A TALE OF TWO SYSTEMS:

AN ASSESSMENT OF ACCESS TO & QUALITY OF YOUTH DEFENSE COUNSEL IN UTAH

THE GAULT CENTER

Defenders of Youth Rights

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A report of the Gault Center

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We earnestly hope the Assessment provides the many dedicated juvenile court professionals in Utah with a critical tool for change and leads practitioners to both build upon existing strengths and vigorously address the challenges within the Utah youth defense system.

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EXECUTIVE SUMMARY

"The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice."[1]

In 1967, the United States Supreme Court affirmed children's constitutional right to due process in delinquency court, including the assistance of counsel. In its decision in *In re Gault*, the Court found that children need "the guiding hand of counsel at every step in the proceedings against [them]."[2]

The Court recognized that, "Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness,"[3] and outlined the vital role of counsel for children: "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the child] has a defense and to prepare and submit it."[4]

But, to this day, although every state has some basic structure to provide attorneys for children, few fully satisfy *Gault's* mandate of access to counsel for young people.[5]

This assessment of access to counsel and quality of representation for Utah youth is part of a nationwide effort to systematically review and provide information about the provision of defense counsel in delinquency proceedings. Since 2000, the Gault Center has evaluated youth defense delivery systems in 28 states.[6]

The purpose of a state assessment is to provide policymakers, legislators, defense leadership, and other legal system practitioners with a thorough understanding of children's access to counsel in the state, identify structural and systemic barriers that impede effective representation of children, highlight best practices where found, and make recommendations that will serve as a guide for improving youth defender services for children in the state.

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1 Kent v. U.S., 383 U.S. 541, 561 (1966).

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

3 *Id.* at 18-19.

4 *Id.* at 36.

5 Nat'l Juv. Def. Ctr., Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel 4 (2017) [hereinafter Access Denied].

6 *State Assessments,* The Gault Ctr., https://www.defendyouthrights.org/initiatives/state-assessments/ (last visited February 23, 2024).

Utah's indigent defense and juvenile court systems have undergone significant transformation over the past decade. The Utah Indigent Defense Commission (IDC), established in 2016, has adopted system and practice standards and, through state grants to counties, is offering support to youth defense attorneys and beginning to chip away at deficient practices that flourish in county-based systems lacking state oversight.

Recent legislative reforms also have ensured that children are represented by counsel throughout a delinquency case proceeding, greatly increased the number of cases diverted from formal juvenile court processing, and significantly reduced Utah's use of secure detention and commitment.

Juvenile court practitioners across the state voiced considerable support for the range of reforms the system has undergone and shared how the reforms challenged them to reconsider their own practices. A probation officer interviewed for this assessment described it as, "We have all evolved through the many changes in the system."

Utah's policymakers, juvenile court practitioners, and IDC should be commended for the work they have done to begin to create a system of indigent defense where it had never before existed and to begin to resize and reshape the juvenile court system. However, much work remains to be done.

This assessment of Utah's youth defense delivery system revealed a tale of two systems: the youth defense system in Salt Lake County and a patchwork, individual contract-based system across the rest of the state. In interviews conducted for this assessment, court professionals across the state repeatedly pointed to Salt Lake County's system as providing the quality of representation necessary to meet the state's constitutional and statutory obligations.

> ***This assessment of Utah's youth defense delivery system revealed a tale of two systems.***

In Salt Lake County, youth defense is contracted to an organization that provides its attorneys with office space, technology, salary and benefits, and support staff; it employs a management structure and conducts regular reviews of attorney performance; it provides initial and ongoing youth defense-specific training to all of its employees; and its attorneys specialize in youth delinquency defense.

That organizational infrastructure matters. In the rest of the state, attorneys who represent youth in delinquency proceedings do not benefit from these same supports. With few exceptions, they are solo practitioners who must, in addition to representing children in court, rent office space, provide their own technology support, perform their own clerical duties, juggle multiple contracts and private clients in order to earn a living, navigate local political environments to maintain indigent defense contracts, and manage countless details to keep their small-business law firm afloat.

Some of the key findings of the assessment include:

- Utah has recently enacted several legislative reforms that have greatly improved youth access to counsel throughout the juvenile court process.
- Utah's Indigent Defense Commission is beginning to build a foundation for the state's youth defense delivery system by establishing standards, contracting with managing defenders, and supporting appellate practice.
- Despite the state's recent reforms, Utah's county-based contract system for youth defense continues to limit access to justice for young people.
- Outside of Salt Lake County, youth defense contracts are too often influenced by county prosecutors, do not provide adequate compensation, and do not allow for specialization.
- Youth defenders across Utah are in need of training in case investigation, motions practice, expressed-interest advocacy, trial advocacy skills, and post-disposition advocacy, as well as adolescent development and racial disparities.

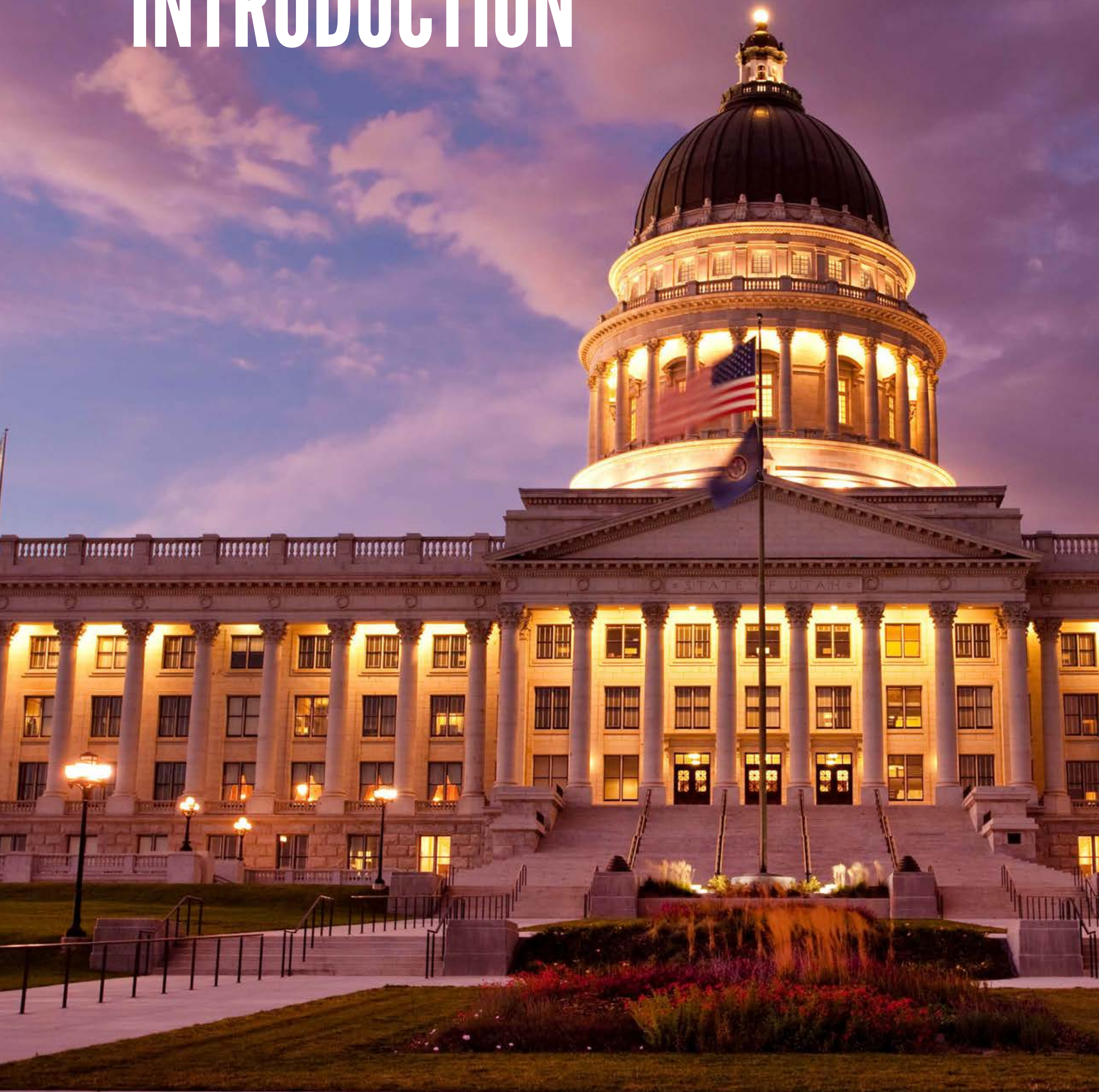
Among other recommendations, this report encourages Utah to:

- Establish a strong statewide system for delivery of youth defense services.
- Ensure the independence of youth defenders.
- Institute pay structures that compensate youth defenders for the time and work needed to provide competent representation.
- Require initial and ongoing training for all youth defenders and managing defenders.
- Establish systems for youth to access counsel at the earliest points of legal system contact.
- Commit to combatting racial disparities.
- Eliminate all fees and costs imposed by the juvenile legal system, particularly costs-of-care charged to families.

Utah's state motto is, simply, "Industry." Merriam-Webster Dictionary defines industry as "systematic labor especially for some useful purpose." For far too long, there has been no system to deliver youth defense in Utah, leaving youth defenders to labor on their own to fulfill the state's obligation to uphold young people's constitutional rights.

Over the past decade, Utah has begun to lay the foundation to provide the systemic supports youth defenders need to fulfill their ethical obligations to their young clients. The state must remain committed to continuing this work. Children in Utah, no matter where they live in the state, have the right to be represented by trained, specialized, zealous expressed-interest attorneys. Utah has both a constitutional obligation and a moral imperative to ensure they receive it.

INTRODUCTION



THE ROLE OF COUNSEL IN DELINQUENCY PROCEEDINGS

"[C]hildren, like adults, are denied their right to counsel not only when an attorney is entirely absent, but also when an attorney is made available in name only."[7]

On the heels of the United States Supreme Court's affirmation in 1963 that indigent adults charged with a criminal offense had a right to a publicly funded defense attorney,[8] the Court decided a series of cases affirming a child's right to specific due process protections when facing delinquency proceedings.[9]

Seminal among these cases, *In re Gault*, decided in 1967, affirmed that children have a due process right to counsel in delinquency proceedings under the Fourteenth Amendment to the United States Constitution.[10] Justice Abe Fortas, writing for the majority, reasoned:

> Under our Constitution, the condition of being a boy does not justify a kangaroo court . . . . There is no material difference in this respect between adult and juvenile proceedings of the sort here involved . . . . The [child] needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the child] has a defense and to prepare and submit it.[11]

The Court explicitly rejected the claim that others would be capable of protecting the child's interests and heralded the unique role of counsel: "The probation officer cannot act as counsel for the child . . . . Nor can the judge represent the child."[12] While the judge, the probation officer, and other court personnel are charged with looking out for an accused child's best interests, children facing "the awesome prospect of incarceration" require counsel to advocate for their stated interests and guide them in proceedings implicating potential loss of liberty.[13]

The right to effective counsel throughout the entirety of a youth's system involvement is critical.[14] "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[15] It is the youth defender who must insist upon fairness of the proceedings, ensure the child's voice is heard at every stage of the process, and safeguard the due process and equal protection rights of the child.[16]

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7 U.S. Statement of Interest at 7, N.P. v. Georgia, No. 2014-CV-241025 7 (Ga. Super. Ct. Fulton Cnty. 2015).

8 Gideon v. Wainwright, 372 U.S. 335 (1963).

9 *Gault*, 387 U.S. at 1; Kent v. United States, 383 U.S. 541 (1966); *In re* Winship, 397 U.S. 358 (1970); McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

10 *Gault*, 387 U.S. at 30-31.

11 *Id.* at 28, 36 (internal citations omitted).

12 *Id.* at 36.

13 *Id.*

14 *See* Strickland v. Washington, 466 U.S. 668 (1984); McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970) (stating that "the right to counsel is the right to the *effective* assistance of counsel" (emphasis added)).

15 United States v. Cronic, 466 U.S. 648, 654 (1984).

16 *See Gault*, 387 U.S. at 36; *see generally Model Rules of Professional Conduct*, Am. Bar Ass'n, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ (last visited January 22, 2024) (outlining the following key ethical duties of counsel: Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer; Rule 1.3: Diligence; Rule 1.4: Communications; Rule 1.8: Conflict of Interest—Current Clients; Rule 1.14: Client with Diminished Capacity).

The youth defender is the only juvenile court system practitioner who is ethically and constitutionally mandated to zealously advocate for the protection of the youth's rights in a manner that is consistent with the youth's expressed interests.[17] This role is distinct from other juvenile court professionals such as the judge, probation officer, guardian *ad litem*, or prosecutor, who consider the perceived "best interests" of the child.[18] If the defense attorney acts in a role akin to an *amicus curiae* (or friend of the court), rather than as a true advocate for the client, the constitutional right to counsel is denied.[19]

Effective youth defense not only requires that the attorney must meet all the obligations due to an adult client, but also necessitates expertise in juvenile-specific law and policy, the science of adolescent development and how it impacts a young person's case, skills and techniques for effectively communicating with youth, collateral consequences specific to juvenile court, and various child-specific systems affecting delinquency cases, such as schools and adolescent health services.[20]

Youth are still developing their cognitive and socio-emotional capacities, which requires defenders to learn about and understand developmental principles.[21] The youth defender must apply this expertise in representing youth at all stages of the court system, including pretrial detention hearings, advisory hearings, suppression hearings, the adjudicatory phase, disposition hearings, transfer hearings, any competence proceedings, and all points of post-disposition while a youth remains under the jurisdiction of the juvenile court.

Youth defenders must also ensure a client-centered model of advocacy and engage and advise their young clients using developmentally appropriate communication.[22] These elements of youth defense advocacy are critical to equipping youth to understand and make informed decisions about their case, including accepting or rejecting a plea offer or going to trial, testifying or remaining silent, developing components of a defense-driven disposition plan, and considering alternatives to juvenile court involvement and programming.[23]

Youth defense delivery systems have a responsibility to provide youth defenders with the necessary training, support, and oversight to ensure attorneys have the time needed to build rapport with clients, obtain discovery and conduct investigations, engage in motions practice and appropriately prepare for hearings, monitor the post-disposition needs of clients under the court's jurisdiction, and consult with the client to ensure expressed-interest representation at all stages of court involvement.[24]

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[17] *See* Nat'l Juv. Def. Ctr., National Juvenile Defense Standards 18-21 (2012) [hereinafter National Youth Defense Standards] (detailing the duty of counsel to provide expressed-interest representation, regardless of the lawyer's perception of the best interests of the client, pursuant to Standard 1.1 Ethical Obligations of Youth Defense Counsel and Standard 1.2: Elicit and Represent Client's Stated Interests).

[18] *See id*. at 18-21 (describing counsel's role as an expressed-interest attorney for the child in Standard 1.2: Elicit and Represent Client's Stated Interests).

[19] Anders v. California, 386 U.S. 738, 744 (1967).

[20] National Youth Defense Standards, *supra* note 17, at 21-22 (detailing the requirements for specialized youth defense training and representation in Standard 1.3: Specialized Training Requirements for Juvenile Defense).

[21] *See generally* Nat'l Juv. Def. Ctr. & Nat'l Legal Aid & Def. Ass'n., Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems (2008) [hereinafter NJDC & NLADA Ten Core Principles] (emphasizing the necessity for public defense delivery systems to provide training on "the stages of child and adolescent development").

[22] National Youth Defense Standards, *supra* note 17, at 43-46 (outlining the requirement of effective, developmentally appropriate communication with young clients: Standard 2.6: Overcoming Barriers to Effective Communication with the Client).

[23] *See* Nat'l Juv. Def. Ctr., Role of Juvenile Defense Counsel in Delinquency Court 9 (2009) (outlining youth defense counsel's unique role in equipping young people with information to be the primary decisionmakers at different points in their cases).

[24] *See* U.S. Statement of Interest, N.P. v. Georgia, *supra* note 7, at 14 ("A juvenile division should have the resources to monitor workloads so that attorneys are available to advocate for clients at intake and during detention and probable cause hearings. Outside of court, they need adequate time to meet with clients, investigate the prosecution's factual allegations, engage in a robust motions practice, devote time to preparing for trial and the disposition process, and to monitor and advocate for the needs of post-disposition clients who are still within the court's jurisdiction.").

States have an obligation to ensure that children are afforded the due process protections enshrined in the Constitution and enumerated in *Gault*, including the vital role of qualified defense counsel. Merely having counsel present for children in delinquency proceedings is inadequate if that counsel does not have sufficient time, resources, and expertise to provide effective advocacy. For this reason, both access to counsel and quality of representation are essential elements of protecting due process rights.

THE GAULT CENTER'S ASSESSMENTS OF YOUTH DEFENSE SYSTEMS

The Gault Center, formerly known as the National Juvenile Defender Center, is dedicated to promoting justice for all children by ensuring excellence in youth defense. For more than 25 years, the Gault Center has worked to better understand how the defense of young people in juvenile court is delivered, state by state, and to support improvement in the delivery of those services.

By conducting statewide assessments of youth defense delivery systems, the Gault Center examines how and when youth access counsel, the quality of representation they receive, and the systemic impediments that prevent youth from receiving high-quality representation. The assessments provide policymakers and leaders with baseline information and data to make informed decisions regarding the structure, funding, and oversight of youth defense and to improve the system of delivering defense services.

The Gault Center has conducted statewide assessments of youth defense systems in 28 states.[25] These assessments gather information and data about the structure and funding of defense systems and examine whether youth receive counsel at all critical stages, the timing of appointments, waiver of counsel, youth defense resource allocation, supervision and training, and access to investigators, experts, social workers, and support staff. Reports note promising practices within a state and offer recommendations for improvements.

Several consistent themes have emerged across state assessments, including an array of systemic barriers that prohibit youth from receiving timely access to qualified youth defense counsel, youth defense not being recognized as a specialized legal practice, and youth defense being significantly under-resourced. Since the *Gault* decision, youth defense systems have faltered and failed in many jurisdictions, leaving far too many children defenseless in courts of law across the country.[26]

States have used assessment report recommendations to implement changes to policies and practices that strengthen youth defense and ensure fair and equitable treatment for youth. Recommendations have been embraced by legislators, courts, defenders, bar associations, law schools, and others to raise the bar with legislative and other policy reforms, through increased funding, enhanced training, and other means. Effective youth defense representation improves the administration of justice and can significantly impact life outcomes for youth facing the juvenile legal system.

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[25] *State Assessments, supra* note 6.

[26] *See generally* ACCESS DENIED, *supra* note 5 (providing a national snapshot of the reality of access to counsel for youth).

METHODOLOGY

The Gault Center began its assessment process in Utah through conversations with local- and state-level juvenile court system practitioners and decisionmakers who were interested in better understanding the system of youth defense in the state. In March 2022, the Utah Indigent Defense Commission invited the Gault Center to conduct a statewide assessment of Utah's youth defense delivery system.

The Gault Center then began a thorough review of Utah's juvenile code, caselaw, and statutes related to youth defense; met virtually with state and local court and defense officials; and collected census and court data. After evaluating a wide range of factors, the Gault Center identified counties for site visits considered to be representative of the heterogeneity found in counties across the state along criteria such as population size, geographic location, presence or absence of detention and/or commitment facilities, ethnic/racial diversity, urban/suburban/rural setting, type of youth defense delivery system, and number of delinquency petitions filed annually.

Site visits were originally scheduled in August and September 2022, but were delayed to March–May 2023 because Utah's juvenile courts were operating almost exclusively remotely due to a surge in the COVID-19 pandemic in the late summer of 2022. During this delay, the Gault Center modified existing court observation protocols and forms to collect data about virtual court hearings. In January and February 2023, Gault Center team members observed 41 virtual juvenile delinquency court hearings across Utah.

In-person site visits were conducted by a 13-member assessment team that included current and former public defenders, private practitioners, academics, and policy advocates. Each assessment team member has several years of experience in the field, and many are considered national experts in the field of youth defense. The assessment team was trained on the Gault Center's assessment protocols and participated in briefings regarding their respective counties, as well as research, reports, and background information about Utah's juvenile court and defense systems.

Two assessment team members went to each of the selected counties, where they conducted interviews, court observations, and tours of courthouses and juvenile detention and commitment facilities. Using interview questionnaires developed by the Gault Center and specifically adapted for use in Utah, the assessment teams interviewed defense lawyers, prosecutors, judges, court administrators, probation officers and supervisors, and detention facility staff. Interviews focused on the role and performance of defense counsel, access to counsel at all critical stages, and systemic impediments to effective representation.

Jointly, the assessment team completed 66 confidential interviews and observed approximately 124 court proceedings across the counties. Completed questionnaires, court and facility observation forms, and other documentation were submitted to the Gault Center for incorporation into this assessment report. The interview questionnaires and court and facility observation forms were coded and analyzed using Dedoose, qualitative data analysis software, to identify trends and outlying practices and policies.

The Gault Center's typical practice in state assessment reports is to not identify jurisdictions, in order to maintain the confidentially ensured to interview participants and so the report is focused on statewide trends in youth defense and not individual county issues. Here, however, we do name Salt Lake County in several places because it was held up by interviewees across the state as demonstrating many elements of effective youth defense practice.

This report and its recommendations are the result of a yearlong assessment of Utah's system of providing counsel to youth in delinquency proceedings. It assesses Utah's youth defense system in the context of what is constitutionally required and uses national standards, research, and best practices as a foundation for review. The report can provide a roadmap to support both positive practices and reforms that can further the integrity of the juvenile legal system by ensuring adequate due process and equal protection of the law through well-trained, effective lawyers for all youth.

UTAH'S JUVENILE COURT & DEFENSE SYSTEMS

Utah has a statewide court system, consisting of the Utah Supreme Court, the intermediate Utah Court of Appeals, and District, Juvenile, and Justice Courts.[27] Utah's trial-level courts are organized into eight judicial districts, with each judicial district encompassing three to six counties.[28] The court system is governed by the Utah Judicial Council, which is charged with the creation of uniform rules for the administration of courts and standards for court personnel and facilities.[29]

Utah's juvenile courts have exclusive original jurisdiction over any youth under 18 accused of violating any federal, state, or municipal law and over any traffic offenses involving minors.[30] Juvenile courts also have jurisdiction in cases of abuse, neglect, or dependency; termination of parental rights, and matters of child custody, support, and visitation in certain cases; and "ungovernable or runaway [youth]" if efforts by other social service agencies are not successful.[31]

Utah juvenile courts also administer probation departments, which supervise youth, conduct evaluations, and prepare dispositional and progress reports.[32] Utah's juvenile courts are of equal status as District Courts, which serve as the state's trial courts of general jurisdiction, and all appeals from juvenile courts are heard in the Utah Court of Appeals.[33] The Board of Juvenile Court Judges adopts administrative rules that govern juvenile courts and oversees juvenile courts' implementation of Judicial Council rules and standards.[34]

27 Utah Code Ann. § 78A-1-101.
28 *Id*. at § 78A-1-102.
29 *Id*. at § 78A-2-104.
30 *Id*. at §§ 78A-6-103-103.5.
31 *Id*. at § 78A-6-103.
32 *Id*. at § 78A-6-205.
33 *Id*. at § 78A-4-103.
34 *Id*. at § 78A-6-203.

In 2015, the Sixth Amendment Center released an assessment report on trial-level indigent defense services in Utah.[35] Commissioned by the Utah Judicial Council's Study Committee on the Representation of Indigent Criminal Defendants, the Sixth Amendment Center's study examined the delivery of trial-level defense services in adult criminal courts (not in juvenile courts).[36]

The Sixth Amendment Center found that, statewide, more than 60 percent of adults charged with misdemeanors were not represented by counsel; in many courts, that number was closer to 75 percent.[37] Utah adults charged with felonies were represented by counsel, but "that lawyer may work under financial conflicts of interest, or may be beholden to a prosecutor to secure future work, or may be appointed too late in the process or be juggling too many cases to be effective."[38]

The assessment concluded that Utah had "no institutional statewide presence, and a limited statewide capacity, to ensure that its constitutional obligations under the Sixth and Fourteenth Amendments are being met at the local level."[39]

In 2016, in response to the Sixth Amendment Center's findings, the Utah State Legislature adopted the Utah Indigent Defense Act, which created the Utah Indigent Defense Commission (IDC).[40] The purpose of Utah's IDC is to "assist the state in meeting the state's obligations for the provision of indigent defense services, consistent with the United States Constitution, the Utah Constitution, and the Utah Code."[41]

Under the Indigent Defense Act, the IDC is statutorily mandated to develop and adopt core principles for indigent defense systems consistent with the U.S. and Utah Constitutions.[42] Those principles must ensure that "an indigent individual receives conflict-free indigent defense services"[43] and that those who provide defense services are independent, have access to adequate resources, can provide representation at all critical stages of proceedings, have a workload that allows for effective representation, are adequately compensated, are properly trained, and are able to meet their obligations under the Utah Rules of Professional Conduct.[44]

In November 2016, the Utah Juvenile Justice Working Group, created by Utah's governor, chief justice, senate president, and house speaker, released its Final Report.[45] Among the group's major findings was that "[m]ost youth do not receive legal representation throughout the duration of the court process, even when their liberty is at stake."[46] Utah law at the time required the appointment of counsel only when

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35 *See* Sixth Amend. Ctr., The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services (2015) (reporting on the current state of public defense services in Utah following an 18-month study of ten sample counties).

36 *Id*. at 4 n.7 ("Though the federal right to counsel extends to cases of indigent juveniles accused of delinquent acts, delinquency representation is not a focus of this report.").

37 *Id.* at 19 ("More people accused of misdemeanors are processed through Utah's justice courts without a lawyer than are represented by counsel – upwards of 62 percent of defendants statewide . . . .").

38 *Id.* at X.

39 *Id.* at 46.

40 Utah Code Ann. § 78B-22-401; *see* Sixth Amend. Ctr., The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services, *supra* note 35, at 90-96 (recommending that Utah form a statewide indigent defense commission to set standards for the provision of public defense and monitor compliance against those standards).

41 Utah Code Ann. § 78B-22-401(2)(a).

42 *Id*. at § 78B-22-404.

43 *Id*.

44 *Id*.

45 *See generally* Utah Juv. Just. Working Grp., Utah Juvenile Justice Working Group Final Report (2016) [hereinafter Utah Juv. Just. Working Group Final Report].

46 *Id*. at 2.

a youth was charged with a felony-level act, but allowed juvenile courts to place youth charged with misdemeanors and contempt in state custody.

The Working Group recommended that Utah law be amended to mandate that counsel be appointed in all juvenile court cases and to remove the requirement for an indigence determination before appointing counsel; that the appointment of counsel continue through all appellate proceedings; and that the recently formed IDC oversee the legal representation of young people in juvenile court.[47]

In August 2017, IDC adopted Core System Principles,[48] which have evolved into the Core System Principles for Indigent Defense Services [hereinafter System Principles].[49] In February 2018, IDC adopted Core Principles for Appointed Attorneys Representing Youth in Delinquency Proceedings [hereinafter Youth Defense Principles].[50] The Youth Defense Principles outline the unique responsibilities of attorneys who represent young people in delinquency proceedings, including their role as expressed-interest advocates,[51] the need for youth-specific training and expertise,[52] and the scope of their representation,[53] including case preparation,[54] disposition advocacy,[55] representation in certification cases,[56] and appeals.[57]

In March 2019, Utah's governor signed into law amendments to the Indigent Defense Act.[58] Importantly, this legislation enacted a mandate that courts appoint counsel to all youth in delinquency cases and that counsel be present at all stages of the proceedings, including detention, post-dispositional review hearings, and on appeal.[59] During the Utah legislature's second special session in 2021, House Bill 2003 removed the requirement that children being appointed counsel in juvenile court submit an affidavit of indigency.[60]

Even with the creation of the IDC and its promulgation of standards, the structure for the provision of constitutionally mandated defense services remains the responsibility of Utah's counties, cities, and towns.[61]

Utah has proven its commitment to improving its juvenile court system and to establishing state oversight of defense services. It can take the next step in ensuring justice for children by fully supporting the systematic provision of youth defense services in consideration of the findings, recommendations, and discussion of best practices related to youth defense that follow.

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47 *Id*. at 15.

48 *Standards,* Utah Indigent Def. Comm'n., https://idc.utah.gov/policies-and-standards (last visited January 22, 2024).

49 *See* Utah Indigent Def. Comm'n., Core System Principles for Indigent Defense Systems (2024) [hereinafter Utah Indigent Def. Comm'n. System Principles].

50 *See* Utah Indigent Def. Comm'n., Core Principles for Appointed Attorneys Representing Youth in Delinquency Proceedings (2018) [hereinafter Utah Indigent Def. Comm'n. Youth Defense Principles].

51 *Id*. at 3 (describing the role of the youth defense attorney in Principle 1: Role of the Attorney as ". . . independent, conflict-free, individualized, developmentally appropriate, and based on the client's expressed wishes.").

52 *Id*. at 4 (describing the requirements that youth defense attorneys should have specialized knowledge, expertise, and training in Principle 3: Areas of Knowledge and Expertise & Principle 4: Qualifications, Training, and Ongoing Education).

53 *Id*. at 5 (defining the "proper period of representation" and the need to continue representation "until court jurisdiction is terminated" in Principle 5: Scope of Representation).

54 *Id*. (outlining the requirement to meaningfully investigate and litigate the delinquency case in Principle 6: Addressing the Allegations).

55 *Id*. (describing effective advocacy at the disposition phase in Principle 7: Dispositional Advocacy).

56 *Id*. at 6 (outlining the requirements for effective representation for attorneys representing youth in certification cases in Principle 8: Clients Facing Risk of Adult Prosecution).

57 *Id*. (outlining the duties of the defense attorney regarding the client's right to appeal in Principle 10: Appellate Representation).

58 S.B. 32, 2019 Gen. Sess. (Utah 2019).

59 Utah Code Ann. § 78B-22-203; Utah Code Ann. § 78B-22-204.

60 *Id*. at § 78B-22-201.5(5).

61 *Id*. at § 78B-22-102(9).

KEY FINDINGS

I. ACCESS TO COUNSEL & QUALITY OF REPRESENTATION

"Justice systems must ensure that the right to counsel comprehends traditional markers of client advocacy and adequate structural support to ensure these traditional markers of representation are met . . . ."[62]

Youth defense counsel must be recognized as an essential component of a developmentally appropriate juvenile court system, as youth need "the guiding hand of counsel at every step in the proceedings against [them]."[63] Counsel "is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings."[64]

> Access to counsel is essential to due process. Beyond being a matter of justice, the perception of fairness strengthens the legitimacy of the court. "Treating youth fairly and ensuring that they perceive that they have been treated fairly and with dignity contribute to positive outcomes in the normal process of social learning, moral development, and legal socialization during adolescence." If youth feel they have been treated fairly, recidivism is reduced.[65]

A. Early Access to Counsel

Children need the assistance of counsel, and no one — not a probation officer, judge, or family member — can substitute as counsel for a young person.[66] Utah law mandates that "an indigent defense service provider has . . . that ability to provide representation . . . at all stages to indigent individuals in juvenile delinquency . . . proceedings."[67] Indigent defense systems in Utah "must ensure that as soon as feasible, defense counsel is assigned and notified of appointment, and indigent individuals are notified of the identity of assigned counsel and how to contact counsel."[68]

1. ACCESS TO COUNSEL AT INTERROGATION

The first time a youth has an explicit right to counsel is during police interrogation. In 1966, the United States Supreme Court ruled that people subject to police interrogation must, at a minimum, be advised of their right to consult a lawyer, to protect their Fifth Amendment right to silence.[69] The following year, the Court explicitly acknowledged in *Gault* that this protection extends to youth under the Fourteenth Amendment's Due Process Clause.[70]

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[62] U.S. Statement of Interest, N.P. v. Georgia, *supra* note 7, at 11.

[63] *In re* Gault, 387 U.S. 1, 36 (1967).

[64] Inst. of Jud. Admin. & Am. Bar Ass'n., Juvenile Justice Standards: Standards Relating to Counsel for Private Parties 11 (1979) [hereinafter IJA-ABA Standards Relating to Counsel for Private Parties] (Standard 1.1: Counsel in Juvenile Proceedings, Generally).

[65] Nat'l Council of Juv. and Fam. Ct. Judges et al., Honoring Gault 1 (quoting Nat'l Rsch. Council, Reforming Juvenile Justice: A Developmental Approach 6 (2013)).

[66] *See* Gault, 387 U.S. at 35-36.

[67] Utah Code Ann. § 78B-22-404 (1)(ii)(C).

[68] Utah Indigent Def. Comm'n. System Principles, *supra* note 49, at 3 (Principle 3B: Scope of Representation: Stages of Proceedings).

[69] Miranda v. Arizona, 384 U.S. 436, 437 (1966).

[70] *Gault*, 387 U.S. at 55.

Police questioning is an especially fraught experience for youth; they face an inherent imbalance of power, which necessitates special care be taken to afford their rights.[71] Youth are particularly susceptible to manipulative strategies commonly used in interrogations, and they often waive their rights or offer confessions in response to unrealistic or short-term incentives.[72] Interrogation should be recognized as a critical stage of the proceedings at which young people should be represented by publicly funded defense counsel.[73]

Police questioning is an especially fraught experience for youth.

In recognition of the harms to both youth and the integrity of law enforcement investigations, states are beginning to legislatively mandate that children consult with defense counsel before they may waive their *Miranda* rights and proceed with law enforcement questioning.[74] These key statutory protections recognize what the U.S. Supreme Court acknowledged more than 70 years ago:

> [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.[75]

Utah law provides that youth cannot be interrogated unless they have been advised of their constitutional rights and of the statutory right to have a parent, guardian, or friendly adult present.[76] Under the same law, if the law enforcement agency has been unable to contact a parent or guardian within one hour after the youth has been taken into custody, the right effectively disappears.[77] Utah law also provides that the interrogator cannot make false statements to the youth or unauthorized statements about leniency.[78] The Rules of Juvenile Procedure also delineate the state's burden to show by a preponderance of evidence that any waiver of constitutional rights is done so knowingly, voluntarily, and in accordance with state statute.[79]

These statutory protections, however, do not appear to be sufficient to uphold children's constitutional right to counsel at interrogation. No court practitioner interviewed for this assessment was aware of a system in place to ensure defense counsel could be available to consult with a young person facing interrogation. With the exception of youth who are already represented by counsel and those whose families can afford to hire private counsel, it appears that children in Utah very rarely exercise their right to

[71] Haley v. Ohio, 332 U.S. 596, 599 (1948) ("[W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.").

[72] *See, e.g.*, Dassey v. Dittmann, 201 F.Supp. 3d 963, 993-1007 (E.D. Wis. 2016) (finding Brendan Dassey's confession involuntary because of the investigators' use of false promises); Taylor v. Maddox, 366 F.3d 992, 1013-1016 (9th Cir. 2004); *see generally*, Int'l Ass'n of Chiefs of Police, Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation (2012) (detailing research and legal developments surrounding police interrogations of youth).

[73] Access Denied, *supra* note 5, at 16 ("States should recognize interrogation as a critical stage of juvenile proceedings requiring a publicly funded defense lawyer to protect children from potential abuses of authority.").

[74] *See, e.g.,* 705 Ill. Comp. Stat. Ann. § 405/5-170(a); Cal. Welf. & Inst. § 625.6; Wash. Rev. Code Ann. § 13.40.740; Md. Code Ann. § 3-8A-14.2.

[75] Haley v. Ohio, 332 U.S. 596, 599-600 (1948).

[76] Utah Code Ann. § 80-6-206.

[77] *Id*.

[78] *Id.*

[79] Utah R. Juv. P. 27A.

counsel during police interrogation. One juvenile court judge acknowledged that "it would be nice to have the resources to have public defenders meet with children before they implicate themselves."

Utah is to be commended for providing important statutory protections to young people who are questioned by law enforcement. The state should take the next step and join those states at the forefront of recognizing the importance of counsel at this critical stage by mandating that youth be advised by defense counsel before being allowed to waive their rights prior to police interrogation.

2. ACCESS TO COUNSEL AT PRELIMINARY INQUIRY/NONJUDICIAL ADJUSTMENT

When a referral is made to juvenile court about an offense allegedly committed by a young person, a juvenile probation officer makes a preliminary inquiry to determine whether the youth is eligible for a nonjudicial adjustment.[80] A nonjudicial adjustment, or NJA, is an agreement between the youth, their parent, and the probation officer that can avoid a formal charge in juvenile court.[81] During a preliminary inquiry, the probation officer may conduct a validated risk and needs assessment, consult with the prosecuting attorney, and require the youth to undergo drug and alcohol screening.[82] The youth must be notified of their right to counsel during the preliminary inquiry process.[83]

If the youth has been referred for an offense alleged to have occurred before the youth turned 12 or if they have been referred for a misdemeanor, infraction, or status offense; have no more than two prior adjudications; and have no more than two prior unsuccessful nonjudicial adjustment attempts, the juvenile probation officer must offer a nonjudicial adjustment.[84] For youth 12 and older, juvenile probation officers

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80 Utah Code Ann. § 80-6-303.5(1).

81 *Nonjudicial Adjustments*, Utah Comm'n on Crim. & Juv. Just., https://justice.utah.gov/juvenile-justice/juvenile-justice-oversight-committee/non-judicial-adjustments/ (last visited February 28, 2024).

82 Utah Code Ann. § 80-6-303.5(3).

83 Utah R. Juv. P. 15(c).

84 Utah Code Ann. § 80-6-303.5(4).

are guided by a statutorily defined list of ineligible offenses and may elect to offer the youth a nonjudicial adjustment.[85] A youth cannot be required to admit guilt as part of the nonjudicial adjustment.[86]

As part of an NJA, a probation officer can require a youth to pay a fine, pay restitution, complete community service, attend counseling and substance abuse treatment, and comply with specified restrictions on their activities or associations, among other conditions.[87] An NJA can initially last up to 90 days but can be extended by a juvenile court judge.[88] If a youth does not successfully comply with an NJA, the prosecutor may file a petition against the youth for the alleged conduct.[89]

Court professionals interviewed for this assessment reported that children are represented by counsel during the preliminary inquiry or nonjudicial adjustment stages of the proceedings either "rarely" or "never." Those who recalled cases in which a youth was represented by counsel at this stage reported that only youth whose families could afford to hire private counsel were represented during the preliminary inquiry or NJA period.

According to interviewees, in some counties, if a youth requests counsel during the preliminary inquiry/NJA phase, their case must be petitioned into juvenile court – the formal processing the NJA is intended to avoid – so that the youth can be appointed counsel. One person reported that when this happens in their jurisdiction, "non-judicial is taken off the table as an option."

Without defense attorneys involved in this stage of the process, probation officers reported that they explain children's rights to them. One explained, "That's when it gets tricky, because they typically have questions, and we can't answer them." Another probation officer said, "We can't give legal advice, so it makes it difficult to build rapport with a youth when they ask, 'What do you think I should do?' and we can't give them advice."

"A judge, a clerk, a bailiff, a prosecutor, a probation officer, a defense attorney, all appearing in court. And 95 percent of the time, the kid refused the non-judicial simply because they didn't understand [the process or their rights]. It is a huge waste of resources for very low-level offenses and kids with low risk levels."

Interviewees in Salt Lake County described the impacts of this dynamic. According to probation officials and youth defense attorneys, each month about 10 to 15 youth decline an NJA in Salt Lake County. When a youth declines to enter into an NJA, the case is sent to the prosecutor, who reviews and petitions the case. A youth defender described: "A judge, a clerk, a bailiff, a prosecutor, a probation officer, a defense attorney, all appearing in court. And 95 percent of the time, the kid refused the non-judicial simply because they didn't understand [the process or their rights]. So then the prosecutor says we should send it back [to the NJA process], and off it goes. It is a huge waste of resources for very low-level offenses and kids with low risk levels."

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85 *Id*. at § 80-6-303.5(8).

86 *Id*. at § 80-6-304(3).

87 *Id*. at § 80-6-304(1).

88 *Id*. at § 80-6-304(5).

89 *Id*. at. § 80-6-304.5(5).

This misunderstanding of the NJA process has long-term implications for youth, as well. A youth defender explained that, "A declined NJA that gets petitioned and then sent back for NJA is not eligible for automatic expungement. So youth who decline simply out of confusion also remove themselves from auto-expungement eligibility without understanding that consequence."

A nonjudicial adjustment can save a young person from formal court involvement but can also result in financial sanctions and conditions that severely curtail the youth's freedom, and a youth who does not successfully comply with an NJA may face formal court charges. Consultation with defense counsel can help ensure a young person understands the charges against them, their rights and options prior to entering into an NJA, the conditions that will be placed upon them by the NJA, and the possible consequences of successful or unsuccessful completion.

Utah should ensure defense counsel is readily available to consult with youth during the preliminary inquiry phase and to represent youth during the NJA period. This time is a critical juncture in a child's involvement with the legal system; if they are able to successfully navigate the NJA period, they will have no formal court record, which means fewer barriers to education, jobs, and other opportunities critical to success. Providing counsel can improve the experience youth and families have while in this process, and ultimately lead to better success and long-term public safety.

3. TIMING OF APPOINTMENT OF COUNSEL

Counsel's immediate action early in a case is vital to ensuring the child's interests are protected "at every step in the proceedings."[90] Early and frequent contacts are also important opportunities for the defender and child to build rapport, trust, and confidence in each other.[91] By some measure, *when* counsel is appointed is as important as *whether* counsel is appointed at all.[92]

The National Council of Juvenile and Family Court Judges (NCJFCJ) encourages juvenile courts to ensure that defense counsel is appointed far enough in advance of an initial hearing to allow youth to meet with counsel "to fully explore the options and make advised and considered decisions about the best course of action."[93] When a summons is served, it should "provide information regarding options for obtaining counsel for the youth prior to the initial hearing, so that counsel has time to prepare, hearings do not need to be unnecessarily continued, and the process proceeds in as timely a fashion as possible."[94] Delayed appointment of counsel "creates unnecessary and inefficient delays" and prevents the youth defender "from being able to prepare for the initial hearing prior to the court date."[95]

NCJFCJ's guidelines note that these delays are unique to children who rely on court-appointed attorneys: "Families who can afford private counsel do not have these barriers and rarely appear at a detention or initial juvenile [delinquency] court hearing without prior consultation with counsel."[96]

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[90] *In re* Gault, 387 U.S. 1, 36 (1967).

[91] National Youth Defense Standards, *supra* note 17, at 34-36 (describing the importance of building a foundation of mutual trust and confidence between the attorney and client in Standard 2.1: Role of Youth Defense Counsel at Initial Client Contact Commentary).

[92] *See, e.g.,* National Youth Defense Standards, *supra* note 17, at 34, 52-53 (stressing the significance of early appointment of counsel in Standard 2.1: Role of Youth Defense Counsel at Initial Client Contact and Standard 3.1: Representation of the Client Prior to Initial Proceedings); Inst. for Jud. Admin. & Am. Bar Ass'n, Juvenile Justice Standards Annotated: A Balanced Approach 74-75 (1996); Nat'l Council of Juv. and Fam. Ct. Judges, Enhanced Juvenile Justice Guidelines, Ch. III: Initiating the Juvenile Court Process 16-17 (2018) [hereinafter NCJFCJ Enhanced Youth Justice Guidelines, Ch. III].

[93] NCJFCJ Enhanced Youth Justice Guidelines, Ch. III, *supra* note 92, at 25.

[94] *Id.* at 21.

[95] *Id.* at 25.

[96] *Id.*

Utah's Youth Defense Principles state that "[e]ffective representation commences in a timely manner, extends for the proper period of representation, and proceeds with reasonable continuity."[97] The Principles call for youth defenders to "represent the client from the initial court proceeding through all subsequent delinquency proceedings until court jurisdiction is terminated, including at detention hearings . . ." and to "be present at all court hearings . . . ."[98]

In 2019, Utah mandated the automatic appointment of counsel for youth in delinquency proceedings.[99] In 2021, the state exempted children from the indigency determination process so that financial eligibility guidelines do not apply and cannot prevent children from being appointed counsel.[100]

Many court professionals interviewed for this assessment reported that counsel is appointed automatically in their county, either as soon as a youth is detained or within one day of a petition being filed. In those jurisdictions, interviewees reported that counsel is always present at a youth's first court hearing.

However, some interviewees indicated that in their jurisdictions, youth are informed of their right to counsel at their first court hearing, but counsel is not present at that hearing. In these counties, interviewees indicated that youth may not be represented by counsel, even when youth are detained. One defender explained, "I'm never there at the initial court hearing. I would like to be."

A managing defender in one county described how they coordinated with their youth defenders to ensure a defense attorney is present at every initial hearing, including detention hearings, even though the court has not yet appointed them. "We decided that it is better to always have someone there. The purpose is that the kid will never be alone. Counsel is officially appointed later, but there is always an attorney there."

Utah's recent legislative changes to the appointment process were lauded by court professionals of all roles from across the state. Judges, prosecutors, and defenders all noted defense attorney presence at initial hearings as a benefit of the new laws. About mandated automatic appointment, one judge simply said, "That law is a godsend."

About mandated automatic appointment, one judge simply said, "That law is a godsend."

One prosecutor noted that "having an attorney for the child helps the case move faster. There are no more delays in finding an attorney." Another remarked that "this new process where every child has an attorney makes it a smoother process."

One defense attorney described how the recent legislative changes have resulted in earlier appointment of counsel and youth having representation at their first court hearing: "The judge recently started having counsel appointed immediately. It used to be that the youth would come to the first hearing and counsel would be appointed there, but now I usually get about three weeks' notice and can reach out to my client before the first hearing."

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[97] Utah Indigent Def. Comm'n. Youth Defense Principles, *supra* note 50, at 5 (Principle 5: Scope of Representation).

[98] *Id*.

[99] Utah Code Ann. § 78B-22-102(10)(a); Utah Code Ann. § 78B-22-203(1).

[100] *Id*. at § 78B-22-201.5(5).

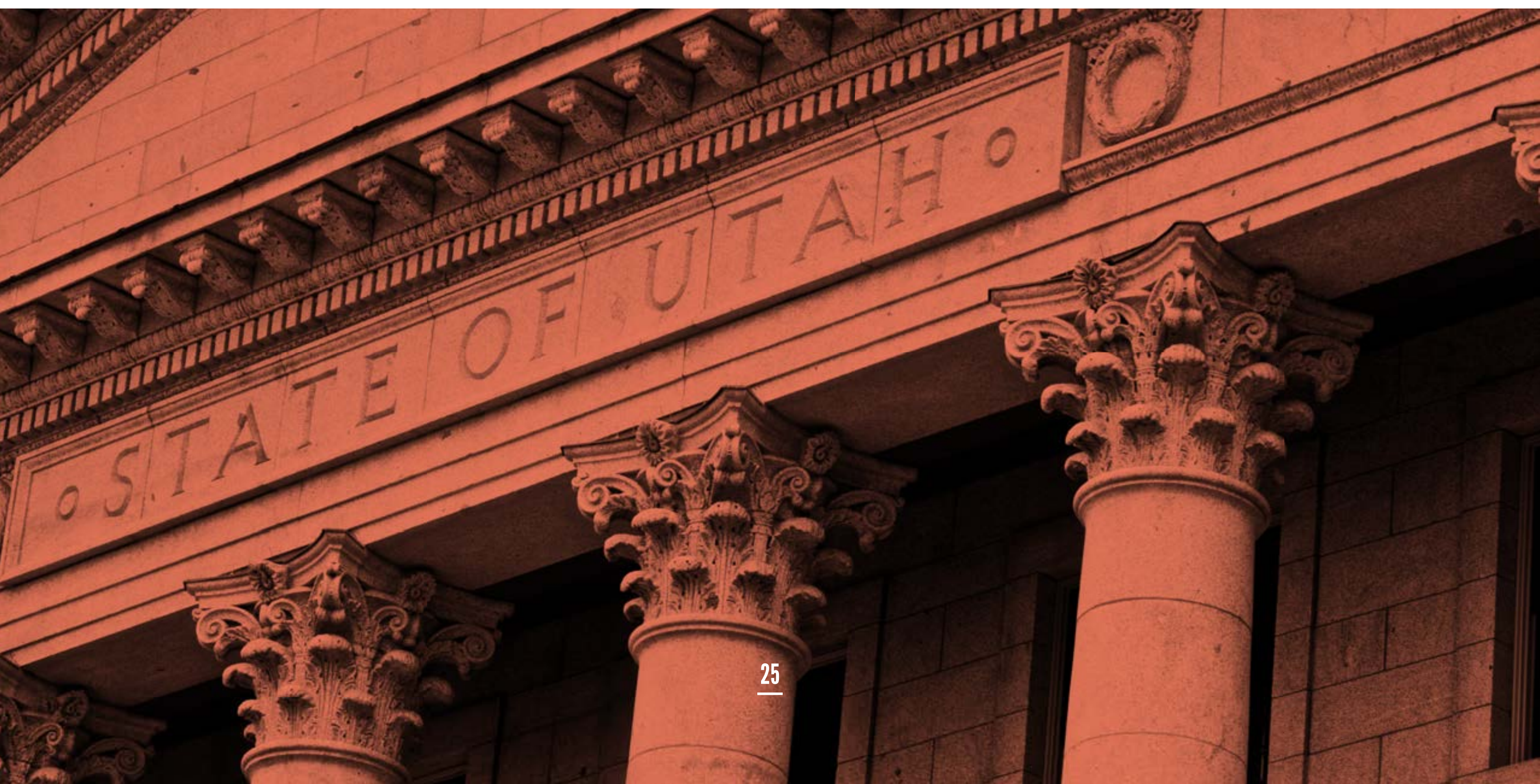
Another defender opined that, "it is much better now with auto-appointment. In the old days, the parents would have to qualify. The kids had no representation at the detention hearings." Another defense attorney explained that the benefits of the new process "are being able to meet with clients and their families from the start, giving them a lot of comfort. This helps the process and makes life easier for the families."

A longtime probation officer reflected on how far the state has come during their career. "Every single child is going to have representation now. There is finally some semblance of uniformity in the state, even though it's all county contracts. Twenty years ago, there was no uniformity or guarantee of representation. It is more equitable now."

A judge described how automatic appointment has played out in their county: "I really like this system. Before, when we had to first have a hearing for determining indigency, it slowed things down and it meant a lot of kids didn't get lawyers because their parents didn't want to pay or apply. Cases run more smoothly now, and kids' rights are better protected if they have an attorney."

Another judge explained that initial concerns about the new laws have not panned out: "When the law changed, there was concern parents wouldn't hire private counsel even if they could and it would be a burden on the taxpayer's dime. It has turned out not to be so much of a concern. There has been an expansion of public defenders to cover the increased caseload, but some judges were appointing counsel on all cases anyway."

Utah's recent legislative reforms have had significant positive impact on the early appointment of counsel in most of the counties visited for this assessment. But the state, counties, and courts must ensure those reforms are being implemented consistently throughout the state and that all youth are represented by counsel at their first court hearing. The state and counties should implement systems to notify managing defenders and contracted youth defenders as soon as a decision is made to detain a youth, to ensure that counsel can then be appointed sufficiently in advance of the initial detention hearing to meet with the young person and prepare.



B. Waiver of Counsel

National best practices call for courts to safeguard the right to counsel by guarding against youth waiver of counsel. The National Council of Juvenile and Family Court Judges states that it is "vitally important that youth are represented by counsel," and considers waiver of counsel "a detrimental practice," as youth "who are not represented by counsel are not likely to effectively exercise their other due process rights."[101] The U.S. Department of Justice has asserted that children cannot knowingly and intelligently waive their right to counsel without first having a meaningful opportunity to consult with a lawyer.[102]

In Utah, youth cannot waive their right to counsel unless they have first consulted with an attorney and the court finds that the waiver is knowing and voluntary and that the youth understands the consequences of waiver.[103] This law, enacted in 2019 – along with the reforms discussed in the section above, to mandate appointment of counsel and eliminate the financial qualifications – appear to have all but eliminated waiver of counsel, at least in the counties visited for this assessment.

Asked about when youth waive counsel, nearly all court practitioners interviewed for this assessment responded "never." "Kids are never without counsel." Of those who did recall some youth waiving counsel, one interviewee estimated that "97 percent of kids have counsel." Another noted that their county has in place a system to allow a youth to consult virtually with a defense lawyer if the youth is considering waiving counsel.

"Kids are never without counsel."

A few interviewees recalled cases where it appeared that a youth's parents pushed the youth to waive their right to counsel. And several others noted that youth do not have counsel for nonjudicial adjustments and sometimes at initial detention or arraignment hearings, as discussed in the section above.

A Utah-based nonprofit organization, Voices for Utah Children, conducted court observations and court practitioner interviews for reports issued in 2019 and 2021.[104] In nearly 30 percent of the court hearings observed in 2018 for the first report, youth were not represented by defense counsel.[105] In court observations just two years later, more than 99 percent of youth were represented by counsel.[106]

Utah has recently adopted several legislative reforms that have transformed the appointment of counsel for youth in delinquency court. As a result, nearly all children are represented by defense counsel throughout the delinquency process. The state and counties should continue to support implementing the law changes, ensure that youth are represented by counsel at initial court hearings, and consider changes to the nonjudicial adjustment process to allow youth to consult with counsel. Utah juvenile court judges must ensure that children and parents alike understand that it is the youth's right to counsel and that only the youth may make a voluntary and informed decision to waive that right.

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101 NCJFCJ Enhanced Youth Justice Guidelines, Ch. III, *supra* note 92, at 24.

102 U.S. Statement of Interest, N.P. v. Georgia, *supra* note 7, at 1.

103 Utah Code Ann. § 78B-22-204; Utah R. Juv. P. 26(c).

104 *See* Voices for Utah Child. & The Univ. of Utah S.J. Quinney Coll. of L., …And Justice for all Kids: A Child's Right to "the Guiding Hand of Counsel" and the State of Defense Representation for Children in Utah's Juvenile Courts (2019) [hereinafter Voices for Utah Child., Justice for All Kids]; Voices for Utah Child., Who's Helping Kids in Court?: How New Policies are Impacting Utah Children's Right to A Defense Attorney In Juvenile Delinquency Court (2021) [hereinafter Voices for Utah Child., Who's Helping Kids in Court?].

105 Voices for Utah Child., Justice for All Kids, *supra* note 104, at 34.

106 Voices for Utah Child., Who's Helping Kids in Court?, *supra* note 104, at 6.

C. Client Contact & Communication

The attorney-client relationship is fundamental to effective representation. Early and frequent contacts are important to enable the attorney to build rapport, confidence, and trust with the youth.[107] "Attorneys representing children must . . . build a trust-based attorney-client relationship. Without that relationship, they cannot satisfy their responsibilities as counsel."[108]

Prior to the first court appearance, attorneys must interview clients as soon as possible.[109] In that preliminary conversation, an attorney's job encompasses a variety of objectives: the attorney should inform the youth of the nature of the allegations and possible consequences; describe their role as an attorney, including an explanation of attorney-client privilege and confidentiality; assess the client's most urgent requests and questions; provide an overview of the case; explain what to expect in court; describe relevant pre-trial release conditions, if applicable; and provide contact information and schedule the next client meeting.[110] Whether the client is detained or released to the community, the initial meeting should be in a confidential setting.[111]

Thereafter, regular contact with child clients is crucial to ensuring youth have an understanding of the proceedings against them.[112] Ongoing client communication is also essential to obtaining key information for locating witnesses; preserving evidence; obtaining information necessary for potential motions; ascertaining the client's mental and physical health, including competence to stand trial or mental state at the time of the alleged offense; obtaining records and delinquency history; and gathering information regarding how the child was treated by investigating agencies, arresting officers, or facility staff.[113] Defense counsel must be aware of the unique characteristics of each client and take the time needed not only to learn about the child's strengths and vulnerabilities, but also to integrate those into the case strategy at every step in the representation.[114]

Defense attorneys should thoroughly prepare youth for what to expect in advance of any hearing and review what happened during the hearing with clients afterward, providing them with ample time to ask questions and raise any concerns.[115] Communication outside of the courtroom is essential to effectively engaging youth in their defense.[116] Youth should have a safe and confidential environment and sufficient time in which to speak with their lawyer and digest the information discussed.[117]

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107 National Youth Defense Standards, *supra* note 17, at 34-36 (outlining the importance of communicating with the client as soon and as often as possible in Standard 2.1: Role of Juvenile Defense Counsel at Initial Client Contact).

108 U.S. Statement of Interest, N.P. v. Georgia, *supra* note 7, at 12.

109 National Youth Defense Standards, *supra* note 17, at 23-25 (addressing the necessity of appointment of counsel at the earliest stage possible in Standard 1.4: Scope of Representation).

110 *Id.* at 34-38 (listing all the issues counsel should review with the client in the initial meeting in Standard 2.1: Role of Juvenile Defense Counsel at Initial Client Contact and Standard 2.2: Explain the Attorney-Client Relationship).

111 *Id.* at 34-36 (describing the requirement to meet in a private setting to ensure confidentiality in Standard 2.1: Role of Juvenile Defense Counsel at Initial Client Contact).

112 *Id.* at 40-41 (stressing the importance of meeting regularly with client and responding promptly to client contact in Standard 2.4: Maintain Regular Contact with the Client).

113 *See id*. at 34-36, 40-41 (Standard 2.1: Role of Juvenile Defense Counsel at Initial Client Contact and Standard 2.4: Maintain Regular Contact with the Client).

114 *Id.* at 34-36 (Standard 2.1: Role of Juvenile Defense Counsel at Initial Client Contact).

115 *See id.* at 40-41 (Standard 2.4: Maintain Regular Contact with the Client).

116 *See id.*

117 *Id.* at 34, 40-41 (Standard 2.1: Role of Juvenile Defense Counsel at Initial Client Contact and Standard 2.4: Maintain Regular Contact with the Client).

Effective communication with youth also requires communicating in a way that is productive and useful for the client. National standards emphasize that attorneys should use developmentally appropriate language to communicate with youth clients throughout the case.[118]

Counsel must "work to overcome barriers to effective communication by being sensitive to difference, communicating in a developmentally appropriate manner . . . and taking time to ensure the client has fully understood the communication."[119] Youth defenders must be sensitive and competent in communicating with young clients who come from different socioeconomic, racial, and ethnic backgrounds than their own or whose gender or sexual orientation identities are different from their own.

Utah's Youth Defense Principles explain that a youth defender's responsibilities include: "regular, developmentally appropriate communication sufficient to enable: the attorney's understanding of the client's expressed wishes; the client's understanding of the allegations, court proceedings, case developments, available evidence, likelihood that the allegations would be found true at trial, and likely dispositional options; and the client's knowing and voluntary decisions regarding plea offers."[120]

Utah youth defenders also have "a responsibility to gather, in each individual case, the relevant client background information, which commonly includes education history, mental health history, medical history, immigration status, and family history."[121]

With few exceptions, assessment site visitors found that youth defenders in Utah understand their duties to meet with clients early, communicate with them often, ensure they understand the role of the defender and courtroom processes, and explain the youth's rights. Most youth defenders interviewed described meeting with clients about one week in advance of the first court hearing when youth are not detained, although a few admitted they sometimes first meet with a client "about ten or 15 minutes before the hearing."

Defenders interviewed for this assessment evidenced an understanding of the need to communicate differently with youth. One explained, "You really need to explain things more than once. Some kids are really good at repeating back what you've said, even though they don't understand. So I ask them to explain to me what they understand, not to repeat back to me." Another defender described: "I try to structure my discussion with them based on their age. I simplify when I'm with younger children and speak differently with older clients."

> ***"I make sure my clients know that 'I don't know' and 'I don't understand' are perfectly fine answers."***

A third defender explained: "I often stop and ask them, 'Does this make sense?' And I tell them, 'It's ok if you don't understand, and I need to make sure you understand everything before we go in there.' I make sure my clients know that 'I don't know' and 'I don't understand' are perfectly fine answers."

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[118] *Id.* at 43-46, 53-55, 57-58, 59-60, 82-84, 90, 108-109 (emphasizing the importance of using developmentally appropriate language and explanations in each stage of a case in Standard 2.6: Overcoming Barriers to Effective Communication with the Client; Standard 3.2: Representation of Client in Police Custody; Standard 3.5: Prepare Client and Parent for Probation Intake Interviews Prior to Initial Hearing; Standard 3.6: Role of Counsel at Arraignment; Standard 4.9: Plea Agreements; Standard 5.1: Prepare Client for Adjudicatory Hearing; Standard 6.3: Involve Client in Development of Disposition Plan and Prepare Client for the Hearing).

[119] *Id*. at 43 (Standard 2.6: Overcoming Barriers to Effective Communication with the Client).

[120] Utah Indigent Def. Comm'n. Youth Defense Principles, *supra* note 50, at 3 (Principle 2: Duties to Client).

[121] *Id*.

When asked what they discuss with clients at their first meeting, youth defenders described an appropriately wide range of topics, including explaining their role as defender, expressed-interest representation, the difference between the defender and other court actors, the concept of attorney-client privilege, the young person's rights, and what to expect throughout the court process. Defenders also described the importance of the first meeting to building rapport with their clients and learning about family dynamics. Defenders described reviewing the charges and discovery materials, if available, with their client and beginning the conversation with their client about the allegations.

Defenders reported explaining to both youth and their parents that as defense counsel, they represent the youth, not the parents. One defender said, "I make sure my clients know, 'Your parents don't have to hear this.' Especially in cases with sex offenses or where the victim may be the parent themselves." Another defender describes his role to youth clients as, "I advise, and you decide."

Many defenders interviewed for this assessment expressed a preference for conducting initial client meetings in person, but also described communicating with youth in the youth's preferred format. One explained, "The kids that can text, I will text with them directly. If they want to pop on a call, I prefer to do video calls." Another youth defender said, "Sometimes they come to my office, and we'll also meet by phone or texting. Kids love to text, and it gives me easy access to them. Sometimes we'll text just to set up an appointment, and sometimes we'll have a whole conversation over text. Technology has changed so many things."

Defenders consistently described experiencing no difficulties contacting youth who are detained. One explained: "There aren't a lot of detained kids, but the detention staff is so good with setting up video calls and in-person visits. Whatever I need, they'll arrange." Another said, "The detention center lets me call whenever. I've never had problems talking to my detained clients." A third defender reported that their local detention center will readily accommodate even weekend visits.

While most judges and prosecutors interviewed for the assessment felt that defenders generally do a good job communicating with their clients, one prosecutor remarked, "Too often, they just meet with their clients for five minutes in the hallway. Yes, they have access to an attorney but is it really quality time?"

Probation officers, however, were noticeably more critical about defense attorneys' client contact and communication. Several commented that they would like to see defenders have more contact with their clients and that too often, defenders do not meet with clients until just before court hearings. One probation officer expressed concern about a defense attorney who lives approximately two hours from the court: "One public defender is based out of [another city] and does a good job, but I've never seen them here in person even once. I think it would hold more weight if they could get here in person rather than have phone conversations. It would go a long way with the youth as well. I'd feel like someone was more vested in me if I could talk to them in person."

"I think it would hold more weight if they could get here in person rather than have phone conversations."

The youth defenders interviewed for this assessment largely appeared to understand the importance of early and ongoing age-appropriate communication with their clients. Utah's automatic appointment process appears to have considerably improved defenders' notification of appointment and ability to contact clients and families in advance of the initial court hearing. And the state's detention facilities should be commended for their understanding of young people's right to counsel and for facilitating communication between youth defenders and their clients.

It is important to understand the barriers facing youth defenders who are not meeting with their clients in advance of hearings; whether it is distance, caseloads, or other issues, it is critical they have the support needed to fulfill their obligations to their youth clients. Where a contracted defender lives far from the county in which they practice, both the defender and the county should examine whether such an arrangement allows the defender to meet their ethical duties to communicate with their clients and the youths' right to effective counsel. Additionally, to support in-person contact and communication, counties should ensure that defense contracts provide reimbursement for travel expenses for client visits.

D. Initial Proceedings

When a person is arrested by police and detained, courts must make a "prompt" determination of probable cause to justify continued detention of that person.[122] The U.S. Supreme Court clarified the meaning of "prompt" by establishing a 48-hour rule for probable cause determinations.[123] Importantly, the Court did not exclude juvenile proceedings from its holding.[124]

National judicial guidelines say that juvenile courts should "hold detention hearings on Saturday mornings for youth admitted to detention Friday afternoon or evening"[125] and that the "youth, parent, and counsel for the youth [should] meet prior to the detention or initial hearing to determine the position they will take at the hearing."[126]

Defense lawyers must prepare as best as possible for detention hearings, often with limited time, and must make probable cause arguments relative to a lack of evidence regarding a charged offense or an insufficient nexus between the client and the offense.[127] Defense counsel have a duty "to explore promptly the least restrictive form of release, the alternatives to detention, and the opportunities for detention review, at every stage of the proceedings where such an inquiry would be relevant."[128]

National standards for youth defender advocacy at the initial hearing point out that "counsel's first obligation is to preserve the client's rights."[129] Accordingly, "[c]ounsel should enter a plea of not guilty, assert constitutional rights, preserve the right to file motions, demand discovery, and set the next court date" and "preserve all of the client's options until adequate investigation, discovery, and legal research can be completed."[130]

In Utah, if a youth is admitted into a detention facility without a warrant, the court must make a probable cause determination within 24 hours of the arrest, including weekends and holidays.[131] Courts must hold a detention hearing within 48 hours, excluding weekends and holidays, of a youth's admission to

122 Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

123 Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

124 *Id.* at 58 (reasoning, "Everyone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail."); *but see*, Schall v. Martin, 467 U.S. 253, 275 (1984) (finding that a slightly longer delay may be acceptable for youth if other adequate procedural safeguards are in place).

125 NCJFCJ Enhanced Youth Justice Guidelines, Ch. III, *supra* note 92, at 22.

126 *Id.* at 23.

127 Nat'l Juv. Def. Ctr, Ten Principles for Providing Effective Defense Advocacy at Juvenile Detention Hearings 3 [hereinafter NJDC Ten Principles at Detention Hearings].

128 *Id.* at 1.

129 National Youth Defense Standards, *supra* note 17, at 59-60 (Standard 3.6: Role of Counsel at Arraignment).

130 *Id.*

131 Utah R. Juv. P. 9(b).

detention.[132] Probable cause determinations and detention hearings may occur concurrently,[133] and arraignment may occur as part of a detention hearing.[134] An arraignment must be held within 30 days of the filing of a petition or within 10 days if the youth is detained.[135]

As with appointment-of-counsel laws, Utah's detention statutes have undergone recent, significant reforms aimed at reducing the number of youth held in detention before adjudication.[136] Children under 10 cannot be held in secure detention, and children under 12 cannot be detained unless they have been charged with one of nine enumerated offenses.[137] Children 12 and older may be detained if they are charged with a felony or an enumerated list of misdemeanor offenses.[138] No youth may be detained if they are charged only with ungovernable or runaway behavior or as requiring protection due to neglect, abuse, abandonment, or dependency.[139]

Based on the results of a detention risk assessment tool, detention facility staff may admit a youth to detention, admit a youth to home detention, place a youth in an alternative detention program, or release the youth to their parent, guardian, or custodian with a promise to bring the youth to juvenile court.[140]

A court may order a detention-eligible youth to be held in secure detention only if it finds that releasing the youth to their parent or guardian "presents an unreasonable risk to public safety" and that less restrictive alternatives have been considered.[141] The court must review any order to detain a youth every seven days.[142] If a youth is ordered to home detention or an alternative detention program, the court must review that order every 15 days.[143]

1. PROBABLE CAUSE DETERMINATIONS

Based on interviews conducted for this assessment, it appears that formal court hearings to determine probable cause are exceedingly rare. Most practitioners interviewed described a process wherein a judge receives electronic notification and a statement of probable cause from the arresting law enforcement agency as soon as a youth is admitted into a detention facility. The judge reviews the charge and the probable cause statement and indicates within the electronic notification system whether they have or have not found probable cause. If a judge does not find probable cause, the detention facility releases the youth.

Defense attorneys explained that they can, and occasionally do, challenge probable cause at the initial detention hearing, since there generally is not a hearing to determine probable cause. "If I'm going to challenge probable cause, it's at the detention hearing. I haven't had any cases where we had a separate hearing to address the initial PC finding for arrest and detention."

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132 *Id*. at 9(c).
133 *Id*. at 9(e).
134 *Id*. at 9(g).
135 *Id*. at 24(a).
136 *See* The Pew Charitable Tr., Utah's 2017 Juvenile Justice Reforms Shows Early Promise 1 (2019).
137 Utah Admin. Code r. 547-13-4.
138 *Id*.
139 *Id*.
140 Utah Code Ann. § 80-6-205(1); Utah Admin. Code r. 547-13-16.
141 Utah R. Juv. P. 9(f).
142 *Id*. at 9(n).
143 *Id*.

2. DETENTION HEARINGS

When asked how often defenders argue for their client's release at the initial detention hearing, 92 percent of court practitioners interviewed for this assessment answered "always" or "often." However, while some interviewees reported that defenders present alternatives to detention, most (including defenders themselves) reported that defenders largely rely on probation to develop a safety plan for the youth to be released.

> ***"Defenders largely rely on probation to develop a safety plan for the youth to be released."***

Assessment site visitors – who observed 15 initial detention or detention review hearings for this assessment – confirmed a strong reliance on probation to develop plans that would allow youth to be released from detention. Court observations revealed detention hearings where judges and probation officers were often the most active participants, with defenders and even prosecutors saying very little. One court observer wrote, "It was unclear at first who the defense attorney was."

Site visitors observed detention hearings in two counties where the youth defender did not appear to fulfill their constitutional and ethical obligations to represent their client's expressed interests. About one hearing, a court observer wrote: "The defender advocated for the youth to *stay* in detention. The judge wanted the youth to be in a less restrictive environment, and as the judge was making arrangements for a less restrictive setting, the youth defender asked the judge to order randomized drug tests. It felt like the defender was a best-interests attorney."

About another hearing, the court observer noted: "This attorney appears to not understand the duty to advocate for the client's stated interests or their duty to advocate on behalf of their client at all. He asked for his client to be held overnight to teach him a lesson."

A probation officer who had previously worked in Salt Lake County compared the quality of representation they witnessed in their current jurisdiction: "Detention advocacy is terrible, and attorney representation is not like it was in Salt Lake County. I was spoiled, seeing the kind of advocacy by the Salt Lake attorneys for so many years."

While the current safety-plan process does result in most youth spending little to no time in detention, youth defenders have an obligation to actively engage their youth clients in the detention alternatives development process. The safety plan – and the young person's success with it – keeps youth out of detention and can set the course for the resolution of the case. The young person's expressed interests must be considered during the development of a safety plan, if the plan is to truly meet the youth's needs and if the youth is to fully understand and buy into the conditions of the plan. It is the duty of the youth defender to advocate for their client's expressed interests during this process.

It is also the duty of the youth defender to advocate for their client's expressed interests during the detention hearing. While court observers witnessed just two hearings where the youth defender did not advocate for their client's expressed interest, those instances raise a red flag indicating that there are youth defenders in Utah who do not meet the most basic constitutional and ethical duties to their young clients. Counties must ensure their youth defense delivery system is providing counsel that understands their role and responsibilities.

3. YOUTH PRESENCE AT DETENTION HEARINGS

Every person accused of a crime has a constitutional right to be present at their hearings.[144] The use of video or other remote technology, particularly in detention hearings involving youth, can be fraught with challenges that affect youth behavior and comprehension and the attorney-client relationship.[145] A "great deal of information is exchanged by not only the spoken word, but also by personal contact and observations inherent in the personal interaction generated by a personal appearance, qualities missing when an event is perceived only through the limitations of the lens of a camera or television monitor."[146]

Assessment interviews found, and court observations confirmed, that across Utah, a considerable number of juvenile court detention hearings are conducted virtually, often as part of a blanket policy or practice of a court or an individual judge. A few interviewees noted that detention hearings in their jurisdictions were virtual "because the sheriff won't transport" or "to cut down on transportation costs for the sheriff's office."

Some interviewees reported that detention hearings in their jurisdictions have always been virtual. Prior to wide adoption of videoconferencing technology during the COVID-19 pandemic, detention hearings in these localities were reportedly conducted via conference call. One interviewee reported that these conference calls were conducted "with everyone except the kid and defense attorney in the courtroom."

Others reported that all hearings, including detention hearings, had been in-person prior to the pandemic, but that detention hearings were continuing to be held via videoconference, even as most other hearings had transitioned back to in-person. A probation officer in one of these jurisdictions expressed concerns: "Youth need to participate in their defense, which is harder when you are virtual."

> ***"Youth need to participate in their defense, which is harder when you are virtual."***

A youth defender in one of these jurisdictions agreed. "The virtual detention hearings are far less effective for the youth. Virtual hearings lead to them being objectified or non-personified; they're just a face on the screen. They can't interact on the fly, they can't clarify or rebut. And if I asked for a breakout every time I needed to talk to my client, the hearing would take an hour. I think more clients are detained in virtual hearings." This defender expressed a belief that detention hearings in their county are "held virtually for convenience of the court and transport staff."

A small number of interviewees reported that their jurisdictions had transitioned back to in-person detention hearings. One probation officer explained: "The judge prefers in-person. It's nice; there's better communication among the attorneys. When it's virtual, the hearing is often the first time the kid has seen their attorney."

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[144] Kentucky v. Stincer, 482 U.S. 730, 745 (1987) ("Although the Court has emphasized that this privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow,' due process clearly requires that a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his absence.' Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.") (internal citations omitted).

[145] *See* Amend. to Fla. R. Juv. Proc. 8.100(A), 796 So. 2d 470, 473-475 (Fla. 2001) (limiting the use of videoconferencing during juvenile detention hearings).

[146] *Id.* at 474.

One defense attorney weighed the pros and cons of virtual and in-person detention hearings: "Generally, I prefer in-person because it provides an opportunity to talk to all the parties, and some families can be hard to track down. However, virtual detention hearings can be less traumatic for the youth, since they don't have to be transported in shackles. Usually we aren't with the youth in detention during a virtual hearing, though."

Another defender explained that the expanded use of videoconferencing has resulted in not being present with his client: "Before, I would be in-person at the detention center with my client. But now everyone is virtual from their offices or wherever."

Seven of the detention hearings that assessment site visitors observed for this assessment were conducted virtually. Court observers noted challenges specific to the virtual format. In hearings where the youth appeared virtually from the detention center, court observers noted that the youth was seated far away from the camera, and it was difficult for other participants to see the youth's face.

One court observer noted an informality and absence of procedure that did not seem appropriate for a detention hearing: "The defender was late to the hearing, the youth was in the detention center, the prosecutor appeared from their car, and a family member was left to advocate for the youth to come home."

At another virtual detention hearing, "The hearing started late because a youth in another hearing did not have representation. The judge's clerk told this youth defender they could just 'pop over' to the other virtual detention hearing and then return to this one after. Nothing that was said indicated that this attorney knew anything about the other child, their case, or the circumstances of their detention hearing."

Most juvenile court practitioners interviewed during this assessment noted both benefits and disadvantages to virtual hearings. As Utah grapples with the impact of virtual hearings on youth, it is important to remember that a child has a constitutional right to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."[147] And as with the waiver of any constitutional right, it must be done knowingly and intelligently by the child.

Blanket policies or practices of holding all detention hearings virtually violate youths' due process rights.

Blanket policies or practices of holding all detention hearings virtually violate youths' due process rights. Youth defenders must advise their clients about potential benefits and disadvantages of appearing in-person at detention hearings and participating remotely. Detention hearings should be conducted virtually only after a youth has knowingly and intelligently waived their constitutional right to be present, and Utah juvenile courts should revise blanket policies or practices of holding all detention hearings virtually.

[147] Kentucky v. Stincer, 482 U.S. 730, 745 (1987).

E. Case Preparation

> [W]ell-established duties [of youth defense counsel] include advocating for the client at intake and in detention hearings, investigating the prosecution's allegations and any possible defenses, seeking discovery, researching legal issues, developing and executing a negotiation strategy, preparing pre-trial motions and readying for trial, exploring alternative dispositional resources available to the client, uncovering possible client competence concerns, and providing representation following disposition and on appeal.[148]

Recognizing that a delinquency proceeding for a child can be "comparable in seriousness to a felony prosecution," the U.S. Supreme Court explained: "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[149]

In all delinquency cases, information about evidence, witnesses, and defenses is necessary to aid the client in the decision whether to plead guilty or go to trial. It is the lawyer's duty to conduct prompt investigation and to "[e]xplore all avenues leading to facts concerning responsibility for the acts or conditions alleged. . . ."[150] "The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities," and the "duty to investigate exists regardless of client's admissions. . . ."[151]

"A case should not go to trial . . . without a prosecutor and counsel for the youth who are qualified and who have exercised due diligence in preparing for the proceeding."[152] Prior to trial, counsel must have "investigated all circumstances of the allegations," "sought discovery," "requested appointment of an investigator or expert witness . . . [as] necessary to protect the youth's rights," and "informed the youth of the nature of the proceedings, the youth's rights, and the consequences if the youth is adjudicated."[153]

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[148] U.S. Statement of Interest, N.P. v. Georgia, *supra* note 7, at 12.

[149] *In re* Gault, 387 U.S. 1, 36 (1967).

[150] IJA-ABA Standards Relating to Counsel for Private Parties, *supra* note 64, at 103 (Standard 4.3: Investigation and preparation).

[151] *Id.*

[152] Nat'l Council of Juv. and Fam. Ct. Judges, Enhanced Juvenile Justice Guidelines, Ch. VI: Trial/Adjudication Hearing 4 (2018).

[153] *Id.*

Thorough preparation is invaluable. In addition to aiding in the client's decision to enter an admission, accept a plea deal, or go to trial, information gathered through discovery and investigation can persuade the government to drop the case altogether or dismiss certain charges. Without investigating the case or pursuing all available discovery from the government, defenders are unable to effectively advise clients about plea offers or taking the case to trial.

Thorough preparation is invaluable.

Utah's Rules of Professional Conduct specify that: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."[154]

Utah's Youth Defense Principles direct youth defenders to "pursue available evidence through discovery and investigation; examine and review all available evidence; file appropriate motions; . . . [and] use expert and other defense resources, as appropriate . . . ."[155]

1. DISCOVERY

The government is required to provide the defense with certain information through discovery,[156] and defense attorneys have a corresponding responsibility to request this information and pursue it, through litigation when necessary, when it is not provided in accordance with the law.[157] National and state youth defender performance standards also demand that defenders challenge issues regarding discovery obligations.[158]

Young people in Utah have the right to receive a copy of the petition or the criminal information.[159] Discovery in delinquency cases is governed by Rule 16 of the Utah Rules of Criminal Procedure.[160] Under Rule 16, prosecutors have a continuing duty to disclose all statements, reports, results of any tests or examinations, and all evidence favorable to the defendant.[161] Upon request, the prosecutor must obtain and disclose any such materials that are in the possession of another governmental agency.[162]

Youth defenders interviewed for this assessment reported varying experiences with the discovery process. Some reported "a very open-file policy" where the prosecutor's office readily shares discoverable materials. One defender said, "We get initial discovery off the bat. We get police records, etc. They're good at getting me what I need." And another explained, "The prosecutor always sends the police reports, case history, and petition automatically. I just email and request anything else."

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154 UTAH R. PROF. CONDUCT 1.1, cmt. 5.

155 UTAH INDIGENT DEF. COMM'N. YOUTH DEFENSE PRINCIPLES, *supra* note 50, at 5 (Principle 6: Addressing the Allegations).

156 Fisher v. Angelozzi, 285 Or. App. 541, 547-548 (2017) (citing Brady v. Maryland, 373 U.S. 83 (1963) and recognizing that prosecutors have a separate duty under the U.S. Constitution "to disclose evidence that is favorable to the defense and material to guilt or sentencing."); Kyles v. Whitley, 514 U.S. 419, 437 (1995) (noting that an "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

157 NATIONAL YOUTH DEFENSE STANDARDS, *supra* note 17, at 68-69, 74-76, 77-78 (outlining duties of counsel as it relates to discovery and fact investigation in: Standard 4.1: Investigate Facts of the Case; Standard 4.5: Seek Discovery Generally; Standard 4.6: Seek Discovery from Law Enforcement).

158 *Id*. at 74-76 (Standard 4.5: Seek Discovery Generally); *see, e.g.*, OR. STATE BAR, SPECIFIC STANDARDS FOR REPRESENTATION IN CRIMINAL AND JUVENILE DELINQUENCY CASES 23-25 (2014) (Standard 5.1: Pretrial Motions and Notice).

159 UTAH CODE ANN. § 80-6-603(1)(c).

160 UTAH R. JUV. P. 20(a).

161 UTAH R. CRIM. P. 16(a).

162 *Id*.

A few defense attorneys described specific difficulties obtaining footage from law enforcement body-worn cameras: "Sometimes it takes weeks to get certain discovery like bodycam footage." A judge noted that "Law enforcement's ability to turn over evidence has gotten worse. Now it's normal to have three pretrials [due to discovery delays]."

Some youth defenders described consistent challenges with the discovery process. One explained: "When we get an appointment order, I ask the prosecutor's office for discovery. They usually only send the police report, and I have to make repeated requests for supplemental reports." Another defender described it as "a systemic problem in both adult and juvenile court. And delay in discovery delays the case, too."

A judge confirmed: "Discovery causes delays."

"Discovery causes delays."

Utah prosecutors must fulfill their continuing duty under the U.S. and Utah constitutions and Utah Rules of Criminal Procedure to disclose all evidence favorable to the defense and other enumerated materials. Where prosecutors do not meet their discovery duties, youth defenders should consistently file motions to compel, and juvenile courts should hold the state accountable to ensure compliance with affirmative mandatory disclosures within specific timelines. Where policy and/or practice reform is necessary to allow for timely disclosure of law enforcement body-worn camera evidence, court practitioners should work together to achieve those reforms.

2. INVESTIGATION

While the rules of discovery govern what the state must disclose to the defense, there is much more to understanding the full picture of a case beyond what the police or prosecution may be required to provide. Youth defenders have an obligation to conduct their own independent investigation in every case.[163]

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction . . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.[164]

Early and comprehensive investigation is necessary to thoroughly test the charges brought against the child client and to provide sound advice.[165] At least one state supreme court has found that failure to conduct investigation in a juvenile case can constitute ineffective assistance of counsel, even when the case is headed to a plea, rather than a trial.[166]

Asked how often in the past year they had used an investigator to help them in a delinquency case, half of the youth defenders interviewed for this assessment responded "never." Just one attorney responded that they "always" use an investigator to help them prepare for trial.

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[163] National Youth Defense Standards, *supra* note 17, at 68-74 (describing counsel's obligation to comprehensively investigate a case in Standard 4.1: Investigate Facts of the Case; Standard 4.3: Interview Defense and State Witnesses; Standard 4.4: Obtain the Client's Social History).

[164] Am. Bar Ass'n, Standards for Criminal Justice: Prosecution and Defense Function 9 (3rd ed. 1993) (§ 4-4.1 Duty to Investigate).

[165] National Youth Defense Standards, *supra* note 17, at 68-69 (Standard 4.1: Investigate Facts of the Case).

[166] *See* State v. A.N.J., 225 P.3d 956 (Wash. 2010).

When asked whether there are any obstacles to hiring an investigator, several defenders identified funding. One defender said that when they use an investigator, they "have to prepay and be reimbursed." Another explained, "If I wanted one, I'd have to find one and retain them myself. I wish I had someone more available." A third defender agreed: "We need a better way to go about getting experts and investigators without having to front the money for few months."

> ***"We need a better way to go about getting experts and investigators without having to front the money for few months."***

A defender who practices in a county where IDC recently contracted with a managing defender, however, reported no difficulties: "I can call [the managing defender] and they'll get me an investigator easy."

Based on interviews conducted for this assessment, it appears that youth defenders in Utah are doing very little independent investigation of their delinquency cases. One defender explained, "I don't let my clients enter a plea until I've investigated," but then described their investigation as "reading the police report and interviewing parents." Another described the investigation they do as "reviewing the evidence provided in discovery."

One defender explained, "I don't ever do investigation in my cases because I always get good plea offers from the prosecutor." (It is important to note that this defender works in a county where the prosecutor is responsible for contracting with defense counsel, an issue discussed in greater detail later in this report, in section II. C. 1. Independent Representation.)

Youth defenders should receive training to understand and support their duty to independently investigate their cases. Defenders have a responsibility to investigate that goes far beyond simply reviewing the information included in a police report and disclosed by the state through discovery. Without conducting an independent investigation, a defense attorney cannot ethically gauge whether a plea deal offered by the state is actually good for their client. Counties and the state should ensure defenders have access and upfront funding to hire investigators at government expense.

3. MOTIONS PRACTICE

A crucial part of case preparation is filing appropriate motions. This can include a vast range of motions, such as challenges to pretrial detention or conditions of pretrial release, challenges to the sufficiency of the petition, discovery motions, motions to suppress evidence, competency challenges, and numerous others.[167] Motions are integral to zealous advocacy and protecting a client's rights.

Asked how often they filed pre-trial motions during the prior year, nearly 60 percent of youth defenders interviewed for this assessment responded "sometimes." The other 40 percent responded "seldom" or "never."

A judge explained that Utah's move away from secure facilities impacted how cases are litigated: "In 2018, there was a major shift. Pretrial motions practice died with those changes. Secure care has become so limited; the state rarely asks for it anymore and cases resolve so much more quickly. Unless a kid is going to secure care, cases usually settle really fast."

[167] National Youth Defense Standards, *supra* note 17, at 79-82 (Standard 4.7: Represent the Client through Pre-Trial Motion Practice and Standard 4.8: Advocate at Pre-Trial Motion Hearings).

In many counties, pre-trial issues are reportedly handled informally. One defender said, "A lot of things are resolved via discussion with the prosecutor. I point out the issues and they think about it and get back to me." One judge confirmed: "Defenders and prosecutors, they have relationships, they talk about issues. There aren't formal motions, but it works out in the background."

One defender noted the power of filing motions when necessary: "Every time I do file, the prosecutor dismisses or offers me an amazing deal."

"Every time I do file, the prosecutor dismisses or offers me an amazing deal."

One judge said that in their county, defense "attorneys file often because they do not get along with prosecutors." Another judge opined that "Newer lawyers are making oral motions that should be in writing."

When asked what types of motions are filed, defenders and judges in counties that reported problems with discovery unsurprisingly reported discovery motions as among the most common. "There are a lot of specific motions for discovery. They want all the evidence before making a decision."

Across counties, interviewees frequently mentioned motions regarding competency, *Miranda*, and suppression. One judge said that in their courtroom, "99 percent of the motions are about *Miranda* issues."

In counties where there is considerable motions practice regarding discovery or *Miranda* issues, court practitioners should work toward systemic reforms to address shortcomings identified across individual cases. Defenders who regularly make oral motions in court should consider filing written motions to create a more robust record. And youth defenders across the state should access resources provided by the IDC to improve their motions practice. (For more information about these supportive services, see Section I. Appeals, below.)

4. EXPERTS

Defending young people requires insight into a host of specialized areas of expertise, such as the science of child and adolescent development, special education, language and contextual comprehension, adolescent mental health and emotional status, and youth-related competency, to name just a few. Experts in these areas can be useful in motions practice, in litigating facts or issues at trial, and as mitigation at disposition or to help with developing targeted and appropriate disposition plans.

Zealous and effective youth defense advocacy requires that attorneys consider and seek out experts and other professionals necessary for trial preparation, evaluation of clients, and testing of physical evidence, where appropriate.[168] Experts should be utilized not just for trial testimony, but in cases involving a youth's competence,[169] to ensure effective communication with a client,[170] for help investigating and

[168] National Youth Defense Standards, *supra* note 17, at 21-23 (describing a counsel's duty to consult with relevant experts, when appropriate in Standard 1.3: Specialized Training Requirements for Juvenile Defense).

[169] *Id.* at 43-46 (describing the obligation to use professional experts to assess a youth's competency and full understanding of court proceedings in Standard 2.6: Overcoming Barriers to Effective Communication with the Client).

[170] *Id.*

addressing mistreatment in youth facilities,[171] and for mitigation and advocacy surrounding particular programing at disposition, among other considerations.[172]

Cases involving youth are often more complex than the individual charge may suggest. Given how developmental science, disability, and competency can affect everything — from detention, to *mens rea*, to mitigation, to identifying the most effective disposition plan — experts are vital to help both defense attorneys and the courts understand the full context of a young person within the case.

Asked how often they had used an expert in a delinquency proceeding during the prior year, 40 percent of youth defenders interviewed responded "never," 20 percent said "seldom," and 40 percent said "sometimes."

Throughout much of the state, defenders noted challenges finding experts when they wanted them. One explained, "I don't think there are enough experts." Another said, "It's a small town and it's hard to obtain an expert."

The funding of experts arose as a particular concern. Assessment site visitors learned that in many counties, the defense's expert budget is controlled by the county prosecutor's office, a clear and alarming conflict of interest.

In many counties, the defense's expert budget is controlled by the county prosecutor's office, a clear and alarming conflict of interest.

As with investigators, counties with managing defenders reported improvements. One defender explained, "Expert expenses are now funded much better. The county hired a fulltime defender manager that we can go to if we need money for experts."

Utah and its counties must immediately end the practice of housing defense expert budgets in county prosecutor offices. Budgets for experts, investigators, and other defense expenses should be housed with the IDC, its contracted county-based managing defenders, or a neutral office within county government.

There appears to be considerable room for improvement across Utah and across legal system practitioners regarding the case preparation process in delinquency proceedings. Reforms to Utah's juvenile legal system that have resulted in fewer youth being formally processed through court, detained, or committed to secure facilities do not relieve youth defenders of their responsibility to test the state's evidence.

[171] *Id.* at 48-50 (Standard 2.8: Obligation to Investigate and Address Custodial Mistreatment).

[172] *Id.* at 112-114 (Standard 6.7: Advocate for the Client's Legal and Procedural Rights at the Disposition Hearing).

F. Adjudication & Plea Hearings

> When no motions or appeals are filed, when no independent investigation takes place, when the actions of the police go unexamined, when all but a handful of cases result in a guilty plea to all counts and when [probation]-recommended dispositions are almost always accepted without challenge, the only possible conclusion is that children . . . do not receive adequate or effective representation in delinquency proceedings, in violation of the Constitution.[173]

A youth defender must zealously advocate for the expressed interests of their client.[174] While other actors in the juvenile court system have a responsibility to pursue the "best interests" of the child, the youth defense attorney is the sole actor whose job is to advocate for the child's perspective. If a child's attorney does not abide by their obligation to provide expressed-interest advocacy, the youth is deprived of their fundamental right to counsel.[175] This role of the youth defender as an expressed-interest advocate is in line with the constitutional mandate for a child's right to an attorney as set forth in *In re Gault*,[176] as well as national best practices.[177]

Although an attorney's job is to advise and counsel, the ultimate decision must be the client's as to whether to accept a plea offer or proceed to trial, and that choice must be respected.[178]

1. PLEAS

Youth defenders must work with their clients to understand their goals and expectations prior to engaging in plea discussions[179] and must convey any offers made by the prosecution, just as in an adult case.[180] Utah's Youth Defense Principles state that defenders should "advise the client on the strengths and weaknesses of the state's case and on all implications of a plea offer, including direct and collateral consequences of accepting the plea offer."[181]

Youth in Utah may enter a denial, admission, or plea of no contest.[182] If a youth enters a denial, the court must set the case for trial or a pre-trial conference.[183] If a youth enters an admission, the court may opt to delay entry of the admission and impose conditions; if the youth successfully completes the conditions, the court must dismiss the petition.[184] If the youth does not successfully complete the conditions or if the court does not opt to delay entry of the admission, the court orders a disposition.[185]

[173] C.R. Div., U.S. Dep't of Just., Investigation of the St. Louis County Family Court, St. Louis, Missouri 17 (2015).

[174] *Id*. at 19-21 (Standard 1.2: Elicit and Represent Client's Stated Interests).

[175] *See* U.S. Statement of Interest in N.P., *supra* note 7, at 7; *see also* Anders v. California, 386 U.S. 738, 744 (1967).

[176] *See In re* Gault, 387 U.S. 1, 36 (1967).

[177] *See generally Model Rules of Professional Conduct, supra* note 16, (outlining the following key ethical duties of counsel: Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer; Rule 1.3: Diligence; Rule 1.4: Communications; Rule 1.8: Conflict of Interest—Current Clients; Rule 1.14: Client with Diminished Capacity).

[178] National Youth Defense Standards, *supra* note 17, at 82-84 (Standard 4.9: Plea Agreements).

[179] *Id*. at 19-21, 82-84 (Standard 1.2: Elicit and Represent the Client's Stated Interests and Standard 4.9: Plea Agreements).

[180] *Id.* at 82-84 (Standard 4.9: Plea Agreements); *see* Missouri v. Frye, 566 U.S. 134 (2012).

[181] Utah Indigent Def. Comm'n. Youth Defense Principles, *supra* note 50, at 5 (Principle 6: Addressing the Allegations).

[182] Utah Code Ann. § 80-6-306(1); Utah R. Juv. P. 25(a).

[183] Utah R. Juv. P. 25(b).

[184] Utah Code Ann. § 80-6-306(2); Utah R. Juv. P. 25(e).

[185] Utah Code Ann. § 80-6-306(2)(c).

Before accepting an admission or plea, the court must find that the plea is voluntary, that the youth has knowingly waived any rights not exercised, that the youth has been advised of any possible consequences, and that there is a factual basis for the plea.[186] A youth may enter a plea of no contest, in which the youth neither admits guilt nor challenges the allegations, with the consent of the juvenile court, which then proceeds as though an admission had been entered.[187]

The vast majority of juvenile delinquency cases in Utah are resolved with pleas. Asked how often youth entered pleas in the prior year, 96 percent of court practitioners interviewed for this assessment answered "always" or "often." A judge estimated that in their courtroom, "99 percent of cases that are not dismissed by the prosecutor are resolved by guilty pleas."

Asked what safeguards are in place to ensure youth understand the plea process and the implications of an adjudication, judges and prosecutors alike stressed the importance of young people being represented by counsel. One prosecutor described the improvements since youth have been guaranteed counsel: "The biggest safeguard is that 100 percent of youth have a lawyer. I am talking to a defender who understands what I'm saying and can explain it to their client. Before, I would talk to unrepresented kids who had no idea what I was talking about. They said they understood, but I wasn't sure."

"The biggest safeguard is that 100 percent of youth have a lawyer."

Defenders interviewed for this assessment consistently expressed an understanding that the choice to plea must be made by their clients, and most reported advising youth not to plea at the initial hearing. One defender explained, "If they have a knee-jerk reaction that they want to plea, I will have a conversation with them about pros and cons. Talk about the evidence and my opinion and let them know it's their call."

Another described that "Sometimes clients just want to plea immediately, but I tell them I need to review discovery in order to advise them. I advise against pleading right away and ask for time to go over the info, talk about the case with the prosecutor and probation to see what we can do to resolve it. I talk about collateral consequences and pitfalls of resolving too quickly."

And a third defender explained: "Pleas can happen any time. I've had kids come in at first appearance and want to take the offer because it's too stressful for them. I always advise them that we need to complete discovery before I can advise them on taking the plea or not."

One defender, however, reported allowing their clients to plead at the initial hearing. "The day of arraignment is usually when clients plead guilty. I review discovery with them and ask them to tell me what happened in their words. Then I ask the prosecutor for a plea deal immediately."

Judges interviewed for this assessment reported that, generally, "defense attorneys do a good job prepping for pleas. They make sure pleas meet all the elements there for the plea to be accepted." However, several judges also expressed concerns about how well defense attorneys communicate with clients before plea hearings. One judge explained that defenders "are clearly prepared on legal end, it's just whether they've been able to communicate with the client."

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[186] Utah R. Juv. P. 25(c).

[187] Utah Code Ann. § 80-6-306(1)(c); Utah Code Ann. § 77-13-2(3).

Another said that in their courtroom, it appears that defenders have "not always met with their client prior to hearings. There's a lot of discussion right before. The kids are having to make too-quick decisions; defense counsel needs to slow the process down for them."

"The kids are having to make too-quick decisions; defense counsel needs to slow the process down for them."

A third judge expressed concerns that, even though they and the defender review a child's rights with them, "Most times, young people don't actually know what they're giving up."

2. TRIALS

If a client chooses to proceed to trial, the attorney must engage in the full range of trial practice, including filing appropriate motions,[188] preparing witness testimony,[189] making appropriate motions and objections during the trial,[190] cross-examining government witnesses, and presenting defense witnesses and other evidence necessary for an adequate defense.[191]

Utah's Youth Defense Principles instruct youth defenders to "adjudicate the allegations against the client unless the plea offer is consistent with the client's expressed wishes and represents a benefit to the client."[192]

Asked how often there were delinquency trials in the prior year, 86 percent of juvenile court practitioners interviewed for this assessment answered "seldom" or "never."

When a case does go to trial, judges reported being generally satisfied with youth defenders' understanding of and ability to argue juvenile-specific law. One judge explained that "They come prepared, they make appropriate objections, they point out holes in the state's case, they file motions to dismiss at the end of the state's case." Another judge said it is "clear they have met with their client and witnesses. Often, the defense is better prepared than the state."

"Sometimes I can have a hearing and everyone could be a cardboard cutout. No one is giving me anything. I would love to get input, ideas, creative lawyering, context for the child's circumstances."

One judge, however, wanted to see more zealous advocacy in their courtroom: "I'd love to see some action. Sometimes I can have a hearing and everyone could be a cardboard cutout. No one is giving me anything. I would love to get input, ideas, creative lawyering, context for the child's circumstances."

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188 National Youth Defense Standards, *supra* note 17, at 79-80 (Standard 4.7: Represent the Client through Pre-Trial Motion Practice).

189 *Id.* at 90-92 (Standard 5.2: Prepare Evidence and Witness Examinations Prior to Adjudicatory Hearing).

190 *Id.* at 92-94, 96-100 (Standard 5.3: Fact-Finding Forum-Judge or Jury; Standard 5.6: Challenging Evidence and Preserving the Record; Standard 5.8: Prepare and Examine Non-Client Defense Witnesses).

191 *Id.* at 95-96, 98-102 (Standard 5.5: Cross-Examination; Standard 5.8: Prepare and Examine Non-Client Defense Witnesses; Standard 5.9: Client's Testimony).

192 Utah Indigent Def. Comm'n. Youth Defense Principles, *supra* note 50, at 5 (Principle 6: Addressing the Allegations).

Interviewees with experience across counties also distinguished between the level of advocacy in Salt Lake County versus the rest of the state: "Motion practice is more vigorous here [in Salt Lake County], more trials, much more zealous here than in other counties." Asked how youth defenders could better represent their clients, a judge in another county responded, "They need more education on legislative updates, to make more arguments on restitution, more motion work, they need to challenge probable cause, do more investigation."

Youth defenders in Utah appear to ensure their clients' pleas meet necessary statutory elements and are legally sound, but must be equally dedicated to communicating with their young clients before plea hearings. Utah must ensure that youth defender caseloads and pay structure support defenders' spending considerable time communicating with youth and their families to ensure a thorough understanding of the consequences of pleading, including the rights young people waive. The state must also ensure youth defenders have access to training in trial advocacy skills and that contract pay structures do not provide financial disincentives for taking cases to trial.

G. Disposition

Dispositional advocacy must be based on thorough and effective planning with youth clients and, as much as possible within the contours of the attorney-client relationship, with the client's family. Although client goals may be quite different from the recommendations of other parties, the "role of counsel at disposition is essentially the same as at earlier stages of the proceedings: to advocate, within the bounds of the law, the best outcome available under the circumstances according to the client's view of the matter."[193]

Disposition planning should begin at the first meeting between defender and client. Good disposition planning can result in client-driven outcomes, stronger advocacy, and better-informed plea negotiations. The attorney should also be aware of all of the possible disposition options and identify the least restrictive options to discuss with the child.[194] To do this satisfactorily, the attorney must be familiar with the client's history, current goals and options, available programs, alternatives to placement, and the collateral consequences of adjudication.[195] Counsel should discuss and explain disposition procedures, as well as any probation or commitment plans proposed by the prosecutor or probation officer to the child.[196]

At the disposition hearing, the defense attorney must advocate for the client's wishes, challenging any recommendations submitted to the court that are adverse to the client's stated interests.[197] After the hearing, the defender must explain the disposition order to the client, clarifying and emphasizing the court's instructions under that order, and informing the client of the potential consequences of not following the order.[198] The attorney must also advise the youth of the right to appeal a disposition.[199]

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193 IJA-ABA Standards Relating to Counsel for Private Parties, *supra* note 64, at 179 (Commentary in Standard 9.3(a): Counseling prior to disposition).

194 National Youth Defense Standards, *supra* note 17, at 106-107 (Standard 6.2: Familiarity with the Range of Disposition Alternatives).

195 *Id.*

196 *Id.* at 108-109 (Standard 6.3: Involve Client in Development of Disposition Plan and Prepare Client for the Hearing).

197 *Id.* at 110-111, 112-114 (Standard 6.5: Prepare for, Review, and Challenge the Pre-Disposition Report and Standard 6.7: Advocate for the Client's Legal and Procedural Rights at the Disposition Hearing).

198 *Id.* at 114-116 (Standard 6.8: Review Final Disposition Plan and Collateral Consequences of Disposition).

199 *Id*. at 121-122 (Standard 7.2: Disclose the Right to Appeal).

Utah recognizes dispositional advocacy as "a core aspect of delinquency defense."[200] The Youth Defense Principles require youth defenders to:

- "advocate for treatment and placements that serve the needs of the individual client, leverage pre-existing strengths and supports, and are consistent with the client's expressed interests;
- actively research all available dispositional options, not limited to only those proposed by the probation department;
- present meaningful dispositional alternatives for the court's consideration, when available; and
- ensure court-ordered services are delivered in the least restrictive setting possible."[201]

As with detention hearings, Utah's probation officers play a significant role in disposition planning and hearings. Interviewees across roles widely reported, and court observations of disposition hearings confirmed, that defenders rely heavily on assessments and planning done by probation, regularly work with probation during the planning process, and will argue against probation recommendations at disposition hearings when these recommendations counter the interests of their client. Whether defenders offer alternatives or simply argue against certain recommendations appears to vary across counties.

One probation officer described, "We don't blindside the defense. We let them know the recommendations beforehand, so the kids come in prepared. Sometimes they've written up their own plan, which we encourage." Another said that defense attorneys "always work with us to find available resources and alternatives."

A defense attorney explained that they "try to present alternatives to the probation officer and convince them to change their recommendation in advance. This works much better than challenging it in court." Another youth defender described, "The probation officer files a report, in conjunction with the prosecutor, with recommendations. So I'll know those ahead of time and can decide whether we'll join or object to the recommendations. A lot of time we can get to an agreement. If we can't, I'll introduce my own evidence of why I don't agree."

Several youth defenders noted fewer challenges at disposition due to recent reforms. "I don't challenge many of probation's recommendations because they're usually reasonable and there are a lot of assessments by psychologists and therapists."

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200 Utah Indigent Def. Comm'n. Youth Defense Principles, *supra* note 50, at 5 (Principle 7: Dispositional Advocacy).

201 *Id*.

Youth defenders were widely reported to be well prepared for disposition hearings. A probation officer said that at disposition hearings in their county, the youth defenders "have read the assessment reports. During the hearing, they offer info from the assessment and sometimes offer alternatives. Alternatives are limited here, but they know them." Another said, "Attorneys are good at advocating at this stage, for example, if they think counseling won't be beneficial or will be a hardship on the family." A third probation officer added that "The defense will definitely talk about things youth is doing well, their strengths, etc."

When discussing disposition hearings, a judge explained, "If there is going to be courtroom argument, this is when it occurs. Mostly these are fact-based arguments, and they also will argue that the recommended disposition is not the least restrictive alternative."

Another judge noted a need for additional information about the children in their court: "If I had a wish list, it would be for more social work resources to help raise issues with educational deficits, homelessness, poverty."

"If I had a wish list, it would be for more social work resources."

Where secure placement is an option, interviewees generally described strong defender advocacy against commitment. A prosecutor reported that "There will always be a disagreement when the recommendation is release to JJYS custody." And a judge described youth defenders as "Zealous advocates, especially against out-of-home placement."

Youth defenders and others described regular advocacy against restitution and fees. One judge said that defenders "try not to create more economic hardship for families. They always ask me to waive the $150 DNA fee."

Across the state, disposition hearings were reported to be the hearings at which youth defenders were most likely to zealously advocate. Utah should invest in social workers within its youth defense system to enhance defenders' disposition advocacy, improve dispositional options and outcomes, and reduce reliance on probation staff and the court.

H. Post-Disposition

"[P]ost-disposition is a critical stage in delinquency proceedings for which counsel should be provided."[202]

The post-disposition phase is often the longest period of court intervention in the lives of youth and families. It is critical that youth retain access to counsel while on probation and especially while they are removed from their homes and sent to facilities away from their family and community. To ensure youth receive adequate due process protections, national standards require that counsel continue representation after a youth is adjudicated and placed on probation or committed to the jurisdiction of the court or a state agency.[203]

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202 Investigation of the St. Louis County Family Court, St. Louis, Missouri, *supra* note 173, at 21.

203 National Youth Defense Standards, *supra* note 17, at 23-25, 120, 124-126 (Standard 1.4: Scope of Representation; Standard 7.1: Maintain Regular Contact with Client Following Disposition; Standard 7.5: Represent the Client Post-Disposition).

Comprehensive post-disposition advocacy by youth defense attorneys encompasses a wide range of in- and out-of-court advocacy, including probation/parole review or revocation hearings; motions to terminate probation early or modify conditions of probation; relief from fees and fines stemming from court involvement; conditions of confinement; institutional disciplinary hearings; ensuring probation and parole officers provide opportunities that promote youth success; access to educational, medical, or psychological services while in confinement or on probation; limiting access to and distribution of juvenile court records by moving to seal, expunge, or purge records; deregistration from offender registries; and eliminating legal and other barriers to community reentry plans.[204]

Attorneys can also offer support, advice, and encouragement to youth and monitor whether court-ordered services are being provided and are appropriate. When youth have been removed from their home and community, their attorney can facilitate a smoother transition back home by assisting in securing desired ongoing services, easing the reentry to school by ensuring educational records and credits are transferred, and working with the youth and their family to address other related issues.

Utah law specifies that once a defender is appointed to a case, they "shall provide indigent defense services for the indigent individual in all court proceedings in the matter for which the indigent defense service provider is appointed."[205] Defense systems must ensure youth "have counsel to represent them at all stages of the juvenile court proceedings."[206]

Recent reforms in Utah extended youth defenders' representation through the post-disposition phase.[207] A probation officer explained: "There was a time when defenders would represent a youth through the end of the case. Now, they represent the child through the termination of the court's jurisdiction, so they are involved in the post-disposition hearings and are present at dispositional reviews and are updated on the youth's progress and compliance." And a judge expressed their support: "Because of recent legislation, defense attorneys are always at reviews. I really like the new system. I don't want kids to feel abandoned after adjudication."

"I really like the new system. I don't want kids to feel abandoned after adjudication."

Juvenile court practitioners interviewed for this assessment largely reported that defense attorneys are almost always present at formal review hearings. Whether youth defenders are involved outside of formal court hearings varied.

Youth defenders described widely varying amounts of involvement in their clients' cases post-disposition. While all reported attending review hearings, some said they "usually meet with [their clients] five minutes before court for a review hearing," while others described much greater involvement. "If they're on probation, we'll talk about how they're doing, how things are going. When they're in custody, I watch if the goals for commitment are being followed. I probably spend 25 percent of my time working on pre-adjudication and 75 percent post-adjudication."

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204 Access Denied, *supra* note 5, at 32.

205 Utah Code Ann. § 78B-22-203(1)(b).

206 Utah Indigent Def. Comm'n. System Principles, *supra* note 49, at 3-4 (Principle 3B: Scope of Representation—Stages of the Proceedings).

207 Utah Code Ann. § 78B-22-203; Utah Code Ann. § 78B-22-204.

A probation officer described it as: “Defense attorneys are super involved in pre-trial negotiations, a little bit involved in the disposition process, and rarely involved in the review/post-disposition process unless there are new charges or we have to extend the review period.”

Defenders were reported to largely be effective advocates at post-disposition review hearings. One prosecutor said, “They are always prepared for the reviews. They’ve read the reports and they’re ready to highlight youth's successes and to discuss any negative attributes of reports.” A judge reported that “Defenders are big advocates for changing or vacating orders,” and another said that defenders in their courtroom regularly “argue for early release from probation or custody.”

One judge did express concern that youth defenders in their courtroom could be stronger advocates when youth face violations of probation. “Orders to show cause are pretty frequent. Sometimes it is willful violation, but sometimes it’s life circumstances like a transportation issue. I do wonder why defenders don’t more vigorously challenge these contempts. You can receive fines, community service, even 72 hours of detention for a contempt.”

“I do wonder why defenders don’t more vigorously challenge these contempts.”

Assessment site visitors observed 39 post-disposition hearings and witnessed widely varying quality of representation. Numerous court observers noted post-disposition hearings that were dominated by the judge and probation officer, with the youth defender and prosecutor sidelined. About the defender in one post-disposition hearing, the court observer wrote, “He is just a passenger on this train.”

At another hearing, the court observer noted: “It seemed as though the judge was more concerned about the young person having a juvenile record than the defense attorney.” And at a third hearing, “The probation officer said more in advocacy for the child than the defender.”

Where youth defenders were observed providing zealous post-disposition representation, though, they provided exceptional quality representation. About one hearing, the court observer wrote: “The defender directed the hearing. They were very attentive to their client through body language and actively listening, ready to jump in and assist client if necessary. The defender was ‘zoned in’ on client, watching his face, with a positive expression. Defender had positive exchanges and laughter with client. The defender was clear on the law and necessary procedures.”

Youth defenders were also observed skillfully navigating difficult situations, including one case where the youth did not want to go home. The court observer noted that with the defender’s advocacy, the hearing was able to end with a “good, creative outcome.”

Utah has taken a vital step toward ensuring young people’s constitutional rights through its recent reforms extending defense representation through the post-disposition period of a delinquency case. Utah should provide training to youth defenders specific to post-dispositional advocacy to ensure all youth across the state receive effective representation throughout the post-disposition phase.

I. Appeals

Appellate practice is an important part of youth defense: "A robust and expeditious juvenile appellate practice is a fundamental component of a fair and effective juvenile delinquency system."[208]

The discussion with a child about their right to appeal should occur early in the representation and throughout the case. Attorneys must explain not only potential appellate issues to their clients as the case progresses, but also the factors the client should consider in deciding whether to appeal.[209] For a child who wishes to appeal, youth defenders must file appropriate notices of appeal and either represent the client or arrange for other representation on appeal.[210]

In Utah, "any order, decree, or judgment of the juvenile court" can be appealed to the Court of Appeals.[211] Utah defense systems "must provide counsel for any first appeal of right . . . ."[212] And Utah youth defenders "must preserve and protect a client's right to appeal."[213] Under the Youth Defense Principles, a youth defender should:

- "be familiar with the rules of appellate procedure;
- preserve issues for appeal, including through motions practice and clear objections;
- counsel the client regarding appellate rights and guide the client through the decision making process regarding possible appeal;
- file the Notice of Appeal, if the client chooses to appeal; and
- cooperate with appellate counsel, if applicable."[214]

In 2020, Utah created the Indigent Appellate Defense Division (IADD) within the Office of Indigent Defense Services.[215] Among other responsibilities, IADD is tasked with providing appellate representation to youth adjudicated delinquent across much of the state.[216] In January 2021, IADD contracted with Utah Juvenile Defender Attorneys (UJDA), a Salt Lake City-based youth defense organization, to implement the Juvenile Delinquency Appellate Defense Project.[217]

A UJDA appellate youth defender described their office's philosophy:

> We actually don't file a ton of appeals. We employ a proactive defense model. We are involved in the case from the beginning — we issue-spot from the beginning of the case, from the time of the police report — which motions should be filed and what should be addressed. We work to ensure that all of the issues are preserved. Probably 80 percent of my work is trial-level. We try to avoid an appeal because they take so long; two years for an appeal is like 10 years to a child. So we prepare on the front end so that we get good outcomes from the beginning of the case.

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208 Nat'l Juv. Def. Ctr, Appeals: A Critical Check on the Juvenile Delinquency System 2 (2014).

209 National Youth Defense Standards, *supra* note 17, at 122-123 (Standard 7.3: Trial Counsel's Obligations Regarding Appeals).

210 *Id*.

211 Utah Code Ann. § 78A-6-359(1); Utah R. Juv. P. 52(a).

212 Utah Indigent Def. Comm'n. System Principles, *supra* note 49, at 5 (Principle 6: System Ensures the Right to Appeal).

213 Utah Indigent Def. Comm'n. Youth Defense Principles, *supra* note 50, at 6 (Principle 10: Appellate Representation).

214 *Id*.

215 Utah Code Ann. § 78B-22-902.

216 *See* Utah Code Ann. § 78B-22-903(1)(a) (authorizing IADD to provide appellate representation to youth in third- through sixth-class counties); *see also* Utah Code Ann. § 17-50-501 (defining what qualifies as a third- through sixth-class county); *see also Utah's 29 Counties,* Utah Ass'n of Counties, https://www.uacnet.org/utah-s-29-counties (last visited January 31, 2024) (showing that 24 of Utah's 29 counties are classified as third- through sixth- class counties).

217 Utah Indigent Def. Comm'n, Indigent Appellate Defense Division: Juvenile Delinquency Appellate Project (2021).

Through its contract with IADD, UJDA is working to implement this model across the state. UJDA provides quarterly training to youth defenders in identifying and preserving issues, weekly postings on the state's youth defender listserv with practice tips and caselaw updates, consultation with trial attorneys and assistance with motions practice, and appellate representation for youth who wish to appeal.[218]

Youth defenders from counties included in the IADD program expressed strong support for it: "Now that we have IADD, it's been amazing." They also voiced approval for the methods of the Appellate Defense Project, focusing on improving trial-level work: "There is not a lot of juvenile caselaw in Utah. The more we can appeal, the more caselaw we can get, but it's hard to get appeals when not many trials happen."

"The more we can appeal, the more caselaw we can get, but it's hard to get appeals when not many trials happen."

Utah has taken recent steps in the right direction by creating an appellate division in the IDC and dedicating resources to improving youth defense representation in the state's smaller counties. The Juvenile Delinquency Appellate Defense Project's focus on proactive defense, motions practice, and trials has the potential to improve the quality of representation across the state and positively impact youth long before the appellate process.

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[218] *Id*.

II. SYSTEMIC BARRIERS TO EFFECTIVE YOUTH DEFENSE

"When faced with severe structural limitations, even good, well-intentioned, lawyers can be forced into a position where they are, in effect, counsel in name only."[219]

Assigning a lawyer to a child is only the first step: "Frequently, even though counsel is assigned to represent youth, crushing caseloads, lack of time to investigate charges or gather critical information, and inadequate training and experience result in ineffective representation."[220]

Systemic and structural issues significantly impact youth defenders' ability to provide quality defense for their clients. Both the juvenile court system and the public defense system must value and uphold high standards of practice in juvenile courts. To adequately protect the rights of youth, a robust system of youth defense requires leadership, oversight, specialization, training, and pay and resource parity.

A. Statewide Standards & Oversight

Systems that provide defense representation to young people in delinquency proceedings must "recognize that children and adolescents are different from adults," "emphasize that youth defense counsel has an obligation to maximize each client's participation in his or her own case in order to ensure that the client understands the court process and to facilitate informed decision making by the client," and "pay special attention to providing high quality representation for the most vulnerable and over-represented groups of children in the delinquency system."[221]

To meet the constitutional mandates of *Gault*, youth defense delivery systems must uphold young people's constitutional rights by providing competent and diligent representation, recognize youth defense as a specialized area of law, provide personnel and resource parity, provide attorney oversight and monitor caseloads, systematically review attorneys according to performance guidelines and standards, and require comprehensive, ongoing training for all attorneys and staff.[222]

"[L]ack of training, supervision, and oversight of appointed counsel may engender constitutionally-infirm advocacy . . . ."

Public defense delivery systems must recognize that the representation of children is different than that of adults and must support counsel who are trained to understand and incorporate adolescent development and the other unique aspects of defending youth. These are not merely aspirational goals. "[L]ack of training, supervision, and oversight of appointed counsel may engender constitutionally-infirm advocacy . . . ."[223]

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219 U.S. Statement of Interest, N.P. v. Georgia, *supra* note 7, at 15.

220 NCJFCJ Enhanced Youth Justice Guidelines, Ch. III, *supra* note 92, at 24.

221 NJDC & NLADA Ten Core Principles, *supra* note 21, at 1.

222 *Id.* at 2.

223 Investigation of the St. Louis County Family Court, St. Louis, Missouri, *supra* note 173, at 20.

1. STANDARDS

Utah law mandates that the Utah Indigent Defense Commission "adopt core principles for an indigent defense system to ensure the effective representation of indigent individuals consistent with the requirements of the United States Constitution, the Utah Constitution, and the Utah Code . . . ."[224]

In 2017, IDC promulgated its Core System Principles for Indigent Defense Services.[225] These principles govern the systems that provide constitutionally and statutorily mandated indigent defense services in Utah, which are almost exclusively county-based contracts with individual attorneys or firms.

In 2018, IDC adopted Core Principles for Appointed Attorneys Representing Youth in Delinquency Proceedings,[226] which speak to the responsibilities of attorneys who provide youth defense services in delinquency court.

IDC's Core System Principles closely align with recognized national principles for public defense delivery systems.[227] These Core Principles and recent legislative reforms create a solid foundation for Utah's indigent defense delivery system.

Similarly, IDC's Core Principles for Appointed Attorneys Representing Youth in Delinquency Proceedings closely align with national standards[228] and provide Utah's youth defense attorneys with the basic framework needed to serve as effective, expressed-interested counsel for their young clients.

2. OVERSIGHT

IDC is also mandated to "oversee individuals and entities involved in providing indigent defense services."[229] Its ability to do so, however, is limited. An IDC employee explained: "We developed guiding principles, but we do not have a way to implement or impose them, because we only provide a small amount of money."

Since its inception, IDC has funded Managing Defender positions in counties across the state.[230] IDC defines a Managing Defender as:

> a specific indigent defense provider with the role of coordinating attorneys, staff, and resources related to providing indigent defense services in a system or across multiple indigent defense systems. This person is the central point of contact for information about the system's indigent defense services and represents the system in various contexts. This attorney should have administrative experience along with significant experience defending adults, minors, and or parents against charges in court and should be selected by a merit-based process.

[224] Utah Code Ann. § 78B-22-404(1)(a).

[225] *See generally* Utah Indigent Def. Comm'n. System Principles, *supra* note 49.

[226] *See generally* Utah Indigent Def. Comm'n. Youth Defense Principles, *supra* note 50.

[227] *See, e.g.,* NJDC & NLADA Ten Core Principles, *supra* note 21; NCJFCJ Enhanced Youth Justice Guidelines, Ch. III, *supra* note 92.

[228] *See, e.g.,* National Youth Defense Standards, *supra* note 50; NJDC Role of Juvenile Defense Counsel in Delinquency Court, *supra* note 23.

[229] Utah Code Ann. § 78B-22-404(1)(e).

[230] Utah Indigent Def. Comm'n., The Role of Managing Defender in Utah's Indigent Defense System 3 (2021).

> A managing defender oversees a system or systems, where contract attorneys are court-appointed to represent individuals in criminal and juvenile court cases. The goal of instituting a Managing Defender (MD) is to have a person to increase the organization of a system and to advocate for more accountability for the local indigent defense services for long-term and consistent constitutional compliance. With more organization in a system, the managing defender can identify improvements and developments and ensure long-term benefits to systems.[231]

Assessment site visitors interviewed eight managing defenders across Utah for this assessment and found defenders who are trying — but often struggling — to provide the oversight and leadership needed to support successful youth defense delivery systems.

One managing defender described challenges juggling their role as managing defender with courtroom work and managing their own private firm: "The managing contract pays $30k, and I also had to have one of the primary court contracts. It's a lot of work. All the attorneys who take these contracts are also managing law firms."

Another managing defender agreed: "If all I did was this job [as managing defender], it would be manageable."

Managing defenders consistently reported an inability to oversee the quality of representation provided by the contract attorneys in their counties. "The weakness of the system is there is no actual oversight. It would be great if I could get another half of a contract to actually supervise and oversee the attorneys, do performance evaluations and court observations, survey for client satisfaction, and review data."

"The weakness of the system is there is no actual oversight."

IDC personnel recognize attorney performance oversight as "an area for improvement. We surveyed managing defenders and asked if they are doing performance evaluations, but outside [two] counties, there is nothing formalized."

One managing defender described the increased difficulties of overseeing juvenile court representation, compared to overseeing attorneys providing defense services to adults: "I'm not able to do checks on the attorneys because of the private nature of the [case management] system. I can't review attorney files unless the attorney sends me information to review."

An IDC employee interviewed for this assessment recognized that managing defenders have limited ability to oversee the attorneys in their county: "Through our contracts, we can require managing attorneys to do certain things, but the independent contractors cannot be required."

Managing defenders also described a lack of ability to effect systemic change to improve youth defense in their counties. "I see it as my job to fight for my defenders, but I don't have the ability to make change at this level. One of the judges told me that they were shocked at my lack of control."

Another managing defender described their role as, "I'm the lead, but I'm not really over anybody."

[231] *Id*. at 2-3.

One managing defender explained that they felt the best way to support the contract attorneys in their county would be to provide administrative support and structure: "I do wish we could give more office, administrative, IT support. None of us went to school to run a business, and none of us are particularly good at it. I wish we didn't have to waste time on any of that stuff. We need a centralized operation. An office where attorneys can work if they want, where they can chat, collaborate, don't have to pay for office space, have someone to answer phones. We need to give attorneys a choice to cut overhead."

Another managing defender agreed: "I would love to have a centralized operation."

> ***"I would love to have a centralized operation."***

Utah has made considerable progress since the founding of IDC just eight years ago. IDC's Core System Principles and Core Principles for Appointed Attorneys Representing Youth in Delinquency Proceedings closely align with national standards and provide a solid foundation for a high-quality youth defense system. However, even the best of system standards cannot be effective if they are not enforced.

Through its contracts supporting managing defenders, it is clear that IDC recognizes the need for management and oversight of the state's county-based contract system. The current structure, however, does not appear to be providing managing defenders with the resources and support they need to provide the oversight or support necessary to ensure young people receive the high-quality representation the constitution demands.

Managing, overseeing, supporting, and evaluating contractors can be more complex than supervising employees, but effective management is possible within a contract system. Utah should look to states that effectively manage contracted youth defense counsel, including Colorado and Massachusetts,[232] which have balanced the nature of independent contractors with the need for a state's indigent defense system to have oversight authority over the quality of representation provided by those attorneys.

Under its current managing defender scheme, IDC should require initial and ongoing training in management and supervision skills for any attorney given a managing defender contract, in recognition that management requires markedly different skills than courtroom advocacy, and should ensure that attorneys who receive managing defender contracts to oversee youth defenders have experience providing representation in delinquency cases and expertise in the unique demands of representing children. IDC should also consider making managing defenders fulltime contractors or IDC employees, moving toward a regional model to support managing defenders and contract attorneys in less populated areas, and providing enhanced administrative supports to managing defenders and contract attorneys.

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[232] *See*, *e.g.*, *The Office of the Alternate Defense Counsel Overview*, Colo. Off. of the Alt. Def. Couns., https://www.coloradoadc.org/about-us (last visited March 6, 2024); *Private Counsel Division*, Mass. Comm. for Pub. Couns. Services, https://www.publiccounsel.net/pc/ (last visited March 6, 2024) (these are two examples of public defense delivery systems that contract with, oversee, and manage attorneys who provide youth defense services across their states).

B. Specialization & Youth-Specific Training

Youth defense specialization is essential to providing adequate delinquency defense to youth.[233] Delinquency cases involve a unique body of law, and outcomes have significant, lifelong implications for youth and their families. In rural communities, where caseloads are not large enough to allow for a dedicated practice in youth defense, it is nonetheless critical that anyone who takes on representation of youth develop an expertise in the practice.

Delinquency defense is a specialized practice,[234] and public defense delivery systems must provide specialized training[235] to ensure attorneys who defend young people are knowledgeable about not only the law, but also youth development, social and cultural differences, education, mental health, trauma, communicating with and effectively interviewing youth, and alternative disposition resources.[236]

> Specialization requires training and oversight to ensure that attorneys have the resources and support necessary for competent representation, including initial and on-going training on adolescent brain development and its implications for building an attorney-client relationship, protecting [youth] clients' constitutional rights, the child's relative culpability, the law of pretrial juvenile detention, dispositional resources, special education law, the collateral consequences of delinquency findings, and the ethical issues that arise in delinquency representation.[237]

The Utah IDC recognizes that: "Indigent defense encompasses distinct areas of practice: criminal defense, delinquency defense, parental defense, and appellate advocacy. Each is its own area of specialization, requiring skills and knowledge distinct from what is required to practice in any other area."[238]

IDC's System Principles mandate that "Indigent defense systems must ensure defense counsel's ability, training, and experience match the complexity of the case. Systems must require counsel to receive continuing legal education in the areas indigent defense representation in which they practice."[239]

In 2019, Utah received a grant from the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) to support specialization and provide youth defense-specific training to attorneys appointed to represent youth across the state.[240] Work under the grant was ongoing during the time of site visits for this assessment but concluded in September 2023.

An IDC employee described the work done under the OJJDP grant: "We have a CLE on youth defense at least every other month and two full-day trainings per year. We provided a mentoring project, where we worked with new attorneys for three months. We have produced handbooks and practice guides."

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233 NATIONAL YOUTH DEFENSE STANDARDS, *supra* note 17, at 21-23 (Standard 1.3: Specialized Training Requirements for Juvenile Defense).

234 *Id*. at 21-23, 145 (Standard 1.3: Specialized Training Requirements for Juvenile Defense and Standard 9.2: Supervisor's Obligation to Ensure Access to Specialized Training).

235 NJDC & NLADA TEN CORE PRINCIPLES, *supra* note 21, at 1-2.

236 NCJFCJ ENHANCED YOUTH JUSTICE GUIDELINES, CH. III, *supra* note 92, at 23-24; NATIONAL YOUTH DEFENSE STANDARDS, *supra* note 17, at 21-23 (Standard 1.3: Specialized Training Requirements for Juvenile Defense).

237 U.S. Statement of Interest, N.P. v. Georgia, *supra* note 7, at 13-14.

238 UTAH INDIGENT DEF. COMM'N. SYSTEM PRINCIPLES, *supra* note 49, at 4 (Principle 5: System Recognizes Distinct Areas of Specialization Within Indigent Defense).

239 *Id*. at 5-6 (Principle 8A: Qualifications and Training).

240 *See Utah Statewide Delinquency Defense Legal Training and Sustainable Capacity Project*, OFFICE OF JUV. JUST. AND DELINQ. PREVENTION, https://ojjdp.ojp.gov/funding/awards/2019-ze-bx-0003 (last visited February 5, 2024).

Juvenile legal system practitioners interviewed for this assessment widely reported that, outside of Salt Lake County, contract attorneys in Utah are rarely able to specialize in youth defense and that, except for the trainings offered under the state's OJJDP grant, most contract attorneys do not have access to youth defense-specific training. Interviewees also widely reported a need to elevate the status of practicing in juvenile court and to create a pipeline of new attorneys dedicated to youth defense as a career.

1. SPECIALIZATION

An IDC official interviewed for this assessment described the need for specialization: "We need to find ways to create specialized attorneys instead of just allowing attorneys to take whatever is in the county contract. We have been able to separate the contract for youth and adult defense, and there are requirements for CLE for anyone whose contract we fund. But that does not make you a specialist. We need more money for youth defense specialization."

> ***"We need more money for youth defense specialization."***

Voices for Utah Children, the nonprofit organization that conducted the waiver-of-counsel studies discussed in Section I. B. above, noted a lack of specialization throughout the state at the time they conducted their court observations: "Defenders outside of Salt Lake County did not see themselves as specialists. There wasn't a cohort for mentoring and teaching others." Voices staff did, however, note efforts to improve: "IDC has done a great job cultivating youth defense specialization, to make sure defenders know this is a separate part of the law, and is working to connect defenders to resources."

A juvenile court judge explained that, "Too often, attorneys who defend adults go defend kids, but they just don't understand the nuances." Another judge explained the impact that specialized youth defenders have on their clients: "Salt Lake County has defenders who love what they do, and youth come away feeling they had effective advocates."

Another judge expressed support for youth defense specialization and tied it to the importance of training: "There are so many benefits of having a firm dedicated to youth defense like they have in Salt Lake. A firm like that makes sure its attorneys are up to date on the law. I had a transfer hearing where I was the one who advised the parties the law had changed."

> ***"There are so many benefits of having a firm dedicated to youth defense."***

A youth defender who provides support through IDC's appellate program has seen the impact that a lack of specialization and access to youth-specific training has on the quality of representation young people receive. "People who have contracts in other counties do a little of everything, and we've seen obvious and important issues that just are not being raised. There are attorneys doing youth defense who know nothing about adolescent development, who have never even heard of *J.D.B.* [*v. North Carolina*,[241] a seminal U.S. Supreme Court ruling on the importance of age and mental status]."

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[241] *See* J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011) (holding that a child's age properly informs the *Miranda* custody analysis).

2. YOUTH DEFENSE-SPECIFIC TRAINING

When asked about what kind of training they received before taking on youth defense work, defense attorneys interviewed for this assessment almost universally reported that they had received no youth defense-specific training. Several described their only training as "on-the-job training" once they took on a youth defense contract. One said they had "been educated through self-study."

Several youth defenders noted that the trainings offered by IDC under the OJJDP grant were the first time in their careers they had been able to access youth-specific training, and they were enthusiastic about the training opportunities the grant provided. One defender explained, "IDC's Department of Justice program is amazing. We get free trainings all the time through this program, including some all-day CLE programs."

Another youth defender described, "I've done several programs with the Indigent Defense Commission that have been great. I did the new lawyer training program, through which I was assigned a mentor who is a very experienced lawyer. I was able to work with them for two or three months. They observed me in court, gave me new tools and angles, and completely changed my level of job satisfaction."

At the time of site visits for this assessment, IDC was unsure whether it would be able to continue to offer training and mentorship opportunities once the federal grant ended: "I think the project is going really well, but I'm not sure what will happen after it ends. We need to develop a plan for how to move forward."

A state-level official with Utah's Division of Juvenile Justice and Youth Services recognized enhanced youth defense training as key to their mission, as well: "The more we can elevate the skill and ability of the defense bar, the better. We want to get to a place where we can keep kids in their home and communities, and the defense bar plays a critical role in that. Defenders need to be grounded in the research on the adolescent brain, the harms of detention, the harms of out-of-home placement."

"The more we can elevate the skill and ability of the defense bar, the better. We want to get to a place where we can keep kids in their home and communities, and the defense bar plays a critical role in that."

Supporting attorneys to become youth defense specialists and creating a robust training program take time. A trial court executive explained: "At a systemic level, we are new getting into this. We're still learning. This translates to the fact that most attorneys just haven't had practice in juvenile court. They need more resources. They need training."

A juvenile court judge compared the quality of advocacy they see from well-trained defenders versus others: "There's a well-trained cohort in Salt Lake County who are strong. I just do not see a lot of advocacy, trials, or reasonable plea negotiations outside of Salt Lake County."

3. STATUS OF YOUTH PRACTICE & YOUTH DEFENDER PIPELINE

Juvenile court practitioners interviewed for this assessment reported that in many places across the state, work in juvenile court is devalued, which contributes to difficulties recruiting attorneys to dedicate their careers to the practice of youth defense and retaining existing attorneys long enough for them to become specialists in youth defense.

One youth defender explained, "There is a perception that juvenile court is 'baby court,' that it's easy and low quality." A juvenile court judge described a "mentality about juvenile court as lesser-than." And some interviewees reported that some county prosecutor offices use assignment to juvenile court as discipline: "We've heard that juvenile prosecution is the garbage job for people not good at adult prosecution."

An IDC official explained that this perception about the status of juvenile court practice impacts their ability to find attorneys willing to take IDC contracts: "If we increased salaries substantially, we would get more and better people. But in some counties, we cannot get people to do public defense work even if there were more money."

Practitioners recognized the need to elevate the status of work in juvenile court as a necessary component of recruiting new defenders. One youth defender explained, "We've been trying to do more outreach to universities. One of my colleagues just went to the University of Utah's law school to talk to students, and BYU has a juvenile law program now. But there just aren't a whole lot of people who are interested."

An IDC employee confirmed: "We don't have a good statewide recruitment effort. We need a concerted effort to educate people about what the work is and the positive aspects of youth defense work. We need to be going to law schools and educating about youth defense. We need to strengthen the youth defense community so new lawyers know they'll have a community that is well-respected."

"We need to strengthen the youth defense community so new lawyers know they'll have a community that is well-respected."

Specialization, training, the status of juvenile court practice, and attorney recruitment and retention are integral pieces of building a strong youth defense system that provides high-quality representation and meets Utah's constitutional mandates. The state should invest the resources necessary to maintain the youth defense-specific training and mentorship program built under the federal grant. IDC should provide and require initial and ongoing training for all attorneys who take youth defense contracts. Courts and counties must ensure that juvenile court is recognized as an important, specialized practice. And the state should support the establishment of youth defense clinics in Utah law schools to create a pipeline of new attorneys dedicated to youth defense as a career.

C. County-Based Contract System

Before Utah created its IDC in 2016, it was "one of just two states requiring local governments to fund and administer all indigent defense services."[242] Despite the state's efforts, through the IDC, to begin to provide funding and other support, youth defense services in Utah are still provided almost exclusively by private attorneys who contract with one of the state's 29 counties.[243] This county-based contract system was identified repeatedly and by practitioners throughout the state and across roles as the root of many of the deficiencies with youth defense in Utah.[244]

When the Utah legislature created the IDC, it seemed to recognize a need to move away from this county-based defense delivery system. In its governing statute, the IDC is mandated to "encourage and aid indigent defense systems in the state in the regionalization of indigent defense services to provide for effective and efficient representation to the indigent individuals."[245]

A state-level official noted the discrepancy between how the state handles youth defense versus other aspects of the juvenile legal system: "Utah is a unified system. The juvenile court is a statewide court system. JJYS is a statewide system, not county-based. There's a reason why we see significant differences in the level of representation across the state."

A juvenile court judge explained that, "Counties being in charge is problematic and always will be. There's a different status of public defenders based on the county they're in. In a statewide system, there's better education, better management."

Another judge noted that, "With the contracts, the work is very individual. Some attorneys are so impressive and work hard and others do the least amount possible. Contract attorneys miss out on the camaraderie of an office that encourages creative lawyering and accountability and disrupts the rut."

"Contract attorneys miss out on the camaraderie of an office that encourages creative lawyering and accountability."

1. INDEPENDENT REPRESENTATION

National standards recognize the utmost importance of professional independence for defense counsel. An indigent defense system "should be designed to guarantee the integrity of the relationship between lawyer and client," and defense counsel "should be free from political influence . . . ."[246] "An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board . . . . Boards of trustees should not include prosecutors or judges."[247]

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242 Sixth Amend. Ctr., The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services, *supra* note 35, at 46.

243 *See* Utah Code Ann. § 78B-22-102(9).

244 *See* Nat'l Juv. Def. Ctr., Broken Contracts: Reimagining High-Quality Representation of Youth in Contract and Appointed Counsel Systems 7 (2019) (detailing the challenges of youth defense contract systems).

245 Utah Code Ann. § 78B-22-404(1)(b).

246 Am. Bar Ass'n, ABA Standards for Criminal Justice Providing Defense Services 13 (1992) (Standard 5-1.3. Professional independence).

247 *Id.*

Utah law mandates that IDC shall adopt core principles that ensure "an indigent individual receives conflict-free indigent defense services,"[248] and defense systems must ensure defenders can "exercise independent judgment without fear of retaliation."[249]

> Indigent defense counsel's primary and most fundamental responsibility is to promote and protect the interests of the client. A system must ensure defense counsel is free to defend clients zealously, based on counsel's own judgement, and without fear of termination, reduction in compensation, reduction in staff, or reduction in defense resources. The selection, funding, and payment of defense counsel should be independent of the judiciary and the prosecution.[250]

Despite these clear mandates, assessment site visitors found that in numerous counties across the state, county prosecutor offices are in charge of, involved in, and/or hold undue influence over the selection of defense counsel, contracts defense attorneys have with counties, and budgets for defense experts and other resources.

In numerous counties across the state, county prosecutor offices are in charge of, involved in, and/or hold undue influence over the selection of defense counsel, contracts defense attorneys have with counties, and budgets for defense experts and other resources.

A state-level official told site visitors that "in some counties, the prosecutors are appointing the defenders." An IDC employee confirmed that "In some places they are doing a better job of separating the defense attorney and the county prosecutor. In other places, they are not."

A managing defender explained that they have "mostly gotten prosecutors out of what defenders do," but went on to say that prosecutors are still on the county's interviewing panel for selecting defense attorneys.

One judge who worked as a defense attorney before joining the bench described their experience: "When I was a defender, my bills went to the county attorney, and they would regularly return bills for more detail. It was a constant debate."

Another judge with prior defense experience told of a similar experience: "I would file motions with the court for experts and assessments, but everything was controlled by the county attorney. They controlled the pot of money."

Wresting control from county prosecutor offices appears to depend on the political environment in each county. One judge explained, "The county attorney here is still in charge of the defense budget. The prior county executive wasn't willing to change that, but we got a new county executive in the last election, and they're willing to pull it from the county attorney."

IDC recognizes the need to remove prosecutors from these roles: "Counties have money set aside for defense experts, but some defenders do have to go through county attorney office to get support. We are trying to get rid of that. Managing defenders are supposed to take over that process."

[248] Utah Code Ann. § 78B-22-404(1)(a)(i)(A).

[249] *Id*. at § 78B-22-404(1)(a)(ii)(A).

[250] Utah Indigent Def. Comm'n. System Principles, *supra* note 49, at 4 (Principle 4: System Provide Representation that is Independent and Free from Interference).

A managing defender described the transition in their county: "There's a county budget to fund defense services. I'm kind of in charge of it, but I don't actually manage any money. The budget person in the DA's office still manages the funds."

Prosecutorial control of defense budgets has contributed to a culture of defense attorneys not utilizing appropriate resources to fully represent their clients. An IDC employee explained, "For a long time, defenders simply would not ask for these resources because of these processes. Counties are doing a better job dedicating resources and changing the processes for requesting resources, but this needs to continue to improve to ensure defense attorneys are able to access those resources."

Prosecutorial control of defense budgets has contributed to a culture of defense attorneys not utilizing appropriate resources to fully represent their clients.

A managing defender confirmed, "Experts and investigators are still kind of new to us. We're figuring out how to use them."

Defense attorneys across the state are well aware that their courtroom opponents, who wield considerably more local political power, are in control of their contracts and resources. One youth defender explained the impact this has on courtroom advocacy: "It should be a more adversarial process. Cases are far less litigated here than in other jurisdictions. We used to have an attorney who was a fighter, and then he lost his contract."

"Cases are far less litigated here than in other jurisdictions. We used to have an attorney who was a fighter, and then he lost his contract."

Current and former female youth defenders interviewed for this assessment also described this county-based power structure as presenting obstacles to newer, younger, and female attorneys who are interested in pursuing careers in youth defense. "It was hard to break into the old boys' club when I wanted to do juvenile cases."

2. FLAT-FEE CONTRACTS & PAY PARITY

"Assigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation."[251]

"Contract counsel compensation should be proportional to the workload required for zealous representation of youth. . . . Pay-by-the-hour or similar billing systems often encourage more zealous representation since counsel are being paid for the full extent of their work."[252]

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[251] ABA Standards for Criminal Justice Providing Defense Services, *supra* note 246, at 39 (Standard 5-2.4 Compensation and expenses).

[252] NJDC Broken Contracts: Reimagining High-Quality Representation of Youth in Contract and Appointed Counsel Systems, *supra* note 244, at 18.

Courts have found low pay rates for assigned counsel that lead to understaffing and excessive caseloads as unconstitutional denial of counsel.[253]

According to IDC staff, youth defense contracts in Utah are "almost always flat-fee contracts." They explained that, "It's good for the county, because it knows what the cost will be every year. But it's not good if you look at how much time attorneys are spending on each case."

Under a flat-fee contract, defense attorneys are generally contracted to provide representation in a percentage of defined cases, such as juvenile delinquency cases. Because flat-fee contracts do not compensate the contractor based on the time they spend providing the services, such contracts financially incentivize contractors to complete work under the contract as quickly as possible. This is not compatible with youth defense attorneys' ethical duties to provide zealous representation.

An IDC official recognized the benefits of paying contract attorneys for their time: "The more hours you put in, the more you get paid, then the more attention you give to things. And if you are assured more money, then you would engage in more practice."

Interviewees noted that youth defense simply is not a budget priority for counties. One judge explained, "Counties are forced to pay for defense. They don't see it as a great need for their county. They see it as, 'Who we can give cheapest contract to.' They put out defense services for bid, and the lowest bid gets the contract. Is that how we want to hire public defenders?"

"They put out defense services for bid, and the lowest bid gets the contract. Is that how we want to hire public defenders?"

An IDC employee explained, "There are just not enough funds. In order to get people who can do youth defense and do it well, they need to be paid well enough and know they will be paid well ongoing. You need to pay people enough to keep them on youth defense."

A state-level official opined that: "The state ought to be sharing the cost with the counties at least 50/50. Because left to their own, the counties will never fund defense enough."

Interviewees also noted pay parity as a problem across most of the state. One judge described that when it comes to pay and resources, "Defenders are simply not on the same playing field as the prosecutor." Another judge explained, "Pay disparity is a limitation. The DA has comparatively unlimited resources for experts and investigators. This is a systemic problem; resources should be the same for both sides."

An IDC official identified pay parity as "critical" for supporting youth defense specialization and ensuring youth are represented by competent attorneys. "Finding people who want to take the contracts and finding competent attorneys are big problems. There are people across the state who want to specialize, but we need enough money to support them. How do I get someone to do fulltime delinquency work if they aren't paid enough?"

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[253] *See, e.g.*, New York Cnty. Lawyers' Ass'n v. New York, 196 Misc.2d. 761 (holding that the statutory compensation rates for assigned counsel was unconstitutional for youth and adults in New York City); Wilbur v. City of Mount Vernon, 989 F.Supp.2d 1122, 1124 (W.D. Wash. 2013) ("[M]unicipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation [of the right to counsel]."); *see also* U.S. Statement of Interest at 11, Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010) (No. 8866-07) (summarizing cases that have found structural inadequacies amounting to a constitutional violation of the right to counsel).

A managing defender concurred that current pay rates make finding competent attorneys a challenge: "With the pay we offer, we usually don't get any experienced applicants."

Other managing defenders noted how the low pay rate is exacerbated by the lack of supportive structure in a contract system. One said, "People don't go to law school to make 50 or 60 grand plus have to pay for their office space." And another explained: "There's a lack of administrative help, things like buying office space, computers, IT. We just got Westlaw. If the state has a resource, we should have it. Financially, it's hard for our attorneys. And there are no benefits."

One youth defender noted that, in addition to discrepancies in pay between defenders and prosecutors, "Youth defense has always been paid less than adult defenders."

Juvenile court judges expressed concern about the impact pay and resource disparities have on the quality of representation young people receive: "Since the day I started practicing law, I've been troubled by the disparity between the prosecution and the defense system. We talk about access to justice and we make small strides, but we never keep it our focus. We need to start at the beginning doing it right."

"Since the day I started practicing law, I've been troubled by the disparity between the prosecution and the defense system."

Another judge explained, "Defenders are left with so much work. They have no support system, no staff, no resources. We're dealing with people's lives. Everything we do in juvenile court with kids, we're putting kids on a path. Either let them know the system failed them and they're not worth any more than that. Or we can totally change the trajectory of this kid's life. Let them know the system is there to protect them and make sure they have access to the resources they need."

3. LACK OF QUALIFIED COUNSEL IN RURAL & REMOTE AREAS

Insufficient pay and support have contributed to a severe shortage of qualified counsel across much of the central and eastern parts of Utah. Juvenile court practitioners outside Utah's more densely populated Wasatch Front frequently described difficulties attracting and retaining qualified counsel. A judge in a rural county told site visitors, "If you know anyone looking for work, send them here."

"There isn't enough money in some of the smaller regions to keep defense attorneys in rural areas."

A longtime juvenile court practitioner explained, "Counties often contract with the local attorney because that's who everyone knows. They're giving contracts to less-qualified or uninvested attorneys because they know them, they're buddies. Especially in smaller counties where fewer attorneys live, the choices are limited. The long and short is, there isn't enough money in some of the smaller regions to keep defense attorneys in rural areas."

This lack of qualified local counsel and courts' increased use of technology to conduct virtual hearings has led to some counties contracting with youth defense counsel who live hours away from the courts they practice in. Asked to identify the biggest limitation with their county's youth defense system, numerous interviewees noted contract defenders who live too far away to regularly appear in court or meet with their clients in-person.

One judge explained, "Some defenders live all over the state. For example, one of the defenders lives in [a county approximately 80 miles away]. He appears in person sometimes but primarily is remote." A probation officer described: "There is an attorney who is not local, and we only see them virtually. There is a disconnect because of the distance. They do a good job, but there isn't the face-to-face."

Prosecutors in rural counties described difficulties with defenders based far outside their counties. "One of our biggest limitations now is that defense attorneys are based [far from the county], so some families complain that they don't have access to meet with their attorney prior to court. Often defense counsel is asking for a few minutes to speak with their client at the beginning of a hearing, which delays court. Prior to COVID, defense attorneys were either in the area or making the commute a couple days a week. That's not happening now. Since COVID, a lot more attorneys are electing to only appear virtually."

Several judges expressed similar concerns about the impact of long-distance defense attorneys and remote hearings on attorney-client contact and quality of representation. One judge explained, "The biggest limitation is that our defender is from [outside the county], so they end up speaking to their client the day of the hearing." Another judge said that "It would be nice to have lawyers next to the youth in the courtroom. But generally, defenders in my courtroom appear virtually."

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A third judge explained, "Because we do remote so often, a lot of kids don't make contact with their attorney. I set some mandatory in-person dates, so that I know the attorney and client will have a chance to speak." Another judge described similar experiences: "Virtual hearings make defense attorneys lazy. They haven't talked to their clients, and cases get dragged on. I've found that if I set an in-person hearing, the case gets resolved."

A youth defense attorney described the connection between smaller, more rural counties' lack of resources and attorneys' taking long-distance contracts: "It's frustrating, because counties are contracting with less-qualified attorneys for the sake of local control, but those same attorneys spend the majority of the time on the road to other, more lucrative counties, and the local client gets representation by phone."

4. WIDE SUPPORT FOR REGIONAL, STATE, AND/OR PUBLIC DEFENSE OFFICE MODEL

When discussing the difficulties and shortcomings of Utah's county-based contract system for youth defense, interviewees expressed wide support for moving toward a regional- or state-level delivery system and for the creation of a system of public defense offices where youth defenders would be government employees, rather than independent contractors.

Several judges expressed support for creating regional defense services, modeled after Utah's judicial districts. One judge suggested, "Defenders should be on a district system, especially in rural areas. Just like judges sit in court in other counties in the district, defenders should cover cases, as well." Another judge opined, "I think we're heading toward the state running defense through districts. It should go that way."

"Defenders should be on a district system, especially in rural areas."

A third judge explained how county prosecutors' continued undue influence over the defense system had thwarted attempts to regionalize defense in their area: "We had discussions about district-wide defense for juvenile court. Two of the counties were fully on board. But the [third] county attorney opposed the idea, and we haven't been able to make any progress."

IDC explained that they "are working on regionalization, facilitating counties working together to create regional contracts so that the counties share an attorney." An IDC official expressed their belief that regionalization could help support youth defense specialization: "I would love to have a corps of attorneys who just do youth defense. But where a single contract isn't enough for fulltime work, attorneys should have youth defense contracts across multiple counties, rather than across different types of practice."

Several interviewees expressed support for moving away from contracts and toward public defender offices. One judge said, "The state should move toward true public defender offices. I have a team of four that works with me. They provide admin support, secretarial, scheduling. Every part of the court system needs that same type of support. And defenders need paralegals, investigators, social workers."

A judge in Salt Lake County described the "strength of having one law firm that is dedicated to youth defense and nothing else. We are fortunate to have incredibly strong youth defense in this county. Defenders always show up, they present novel legal theories, rarely have I heard a youth say they do not know who their attorney is." A judge in another county said, "Oftentimes I wish we had a firm like the one in Salt Lake County."

A state-level official described wanting "to help every county see the need for an independent office. We need to get Utah to move toward independent public defense. We need to get rural counties to see youth defense specialization as critical, to partner with more robust jurisdictions that could provide training and support."

"We need to get Utah to move toward independent public defense. We need to get rural counties to see youth defense specialization as critical."

Utah's county-based contract system for youth defense limits access to justice for young people. The state and all counties must immediately remove county prosecutor offices from any form of control or oversight of youth defense contracts, funding, or other resources. Counties should stop using flat-fee contracts for defense services and institute hourly pay-rate structures that properly compensate youth defenders for the time needed to provide competent representation in every case. Counties should ensure pay and resource parity between youth defenders and prosecutors. IDC should incentivize each of these reforms through its grant-making. Utah, the IDC, and counties should move toward regionalization of defense services and oversight and explore the creation of public defense offices.

D. Equitable Treatment of Youth

"Research shows that when young people sense inequity in the juvenile justice system, they are less likely to be successful in turning away from misconduct and toward more positive community engagement."[254]

Advocacy for equitable treatment is an essential part of the role of youth defenders.[255] Defenders have a duty to educate themselves about the unique experiences and perspectives of the populations they serve, and to confront their own biases and those inherent in the legal system.[256] Defenders must recognize their own vulnerability "to the negative effects of implicit bias as they practice in a paternalistic system that is easily manipulated by perceptions of race and class," and provide "loyal, client directed legal advocacy" to safeguard against the harms caused by the effects of racial injustice in the juvenile legal system.[257]

Racial and ethnic disparities permeate Utah's juvenile legal system. Collectively, nonwhite youth account for about 27 percent of the state's general youth population, but 40 percent of court referrals, 51 percent of youth in locked detention, 59 percent of youth in community placement, and 53 percent of youth in secure facilities.[258] Black youth face the highest rates of disparity at arrest, court referral, locked detention, community placement, and secure commitment.[259] Only at secure commitment do Native Hawaiian/Pacific Islander and Latino/Hispanic youth begin to approach the level of disparity Black youth face.[260]

According to 2021 data, Utah's overall commitment and detention rates were below national rates, but its disproportionate incarceration of Black, Latino/a, and Native/Indigenous youth was nearly double the national rate.[261]

> ***"When you look at detention, secure care, and community custody length of stay, there's still a lot of work to be done."***

JJYS personnel expressed recognition of racial disparities and how system practices exacerbate them: "Disparity is something we need to talk about. Our disparity rate has improved, and we need to highlight how the policy changes have made improvements. But when you look at detention, secure care, and community custody length of stay, there's still a lot of work to be done. We need to examine our risk tools and we need to see how they are contributing to the disparity. We are using standard risk tools and opportunities for diversion. Our early intervention services, they were built for white kids."

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[254] Voices for Utah Child., Striving for Equity in Utah's Juvenile Justice System 4 (2020).

[255] *See generally Racial Justice for Youth- A Toolkit for Defenders: Case Advocacy*, Geo. Law Juv. Just. Initiative & The Gault Ctr., https://defendracialjustice.org/case-advocacy/ (last visited February 19, 2024).

[256] *See* Kristin Henning, Empirical Studies: Implicit Racial Bias in the Criminal/Juvenile Legal System 1 (2023) (imploring youth defenders to confront their own implicit biases to better serve youth in the juvenile legal system).

[257] Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 Am. Crim. L. Rev. 649, 694 (2017); *see also* Racial Justice for Youth: A Toolkit for Defenders, *Case Advocacy*, Geo. Law Juv. Just. Initiative & The Gault Ctr., https://defendracialjustice.org/case-advocacy/ (last visited February 19, 2024); Racial Justice for Youth: A Toolkit for Defenders, *Confronting Bias*, Geo. Law Juv. Just. Initiative & The Gault Ctr., https://defendracialjustice.org/confronting-bias/ (last visited February 19, 2024).

[258] *Make-up of Utah's Youth Population at Different Points of Contact*, Utah Comm'n on Crim. & Juv. Just., https://justice.utah.gov/wp-content/uploads/JJ_Presentation_StateOnly_2020.html (last visited February 20, 2024).

[259] *Id.* (select "Arrest," "Court Referral," "Locked Detention," "Community Placement," "Secure Care" on the top banner to compare racial and ethnic breakdowns of youth at various points of contact).

[260] *Id*. (select "Secure Care" on the top banner to view racial and ethnic breakdowns of youth facing secure commitment).

[261] *See Juvenile Justice State Profiles*, Off. of Juv. Just. & Delinq. Prevention, https://www.ojjdp.gov/ojstatbb/special_topics/stateprofile.asp (last visited February 20, 2024) (select "Utah" as the state to view the following 2021 data: Utah's commitment rate was 23 per 100,000 compared to the national rate of 39; Utah's detention rate was 14 per 100,000 compared to the national rate of 33; and Utah's ratio of minority youth to white youth in residential placement was 9.2 versus the national rate of 4.7).

Despite the state's troublingly high rates of disparity, most youth defenders interviewed for this assessment reported few concerns with how the juvenile court system treats youth of different races or ethnicities. Several defenders did express concerns about disparate policing of Black, Latino/a, and Native/Indigenous youth; however, most defenders said they had never raised race-related arguments in court.

Salt Lake County's contracted firm dedicated to youth defense appeared to stand alone in its recognition of racial disparities in the juvenile legal system and its work to challenge them. One of its youth defenders described: "Youth are pulled over all the time for being Black or brown. We're raising these issues in court, trying to get everyone in tune to the challenges faced by individual ethnic groups. We have specific concerns with Native American youth. We work with our social workers to pull data on disproportionality, and our attorneys will include that in a dispositional memorandum to the court."

Racial and ethnic disparities exist at every step of the juvenile legal system, from in- and out-of-school suspensions to arrest to the juvenile court system. Utah must commit to reducing these disparities by conducting regular analyses of system involvement, interventions, and outcomes; and by requiring that all juvenile legal system professionals be trained on the historical context of overrepresentation and debias techniques. Youth defenders have a unique role and specific responsibilities to advance justice and champion a collective commitment from those working in the system to ensure the fairness of the juvenile court process and experience.

E. Costs & Fees

Across the country, juvenile courts routinely impose financial obligations on youth and families in delinquency matters, "including appointment of counsel fees, bail, diversion and treatment program fees, community supervision and placement fees, court costs, and restitution, frequently without consideration for each individual youth's ability to pay."[262] The imposition of these financial obligations, especially on youth and families unable to pay, "can result in serious and long-term consequences . . . including further penetration into the juvenile justice system, increased recidivism, difficulty engaging in education and employment opportunities, [and] civil judgements."[263] "Families burdened by these obligations may face a difficult choice, either paying juvenile justice debts or paying for food, clothing, shelter, or other necessities."[264]

Fees imposed by the juvenile court system can also result in the "exacerbation of existing racial and ethnic disparities and increased financial burdens for impoverished families."[265] And, when fees are ordered and collected with the goal of raising revenue, "they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents."[266] All this, "for reasons unrelated to public safety and counterproductive to the rehabilitative aims of the juvenile court."[267]

The National Council of Juvenile and Family Court Judges (NCJFCJ) encourages juvenile courts "to work towards reducing and eliminating fines, fees, and costs by considering a youth and their family's ability to pay prior to imposing such financial obligations" and to "presume youth indigent when making decisions

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262 Nat'l Council of Juv. and Fam. Ct. Judges, Resolution Addressing Fines, Fees, and Costs in Juvenile Courts 1 (2018) [hereinafter NCJFCJ Resolution Addressing Fines, Fees, and Costs].

263 *Id.*

264 C.R. Div., U.S. Dep't of Just., Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles 1 (2017).

265 NCJFCJ Resolution Addressing Fines, Fees, and Costs, *supra* note 262, at 1.

266 C.R. Div., U.S. Dep't of Just., Dear Colleague Letter: Law Enforcement Fees and Fines 2 (2016).

267 NCJFCJ Resolution Addressing Fines, Fees, and Costs, *supra* note 262, at 1.

regarding the imposition of fines, fees, and costs if the youth was previously determined indigent for the purpose of securing attorney representation."[268] NCJFCJ "believes that the core functions necessary for our nation's juvenile courts to meet their rehabilitative goals should be fully funded by governmental revenue and not by revenue generated by fines, fees, and costs."[269]

Nationally, juvenile courts that track the income levels of youths' families have found that 60 percent had incomes of less than $20,000.[270] This, combined with juvenile courts' "emphasis on families' needs when adjudicating delinquency,"[271] means that court systems that charge youth and families are levying financial punishments on those with the most significant barriers to accessing services, but who are least able to pay.

In Utah, when a youth is adjudicated, the court can order them to pay a fine, fee, or cost, pay restitution, or complete community service hours.[272] If a juvenile court orders a youth to pay a fine, fee, cost, or restitution, the court must ensure its order "is reasonable; prioritizes restitution; and . . . takes into account the minor's ability to pay . . . if the minor is ordered to secure care."[273]

The cumulative cost of any fine, fee, or cost may be up to $190 if the youth is under 16 years of age and up to $280 if the youth is 16 or older.[274] These limits are "per criminal episode"[275] and do not include restitution.[276]

With two exceptions,[277] all fines, fees, penalties, and forfeitures collected by a juvenile court are paid into the state's general fund.[278] Youth can complete a work program to satisfy all or part of a restitution order.[279]

Youth who are offered a nonjudicial adjustment (NJA) can be fined up to $250. [280] Youth cannot be denied a nonjudicial adjustment for inability to pay.[281] Any fee, fine, or restitution must be based on the family's ability to pay.[282] All NJA funds are deposited in the state's Nonjudicial Adjustment Account, a restricted account.[283] Funds in this account must be used "to pay the expenses of juvenile compensatory service, victim restitution, and diversion programs."[284]

Juvenile courts may charge a filing fee for a petition for expungement.[285] Expungement cannot be granted if a youth has not satisfied restitution from juvenile court[286] or from an NJA.[287]

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[268] *Id.* at 2.

[269] *Id.*

[270] Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 Wash. U. J. L. & Pol'y 53, 58-59 (2012).

[271] *Id.* at 54.

[272] Utah Code Ann. § 80-6-709(1)(a).

[273] *Id*. at § 80-6-709(2).

[274] *Id*. at § 80-6-709(3)(a).

[275] *Id*. at § 80-6-709(3).

[276] *Id*. at § 80-6-709(3)(b).

[277] *See id*. at § 78A-6-210(3)(b) and § 78A-6-210(4) (laying out exceptions regarding state rehabilitative employment programs and enumerated traffic offenses).

[278] *Id*. at § 78A-6-210(3).

[279] *Id*. at § 80-6-709(1)(b)(i).

[280] *Id*. at § 80-6-304(1)(a).

[281] *Id*. at § 80-6-304(4).

[282] *Id*. at § 80-6-304(4)(b).

[283] *Id*. at § 78A-6-210(1).

[284] *Id*. at § 78A-6-210(2)(c).

[285] *Id*. at § 80-6-1007(1).

[286] *Id*. at § 80-6-1004.1(6)(c).

[287] *Id*. at § 80-6-1004.1(6)(d).

While Utah has limited the amount of fines and fees its juvenile courts impose on youth, it allows for considerable costs to be charged to a young person's parents. Courts can order a youth's parent or legal guardian to reimburse the cost of the youth's defense services.[288] A parent or guardian can be held liable for property damages up to $2,000 or $5,000 when a youth is adjudicated for certain offenses.[289]

If a detention center releases a child and the child's parent, guardian, or custodian does not retrieve the child within 24 hours, "the parent, guardian, or custodian is responsible for the cost of care for the time the child remains in the detention facility."[290] When a juvenile court places a youth in state custody, it must order the youth's "parent, guardian, or other obligated individual to pay child support for each month the child is in state custody . . . ."[291]

A JJYS official described how the state's charging for cost-of-care and child support undermines the agency's work: "It is a terrible practice. These charges should not exist. Our staff approaches their work as coaches, they are there to advocate for the kid, they want to mentor and support them. And then we ask them to go to the family and ask about financial information and that destroys their ability to work toward rehabilitative ends."

"It is a terrible practice. These charges should not exist."

The U.S. Department of Justice also recognizes that financial sanctions have unintended consequences, including "the potential to push young people further into the criminal justice system, drive children and their parents into debt, and put considerable strain on familial relationships. In many cases, unaffordable fines and fees only undermine public safety by impeding successful reentry, increasing recidivism, and weakening community trust in government."[292]

"The detrimental effects of unjust fines and fees fall disproportionately on low-income communities and people of color, who are overrepresented in the criminal [legal] system and already may face economic obstacles arising from discrimination, bias, or systemic inequities."[293]

Given the vast racial disparities in Utah's juvenile legal system, particularly in its detention and secure facilities, the state should view eliminating its cost-of-care and child support policies as an important step toward equity. "Eliminating the unjust imposition of fines and fees is one of the most effective ways for jurisdictions to support the success of youth and low-income individuals, honor constitutional and statutory obligations, and reduce racial disparities in the administration of justice."[294]

Utah has made progress limiting the financial burden of court involvement and should continue to address the impacts of juvenile legal system fees and costs imposed on young people and families. The state should abolish all fines, fees, and costs associated with juvenile court involvement, and should prioritize eliminating costs-of-care charged to families while their children are incarcerated.

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[288] *Id*. at § 78B-22-304.

[289] *Id*. at § 80-6-610(1), (2).

[290] *Id*. at § 80-6-207.

[291] *Id*. at § 78A-6-356.

[292] Off. for Access to Just., U.S. Dep't of Just., Access to Justice Spotlight: Fines & Fees (2023) [hereinafter ATJ Spotlight on Fines & Fees].

[293] Dear Colleague Letter from the Off. of the Assoc. Att'y Gen, U.S. Dep't of Just. on Fines and Fees (Apr. 20, 2023).

[294] ATJ Spotlight on Fines & Fees, *supra* note 292.

STRENGTHS & PROMISING PRACTICES

Over the past several years, Utah has made remarkable progress reforming its juvenile legal system and beginning to create a system of indigent defense. The dedication shown by juvenile legal system practitioners to enacting these reforms indicates a genuine commitment to ensuring young people's constitutional rights, wellbeing, and future success.

Ensuring every youth is represented by counsel from initial appearance through post-disposition

Access to counsel is essential for access to justice for all youth in the legal system. Without counsel, youth are left to navigate a complex web of legal processes and procedures that determine their freedom and their future. Through several legislative reform efforts in recent years, Utah has mandated the automatic appointment of counsel for youth in delinquency proceedings, exempted children from the indigency determination process so that financial eligibility guidelines do not apply and cannot prevent children from being appointed counsel, ensured that youth cannot waive their right to counsel unless they have first consulted with an attorney, and extended defense representation through the post-disposition period of a delinquency case. Juvenile court practitioners across the state voiced considerable support for these reforms, emphasizing how the reforms have improved both the protection of young people's constitutional rights and how the juvenile court system operates.

Increasing diversion through nonjudicial adjustments

Diversion from the legal system leads to far better outcomes for young people and communities. Decades of research confirms that youth afforded diversion opportunities have lower levels of future system involvement, especially when made available to young people who face higher risks for system intervention.[295] Utah's nonjudicial adjustment process enables young people to avoid formal juvenile court processing. In FY23, almost 64 percent of youth were diverted from formal processing, 94 percent of whom successfully completed the nonjudicial process and did not require further intervention by the court.[296]

Improving youth outcomes by reducing detention

Detention causes lasting harm to young people and their communities. Time in detention creates barriers to educational success, weakens long-term mental and physical health outcomes, increases victimization of youth, and does not decrease the likelihood of future involvement in the legal system.[297] The state's detention laws have undergone recent, significant reforms aimed at reducing the number of youth held in detention before adjudication. Through these reforms, the state has taken important steps to prevent Utah children from being ensnared by or pushed deeper into the juvenile legal system, both of which have negative consequences on a youth's future success.

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[295] Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review,* 40(5) Crim. Just. and Behavior, 497-518 (2013) (finding that "diversion programs for youth are significantly more successful than traditional juvenile justice systems in reducing recidivism . . . .").

[296] *Nonjudicial Adjustments*, Utah Comm'n on Crim. & Juv. Just., https://justice.utah.gov/wp-content/uploads/FY_2023.html#nonjudicial-adjustments (last visited March 7, 2024).

[297] Richard Mendel, The Sent'g Project, Why Youth Incarceration Fails: An Updated Review of the Evidence 12-19 (2022).

Establishing specialized youth defense standards

Standards provide a clear set of expectations and a framework of accountability for youth defense systems and practices.[298] Utah's Indigent Defense Commission has adopted Core System Principles and Core Principles for Appointed Attorneys Representing Youth in Delinquency Proceedings, both of which closely align with national standards. The standards establish a solid foundation on which the state can build a youth defense delivery system that meets its constitutional and statutory obligations and upholds the rights and interests of Utah youth.

Supporting appellate practice through the creation of an appellate division

Appellate practice is an important part of youth defense. Since 2020, Utah's Indigent Appellate Defense Division (IADD) has been available to provide appellate representation to youth adjudicated delinquent across much of the state. IADD has also established the Juvenile Delinquency Appellate Defense Project, which provides both essential appellate services and trial-level support that is sorely needed by defenders struggling to practice in the state's decentralized contract system. The rights of young people across Utah are strengthened through the work of the appellate division and project.

Delivering specialized youth defense training through a federal grant

Utah recently completed a multi-year federal grant, under which it provided youth defense-specific training, created resources for youth defenders, and provided mentoring to attorneys new to youth defense. Youth defenders across the state expressed enthusiastic support for the services offered under the grant, especially the training, which was the first youth defense-specific training many of them had attended.

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[298] *See generally The Impact of National Standards on Juvenile Defense Practice*, Am. Bar Ass'n., https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/june-2013/the-impact-of-national-standards-on-juvenile-defense-practice/ (last visited March 7, 2024).

OPPORTUNITES FOR CHANGE: A CALL TO ACTION

RECOMMENDATIONS

RECOMMENDATIONS TO IMPROVE ACCESS TO COUNSEL & QUALITY OF REPRESENTATION

Establish a strong statewide system for delivery of youth defense services

Utah's county-based contract system for youth defense limits access to justice for young people. The state should commit to building the organizational infrastructure necessary to ensure that every child, no matter where they are in the state, is represented by a well-trained, specialized youth defender who has access to the resources necessary to provide a zealous, constitutionally sound defense.

To begin to create this infrastructure across the state and to address existing access-to-counsel issues in rural and remote parts of the state, Utah, the IDC, and counties should move toward regionalization of defense services, support structure, and oversight. IDC should consider making managing defenders fulltime contractors or IDC employees, responsible for providing support and oversight for contract attorneys across counties, particularly in less-populated areas of the state. IDC should look to states that provide substantive oversight of contract attorneys, such as Colorado and Massachusetts, for ways to enhance managing defenders' ability to oversee contract youth defenders in Utah.

Through a regionalized model, Utah should provide enhanced administrative support to managing defenders and contract attorneys, including shared office space, IT services, legal research tools, and administrative support staff. The state should invest in social workers within its youth defense system to support and enhance defenders' detention and disposition advocacy and to improve dispositional options and outcomes.

Ensure independence of youth defenders

Utah and each of its counties must act swiftly to remove county prosecutor offices from any form of control or oversight of youth defense contracts, funding, expert budgets, or other resources. County prosecutors' involvement in defense contracts and resources presents a clear conflict of interest and denies youth their right to independent representation. Prosecutorial involvement was reported to influence defenders' zealousness in advocacy and to thwart attempts to improve youth defense delivery systems across counties. Prosecutors should not be involved in selecting attorneys for youth defense contracts. Budgets for experts, investigators, and other defense expenses should be housed with the IDC, its contracted managing defenders, or a neutral office within county government.

Institute pay structures that compensate youth defenders for the time and work needed to provide competent representation

Flat-fee contracts provide a financial disincentive for attorneys to spend the requisite time and resources on a case. Counties should stop using flat-fee contracts for defense services and institute hourly pay-rate structures that properly compensate youth defenders for the time needed to provide competent representation in every case. Counties and the state should ensure defenders have access and upfront funding to hire investigators at government expense. Additionally, all contracts must ensure pay and resource parity between youth defenders and prosecutors.

Require initial and ongoing training for all youth defenders and managing defenders

IDC should require initial and ongoing training for all attorneys who take youth defense contracts, and the state should invest the resources necessary to maintain the youth defense-specific training and mentorship program built under its recent federal grant. Youth defenders across Utah are in need of training in case investigation, motions practice, expressed-interest advocacy, trial advocacy skills, and post-disposition advocacy, as well as adolescent development and racial justice.

IDC should also require initial and ongoing training in management and supervision skills for any attorney given a managing defender contract, in recognition that management requires markedly different skills than courtroom advocacy. Managing attorneys who oversee youth defenders should be required to participate in youth defense training and develop expertise in youth defense.

Establish systems for youth to access counsel at the earliest points of legal system contact

Recent legislative reforms have ensured that youth are represented by counsel throughout the juvenile court process, but young people in Utah rarely have access to counsel at early, critical points of legal system contact, including during interrogation, the nonjudicial adjustment (NJA) process, and even initial appearances in court. Utah should legislatively mandate that youth be advised by defense counsel before being allowed to waive their rights prior to police interrogation. The state should establish systems to ensure that youth are represented by counsel during the preliminary inquiry phase and NJA process prior to formal court involvement. And courts and counties must ensure systems are in place to notify defense counsel when youth are detained and to ensure every young person is represented by counsel at their initial court hearing.

Support specialization & create a pipeline for future youth defenders

Utah and its counties must ensure that juvenile court is recognized as an important, specialized practice for all practitioners, including youth defenders, prosecutors, judges, and probation officers. In rural and remote areas of the state, where the youth defense contract in a single county is not sufficient for a fulltime contract, IDC and counties should encourage the regionalization of youth defense. An attorney who can provide youth defense services across counties can dedicate themselves to specializing in youth defense.

The state should support the establishment of youth defense clinics in Utah law schools to create a pipeline of new attorneys dedicated to youth defense as a career. Students in youth defense clinics can provide representation, under the supervision of attorney instructors, in certain types of delinquency cases, providing caseload relief for the state's current system of youth defense.

RECOMMENDATIONS TO IMPROVE JUSTICE & FAIRNESS FOR YOUTH

Eliminate blanket policies or practices of virtual hearings

Blanket policies or practices of holding all detention hearings virtually violate youths' due process rights. Youth defenders must advise their clients about potential benefits and disadvantages of appearing in-person at detention hearings and participating remotely. Detention hearings should be conducted virtually only after a youth has knowingly and intelligently waived their constitutional right to be present, and Utah juvenile courts should revise blanket policies or practices of holding all detention hearings virtually.

Collaborate to address recurring problematic practices

Where the juvenile court process or youth access to justice is delayed or thwarted by recurring problematic practices, juvenile court practitioners should collaborate to implement system reforms. In some counties, problems with police interrogation practices or police or prosecutor discovery disclosure were widely reported by numerous juvenile legal system practitioners and acknowledged as causing delays and disruptions in the juvenile court process. Rather than placing the burden on youth defenders to challenge each individual instance and allowing the court process to be delayed, court practitioners should work together toward systemic reforms to address shortcomings identified across individual cases.

Commit to combatting racial disparities

Racial and ethnic disparities exist at every step of the juvenile legal system, from in- and out-of-school suspensions to arrest to the juvenile court system. Utah must commit to reducing these disparities by conducting regular analyses of system involvement, interventions, and outcomes; and by requiring that all juvenile legal system professionals be trained on the historical context of overrepresentation and debias techniques. Youth defenders have a unique role and specific responsibilities to advance justice and champion a collective commitment from those working in the system to ensure the fairness of the juvenile court process and experience.

Eliminate all fees and costs, particularly costs-of-care charged to families

Utah has made progress limiting the financial burden of court involvement and should continue to address the impacts of juvenile legal system fees and costs imposed on young people and families. The state should abolish all fines, fees, and costs associated with juvenile court involvement, and should prioritize eliminating costs-of-care charged to families while their children are incarcerated.

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