with the recommendations made by the Ohio Sentencing Commission; and,

Should enact and implement a juvenile defense delivery system for the State of Ohio that ensures:

- Adequate funding and resources for salaries, contractual rates, expert services, case support, and ancillary services; and,
- Provides ready access to and quality representation by trained and competent defense counsel.

II. THE JUDICIARY:

Should ensure that all judges handling juvenile matters receive ongoing training in juvenile matters;

Should encourage leadership among the judiciary on juvenile justice issues; and

Should require training and education of attorneys appointed to represent indigent youth that focused on the special needs of juveniles in the justice system.

III. LOCAL COURTS AND COUNTIES:

Should institute systems for the appointment of counsel to all children and youth at the earliest possible time in all delinquency and unruly cases where loss of liberty is a possible outcome;

Should ensure that Ohio's juvenile defender system is sufficiently and adequately funded, including costs for appointed counsel, expert services, investigative resources and ancillary services;

Should develop and implement standardized procedures for the eligibility and appointment of counsel for children and youth, including, but not limited to, minimum practice requirements to be eligible for appointment, requirements of ongoing professional education in

juvenile law and related issues, periodic review of attorney performance, and equitable distribution of appointments;

Should engage in a thorough and ongoing review of detention practices, including the role of defense counsel, to prevent the overuse and abuse of detention; and,

Should address the issues of disproportionate minority representation in the juvenile justice system in real and meaningful ways, including the collection and dissemination of data related to race in every aspect of the system.

IV. OFFICE OF THE OHIO PUBLIC DEFENDER:

Should provide increased opportunities for all juvenile defense attorneys to participate in meaningful and intensive training on relevant issues facing children and youth in the system, including child development issues, motion practice, dispositional advocacy, detention advocacy, trial skills, competency and capacity litigation, education advocacy, and post-disposition advocacy;

Should provide and promote leadership among the entire juvenile defense bar and take a leadership role on substantive juvenile law issues such as bindover and serious youthful offender trends, disproportionate minority confinement issues, mental health issues, girls issues and school-based referrals to juvenile court;

Should increase appellate and other post-dispositional advocacy initiatives;

Should provide strong legislative advocacy on right to counsel issues and other substantive issues involving children and youth in the justice system; and,

Should develop and implement a strategic plan, including staffing, support, resources, training, expert services and adequate funding, for the formation of state public defender offices and/or standardized appointment procedures in every county.

V. LOCAL PUBLIC DEFENDER OFFICES:

Should implement a system which ensures that every child and youth will consult with counsel at all critical stages of juvenile proceedings and that every child, youth, parent and guardian have all necessary information concerning the importance of representation prior to decisions of waiver being made;

Should directly address the overuse and abuse of detention within the juvenile justice system through increased detention advocacy, ensuring due process in all proceedings available to children and youth, and effective advocacy on behalf of alternatives to secure detention;

Should implement a system of representation:

- that provides juvenile defense practitioners with adequate and ongoing training in child development issues, motion practice, disposition advocacy, detention advocacy, basic and advanced trial skills, competency and capacity litigation, education advocacy and appellate work;
- that provides structured mentoring to all attorneys inexperienced in juvenile law practice and procedure;
- that provides ready and available access to client information, sample motions and pleadings, caseload data, and current level of resources;
- that allows adequate appellate advocacy on behalf of all children and youth in the system;
- that provides a fair and standardized policy to address conflicts of interest among clients within the system;
- that tracks and sets caseload and workload limits for all counsel handling juvenile matters.

Should provide leadership on juvenile justice issues in local communities to further educate the public on issues such as bindover and serious youthful offender trends, disproportionate minority representation, mental health issues, girls' issues and school-based referrals to juvenile court.

VI. BAR ASSOCIATIONS:

Should take a greater role in the further development and implementation of a fair and just juvenile justice system;

Should take an active role in ensuring that there are sufficient continuing legal education offerings for juvenile law practitioners; and

Should ensure that practice standards are met by practitioners and the juvenile justice system supported by adequate funding and resources.

VII. OHIO LAW SCHOOLS:

Should examine the nature and content of law school courses related to juvenile practice to ensure appropriate educational opportunities are provided to law students that can support high standards in juvenile court practice; and,

Should provide prestigious internships, externships and fellowship opportunities to public interest organizations such as juvenile defender units, juvenile law centers, and juvenile justice policy initiatives to attract quality students into the juvenile practice area.