

DELAWARE

An Assessment
of Access to Counsel and
Quality of Representation
in Juvenile Delinquency
Proceedings

JULY 2017



NJDC

NATIONAL JUVENILE DEFENDER CENTER

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DELAWARE

An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings

A REPORT OF THE NATIONAL JUVENILE DEFENDER CENTER

PRIMARY AUTHOR:

Nadia Seeratan
Senior Staff Attorney & Policy Advocate

EDITED BY:

Tim Curry
Director of Training & Technical Assistance

Sarah Edwards
Development & Communications Manager

Christina Gilbert
Senior Staff Attorney & Policy Counsel

Hillela Simpson
Gault Fellow

UNDER THE DIRECTION OF:

Mary Ann Scali
Executive Director



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Stephen A. Bergman

Juvenile Protection Division - Maryland Office of the Public Defender, Baltimore, Maryland

Kathryn Morris

Children’s Justice Clinic - Rutgers, The State University of New Jersey, Camden, New Jersey

Laura Cohen

Criminal and Youth Justice Clinic - Rutgers Law School, Newark, New Jersey

Amanda Powell

Consultant with National Juvenile Defender Center, Washington, D.C.

Lauren Dollar

Mid-Atlantic Juvenile Defender Center, Washington, D.C.

Nadia Seeratan

National Juvenile Defender Center, Washington, D.C.

Christina Gilbert

National Juvenile Defender Center, Washington, D.C.

Sandra Simkins

Children’s Justice Clinic - Rutgers, The State University of New Jersey, Camden, New Jersey

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

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EXECUTIVE SUMMARY

Fifty years ago, the United States Supreme Court affirmed children’s constitutional right to due process and to the assistance of counsel in delinquency court.¹ The historic decision, known as *In re Gault*, set forth a new status quo for the country: the pursuit of justice in juvenile court was no longer an abstract ideal but a necessary function of law requiring protections under the 14th Amendment of the Constitution. Threaded into the Supreme Court’s opinion were simple and yet, at the time, radical notions that children who face charges in juvenile court deserve a legal advocate to safeguard their rights and interests;² and that the good intentions of government, when left unchecked, cause injury to children, their families, and their future opportunities. Today, states are still working to fulfill this vision — central to which is an effective system of appointing high-quality defense counsel at all stages of a young person’s case.³

Over the last two decades, the National Juvenile Defender Center (NJDC) has evaluated juvenile defense delivery systems in 21 states; Delaware is now the 22nd. The purpose of a state assessment is to provide policymakers, legislators, and defense leadership, among other stakeholders, with a comprehensive understanding of children’s access to counsel in the state, to identify structural and systemic barriers to ensuring effective representation for young people, and to offer best-practices recommendations to improve access to and quality of juvenile defense.

The First State — as Delaware is proudly known⁴ — provides legal representation for youth charged in delinquency court through the Office of Defense Services (ODS).⁵

NJDC’s expert investigators visited Delaware’s three counties, where they conducted interviews with ODS staff and other juvenile court stakeholders, observed delinquency proceedings, and obtained information and reports from the Delaware Family Courts. Investigators also completed a statutory review of the state’s court rules, laws, and proposed legislation.

It was readily apparent that those responsible for dispensing justice in Delaware’s juvenile court system are firmly committed to fairness and helping youth access opportunities. However, there was no shared agreement among stakeholders of what effective juvenile public defense should look like, nor a clear articulation of how strong representation for youth supports the goals of the juvenile justice system.

Investigators concluded the quality of representation falls short of fulfilling the constitutional guarantees of due process for children in court. Delaware is one of a few states in the nation that imposes monetary bail on children, and one of the only states that allows for bail and detention hearings to be conducted via videoconference. And Delaware Family Courts persist in applying mandatory minimum sentences to some youth, despite research supporting developmentally informed, individualized justice for children. Serious racial inequities exist at all stages of delinquency proceedings across the state, with Black and brown children receiving harsher treatment at every decision point. Punitive practices like these make the need for zealous defenders essential.

1. *In re Gault*, 387 U.S. 1, 16 (1967).

2. *Id.*

3. NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS § 1.1 ETHICAL OBLIGATIONS OF JUVENILE DEFENSE COUNSEL (2012), <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf> [hereinafter NAT’L JUV. DEF. STDS.]; NAT’L JUVENILE DEFENDER CTR. & NAT’L LEGAL AID & DEFENDER ASS’N, TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS (2d ed. 2008), http://www.njdc.info/pdf/10_Core_Principles_2008.pdf [hereinafter TEN CORE PRINCIPLES]. See also NAT’L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 9 (2009); DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES, NAT’L JUVENILE DEFENDER CTR. 22-25 (2016), <http://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf> [hereinafter DEFEND CHILDREN].

4. *Delaware Government*, STATE OF DELAWARE, OFFICIAL WEBSITE, <http://delaware.gov/topics/facts/gov.shtml> (last visited May 26, 2017) (Delaware is the First State because it was the first of the 13 original states to ratify the U.S. Constitution).

5. DEL. CODE ANN tit. 29, § 4602 (2016).

The shortcomings identified in the Assessment are not because of negligent lawyering; on the contrary, most juvenile defenders are fiercely dedicated to their clients and to ensuring the best possible case outcomes. However, the juvenile court system overall lacks an awareness of the direct and collateral harms youth experience when adjudicated delinquent — especially when children are unnecessarily processed through court as a means to access court-based interventions. Rather than serve as advocates for children’s expressed interests, lawyers are encouraged to move clients quickly through adjudication with the goal of obtaining services, whether they are necessary or not.

The net this perspective casts over children, and particularly children of color, results in young people being tangled deeper in court and for longer periods of time when less-restrictive alternatives are appropriate. Moreover, systemic deficiencies limit children’s access to counsel and inhibit juvenile defenders’ ability to advocate for dispositions that are better-suited for a child’s interests and success.

While there is cause for concern in Delaware’s juvenile court system, the investigators also found notable strengths and promising practices that have been implemented with broad support. Building on the success of these reforms will keep the state on track to address and overcome the system’s shortfalls.

The Assessment’s core recommendations call for collaborative action to remedy gaps in juvenile defense delivery at the state, county, and local levels. The report concludes with a set of strategies to guide stakeholders through the implementation process and at last ensure that Delaware’s youth receive the constitutional protections guaranteed to them over five decades ago.

CORE RECOMMENDATIONS

ELIMINATE SYSTEMIC BARRIERS TO JUSTICE FOR CHILDREN

1 End Monetary Bail for Juveniles

Monetary bail for children should be abolished and replaced with developmentally appropriate, community-based alternatives. Monetary bail disproportionately affects poor children of color who, by virtue of their status as children, rarely have their own money in the amounts typically required for bail. This effectively denies their release without any consideration of what is appropriate for them as children.

2 End the Use of Video Bail Hearings and Transport Youth to Court for Hearings

Delaware should end the use of video bail hearings for youth and allow youth to appear in court for all bail/detention hearings. The Division of Youth Rehabilitative Services should be required to transport youth to all court appearances.

3 Eliminate Mandatory Minimum Sentences for Youth

Mandatory minimum sentences should be abolished for youth in the delinquency system.

4 Eliminate Racial Disparities

Delaware should provide mandatory training and education for juvenile justice stakeholders to work toward ending the disparate treatment of youth of color at all stages of system contact.

5 Reduce and Ultimately End Prosecution of Youth in the Adult System

All efforts should be made to ensure youth are not subject to adult court jurisdiction. Youth who are subject to prosecution in the adult criminal justice system should be afforded a reverse amenability hearing that provides individualized consideration to determine whether a youth would be better served in the rehabilitative juvenile justice system rather than the punitive adult system. The Office of Defense Services should establish a Youthful Defender Unit composed of a small group of juvenile defense attorneys with specialized training and skills necessary to represent youth charged as adults.

6 Eliminate “Once an Adult, Always an Adult” Statutory Provision

Delaware should abolish the “Once an Adult, Always an Adult” statutory provision in recognition of the developmental status of youth.

STRENGTHEN JUVENILE DEFENSE

1 Foster Zealous Advocacy and Address Role Confusion

Juvenile defense attorneys should zealously advocate to protect the due process rights of children throughout their involvement in the juvenile justice system. All juvenile court stakeholders, including those within the defense system, must understand that juvenile defense attorneys are ethically bound to provide meaningful advocacy for their client's expressed interests. The role confusion that prevails in Delaware's juvenile court practices leave far too many children without effective representation.

2 Recognize Juvenile Defense as a Specialized Area of Practice

Juvenile defense should be recognized as a highly specialized area of law. Attorneys handling juvenile delinquency cases should be required to receive ongoing training, supervision, and support to ensure comprehensive knowledge and expertise specific to the representation of children.

3 Establish Juvenile Defense Leadership Positions

The Office of Defense Services should create a position for a chief juvenile defender, who reports to the chief defender in Central Administration, to support, strengthen, and enhance the juvenile defense delivery system across the state. The chief juvenile defender should provide dedicated juvenile defense leadership to both the Public Defender's Office and the Office of Conflicts Counsel.

The Office of Conflicts Counsel, housed along with the Public Defender's Office under the Office of Defense Services, should create a juvenile managing attorney position to provide supervision and support to conflict attorneys who accept juvenile cases and ensure juvenile-specific expertise is maintained by its attorneys through requiring attendance at ongoing mandatory juvenile trainings. The Office of Conflicts Counsel should maintain a list of conflict attorneys who are specialists in juvenile delinquency representation and ensure that youth cases are assigned to juvenile specialists on this list. Court observation, performance feedback, and mentoring should be essential components of supervision for all attorneys handling juvenile cases both in the Public Defender's Office and Office of Conflicts Counsel.

4 Establish Specialized Juvenile Defense Practice Units

The Office of Defense Services should establish statewide, specialized juvenile defense practice units within the Public Defender's Office and the Office of Conflicts Counsel that are dedicated to representing youth.

5 Promulgate Statewide Juvenile Defense Standards of Practice and Establish Protocols for Monitoring and Oversight

Juvenile defense practice standards that outline ethical obligations and performance expectations for attorneys representing youth in delinquency proceedings should be adopted and implemented statewide to promote uniformity of practice and end "justice by geography," whereby children's access to quality representation depends on where they reside or are arrested.

6 Ensure Timely Appointment of Counsel and Afford Representation at All Stages

Children, by virtue of their status as children, should be appointed a juvenile defense attorney at all court appearances, including at the Justice of the Peace Court. Appointment should be irrespective of the income of their parents or guardians. Delaware should expand upon the recent reforms to ensure that appointment occurs at children’s earliest point of contact with the juvenile court system. Counsel should continue their representation throughout the duration of young people’s court involvement. This includes through all post-disposition stages of a case. Defense representation should also be provided, either directly or through the development of partnerships, for collateral matters such as school suspensions or expulsion hearings, expungement proceedings, and sex offender registry review hearings.

7 Ensure Continuity of Representation

Youth should be represented by the same attorney (“vertical representation”) throughout the duration of their involvement in the justice system. Horizontal representation — where a child has a different lawyer at each phase of the court process — precludes the ability of a child and a lawyer to establish a meaningful attorney-client relationship.

8 Allocate or Reallocate Sufficient Resources

Resources must be allocated or reallocated to support juvenile defense practice and specialized juvenile defense units within the Public Defender’s Office and the Office of Conflicts Counsel, with training and supervision that allows for reasonable caseloads and effective advocacy. Adequate funds must be allotted to ensure that pay and resources for Office of Conflicts Counsel attorneys who accept juvenile delinquency cases in Family Court are on par with accepting an adult felony case in Superior Court.

9 Establish a Comprehensive Juvenile Defense Data Collection System

The Office of Defense Services should prioritize tracking data regarding juvenile representation to inform future decision-making and foster improvements in policy. Externally, the Office of Defense Services should work with stakeholders, including the Criminal Justice Council and the Delaware Judicial Information System staff, to ensure data specific to juvenile defense is collected, and that other data that may be unavailable — such as instances of waiver of counsel — can be accessed statewide. Best practices and innovations should be identified and promoted through data collection.

“The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”

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

INTRODUCTION AND METHODOLOGY

The National Juvenile Defender Center (NJDC)'s state assessments are designed to equip policymakers, defense leadership, and other key stakeholders with a comprehensive analysis of the nature and structure of their state's juvenile defense system. Assessments are a unique tool for stakeholders to employ as they develop reforms to address shortfalls in the representation of youth.

Assessments are informed by qualitative research and data collection, which together provide a broad understanding of the strengths and weaknesses of states' juvenile defense systems.

Until NJDC launched its first state assessment, the issues, policies, and funding decisions specific to juvenile defense had never been fully understood or studied separately from adult criminal defense practice. Although some examinations of the adult system have included a juvenile component, such reviews have been cursory. In partnership with its regional juvenile defender centers, NJDC has completed assessments in 22 states, including Delaware.

NJDC was invited to conduct an Assessment in Delaware in order to provide the state with a detailed picture of the system of juvenile public defense. The chief judge of the Family Court of the State of Delaware expressed support for the Assessment and issued a memorandum to all Family Court judges and commissioners asking for their cooperation in meeting with Assessment investigators and providing access to juvenile court hearings. Similarly, the chief magistrate of the Justice of the Peace Court also backed the Assessment and sent out a memorandum to all Justice of the Peace magistrates requesting their cooperation. Other stakeholders within Delaware's juvenile justice system were also supportive during the investigation process.

The Assessment began with preliminary visits to the state for meetings with key stakeholders, policymakers, advocates, and defenders. NJDC staff prepared a comprehensive briefing memorandum with general information about Delaware's geography, demographics, economy, judicial branch, politics, and specific information about Delaware's juvenile justice system including the juvenile code, arrest statistics, disproportionate minority contact, the right to counsel in juvenile delinquency proceedings, transfer to adult court, and the adult public defense system.

With advice and input from local experts, NJDC conducted site visits in all three of Delaware's counties. NJDC assembled an investigative team of experts in juvenile defense that included current and former public defenders, academics, juvenile defense policy experts, and juvenile justice advocates. Each team member possessed extensive knowledge of the role of defense counsel in juvenile court. The investigative team was trained on the Assessment methodology and protocols, and members were dispersed across the state to conduct court observations, engage in confidential meetings with justice system personnel, and conduct site visits to the two detention centers and the post-adjudicatory Level IV and V commitment facilities. The Assessment teams used standardized interview protocols developed by NJDC that were specifically tailored to Delaware's juvenile court system. Upon completion of each site visit, the team members debriefed with NJDC staff and submitted field notes that were used to develop this report and its recommendations about access to counsel and quality of representation in the state's juvenile defense delivery system.

Delaware's small size presented a unique opportunity to capture a complete picture of the state's juvenile public defense system. By visiting all three counties, investigators observed Delaware's Family Courts responsible for 100 percent of the youth who enter Delaware's juvenile delinquency system. The investigative team also conducted an analysis of state demographics, population rates, juvenile arrest data, disposition rates, and operations at public defender offices, juvenile courts, detention centers, and other youth facilities. To ensure confidentiality, neither county-specific references nor names of those interviewed are used in this report.



CHAPTER ONE

Due process and the role of counsel in delinquency proceedings

I. THE EVOLUTION OF DUE PROCESS AND THE RIGHT TO COUNSEL

The first juvenile court in the United States was established on July 1, 1899, in Cook County, Illinois.⁶ The court embraced the English common law *parens patriae* philosophy which afforded the state a parental role to intervene in the lives of children, premised on the rationale that children were capable of rehabilitation and were less deserving of the harshest punishments imposed on adults.⁷ Thus began the juvenile court movement: by 1925, all but two states had created juvenile courts designed to be less punitive and more therapeutic than the adult criminal justice system.⁸ However, significant procedural and substantive differences emerged as juvenile courts provided only cursory legal proceedings, placing judicial economy and perceived best interests before due process protections for youth. Typically, no defense attorneys were involved — even when a youth’s liberty interest was at stake. Judges held unfettered discretion and imposed dispositions based on individual interpretation of a child’s “best interests,” which could vary wildly from warnings to probation supervision to placement in foster homes to confinement in “training schools” and other institutions for unspecified periods of time — irrespective of the alleged offense.⁹ Little formal procedure existed.

As the number of institutionalized youth increased, confidence in the ability of juvenile courts to succeed in rehabilitating “wayward” youth decreased. However, for almost 70 years after the establishment of the first juvenile court, constitutional challenges to juvenile court practices that denied standard procedural rights were consistently overruled.¹⁰ It was commonplace in state courts around the country for youth to be adjudicated by a mere preponderance of evidence, and basic due process rights — including the right to counsel, right to notice of charges, right to cross-examine witnesses, and right against self-incrimination — were denied to children.¹¹

A wave of changes began with the U.S. Supreme Court’s 1963 decision in *Gideon v. Wainwright*.¹² Emphasizing that “lawyers in criminal court are necessities, not luxuries,”¹³ *Gideon* held that the Sixth Amendment right to counsel requires appointment of a publicly funded attorney for adults charged with felonies who cannot otherwise afford defense counsel.¹⁴ In the unanimous decision, the Court wrote, “Reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”¹⁵

On the heels of *Gideon*, the U.S. Supreme Court decided a series of cases establishing a child’s right to due process protections when facing delinquency

6. NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 84 (Melissa Sickmund & Charles Puzzanchera eds., 2014), <http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf> [hereinafter NCJJ 2014 NATIONAL REPORT].

7. See *In re Gault*, 387 U.S. 1, 16 (1967).

8. NCJJ 2014 NATIONAL REPORT, *supra* note 6, at 84.

9. *Id.*

10. *Gault*, 387 U.S. at 11 (citing David R. Barrett et al., Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 794-95 (1966)).

11. *Gault*, 387 U.S. at 17; David R. Barrett et al., Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 794-95 (1966). See also NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 12 (2005) [hereinafter NCJFCJ JUVENILE DELINQUENCY GUIDELINES]; NAT’L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 158 (Joan McCord et al. eds., 2001).

12. 372 U.S. 335 (1963).

13. *Id.* at 344.

14. *Id.*

15. *Id.*

proceedings.¹⁶ Seminal among these cases, *In re Gault*, decided in 1967, clearly affirmed the right to counsel in delinquency proceedings under the Due Process Clause of the United States Constitution — as applied to states through the Fourteenth Amendment.¹⁷ The author of the opinion, Justice Abe Fortas, wrote:

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 juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child “requires the guiding hand of counsel” at every step in the proceedings against him.¹⁸

The Court in *Gault* recognized that youth in juvenile court were getting “the worst of both worlds,”¹⁹ explaining that youth received “neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”²⁰ The Court held that children charged with delinquency have a fundamental constitutional right to notice of charges against them, the right to counsel, the right to confront and cross-examine witnesses against them,

and the right against self-incrimination.²¹ Moreover, the Court explicitly rejected the State of Arizona’s claim that the child had others capable of protecting his interests, instead emphasizing the unique role of counsel and cautioning against the dangers of substituting other court actors as an advocate for the child.²² “The probation officer cannot act as counsel for the child. His role . . . is as arresting officer and witness against the child. Nor can the judge represent the child.”²³ While the judge, the probation officer, and other court personnel are charged with looking out for an accused child’s best interests, the Court noted that a child facing “the awesome prospect of incarceration” requires counsel to guide him in proceedings implicating potential loss of liberty.²⁴

Subsequent to *Gault*, the Court continued to increase protections for juveniles, holding that, rather than the mere preponderance standard previously relied upon by many state courts,²⁵ children are entitled to have the state prove the charges beyond a reasonable doubt in order for the courts to adjudicate a child in a delinquency proceeding, and holding that double jeopardy bars multiple prosecutions of a juvenile based on the same allegations.²⁶

Following in the Court’s footsteps, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJJPA) in 1974,²⁷ which established the U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention (OJJDP).²⁸ The JJJPA, through OJJDP, sought to regulate the function

16. *Gault*, 387 U.S. at 12; *United States v. Kent*, 383 U.S. 541, 553 (1966); *In re Winship*, 397 U.S. 358, 359 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

17. *See generally Gault*, 387 U.S. at 20.

18. *Id.* at 28, 36 (footnotes omitted).

19. *Id.* at 18 n.23 (internal quotations and citation omitted).

20. *Id.*

21. *Id.* at 10. *See also In re Winship*, 397 U.S. 358, 368 (1970) (describing the rights affirmed in *Gault*).

22. *Gault*, 387 U.S. at 36.

23. *Id.*

24. *Id.*

25. *Winship*, 397 U.S. at 368.

26. *Breed v. Jones*, 421 U.S. 519, 537 (1975).

27. Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5601 (2012).

28. *Legislation/JJDP Act*, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/about/legislation.html> (last visited May 26, 2017) (“Congress enacted the Juvenile Justice and Delinquency Prevention (JJDP) Act . . . in 1974. This landmark legislation established OJJDP to support local and state efforts to prevent delinquency and improve the juvenile justice system.”). *See also* U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONTACT (DMC) 2 (2014), http://www.ojjdp.gov/mpg/litreviews/Disproportionate_Minority_Contact.pdf; U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, IN FOCUS: DISPROPORTIONATE MINORITY CONTACT (2012), <http://www.ojjdp.gov/pubs/239457.pdf>.

of the juvenile justice system and its treatment of children. Additionally, the JJDP Act created the National Advisory Committee for Juvenile Justice and Delinquency Prevention, charged with the development of national juvenile justice standards.²⁹ Those standards were published in 1980, requiring that counsel represent children in all proceedings stemming from a delinquency matter, beginning at the earliest stage of the process.³⁰

Even earlier, the Institute for Judicial Administration (IJA) and the American Bar Association (ABA) recognized the need to create a foundation for establishing constitutionally required protections for youth in delinquency courts and in 1971 began the production of a 23-volume set of juvenile justice standards.³¹ The standards provide critical guidance on how to establish juvenile justice system procedures that ensure fair and effective management of juvenile matters, including a clear mandate that youth have access to counsel in delinquency proceedings.³²

Despite these efforts, by the 1980s it was disturbingly apparent that a disproportionate number of children of color were caught in the web of the juvenile justice system. This stark disparity led Congress to pass

legislation in 1988 amending the JJDP Act to provide funding to the states to decrease the disproportionate number of youth of color in juvenile facilities, both pre- and post-adjudication.³³ However, racial disparities continued to pervade the justice system, and, in 1992 when Congress reauthorized the JJDP Act, it enacted additional amendments elevating the issue of disproportionate minority confinement as a core requirement and tying state funding eligibility to compliance with the core requirements provisions.³⁴

With the 1992 reauthorization, Congress also reaffirmed the importance of the role of defense counsel in delinquency proceedings, charging OJJDP with establishing and supporting advocacy programs and services that protect due process rights of youth in juvenile court and calling for improvement of the quality of legal representation for youth in delinquency proceedings.³⁵ The deficiencies of public defense delivery systems were specifically pinpointed.³⁶

The last reauthorization of the JJDP Act occurred in 2002.³⁷ It included additional amendments expanding funding and data collection to include any disproportionate minority *contact* (DMC) within the juvenile justice system, rather than focusing

29. 42 U.S.C. § 5601. *See also Due Process Advocacy*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <https://www.ncjrs.gov/pdffiles/fs9749.pdf> (last visited May 26, 2017).

30. NAT'L ADVISORY COMM. FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE, §3.132 REPRESENTATION BY COUNSEL – FOR THE JUVENILE (1980).

31. *See IJA-ABA Standards for Juvenile Justice: Standards Relating to Counsel for Private Parties*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/JuvenileJusticeStandards.html (last visited June 8, 2017). *See also* INST. FOR JUDICIAL ADMIN. & AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH xvi-xviii (Robert E. Shepherd Jr., ed. 1996) [hereinafter IJA-ABA JUVENILE JUSTICE STANDARDS] (describing the project).

32. IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at § 1.1.

33. Anti-Drug Abuse Act of 1988, 21 U.S.C.A. § 1501 (1988). *See also Disproportionate Minority Contact Chronology: 1988 to Date*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/dmc/chronology.html> (last visited June 10, 2015). *See generally* CHRISTOPHER HARTNEY & LINH VUONG, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 2 (Nat'l Council on Crime and Delinq. 2009) [hereinafter HARTNEY & VUONG, RACIAL AND ETHNIC DISPARITIES], http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf. While disproportionate minority confinement for justice system-involved youth has been a subject of concern since the 1988 federal mandate made more information available on racial disparities in the juvenile system and also promoted efforts to reduce these numbers, no similar efforts have been made in the adult system.

34. Heidi M. Hsia et al., *Disproportionate Minority Confinement: 2002 Update*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION I (2004), <http://www.ncjrs.gov/pdffiles1/ojjdp/201240.pdf>.

35. *See* Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 102-586, 106 Stat. 4982 (1992) (reauthorizing the Act for fiscal years 1993-1996), *amended by* Pub. L. No. 107-273, 116 Stat. 1871 (2002). *See also* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP ANNUAL REPORT 2002 17-26 (2002), <https://www.ncjrs.gov/pdffiles1/ojjdp/202038.pdf>.

36. *See* sources cited *supra* note 35.

37. *See* 42 U.S.C. § 5601 (2002). *See also* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002). Legislation/JJDP Act Authorizing Legislation, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/about/legislation.html> (last visited May 26, 2017); Kristin Finklea, *Juvenile Justice Funding Trends*, CONGRESSIONAL RESEARCH SERVICE (2016), <https://www.fas.org/sgp/crs/misc/RS22655.pdf>.

just on disproportionate minority *confinement*.³⁸ This expansion recognized that youth of color receive disproportionate outcomes at all points of system contact, rather than solely pretrial secure detention and post-disposition commitment.³⁹ The JJDPDA still stands as the country's primary federal legislation regulating juvenile justice, but it is overdue for reauthorization.⁴⁰

Recognizing a gap still existed with respect to protecting the due process right to counsel for youth, the National Juvenile Defender Center promulgated the National Juvenile Defense Standards in 2012 to provide specific guidance, support, and direction to juvenile defense attorneys and other juvenile court stakeholders on the specific roles and responsibilities of juvenile defenders.⁴¹

Most recently, in March 2015 the U.S. Department of Justice (DOJ) filed a statement of interest to address, at the state level, the due process right to counsel for children accused of delinquency, as established by the U.S. Supreme Court in *Gault*.⁴² According to the DOJ, "For too long, the Supreme Court's promise of fairness for young people accused of delinquency has gone unfulfilled in courts across our country Every child has the right to a competent attorney who will provide the highest level of professional guidance and advocacy. It is time for courts to adequately fund public defense systems for children and meet their constitutional responsibilities."⁴³

Despite the array of U.S. Supreme Court cases, federal law and policies, standards and guidelines, and decades of reform efforts following *Gault*, states continue to struggle with effectively implementing basic due process rights for juveniles.

This Assessment is a comprehensive review of the extent to which Delaware has implemented these due process guarantees for youth and the reforms that are still necessary to achieve the promise of *Gault*.

II. THE ROLE OF DEFENSE COUNSEL

*"(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."*⁴⁴

- U.S. Dep't of Justice Statement of Interest for N.P. et al. v. Georgia

Although the right to counsel for youth in delinquency proceedings was established by the U.S. Supreme Court's decision in *Gault* 50 years ago,⁴⁵ in jurisdictions around the country, youth either continue to go unrepresented or, as is too often the case, receive an attorney lacking in the skills or supports needed to effectively represent the child.

These actual and constructive denials of representation deny youth due process. The right to effective counsel throughout the entirety of a youth's system involvement is critical.⁴⁶ It is the juvenile defender who must insist upon fairness of the proceedings, who must ensure that the child's voice is heard at every stage of the process, and who must safeguard the due

38. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. § 1758 (2002). *See also* Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, THE SENTENCING PROJECT 1 (2014), http://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf.

39. *Id.*

40. The JJDPDA expired in 2007. Legislation to reauthorize the Act has been introduced in the House and Senate in 2015, 2016, and again in 2017.

41. *See* NAT'L JUV. DEF. STDS., *supra* note 3 (explaining the role of juvenile defense counsel).

42. *See* U.S. Dep't of Justice Statement of Interest for N.P. et al. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. 2014) [hereinafter Statement of Interest in N.P.]. *See also* Press Release, Department of Justice, Department of Justice Statement of Interest Supports Meaningful Right to Counsel in Juvenile Prosecutions (March 13, 2015), <https://www.justice.gov/opa/pr/departments-justice-statement-interest-supports-meaningful-right-counsel-juvenile-prosecutions>.

43. Press Release, Department of Justice, Department of Justice Statement of Interest Supports Meaningful Right to Counsel in Juvenile Prosecutions (March 13, 2015), <https://www.justice.gov/opa/pr/departments-justice-statement-interest-supports-meaningful-right-counsel-juvenile-prosecutions>.

44. Statement of Interest in N.P., *supra* note 42, at 7.

45. *In re Gault*, 387 U.S. 1, 36 (1967) (internal citations omitted).

46. *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (holding that "the right to counsel is the right to the *effective* assistance of counsel") (emphasis added).

process and equal protection rights of the child.⁴⁷ The juvenile defender is the only justice system stakeholder 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.⁴⁸ This role is distinct from other juvenile court stakeholders, such as the judge, probation officer, guardian *ad litem*, or prosecutor, who consider the perceived "best interests" of the child.⁴⁹ As the U.S. Supreme Court stated in reinforcing the right to counsel for juveniles, "[W]e made clear in [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts."⁵⁰ If the child's attorney does not abide by the obligation to provide "expressed interest" advocacy, the youth is deprived of the fundamental right to counsel.⁵¹

Effective juvenile defense not only requires the attorney to meet all the obligations due to an adult client, but also necessitates the development of expertise in juvenile-specific law and policy; the science of adolescent development and how it affects a child's case; skills and techniques for effectively communicating with youth; collateral consequences specific to youth; and various other systems affecting the child, such as schools and adolescent health services.⁵² As the U.S. Supreme Court has noted, children "cannot be viewed simply as miniature adults" and should not be treated as such.⁵³ Rather, "[a] child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception."⁵⁴ Defenders must be thoughtful when communicating with youth and in crafting

legal arguments with respect to a youth's reduced culpability and increased capacity for rehabilitation.⁵⁵

Juvenile defenders must apply this expertise in representing youth at all stages of the justice system, and must ensure a client-centered model of advocacy whereby they empower and advise the youth client using developmentally appropriate communication so youth are able to make informed decisions about their case, such as whether to accept a plea offer or go to trial, to testify or remain silent, to accept or advocate against a service plan proffered by the state, or to offer alternatives.⁵⁶

Juvenile defense delivery systems must provide juvenile defenders with the necessary training, support, and supervision to ensure attorneys invest the appropriate amount of time to build rapport with clients, obtain discovery and conduct investigations, engage in motions practice and prepare for hearings, and monitor the post-disposition needs of clients within the court's jurisdiction in consultation with the client to ensure stated interest representation at all stages of court involvement.⁵⁷

Following the commemoration of the 50th anniversary of *In re Gault*, it is more important than ever to ensure the due process protections guaranteed to youth, including the critical role of defense counsel, are fully realized in juvenile courts around the country, including in Delaware.

47. The juvenile defense attorney has a duty to advocate for a client's "expressed interests," regardless of whether the "expressed interests" coincide with what the lawyer personally believes to be in the "best interests" of the client. *In re Gault*, 387 US 1 (1967). See generally, AM. BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT 1.2, 1.3, 1.4, 1.8, 1.14. "Expressed-interest" (also called stated-interest) representation requires that counsel assert the client's voice in juvenile proceedings.

48. See NAT'L JUV. DEF. STDS., *supra* note 3, at § 1.1 ETHICAL OBLIGATIONS OF JUVENILE DEFENSE COUNSEL, § 1.2 Elicit and Represent Client's Stated Interests. See also *Gault*, 387 US at 1.

49. "Best interest" representation allows advocates to advocate for their belief of what is best for the child.

50. *In re Winship*, 397 U.S. 358, 365 (1970).

51. See Statement of Interest in N.P., *supra* note 42, at 2 n.1.

52. NAT'L JUV. DEF. STDS., *supra* note 3, at § 1.3: SPECIALIZED TRAINING REQUIREMENTS FOR JUVENILE DEFENSE.

53. *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

54. *J.D.B.*, 564 U.S. at 272 (citations and internal quotation marks omitted).

55. TEN CORE PRINCIPLES, *supra* note 3, at 2.

56. NAT'L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 9 (2009). See also TEN CORE PRINCIPLES, *supra* note 3.

57. Statement of Interest in N.P., *supra* note 42, at 14.

“ [I]t is more important than ever to ensure the due process protections guaranteed to youth, including the critical role of defense counsel, are fully realized.”

CHAPTER TWO

Legal representation of youth in context

I. THE RIGHT TO COUNSEL IN DELAWARE

The constitutional right to counsel for youth in delinquency proceedings, as affirmed by the U.S. Supreme Court in *Gault*, is not expressly conveyed under Delaware statute but, during the course of the investigation for this Assessment, was generally construed to apply through the Delaware Family Court Rules of Criminal Procedure,⁵⁸ which govern all delinquency proceedings. At the time, the Rules did not provide a specific right to counsel for youth; instead, they simply provided that when a person appears in court without counsel, the court shall advise the person of the right to counsel, and where “the law requires” or in cases where the “Court deems it appropriate,” the court shall appoint counsel to provide representation at every stage of the proceedings, unless the right to counsel is waived or independent counsel obtained.⁵⁹

In February 2017, the Rules were amended to add a new section, effective as of April 2017. This new rule explicitly states that youth have a right to counsel at all stages in delinquency proceedings.⁶⁰ If a child is not represented by counsel at the initial Family Court

appearance, “the Court shall order the Chief Defender to assign counsel.”⁶¹ Prior to the adoption of this rule, the only requirements for advisement of the right to counsel to the child and the child’s custodian were prior to the commencement of a detention hearing⁶² and prior to an arraignment hearing.⁶³ While the new rule indicates a right to counsel at all stages of the case, it conflicts with pre-existing Rule 11, which specifically states that there is no right to counsel at the disposition hearing. In fact, Rule 11 explicitly revokes the right to counsel if a plea is entered, specifying that the constitutional right to be represented by counsel at trial and sentencing will be waived if a plea of guilty is accepted by the court.⁶⁴ The Office of Defense Services (ODS) indicates that despite the conflict between the written rules, in most instances if children are represented in court at other stages, they will also be represented for the entry of a plea, disposition, and subsequent review hearings.

Delaware provides counsel to youth through ODS, which provides legal representation throughout all stages of their criminal and delinquency cases to clients who cannot afford an attorney. ODS is composed of three branches: Central Administration,

58. DEL. FAM. CT. R. CRIM P. 44.1(a) (2017). *See also* DEL. CODE ANN. tit. 29, § 4602(c) (2016) (providing that persons under age 18 arrested or charged with a crime or act of delinquency are automatically eligible for representation by the Office of Defense Services).

59. DEL. FAM. CT. R. CRIM P. 44(a) (2008). This rule did not provide a specific right to counsel for juveniles and was ambiguous, although it provided a safeguard with respect to child waiver of counsel. At the time of the Assessment the rule stated: “If the person charged appears in Court without counsel, the Court shall advise of the right to counsel and, *in every case in which the law requires and in any other case in which the Court deems it appropriate*, the Court shall appoint counsel to represent the person charged *at every stage of the proceeding* unless the person charged elects to proceed without counsel or is able to obtain counsel. A waiver of the right to counsel by a child shall be in writing unless made in Court on the record or made in the presence of the child’s custodian. The Court may appoint the Public Defender to represent a person charged if it finds at or after arraignment that the person charged, and if the person charged is a child the custodian as well, is indigent; *if the person charged is an indigent child who wishes counsel but whose custodian is not indigent but has refused to obtain counsel for the child, the Court may appoint counsel to represent the child at the expense of the child’s custodian.*” *Id.* (emphasis added).

60. DEL. FAM. CT. R. CRIM P. 44.1(a) (2017).

61. FAM. CT. CRIM P. 44.1(b).

62. DEL. FAM. CT. R. CRIM. P. 5.1(a)(2)(b) (2017).

63. DEL. FAM. CT. R. CRIM. P. 10(a)(2) (2017). Rule 44(a) also provided language regarding indigence eligibility to request representation by the Public Defender or appointment of counsel; however, with the passage of House Bill 382, deeming children under 18 automatically eligible for representation by the Office of Defense Services irrespective of an indigence determination, this section of the law is no longer applied. *See* H.B. 382, 148th Gen. Assemb. (Del. 2016), <http://legis.delaware.gov/BillDetail?legislationId=24598>.

64. DEL. FAM. CT. R. CRIM. P. 11(c)(8)(b) (2017). *See also* DEL. FAM. CT. R. CRIM P. 1(e) (2017) (providing “sentence” shall, in the case of a child, mean “disposition”).

the Public Defender's Office (PDO), and the Office of Conflicts Counsel (OCC).⁶⁵

The prevailing law at the time of the Assessment site visits in February 2016 was that in order for counsel to be appointed for a child, an indigence determination was required by ODS or the court.⁶⁶ This law required that in cases where either a child and the child's custodian are deemed "indigent," or the custodian is not found to be indigent but will not obtain counsel for the child, the court may appoint counsel at the expense of the child's custodian.⁶⁷ However, in practice, at least since 2013, ODS had an internal policy of deeming all youth financially eligible for appointment of an attorney at public expense and providing representation.⁶⁸ In the summer of 2016, this practice was codified by the legislature.⁶⁹ Now, "[a]ny person under the age of 18 arrested or charged with a crime or act of delinquency shall be automatically eligible for representation by the Office of Defense Services."⁷⁰

II. SYSTEM STRUCTURES IN DELAWARE

The experiences of children in the justice system are determined to a large extent by the structures of the judicial system, the juvenile justice system, and the

public defense system. Each system affects how and where delinquency proceedings and processes are handled, from young people's first contact with the system to the time they exit.

Delaware has a unique additional agency called the Criminal Justice Council (CJC), created in 1984. "The CJC is an independent body committed to leading the criminal justice system through a collaborative approach that calls upon the experience and creativity of the Council, all components of the criminal justice system [juvenile and adult], and the community."⁷¹ The CJC is the State Administering Agency of multiple federal grant programs that enhance the criminal justice system in Delaware.⁷²

Currently, CJC membership consists of 29 members and includes chief judges and magistrates, law enforcement and corrections officers, adult and youth serving agencies, the chief defender, and members of the public.⁷³

A. Structure of Delaware's Judicial System

The Delaware Judiciary is comprised of six courts, all authorized by the state constitution: the Supreme Court, the Superior Court, the Court of Chancery, the

65. DEL. CODE ANN tit. 29, § 4601 (2015). As discussed *infra* note 245, in 2015, the statewide Office of Conflicts Counsel administration by the Office of Defense Services was codified at DEL. CODE ANN tit. 29, § 4605 (2015).

66. DEL. FAM. CT. R. CRIM P. 44(a) (2015); DEL. CODE ANN tit. 29, § 4602(a) (2015). A determination of indigence is made by the Office of Defense Services prior to arraignment, but by statute at or after the arraignment the determination is made by the court. DEL. CODE ANN tit. 29, § 4602(b) (2016).

67. DEL. FAM. CT. R. CRIM P. 44(a) (2017).

68. This practice formally began on March 14, 2013.

69. H.B. 382, 148th Gen. Assemb. (Del. 2016), <http://legis.delaware.gov/BillDetail?legislationId=24598>.

70. DEL. CODE ANN tit. 29, § 4602 (2016).

71. DEL. CODE ANN tit. 11, § 8700 (2005). See also *The Delaware Criminal Justice Council*, STATE OF DELAWARE: THE OFFICIAL WEBSITE OF THE FIRST STATE, <http://cjc.delaware.gov/> (last visited May 26, 2017).

72. *About the Agency*, STATE OF DELAWARE: THE OFFICIAL WEBSITE OF THE FIRST STATE, <http://cjc.delaware.gov/divisions.shtml> (last visited May 26, 2017).

73. See DEL. CODE ANN tit. 11, § 8701 (2015). Membership includes the Chief Justice of the Supreme Court; the President Judge of Superior Court; the Chief Judge of Family Court; the Chief Magistrate of the Justice of the Peace Court; the Attorney General; the Chief Defender; the Commissioner of the Department of Correction; the Chief of the Bureau of Prisons of the Department of Correction; the Director of the Division of Youth Rehabilitation; the Chairperson of the Board of Parole; the Superintendent of the State Police; the Chief of the New Castle County Police Department; the Chief of the Wilmington Police Department; the Chairperson of the Delaware Police Chiefs' Council; the Director of the Division of Forensic Science; the Secretary of Health and Social Services; the Secretary of Labor; the United States Attorney for the District of Delaware; the Secretary of Education; the Secretary of the Department of Technology and Information; the Chief Judge of the Court of Common Pleas; the Secretary of the Department of Services for Children, Youth and their Families; the Secretary of Public Safety; or a designated representative for each of these members. Additionally, a sitting judge of the United States District Court for the District of Delaware as designated by the Chief Judge of the United States District Court for the District of Delaware and five at-large members who serve at the pleasure of the Governor for a term of five years served on the Council.

Family Court, the Court of Common Pleas, and the Justice of the Peace Court.⁷⁴

The Delaware Supreme Court is the state's highest court. The Supreme Court receives direct appeals from the Court of Chancery, the Superior Court, and the Family Court, and it exercises general powers of superintendence over the other state courts.⁷⁵

For most people, including many youth, the Justice of the Peace Court is their initial entry point into the justice system.⁷⁶ It has jurisdiction over certain civil matters.⁷⁷ This includes making preliminary detention and bail decisions for any person under 18 who is arrested when the Family Court is not in session.⁷⁸ These decisions are then reviewed by the Family Court on the next day it is in session.⁷⁹ The Justice of the Peace Court also handles truancy cases, including "criminal contempt of a truancy court order," but otherwise has limited jurisdiction for juvenile offenses.⁸⁰ The Court of Common Pleas hears appeals, except for those related to contempt of

court in truancy proceedings, which the Family Court hears.⁸¹ There are currently 16 Justice of the Peace Court locations across Delaware's three counties.⁸² By law, in each county there must be at least one open Justice of the Peace Court at all times.⁸³

The Family Court has exclusive jurisdiction over juvenile delinquency and misdemeanor domestic relations cases, as well as adult misdemeanor crimes against juveniles, intra-family misdemeanor crimes, and most juvenile traffic infractions.⁸⁴ The Family Court does not conduct jury trials and does not have jurisdiction over certain enumerated juvenile offenses outlined by statute.⁸⁵ Where a charge of delinquency that would be within the original civil jurisdiction of the Family Court is joined with a felony pending against a child in Superior Court, those charges will fall within the original criminal jurisdiction of the Superior Court.⁸⁶ Additionally, various specialty courts, such as Mental Health Court and Drug Court, have been developed under the Family Court's jurisdiction.⁸⁷

74. DEL. CONST. art. IV, § 1. *See also* ANNUAL REPORT, THE DELAWARE JUDICIARY (2015), <http://courts.delaware.gov/aoc/AnnualReports/FY15/doc/AnnualReport2015.pdf#search=annual%20report>.

75. *An Overview of the Delaware Court System*, DELAWARE COURTS, <http://courts.delaware.gov/overview.aspx> (last visited May 26, 2017).

76. *See id.* *See also* DEL. CODE ANN tit. 10, § 9202(d) (2002) ("The Justice of the Peace Court shall have and exercise such jurisdiction, both criminal and civil, as shall be conferred upon it by law."); ANNUAL REPORT, THE DELAWARE JUDICIARY (2015), <http://courts.delaware.gov/aoc/AnnualReports/FY15/doc/AnnualReport2015.pdf#search=annual%20report>.

77. *An Overview of the Delaware Court System*, DELAWARE COURTS, <http://courts.delaware.gov/overview.aspx> (last visited May 26, 2017). *See also* ANNUAL REPORT, THE DELAWARE JUDICIARY (2015), <http://courts.delaware.gov/aoc/AnnualReports/FY15/doc/AnnualReport2015.pdf#search=annual%20report>.

78. *See* DEL. FAM. CT. R. CRIM P. 5(b)(1)(b) (2017) (allowing a peace officer apprehending a child without a warrant to bring the child before a court other than the Family Court).

79. *See* DEL. CODE ANN tit. 10, § 1009(d) (2014); DEL. FAM. CT. CRIM P. 5(b)(2)(c)(iii) (2017).

80. DEL. CODE ANN tit. 10, § 921(3) (2016) ("Justice of the Peace Court shall have original and exclusive jurisdiction over truancy matters as set forth in Chapter 27 of Title 14, and the Family Court shall assume exclusive jurisdiction over those matters transferred or appealed from the Justice of the Peace Court in accordance with §§ 2731 and 2732 of Title 14.")

81. *An Overview of the Delaware Court System*, DELAWARE COURTS, <http://courts.delaware.gov/overview.aspx> (last visited May 27, 2017).

82. *Id.*

83. DEL. CODE ANN tit. 10, § 9205 (2006).

84. DEL. CODE ANN tit. 10, § 921-922 (2016); *Jurisdiction of the Family Court*, DELAWARE COURTS, <http://courts.delaware.gov/family/jurisdiction.aspx> (last visited May 27, 2017). Domestic relations cases include child neglect, dependency, child abuse, child and spousal support cases, paternity of children, custody and visitation of children, adoptions, terminations of parental rights, divorces and annulments, property divisions, specific enforcement of separation agreements, guardianship over minors, imperiling the family relationship, and orders of protection from abuse. *See also* DEL. CODE ANN tit. 10, § 927 (2007) (enumerating traffic offenses over which Family Court has exclusive civil jurisdiction for juveniles); *Criminal Cases in the Family Court*, DELAWARE COURTS, http://courts.delaware.gov/help/proceedings/fc_criminal.aspx (last visited May 27, 2017).

85. DEL. CODE ANN tit. 10, § 921(2)(a) (2016) (offenses excluded from Family Court jurisdiction include cases where juveniles are charged with first or second degree murder, rape in the first or second degree, unlawful sexual intercourse in the first degree, assault in the first degree, robbery in the first degree, kidnapping in the first degree, or an attempt to commit any of these crimes); *Jurisdiction of the Family Court*, DELAWARE COURTS, <http://courts.delaware.gov/family/jurisdiction.aspx> (last visited May 27, 2017).

86. DEL. CODE § 921(16).

87. *Criminal Cases in the Family Court*, DELAWARE COURTS, http://courts.delaware.gov/help/proceedings/fc_criminal.aspx#juvenile (last visited May 28, 2017) (explaining that juveniles may be sent to diversion, including Drug Court).

Cases heard by a Family Court judge are appealed directly to the Delaware Supreme Court.⁸⁸ Cases heard by a Family Court commissioner can be appealed to a Family Court judge, who then makes a *de novo* determination on the portion to which objections are made. The judge's order is then appealable to the Supreme Court.⁸⁹

The Superior Court is a court of general jurisdiction with exclusive jurisdiction over adult felony cases and most drug offenses.⁹⁰ Appeals from the Superior Court are made to the Delaware Supreme Court.⁹¹

The Court of Common Pleas has jurisdiction over misdemeanor criminal cases,⁹² and appeals are taken to the Superior Court.⁹³

B. Structure of Delaware's Juvenile Justice System

In Delaware, youth in the juvenile justice system under the age of 18 are not considered "criminals" except as specified in Title 10, section 1010 pertaining to cases where youth are subject to adult court jurisdiction.⁹⁴

1. Family Court and Justice of the Peace Court

The Delaware legislature endorsed the concept of a statewide, unified family court with establishing legislation in 1971.⁹⁵ The Delaware Family Court has branches in each of its three counties. The Family Court has "original statewide civil and criminal jurisdiction over family and child matters and offenses."⁹⁶ In 2005, the Family Court became a constitutional court by virtue of an amendment to the Delaware Constitution.⁹⁷

In Family Court, judges and commissioners preside over delinquency cases, with a general practice of judges presiding over felony cases and commissioners presiding over misdemeanor cases.

By statute, the governor appoints 17 judges to serve in the Family Court statewide.⁹⁸ Judges have the authority to "[h]ear, determine, render, and enforce judgment in any proceeding before the Court."⁹⁹ This includes the authority to determine and enter disposition for alleged violations of probation by youth.¹⁰⁰ Commissioners, on the other hand, are attorneys appointed by the governor and assigned to oversee a range of Family Court matters, such as juvenile detention hearings¹⁰¹ and delinquency proceedings, which include but are not limited to amenability hearings, arraignments, preliminary hearings, case reviews, violation of probation hearings, and trials.¹⁰² Commissioners also have the power to

88. See *Jurisdiction of the Family Court*, DELAWARE COURTS, <http://courts.delaware.gov/family/jurisdiction.aspx> (last visited May 27, 2017). The exception is adult criminal cases, which are appealed to the Superior Court. DEL. CODE ANN. tit. 10, § 1051(b) (1994).

89. DEL. CODE ANN. tit. 10, § 915(d)(1) (2008).

90. DEL. CODE ANN. tit. 10, § 541 (1953). See also *Legal Jurisdiction*, DELAWARE COURTS, <http://courts.delaware.gov/superior/aboutus/jurisdiction.aspx> (last visited May 28, 2017).

91. DEL. SUP. CT. CRIM. PROC. 37; DEL. CODE ANN. tit. 10, § 9901(2) (1969). See also DEL. CODE ANN. tit. 10, § 1051(b) (1994); *Legal Jurisdiction*, DELAWARE COURTS, <http://courts.delaware.gov/superior/aboutus/jurisdiction.aspx> (last visited May 28, 2017).

92. DEL. CODE ANN. tit. 10, § 1322 (1994).

93. DEL. CODE ANN. tit. 10, § 1326 (1994).

94. DEL. CODE ANN. tit. 10, § 1010 (2012).

95. *Family Court History*, DELAWARE COURTS, <http://courts.delaware.gov/family/history.aspx> (last visited May 28, 2017). See also DEL.

CODE ANN. tit. 10, § 902(a) (1971) ("In the firm belief that compliance with the law by the individual and preservation of the family as a unit are fundamental to the maintenance of a stable, democratic society, the General Assembly intends by enactment of this chapter that 1 court shall have original statewide civil and criminal jurisdiction over family and child matters and offenses as set forth herein.

The court shall endeavor to provide for each person coming under its jurisdiction such control, care, and treatment as will best serve the interests of the public, the family, and the offender, to the end that the home will, if possible, remain unbroken and the family members will recognize and discharge their legal and moral responsibilities to the public and to one another.").

96. DEL. CODE ANN. tit. 10, § 902(a) (1971).

97. *Family Court History*, DELAWARE COURTS, <http://courts.delaware.gov/family/history.aspx> (last visited May 28, 2017). See also DEL. CONST. art. IV, § 1.

98. DEL. CODE ANN. tit. 10, § 906(a)-(b) (2008).

99. DEL. CODE ANN. tit. 10, § 925(9) (2009).

100. DEL. CODE § 925(18).

101. DEL. CODE ANN. tit. 10, § 915(c)(6) (2008).

102. DEL. CODE § 915(c)(8).

accept pleas and to enter disposition for children who have been adjudicated delinquent.¹⁰³

Magistrates are judicial officers appointed by the governor¹⁰⁴ to preside in the Justice of the Peace Court. Unlike judges or commissioners, magistrates are not required to be trained in the law.¹⁰⁵

2. *Delaware Department of Justice, Office of the Attorney General: Family Division*

The Office of the Attorney General (OAG) is responsible for making all charging decisions following an arrest. A team of deputy attorneys general in the OAG prosecute juvenile delinquency cases in Family Court and truancy cases in the Justice of the Peace Court.¹⁰⁶ The unit is charged with coordinating between police, probation, schools, and the courts, and “seeks disposition of cases that aim to protect the community while being in the best interest of the juvenile.”¹⁰⁷

3. *The Department of Services for Children, Youth and their Families*

The Department of Services for Children, Youth and their Families (DSCYF) is the umbrella agency that provides integrated youth services through three service groups: the Division of Youth Rehabilitative Services (DYRS), the Division of Family Services

(DFS), and the Division of Prevention and Behavioral Health Services (DPBHS).¹⁰⁸ DSCYF’s mission is to provide a “continuum of prevention, community-based, and confinement services” to youth in Delaware’s juvenile justice system.¹⁰⁹

The three entities have distinct obligations within DSCYF. DYRS provides services to youth ordered into its care by the Family Court. These services include detention, treatment, probation, and post-disposition aftercare services.¹¹⁰ DYRS is responsible for assessing the individual needs of youth up to age 19 and collaborating with the youth’s family, school, and community to coordinate services and resources that will help the child become a positive citizen within the community.¹¹¹ DPBHS provides assessment, treatment, and services that range from outpatient to residential for youth up to age 18 who are dealing with mental health or substance abuse issues.¹¹² DFS investigates child abuse and neglect and dependency allegations, as well as offering treatment services, foster care, adoption, independent living, and child care licensing services.¹¹³

a. Detention Facilities

DYRS operates two secure pretrial detention facilities in Delaware. The New Castle County Detention Center (NCCDC) has 64 beds, and the Stevenson

103. DEL. CODE § 915(c)(9)-(10).

104. *Magistrate Screening Committee*, DELAWARE COURTS, <http://courts.delaware.gov/jpcourt/screening.aspx> (last visited May 28, 2017).

105. *Id.* See also *Frequently Asked Questions*, STATE OF DELAWARE: THE OFFICIAL WEBSITE OF THE FIRST STATE, <http://dpr.delaware.gov/boards/magistrate/faqs.shtml> (last visited May 28, 2017).

106. *Family Division: About the Division*, DELAWARE.GOV, <http://attorneygeneral.delaware.gov/family/> (last visited May 29, 2017) (The Family Division also includes three other Department of Justice units: Child Support, Child Protection, and Domestic Violence and Child Abuse; cross-training to provide a range of services across the four units is the encouraged practice.).

107. *Family Division: About the Division*, DELAWARE.GOV, <http://attorneygeneral.delaware.gov/family/> (last visited May 29, 2017).

108. David Backes, *Delaware Improves Juvenile Justice System by Integrating Services*, RECLAIMING FUTURES (July 2, 2012), <http://reclaimingfutures.org/delaware-improves-juvenile-justice-system>; *Department of Services for Children, Youth and their Families: About the Department*, STATE OF DELAWARE: THE OFFICIAL WEBSITE OF THE FIRST STATE, <http://kids.delaware.gov/aboutdepartment.shtml> (last visited May 29, 2017).

109. John Wilson et al., *JUVENILE JUSTICE SYSTEM IN DELAWARE 2012: THE LITTLE ENGINE THAT COULD 2* (2012), http://kids.delaware.gov/pdfs/yrs_csg_jjbook.pdf [hereinafter *JUVENILE JUSTICE SYSTEM IN DELAWARE*].

110. *Delaware State Profile*, NAT’L CTR FOR JUVENILE JUSTICE, <http://dev.ncjj.org/stateprofiles/profiles/DE06.asp> (last updated Nov. 27, 2007).

111. DEL. CODE ANN tit. 31, § 5108(b) (1995); *Division of Youth Rehabilitative Services*, STATE OF DELAWARE, <http://kids.delaware.gov/yrs/yrs.shtml> (last visited June 6, 2017).

112. *Prevention and Behavioral Health Services*, STATE OF DELAWARE, <http://kids.delaware.gov/pbhs/pbhs.shtml> (last visited May 29, 2017); *JUVENILE JUSTICE SYSTEM IN DELAWARE*, *supra* note 109, at 1.

113. *Family Services*, STATE OF DELAWARE DEPT. OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, <http://kids.delaware.gov/fs/fs.shtml> (last visited June 6, 2017).

House Detention Center (Stevenson House) has 55 beds.¹¹⁴

Delaware made a commitment to detention reform in 2002 when the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI) came to the state. At that time Delaware became a JDAI replication site with a focus on reducing the excessive placement of children and adolescents in Delaware's secure detention facilities.¹¹⁵

b. Commitment Facilities

DYRS also operates four staff-secure residential treatment facilities for youth adjudicated delinquent and ordered into secure care and treatment by the court.¹¹⁶ The Ferris School is a hardware-secure, Level V facility that holds up to 72 adjudicated boys between the ages of 13 and 18. The average length of stay at Ferris is six months. Ferris is intended for youth deemed to be serious or "chronic" offenders who are a risk to self or others and who require intensive rehabilitative treatment. It is a licensed drug and alcohol residential treatment facility. Grace Cottage is a 14-bed, Level IV facility for girls; Snowden Cottage is a 15-bed, Level IV facility for adjudicated boys; and Mowlds Cottage is a 15-bed, Level IV transitional housing program for boys who are transitioning out of the Ferris School. Mowlds also provides for short-term commitments for youth on the aftercare program who have been committed directly by the Family Court.¹¹⁷ The average length of stay for all programs in Mowlds is six weeks.¹¹⁸ All facilities have an Educational Services unit charged with providing educational programming for youth. There is no Level V facility for girls, so girls deemed to be in need of that level of care are sent to facilities in other states. Ten percent of Delaware's committed youth, both girls

and boys, are sent out of state through contracts and agreements with other state facilities and agencies. This percentage includes youth adjudicated of sex offenses, as Delaware does not have any residential treatment programs for these youth.¹¹⁹

A 2012 report states that DYRS serves around 5,000 youth per year; approximately 3,000 youth are served through community-based services and 2,000 youth are placed into DYRS-operated detention or residential commitment facilities.¹²⁰

Boys aged 16 and 17 who are charged as adults are incarcerated in the Sussex Correctional Institute — an adult facility — and held in the Youthful Criminal Offenders Program (YCOP) unit. These youth, whether pretrial or post-conviction, are isolated from the general adult population due to their status as children.

C. Structure of Delaware's Public Defense Delivery System

Delaware's public defense delivery system is a state-based system with centralized management and training. The current structure of the Delaware Office of Defense Services (ODS) was established in May 2015 to expand and reorganize the existing Public Defender's Office (PDO) and to reflect its broadened role to provide oversight of appointed counsel attorneys providing publicly funded defense in conflict cases.¹²¹ Responsibility for conflict attorneys moved from the court to PDO in 2011 in an effort to remove judicial oversight from the operation of public defense services. The conflict program was renamed the Office of Conflicts Counsel (OCC) and became a division of the PDO. The creation of ODS is an effort to remedy barriers in the provision of public defense representation throughout the state.

114. NCCDC is located in Wilmington and Stevenson House is located in Milford.

115. See JUVENILE JUSTICE SYSTEM IN DELAWARE, *supra* note 109, at 1. See also *Juvenile Detention Alternatives*, STATE OF DELAWARE, http://kids.delaware.gov/yrs/yrs_JJ_Collaborative.shtml (last visited May 29, 2017).

116. STACY EDWARDS ET AL., STATE OF DELAWARE CRIMINAL JUSTICE COUNCIL, YRS FACILITY POPULATIONS BY QUARTER FOR 2014-2016 1ST QUARTER (2016), http://cjc.delaware.gov/sac/pdf/JuvenileJustice/YRS_Facility_Populations_2014-2016_1st_Quarter.pdf [hereinafter YRS FACILITY POPULATIONS BY QUARTER].

117. *Id.* at 3.

118. *Id.*

119. JUVENILE JUSTICE SYSTEM IN DELAWARE, *supra* note 109, at 1.

120. See *id.*

121. The Governor of Delaware signed Senate Bill 47, establishing Delaware's Office of Defense Services (ODS), in May 2015. An Act to Amend the Delaware Code Relating to Criminal Defense for Indigent Persons, S.B. 47, 148th Gen. Assemb. (Del. 2015).

The chief defender, appointed by the governor for a term of eight years,¹²² oversees the operation of ODS, including the appointment of attorneys and other ODS staff. Central Administration provides management and support for both the PDO and OCC.

The PDO maintains offices in all three counties in Delaware and is led statewide by a chief deputy. Each county office is headed by an assistant division head, who reports to the chief deputy. The OCC is headed by a chief conflicts counsel with an administrative office in one county. The OCC also has one supervisor in each of the other counties. Stakeholders describe OCC as a law practice composed of multiple independent contractors, as distinct from the PDO, which is operated more like a traditional law firm.¹²³ The OCC contracts with private attorneys to handle cases in which the PDO has conflicts that preclude it from taking on the case. OCC attorneys maintain independent offices throughout the state and are paid by the OCC at either an hourly rate or through a flat rate contract.

The PDO employs ancillary support services, such as investigators, psycho-forensic evaluators, mitigation specialists, paralegals, and administrative professionals, who are available to any of the PDO attorneys. OCC does not employ individuals who provide ancillary services, but conflict attorneys may access these services by making requests to the chief conflicts counsel. OCC's management team has grown since its inception in 2011.

In addition to providing direct public defense services in all three counties of the state, ODS is also active in furthering legislative and policy initiatives in the areas of criminal and juvenile justice.

III. AN OVERVIEW OF DELAWARE LAW RELATING TO DELINQUENCY PROCEEDINGS

What follows is a brief summary of key statutory provisions relating to delinquency proceedings in Delaware. It is not intended to be legal advice, nor is it intended to be a comprehensive analysis of the entire juvenile code. For greater detail on specific provisions, please look to Title 10, section 901 et seq.

The Family Court has “original statewide civil and criminal jurisdiction over family and child matters and offenses.”¹²⁴ Delaware law provides that “no child shall be deemed a criminal by virtue of an allegation or adjudication of delinquency” unless charged as an adult, and the “proceedings shall be in the interest of rather than against the child.”¹²⁵ Where a child is adjudicated delinquent, dispositional decisions are to provide the least restrictive interventions necessary to protect public safety and offer the youth opportunity for rehabilitation.¹²⁶

A child is defined as “a person who has not reached his or her eighteenth birthday.”¹²⁷ There is no minimum age of jurisdiction; however, legislation passed in July 2015 limited prosecution of children under the age of ten unless, after a competency evaluation, the court makes a determination that the child is competent to proceed.¹²⁸ The OAG may request that the court extend its jurisdiction over a youth up to age 21 or until they are discharged by the court.¹²⁹

A. Complaint, Arrest, Initial Court Appearance, and Detention Determinations

Youth who are arrested when the Family Court is not in session first appear before a magistrate at the Justice of the Peace Court because, as previously mentioned, at least one court in each county is open 24 hours a

122. Currently, Chief Defender Brendan O'Neill is serving a six-year term, as his appointment was prior to the enactment of S.B. 47. *About the Office of Defense Services*, DELAWARE.GOV, <http://ods.delaware.gov/office-defense-services/> (last visited May 29, 2017).

123. Matt Bittle, *Delaware Public Defender's Office Operating 'Smoothly' After Split*, DELAWARE STATE NEWS (Jul. 24, 2015), <http://delawarestatenews.net/news/delaware-public-defenders-office-operating-smoothly-after-split/>.

124. DEL. CODE ANN tit. 10, § 902 (1971).

125. DEL. CODE ANN tit. 10, § 1002(a) (2016).

126. DEL. CODE ANN tit. 10, § 1008(c)-(d) (2015).

127. DEL. CODE ANN tit. 10, § 901(4) (2016).

128. DEL. CODE § 1002(b)(1). *See also* An Act to Amend Title 10 of the Delaware Code Relating to Delinquency Proceedings in the Family Court, H.B. 126, 148th Gen. Assemb. (Del. 2015), <http://legis.delaware.gov/BillDetail?LegislationId=24669>.

129. DEL. CODE ANN tit. 10, § 928(a) (2010).

day. The justice of the peace or magistrate decides whether secure detention is appropriate and sets the amount, type, and conditions of bail.¹³⁰ Where the Family Court has original jurisdiction, it reviews these decision on the next business day.¹³¹

Any judge of any court in Delaware, including a Justice of the Peace Court magistrate, is authorized under the law to make detention determinations.¹³² At any detention hearing, the court must consider all information with respect to the possible release of the child from custody, including the child's prior delinquency record, the present home situation, availability of adequate adult supervision pending trial, the nature and circumstances of the alleged misconduct, protection of the public interest, and the general welfare of the child.¹³³ Pending adjudication, no child alleged to be delinquent may be placed in secure detention unless there is no less restrictive means to reasonably assure the child will attend the adjudicatory hearing, *and* that at least one of nine additional factors outlined in the statute exist.¹³⁴

Additionally, prior to making a decision of secure detention, the court must consider and, where appropriate, employ one of five alternatives to secure detention:

- (1) Release on the child's own recognizance.

- (2) Release to parents, guardian, custodian or other willing member of the child's family acceptable to the Court.

- (3) Release on bail, with or without conditions.

- (4) Release with imposition of restrictions on activities, associations, movements, and residence reasonably related to securing the appearance of the child at the next hearing.

- (5) Release to a nonsecure detention alternative developed by the Department of Services for Children, Youth and their Families such as home detention, daily monitoring, intensive home base services with supervision, foster placement, or a nonsecure residential setting.¹³⁵

If the court decides to place a child in secure detention, the court must provide in writing the basis for the detention determination and the reasons for not employing one of the five alternatives to secure detention.¹³⁶ If a risk assessment was completed for the pending offense and resulted in a presumption of release, the court must state in writing the basis for overriding the presumption.¹³⁷

If secure detention is imposed by the Justice of the Peace Court, the youth is detained until the next day the Family Court is in session, when a bail review hearing before a judge or commissioner is conducted to determine the appropriateness of detention and to review conditions of release.¹³⁸ If a child is detained

130. *See* DEL. FAM. CT. R. CRIM P. 5(b)(1)(b) (2017) (allowing a peace officer apprehending a child without a warrant to bring the child before a court other than the Family Court).

131. DEL. CODE ANN tit. 10, § 1009(d) (2014); DEL. FAM. CT. CRIM P. 5(b)(2)(c)(iii) (2017).

132. DEL. CODE ANN tit. 10, § 1005(b) (1995); DEL. CODE ANN tit. 10, § 1007 (2012).

133. DEL. FAM. CT. R. CRIM. P. 5.1(b) (2017).

134. DEL. CODE ANN tit. 10, § 1007(a) (2012). These factors are as follows: (1) Youth is a fugitive; (2) charged with a felony; (3) charged with class A misdemeanor that involves violence, sex offense, unlawful imprisonment, or weapons offense; (4) failed to appear at past hearings or substantial probability that child will fail to appear; (5) alleged to be intimidating witnesses or unlawfully interfering with administration of justice; (6) escaped from detention facility or pattern of repeated failure to comply with court ordered placement; (7) incurred new charges while sentenced to facility or residential placement and the parent/guardian refuses custody; (8) breached condition of release; or (9) committed new charge while on release for prior charges. Note that the criteria for detention under DEL. FAM. CT. R. CRIM. P. 5.1(c) slightly vary from those of the statute. Under the Rules, at least one of the following grounds must exist: nature of alleged offense threatens physical safety of persons or property; no adequate supervision; likely that child may flee the jurisdiction; child has escaped after commitment or is a fugitive from another State; reasonable grounds to believe that physical/mental/emotional well-being is threatened or impaired and there is no less restrictive alternative; or child has a prior record of delinquency. *See* DEL. FAM. CT. R. CRIM. P. 5.1(c).

135. DEL. CODE ANN tit. 10, § 1007(b) (2012).

136. DEL. CODE § 1007(c).

137. *Id.*

138. DEL. CODE ANN tit. 10, § 1005(3) (1995); DEL. CODE ANN tit. 10, §1007(d) (2012).

pending adjudication, the adjudicatory hearing must be held no later than 30 days from the date of detention.¹³⁹

The statute governing the Family Court¹⁴⁰ is silent on the right to counsel at the initial detention hearing. The code only provides that “[a] detention review with counsel shall be heard within 14 days of the initial detention hearing”¹⁴¹

The Family Court Rules of Criminal Procedure are also silent on the child’s right to counsel where the initial detention hearing is held in the Justice of the Peace Court. The rules only specify that if the child is detained by a court other than the Family Court, “a detention hearing shall be held by [the Family] Court on the next day it is in session.”¹⁴² However, if the initial detention hearing is heard by the Family Court, prior to the commencement of the detention hearing, the child and custodian shall be advised of the right to counsel.¹⁴³ The Justice of the Peace Court Rules of Criminal Procedure do not address advisement of the right to counsel.

B. Bail

Under the Delaware Constitution, “[A]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is positive or the presumption great.”¹⁴⁴ Delaware’s presumption against secure detention requires the court to consider releasing a child on bail, with or without conditions,

as an alternative to detention.¹⁴⁵ Regardless of whether the initial hearing is at the Justice of the Peace Court or the Family Court, the court sets the amount, type, and conditions of bail.¹⁴⁶ A juvenile risk assessment instrument is used to guide bail determinations.¹⁴⁷ Bail is not a prerequisite to release, however. Children may be released on their own recognizance with or without conditions of release.¹⁴⁸ If a secured bail amount is set and posted, the child is released.¹⁴⁹ If bail is not posted, the child remains in secure detention. When secured bail is set, Family Court must hold periodic bail reviews.¹⁵⁰ Bail policy, procedures, and guidelines are regularly reviewed by the chief magistrate for the Justice of the Peace Court and set forth to all Justice of the Peace Court magistrates.¹⁵¹

C. Arraignment

Under the Family Court Rules of Criminal Procedure, the court is required to advise the child and the child’s custodian of the right to counsel prior to the commencement of an arraignment.¹⁵² The court shall inform the child and the child’s custodian of the charges in the petition, the right to plead guilty or not guilty, and the right to a speedy trial.¹⁵³ The court must also advise the child and custodian of the nature and purpose of the pending proceedings and the child’s constitutional rights, if the child is not represented by counsel.¹⁵⁴ A guilty plea may be entered at arraignment.¹⁵⁵ If a plea of not guilty is entered, the case is scheduled for review or an adjudicatory hearing.

139. DEL. CODE ANN tit. 10, § 1007(f) (2012).

140. DEL. CODE ANN tit. 10, § 901 et seq. - § 1001 et seq.

141. DEL. CODE § 1007(e).

142. DEL. FAM. CT. R. CRIM. P. 5.1(a)(1) (2017).

143. DEL. FAM. CT. R. CRIM. P. 5.1(a)(2)(b) (2017).

144. DEL. CONST. art. 1, § 12.

145. DEL. CODE ANN tit. 10, § 1007(b)(3) (2012).

146. *See generally* DEL. CODE ANN tit. 10, §§ 1005 (1995), 1007 (2013).

147. *See infra* Appendix A, Delaware Juvenile Risk Assessment Form.

148. DEL. CODE ANN tit. 10, § 1005(b)(1) (1995).

149. Conditions of release are set at either the initial bail hearing or a subsequent bail hearing before release.

150. DEL. CODE ANN tit. 10, § 1007(e) (2012).

151. Legal Memorandum from the State of Delaware Justice of the Peace Courts to Justices of the Peace No. 11-294, Bail Procedures and Guidelines (Nov. 8, 2011), <http://courts.delaware.gov/legal%20memoranda/>; Legal Memorandum from the State of Delaware Justice of the Peace Courts to Justices of the Peace No. 11-242, Bail Policy (Nov. 18, 2011), <http://courts.delaware.gov/legal%20memoranda/>.

152. DEL. FAM. CT. R. CRIM. P. 10(a) (2017).

153. FAM. CT. CRIM. P. 10(b).

154. FAM. CT. CRIM. P. 10(a).

155. FAM. CT. CRIM. P. 10(d).

D. Diversion and Pre-Adjudicatory Probation

Pre-adjudication diversion is available to some of Delaware's youth at the discretion of the Attorney General's office. These pre-adjudicatory programs occur without formal adjudication and include programs such as school diversion, mediation, and teen court. They are not codified, and their use is not consistent statewide. Arbitration is also available to eligible youth pursuant to Family Court Criminal Procedure Rule 6A.¹⁵⁶

A child may also be "diverted" from deeper involvement in the system after accepting an admission or plea of *nolo contendere*, if the court chooses to stay the declaration of delinquency, defers further proceedings, and places the child on probation before adjudication.¹⁵⁷ If a child on this track satisfactorily completes this probation, the court shall vacate the adjudication.¹⁵⁸ If the child is unsuccessful, the declaration of delinquency is entered.¹⁵⁹

The Family Court Adjudicated Drug Court Program is not a diversion program. However, it allows a delinquency adjudication to be vacated upon successful completion of the program.¹⁶⁰

A mental health court program also operates statewide. In both of these programs, youth typically will enter a deferred guilty plea, although some adjudicated youth enter the program on a case-by-case basis.¹⁶¹ Entry into either program is contingent upon court approval. If youth do not successfully complete drug court or mental health court programs, their plea will not be vacated and the youth may face a violation of probation action.

E. Adjudicatory Hearing

The adjudicatory hearing is the juvenile equivalent of a trial in the adult criminal justice system. In Delaware, youth do not have a right to a jury trial in delinquency proceedings.¹⁶² All hearings or trials conducted in the Family Court are on the record and open to the public.¹⁶³

At or before the hearing, the child may plead not guilty, guilty, or, with the consent of the court, *nolo contendere* — i.e., guilty without admission.¹⁶⁴ Prior to accepting a guilty plea or a plea of *nolo contendere*, the court must address the youth and ascertain whether several requirements for accepting the plea are met,¹⁶⁵ including ensuring the plea is knowing, voluntary,

156. DEL. FAM. CT. R. CRIM. P. 6A(a) (2017).

157. DEL. CODE ANN tit. 10, § 1009A (2006).

158. See generally DEL. CODE ANN tit. 10, § 1009A (2006).

159. See generally *id.* See also DEL. CODE ANN tit. 11, § 4218 (2016).

160. See generally DEL. CODE ANN tit. 10, § 1012 (2003).

161. *Delaware's Mental Health Courts*, DELAWARE CRIMINAL JUSTICE COUNCIL 5, <http://courts.delaware.gov/aoc/mhtf/doc/DEMENTalHealthCourts.pdf>.

162. See DEL. FAM. CT. R. CRIM. P. 1(e) (2017); DEL. FAM. CT. R. CRIM. P. 24(a) (2017). See also *R.S. v. State*, 1981 WL 377683 (Del. Super. Ct. 1981) (holding that a "request for a de novo jury trial must be considered frivolous").

163. DEL. FAM. CT. R. CRIM. P. 24 (2017).

164. DEL. FAM. CT. R. CRIM. P. 11(a)-(b) (2017).

165. The Rules provide ten factors the court must ascertain before accepting a plea from a juvenile: "(1) that the person charged is the person named as the person charged in the information or petition; (2) that the person charged understands the facts alleged in the information or petition and that these facts constitute the particular offense(s) charged; (3) that the person charged has fully discussed the facts alleged in the information or petition and the plea of guilty to the offense charged therein with counsel, if the person is represented, and if the person is a child with the custodian as well; (4) that the person charged is knowingly, intelligently and voluntarily admitting the offense charged, in the information or petition; (5) that no threats, promises, or representations have been made to the person charged or, if the person is a child to the person or the custodian, to induce entry of a plea of guilty or *nolo contendere*; (6) that the person charged, and if the person is a child the custodian as well, understands the sentencing alternatives available to the Court if the person charged enters a plea of guilty or *nolo contendere*, including, if the person is a child, the provisions of the Mandatory Sentencing Act, if applicable; (7) that there have been no promises or representations made to the person charged, or if the person is a child to the person or the custodian, with respect to the sentence the Court will impose; (8) that the person charged understands that the following Constitutional rights will be waived if the plea of guilty or *nolo contendere* is accepted by the Court: (a) the right to a speedy trial; (b) the right to be represented by counsel at trial and sentencing; (c) the right to cross-examine witnesses and present defense witnesses; and (d) the right to be presumed innocent until proven guilty beyond a reasonable doubt; (9) that the person charged understands that the next step in the proceedings will be sentencing; and (10) that the person charged, and if the person is a child the custodian as well, fully understands the consequences of the plea of guilty to the offense(s) charged in the information or petition." DEL. FAM. CT. R. CRIM. P. 11(c).

and intelligent;¹⁶⁶ that the youth understands the constitutional rights they are waiving by making the plea;¹⁶⁷ and that there is a factual basis for the plea.¹⁶⁸ After a youth enters a plea the court may proceed directly to adjudication and disposition or may continue the matter for disposition.¹⁶⁹

F. Disposition

Disposition in a juvenile case is the same as sentencing for an adult.¹⁷⁰ Under Delaware’s Family Court Rules of Criminal Procedure, if the youth is adjudicated after entering a plea of guilty or *nolo contendere*, the youth’s right to counsel at disposition is deemed waived.¹⁷¹ In instances where the youth is determined to be delinquent after an adjudicatory hearing, the youth is afforded the right to counsel at disposition,¹⁷² who may then speak on the youth’s behalf and present information in mitigation of punishment at the disposition hearing.¹⁷³

In reaching dispositional decisions, the DYRS Dispositional Guidelines require the court and DSCYF to consider the instant offense, prior record of delinquency, and availability of less restrictive interventions that will protect public safety and offer the youth an opportunity for rehabilitation.¹⁷⁴ The guidelines require that DYRS makes a service level

recommendation to the Court, which makes the final determination.”¹⁷⁵

1. Family Court Discretion in Determining Disposition

The Family Court has broad discretion over a child’s disposition.¹⁷⁶ The court may defer the proceedings pending further investigation or where the interests of the child will thereby be served.¹⁷⁷ While the proceedings are pending, the court may release or detain the child.¹⁷⁸ At disposition, the court has several determinations it can make including, but not limited to, allowing the child to remain in the home, placing the child on probation, or placing the child in the custody of DSCYF.¹⁷⁹

2. Mandatory Minimum Sentencing for Some Offenses

Despite the court’s broad discretion in disposition and the mandate of the Dispositional Guidelines that “only chronic or violent juvenile offenders require secure incarceration,”¹⁸⁰ Delaware law also provides for mandatory minimum sentencing, under certain circumstances, for a child who is 14 years of age or older,¹⁸¹ removing judicial officers’ discretion in setting juvenile dispositions in some cases.¹⁸² A child over the age of 14 who is adjudicated of two

166. DEL. FAM. CT. R. CRIM. P. 11(c)(4) (2017).

167. FAM. CT. CRIM. P. 11(c)(8).

168. FAM. CT. CRIM. P. 11(d).

169. FAM. CT. CRIM. P. 11(e) (2017). *See also* DEL. FAM. CT. R. CRIM. P. 1(e) (2017) (stating that “sentence” shall, in the case of a child, mean “disposition”).

170. DEL. FAM. CT. R. CRIM. P. 1(e) (2017).

171. FAM. CT. CRIM. P. 11 (c)(8) (However, ODS policy is to provide counsel even after a plea of guilty or *nolo contendere*.)

172. DEL. FAM. CT. R. CRIM. P. 32(a)(1) (2017).

173. FAM. CT. CRIM. P. 32 (a)(1).

174. DEL. CODE ANN tit. 10, § 1008(d) (2015). *See also Dispositional Guidelines for Juveniles*, STATE OF DELAWARE, http://kids.delaware.gov/yrs/yrs_dispositional_guid.shtml (last visited May 29, 2017) (guidelines establishing DYRS make service level recommendations to the court, which then makes the final determination).

175. *Dispositional Guidelines for Juveniles*, STATE OF DELAWARE, http://kids.delaware.gov/yrs/yrs_dispositional_guid.shtml (last visited May 29, 2017).

176. DEL. CODE ANN tit. 10, § 1009(c) (2014).

177. DEL. CODE § 1009(c)(1).

178. *Id.*

179. *Id.* *See also* DEL. CODE ANN tit. 10, § 1009(f)(1)-(2). Revocation or suspension of driving privileges cannot be waived except *after* a minimum of six months, and then only after the child successfully completes a course of instruction and demonstrates a critical need (e.g., loss of meaningful employment opportunity, loss of school opportunity, or urgent need of child or immediate family) for return of driving privileges.

180. DEL. CODE ANN tit. 10, § 1008(c).

181. DEL. CODE ANN tit. 10, § 1009(e)(6) (2014).

182. DEL. CODE § 1009(e), (k).

felonies within a 12-month period “is declared in need of mandated institutional treatment” under the statute, and the Family Court must commit the child to DSCYF for a minimum mandatory sentence of six months of institutional confinement.¹⁸³

Additionally, a minimum mandatory commitment of 12 months shall be ordered by the court where a child is adjudicated delinquent of an offense that constitutes either “possession of a firearm during the commission of a felony” *or* “robbery first degree,” where a deadly weapon appears to be displayed, is represented to be in the youth’s possession, or in which serious physical injury is inflicted on a person not involved in the commission of the offense.¹⁸⁴ Under Delaware law, children 14 years of age or older who are convicted of “possession of a deadly weapon by a person prohibited,” where the weapon is a handgun, are subject to a minimum mandatory sentence of six months in Level V incarceration.¹⁸⁵ For a second such conviction, a minimum mandatory sentencing of one year of Level V incarceration must be imposed.¹⁸⁶

G. Post-Disposition Proceedings

In Delaware, youth only have a right to counsel post-disposition at the appeal stage.¹⁸⁷ The court may also hold disposition review hearings, but the rules are unclear as to whether counsel is to be appointed for these hearings.

H. Children Tried in Adult Criminal Court

Statutory exceptions to the Family Court’s jurisdiction provide that a child can be prosecuted as an adult if the child is charged with certain offenses or if there is a determination that the child is “non-amenable” to the Family Court’s rehabilitative processes.¹⁸⁸ In some instances, the child’s case originates in Family Court, and after an application for transfer is made and a

hearing held, the youth may be transferred to the Superior Court or another court having jurisdiction over the offense for trial as an adult.¹⁸⁹ In other cases, due to statutory exclusion, the Superior Court has original jurisdiction over the child’s case, but the case may be transferred to the Family Court if the interests of justice would best be served.¹⁹⁰ However, there are also some cases where neither court has the discretion to consider a youth’s amenability to the rehabilitative processes of Family Court, and the child must be prosecuted in Superior Court.¹⁹¹ Additionally, under a “Once an Adult, Always an Adult” provision in Delaware law, the Family Court cannot have jurisdiction if the child was previously declared to be “non-amenable” to the rehabilitative processes of the Family Court, if the child was previously denied an application for reverse transfer, or the child was previously convicted as an adult for a felony.¹⁹²

183. DEL. CODE § 1009(e)(1).

184. DEL. CODE § 1009(k).

185. DEL. CODE ANN tit. 11, § 1448(f)(1) (2017).

186. DEL. CODE ANN tit. 11, § 1448(f)(1) (2017).

187. DEL. FAM. CT. R. CRIM. P. 38.2 (2017).

188. DEL. CODE ANN tit. 10, § 1010 (2012). *See also* DEL. CODE ANN tit. 10, § 921(2)(a)-(b) (2016); DEL. CODE ANN tit. 10, § 1002 (2016).

189. DEL. CODE § 1010.

190. DEL. CODE ANN tit. 10, § 1011 (2002).

191. DEL. CODE ANN tit. 11, § 1447A(f) (2001); DEL. CODE ANN tit. 11, § 1447(d) (2001); DEL. CODE ANN tit. 11, § 1302 (1995); DEL. CODE ANN tit. 11, § 1449(d) (1995).

192. DEL. CODE § 1011(e).

“ [Delaware’s] new rule explicitly states that youth have a right to counsel at all stages in delinquency proceedings.”



CHAPTER THREE

Assessment findings and analysis

This chapter outlines key findings about Delaware’s juvenile public defense system. Across the state, the investigative team was welcomed by various juvenile justice stakeholders, including judges, commissioners, prosecutors, defenders, probation officers, detention and residential center staff, and others. A culture of collegiality, camaraderie, and cooperation among these key players was evident to all investigators. This culture, which has positive aspects, also inhibits and limits effective and zealous defense, as evidenced by a severe lack of advocacy on behalf of youth. Many stakeholders, including juvenile defenders, voiced a belief that it was “best” for system-involved youth to be adjudicated to receive services that could be provided by the justice system. At the outset, this immediate acquiescence to juvenile court involvement ignores the fact that some accused children do not belong in the justice system and frames the obstacles to providing an effective juvenile public defense delivery system in Delaware.

Moreover, the camaraderie embraced by key justice system stakeholders in juvenile justice contributes to a troubling divide between insiders and outsiders in the family courts throughout the state. Youth and families too often appeared to have little understanding of what was happening during the court process — a pervasive sense of being on the outside looking in — with little or no control over their futures.

I. THE ROLE OF JUVENILE DEFENSE COUNSEL IN DELAWARE AT CRITICAL STAGES OF DELINQUENCY PROCEEDINGS

Access to counsel is an essential first step to protecting a youth’s due process rights, but access alone is insufficient for ensuring *effective* assistance of counsel. The U.S. Department of Justice has made clear, “[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.”¹⁹³ Counsel for youth must be more than a body in the

room; counsel must be competent to deliver quality representation. The IJA/ABA Standards provide that it is “the responsibility of courts, defender agencies, legal professional groups, individual practitioners, and educational institutions to ensure that competent counsel . . . [is] available for representation of all persons with business before juvenile and family courts.”¹⁹⁴

The Delinquency Court Guidelines produced by the National Council for Juvenile and Family Court Judges provide that qualified counsel should fulfill all of the following responsibilities prior to going to trial:

- (1) Investigate all circumstances of the allegations.
- (2) Seek discovery of any reports or other evidence to be submitted or considered by the juvenile delinquency court at the trial.
- (3) If circumstances warrant, request appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protect the child’s rights.
- (4) Inform the youth of the nature of the proceedings, the youth’s rights, and the consequences if the youth is adjudicated on the petition.¹⁹⁵

Across Delaware, investigators observed a troubling lack of zealous advocacy by lawyers on behalf of youth. While most children in Family Court now appear with counsel, in many instances, the attorney standing beside the youth is available “in name only” and was rarely seen providing adequate representation.

For youth, continuity of representation is critically important to establishing this trust. Research in adolescent development suggests that youth have a harder time developing trust with those

193. See Statement of Interest in N.P., *supra* note 42, at 7, 11.

194. IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at § 2.1(a).

195. NCJFCJ JUVENILE DELINQUENCY GUIDELINES, *supra* note 11, at 122.

in authority,¹⁹⁶ are more susceptible to feeling traumatized or abandoned when those they do trust disappear,¹⁹⁷ and have psychosocial and cognitive development considerations that require an investment of time and dedication to overcome.¹⁹⁸ As such, having a trusted attorney on whom the youth can rely throughout the court process is essential. Vertical representation is the term used to describe systems in which the same lawyer represents the youth at every stage of the case. Yet, in Delaware at the time of the Assessment, ODS used a system of horizontal representation — a term used to describe a system of defense representation in which a client is represented by different attorneys at different stages in the case. For example, youth often have a different attorney representing them at bail review, adjudication, and disposition stages. As this report will illuminate, such inconsistency in the youth's representation has consequences on many levels.

A. Arrest and Initial Proceedings

Juvenile defenders are not present at interrogation or during many early proceedings in Delaware. When a child alleged to be delinquent is arrested by law enforcement, Delaware law requires the officer to immediately notify the child's custodian,¹⁹⁹ to take the child before the Family Court or the Justice of the Peace Court to determine whether the child should be detained, and to file a sworn complaint alleging delinquency with a report stating the reason for the youth's apprehension.²⁰⁰ At this stage the court may issue a warrant for the officer to take

the child into custody, may release the child on the child's own recognizance or with bail, or may order the child detained by DSCYF if no less restrictive alternative is available.²⁰¹ Prior to an arrest, an officer can offer youth alleged to have committed minor misdemeanors entry into the civil citation program, a civil ticketing alternative to arrest and criminal prosecution.²⁰² If the officer chooses to arrest the youth, it is the officer, rather than the prosecutor, who determines which charges to bring against a youth, and it is the officer who files a petition for every arrest made, bringing the youth into the court system. More recently, law enforcement will contact the prosecutor when a youth is arrested outside of Family Court hours with a gun or for other weapons-related charges. In those instances, deputy attorneys general are appearing in Justice of the Peace Courts in order to pursue adult court prosecutions and seek high bail determinations. However, no defense attorneys are present at this time.²⁰³

At the earliest points of contact with law enforcement, including during police interrogation, the presence of an attorney provides an invaluable safeguard to protect youths' rights and advocate on their behalf.²⁰⁴ However, defense attorneys are not available to youth during police interrogations, and even when youth are arrested and brought before the courts, in many instances they stand unrepresented as decisions on their liberty are made.²⁰⁵

196. See generally Jeffrey Fagan & Tom Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUSTICE RESEARCH 217, 236 (2005); REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 91 (Richard J. Bonnie et al. eds. 2013), <https://www.nap.edu/catalog/14685/reformingjuvenile-justice-a-developmental-approach> [hereinafter REFORMING JUVENILE JUSTICE].

197. See generally NAT'L CTR. FOR MENTAL HEALTH AND JUVENILE JUSTICE, TRAUMA AMONG YOUTH IN THE JUVENILE JUSTICE SYSTEM 3 (2016), <https://www.ncmhjj.com/wp-content/uploads/2016/09/Trauma-Among-Youth-in-the-Juvenile-Justice-System-for-WEBSITE.pdf>; KRISTINE BUFFINGTON ET AL., NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, TEN THINGS EVERY JUVENILE COURT JUDGE SHOULD KNOW ABOUT TRAUMA AND DELINQUENCY (2010), http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_1.pdf; REFORMING JUVENILE JUSTICE, *supra* note 196; MACON STEWART, NAT'L CTR. FOR CHILD TRAUMATIC STRESS, CROSS-SYSTEM COLLABORATION (2013), http://www.nctsn.org/sites/default/files/assets/pdfs/jj_trauma_brief_crosssystem_stewart_final.pdf.

198. See Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOL. 583, 592 (2009).

199. DEL. CODE ANN tit. 10, § 1004 (2007) (describing duties of officer who has a child in custody).

200. DEL. CODE § 1004(2).

201. DEL. CODE ANN tit. 10, § 1005 (1995).

202. DEL. CODE ANN tit. 10, § 1004A (2016).

203. See *infra* Sections 3.IV.B, 3.IV.C.

204. See NAT'L JUV. DEF. STDS., *supra* note 3, at § 3.2: REPRESENTATION OF THE CLIENT IN POLICE CUSTODY. See also *Haley v. Ohio*, 332 U.S. 596 (1948).

205. See *supra* Section 2.III.A.

1. Arraignment

At the time of this Assessment, OCC attorneys did not appear at arraignments. When there was a PDO conflict, an OCC attorney would be appointed to handle future appearances, but no attorney was available to consult with the youth at the initial appearance. This absence resulted in youth having to represent themselves at this critical hearing where their liberty interests were at stake. Since conducting this Assessment, OCC has begun developing practices to address the lack of OCC counsel at arraignment. For example, in one county, since November 2016, OCC attorneys have begun to appear at the arraignment calendar on a rotating basis. In another, the supervising attorneys have started appearing at arraignment since noncontract attorneys are not able to appear within the short timeframe in which notification of a conflict is made available. This is not a suitable fix, since having supervising attorneys take on this role detracts from their ability to adequately perform their duties as supervisors. In January 2017, one Family Court changed its arraignment process so that arraignments occur at various times throughout the day. This change makes it even more challenging for OCC attorneys or supervisors to be present at arraignments. With so many potential times at which counsel may be needed, setting up a rotating assignment similar to that in the first county mentioned here is unworkable. Resource limitations also make it difficult to ensure that conflict-free counsel can be available at all possible arraignment calendars in this county. For youth conflicted out of PDO representation, this places them at a significant disadvantage.

Youth who are represented by the PDO have an attorney appear with them at the initial bail review hearing in the Family Court. This bail review hearing takes the place of an arraignment hearing. One investigator reported, “There is no formal arraignment; rather, what the court calls ‘arraignment’ is merely the filling out of a form or an interview with a non-attorney intake worker at the Public Defender’s Office, with no hearing or court process conducted.” This practice was confirmed in other interviews — no formal advisement and reading of the charges against the child takes place in the Family Court unless a youth is entering a guilty plea at the initial Family Court hearing. In that instance the proceeding turns

into a formal arraignment and adjudication all in one hearing, where youth plead at arraignment, even without discovery. Equally troubling is that there was no sign that probable cause is ever contested. Presumably, when a case begins in the Justice of the Peace Court, a probable cause finding is made in the absence of defense attorneys to raise any challenges. But on review in Family Court, investigators observed no instance of defense attorneys challenging that prior finding (assuming one was made) or of probable cause being contemplated as a necessary finding by the court. ODS reports that for both youth and adults, police provide the magistrate with an affidavit on which the magistrate determines probable cause, *ex parte*. Even so, that magistrate’s decision is subject to review by the Family Court, and defense attorneys should raise a challenge to probable cause whenever there is a colorable reason to do so. The practice in Delaware systemwide is that, outside of adult felonies, there are no probable cause hearings in which attorneys play a role. For both youth and adults, defense attorneys should be demanding probable cause hearings, challenging probable cause, filing motions to dismiss when probable cause is not sufficiently established, and challenging detention determinations made without a legitimate probable cause determination.

2. Initial Bail Review/Video Bail Hearings

As discussed earlier, when a youth is detained, the court conducts the initial bail review hearing via video. Investigators were troubled by the video bail hearings observed in all three counties. Investigators regularly saw either of two scenarios playing out. In some instances, the child’s attorney was at the detention facility to ensure that the youth had direct access to confidential conversations with counsel, but was not available in the courtroom to negotiate with prosecutors and intake workers or to have conversations with family members. Alternatively, if the child’s attorney was in the courtroom managing the on-site representation required, the youth was left alone at the facility, observing what was happening as if it were a television program. Either process severely impedes effective advocacy.

In those video hearings where the defender was with the youth at the detention facility, investigators observed that both the youth and the attorney were prevented from fully understanding the interactions in the courtroom. At some hearings the defense attorney

was not visible on the video feed; only the child was on camera, and if someone other than the child spoke, it was not necessarily clear who was speaking. For those unfamiliar with this process, including families present in the courtroom and our investigators, this practice further confused an already confusing situation. Of even greater concern were those situations in which the teams observed the defense attorney say almost nothing during the hearing. These lawyers did not appear to have interacted or spoken with the child nor to have engaged in advocacy of any kind on the child's behalf. The lawyers working remotely seemed just as disengaged in the process as the youth. Even when the defender was trying to communicate with the youth while both were at the facility, there was limited opportunity for confidentiality in their communications. Investigators overheard conversations that were supposed to be confidential between the defender and the youth, but which were instead broadcast into the courtroom prior to the start of the hearing.

In hearings where attorneys were in the courtroom without the child, communication was no better. In those video hearings observed with the defender in the courtroom, rather than with the youth at the detention center, the only face the detained child saw was that of the judge. Youth reportedly could not see the rest of the courtroom and had no true understanding of who else was there or where the other voices were coming from. In such situations, there is no way for the child's attorney to communicate with the youth except via the video link, rendering all attorney-client discussions void of the protections of confidentiality. Investigators also observed technical difficulties with lags in the video. One investigator reported observing a child in detention struggling to understand what was happening and repeatedly trying to speak, because his attorney was in the courtroom and unable to confidentially address the youth's concerns. While the presiding commissioner stopped the youth several times from making statements that could potentially be incriminating, another commissioner might not have followed the same course. Moreover, the child remained confused and unable to participate in the process or to appropriately engage in his own defense because he was physically separated from the proceedings and his lawyer.

One investigator reported:

The worst moment of my observations on the Assessment team occurred during the video bail hearings. Over a video screen, I watched as a tiny, 13-year-old boy sat alone in a detention room. There was no one in the room with him and NEVER did the lawyer attempt to talk to him. The public defender was in the courtroom, but there was no connection whatsoever between the lawyer and the client. The hearing proceeded as if the youth had no lawyer, and I'm sure the youth felt as if he didn't have a lawyer. A second and third video bail hearing proceeded the same way: youth alone in the detention center, the lawyer in the courtroom had no contact with them before or during the hearings. The hearings proceeded as if the youth had no lawyer.

Investigators reported only one instance where a defender objected to these practices, and they did not observe any instances where defenders requested additional time to confer with their client when they were not in the same location.

The absence of counsel at all of these early but critical stages of a juvenile case denies youth due process. This is even more troubling given the lack of meaningful post-arrest diversion programs. As one juvenile defense attorney shared, "Every police contact becomes a charge — there is no meaningful diversion. Everything is charged, and most charges result in a plea."

B. Case Preparation and Confidential Client Contact

Across Delaware, attorneys, whether with the PDO or OCC, were not regularly meeting their clients for the first time until well after critical legal proceedings — such as bail, detention, or arraignment — had already taken place. Based on site investigators' interviews and court observations, virtually no case preparation is conducted, partly due to a heavy plea culture with minimal advocacy on behalf of youth.

When youth are detained, intake workers with ODS usually conduct the preliminary interview with the youth via videoconference, with the intake worker in the office and the child at the facility. The use of video interviews for the initial intake interview with the defender office significantly limits the opportunity to engage in a developmentally

appropriate manner with the youth and ensure confidential communications.

For non-detained youth, these interviews with a public defense intake worker typically take place prior to an in-person court hearing at the county courthouse. In one county, the intake worker meets with the youth in a small, open-air cubicle immediately outside a courtroom and adjacent to a row of benches where people sit waiting for their case to be called. There is little privacy, and it is difficult to imagine how sensitive conversations can take place with any semblance of confidentiality, which the rules of ethics require.²⁰⁶ Another county similarly does not provide ODS with private office space where confidential client interviews can take place. Rather, ODS simply has a desk in an open area at the courthouse, where children meet with the intake worker and complete required forms to assess a conflict on the first day they appear in court.

Additionally, investigators observed that where youth are represented by the PDO, they have little ability to form a confidential attorney-client relationship because of the practice of horizontal representation. A youth may see a different attorney at every court proceeding. And, according to those interviewed, there is no preparation of cases for clients between court hearings. Attorneys described a process in which, after each court appearance, the file is updated and then made available to whichever PDO attorney will next appear on the docket the day the child's case is set. Often, the next attorney to handle the case doesn't pick up the file and review it until the day of the next hearing.

Based on observations of the investigators and review of case files, attorneys pick up a stack of case files on the way to their assigned courtroom, review the files, and then represent all the children named in each file — on the day of the scheduled matters. The attorney then calls out the name of the client and speaks with the client for a few minutes. Not only does the child not gain any confidence in the attorney's ability to be their voice in the courtroom, but the attorney also does not get to know the client or become vested in obtaining positive outcomes for the youth. This lack of client contact and case preparation diminishes the

quality of representation. It also may exacerbate the stress youth and their family feel about navigating the system. And meetings of such short duration held just prior to the court hearing with the representation only for this proceeding provide little opportunity or incentive for the defender to get to know the client or to provide zealous advocacy. Case preparation and client interviews should occur in advance of the hearing, and time to talk to the client should be scheduled.

C. Investigation and Discovery

Investigation and discovery were mostly absent, based on the observations of practice and stakeholder interviews in Delaware. Discovery motions are typically cookie-cutter and not tailored to the specifications of the case. One judge noted that “it is extremely rare to see a public defender move to dismiss a case for a discovery violation.” And in some instances, she estimated that 15 to 20 percent of the time, “kids plead at arraignment, even without discovery.” Children who plea at arraignment are sentenced the same day they initially come to court without any discovery or independent investigation of the facts or mitigating factors.

The PDO employs investigators and makes them available to both PDO and OCC attorneys. However, the Assessment team learned that many attorneys in the PDO and OCC believe the assignment of investigators is prioritized for more serious adult felony cases in Superior Court. ODS leadership explained they have worked to clarify this misperception and have made it policy for attorneys handling delinquency matters to have access to investigators through a request process. However, additional efforts are required to ensure that lawyers handling juvenile cases, whether in the PDO or OCC, understand they can access investigators for juvenile cases. Meaningful investigation and discovery are critical given the plea culture that pervades the Family Court. Without investigation or active pursuit of discovery, the attorney has limited information with which to establish a defense or engage clients in effective decision-making about strengths and weaknesses of the charges against them. Without a robust discovery practice, effective assistance of counsel simply is not possible.

206. DEL. RULE OF PROF'L CONDUCT r. 1.6, 5.3 (2013).

D. Pretrial Hearings and Motion Practice

Across Delaware there are few contested pretrial hearings or motions filed and litigated.

When discussing motions, investigators who interviewed public defenders, prosecutors, judges, and commissioners found that all emphasized the relationship of trust among the court decision-makers. There was widespread belief that “motions aren’t filed unless there is a *real issue*, and that there aren’t often any *real issues*.” Attorneys in both the OCC and the PDO acknowledged that although it is typical for a child to give a statement to the police, motions to suppress are not filed or litigated. At the time of the site visits, the only motions filed regularly were boilerplate discovery motions, motions for competency evaluations, and continuances. Data received in early 2017 shows that a few additional substantive motions are filed, such as motions to dismiss, bail review, sentence review or modification, and answers. However, court data shows that only seven motions to suppress were filed in 2015, and only two motions to suppress were filed in 2016.²⁰⁷ The only conclusion possible from this data is that defense attorneys representing children throughout the state are simply acquiescing to charges filed against children and that they do not see any Fourth or Fifth Amendment issues, accepting the officers’ accounts of events as indisputable fact. This lack of advocacy or testing of fact significantly diminishes the role of the juvenile defender.

One Family Court judge stated that she sees very few motions, perhaps one motion to suppress per year. She has never held a hearing on a motion to suppress, leading one investigator to comment, “Motions are an annual event.” When asked about filing motions to suppress, one defense attorney admitted that in over 20 years of juvenile court practice, the attorney had only filed two motions to suppress. Another attorney stated, “There is a great deal of trust between defenders and prosecutors,” and an emphasis on working things out off the record prior to court, leading to curtailed motions practice. However, trust does not

negate the importance of legal advocacy and testing of evidence. Actual advocacy for clients through the filing and litigation of motions ensures youths’ rights are upheld and provides a system of justice and equity for all youth. Increased motions practice might also lead to dismissal of charges against a youth or reveal holes in the prosecution’s case. In many instances, it appeared the defense attorney provided cover for the prosecution — rather than advocacy for their clients — when the prosecution’s case was weak, simply to ensure the youth received services. The overwhelming sentiment the investigative team experienced was that holding the government to its constitutional burden was of less importance than ensuring youth received court-ordered services, despite the long-term harmful consequences of a juvenile court adjudication. Strikingly, stakeholders — defenders and non-defenders alike — made little acknowledgement of what the child client thought or wanted in this process.

E. Adjudication and Plea Agreements

In Delaware, stakeholders shared that the great majority of juvenile cases are resolved by a guilty plea, or a plea of *nolo contendere*.²⁰⁸ One Family Court commissioner noted that she had presided over fewer than five trials for either juveniles or adults in the past two years. She described a culture of resolving cases by pleas, even though some cases might have been resolved more favorably for a youth if a trial was pursued. The large number of pleas occurring across the state makes it imperative for juvenile defenders to have a meaningful opportunity to inform their clients of the rights they are waiving and of the consequence of the plea. Issues such as school removal and/or exclusion, loss of housing, obstacles to future employment, immigration consequences, and sex offender registration, are just some of the many possible direct and collateral consequences a juvenile plea may bring for the child. Moreover, defense attorneys must advise their clients at the time of the plea as to all the possible and likely dispositions the court may impose.

207. See *supra* Section II.B.3.

208. Delaware is not unique in this area. See generally LINDSEY DEVERS ET AL., DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (Scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through the plea bargaining process.) See also Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals* (Mar. 22, 2012), <http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html>.

The reason for the high numbers of pleas seems to vary across the state. Investigators found that plea practice demonstrates a worrisome lack of zealous advocacy, again with an emphasis to achieve service provision for youth without consideration of non-court alternatives. One investigator shared the impression that “generally there is a significant ‘plea practice’ where children are typically overcharged and then have their cases pled down to the lowest level of accountability necessary to get them the services they need, without regard for the immediate negative impacts of an adjudication on the life of the child.” One judge estimated pleas occurred in excess of 90 percent of cases. Practice varied from courtroom to courtroom, but one investigator expressed serious concerns, stating, “The plea hearings I observed did not measure up to the basic requirements of due process and do not conform to the law regarding pleas.”²⁰⁹

Another investigator shared the following observations:

The plea hearings are extremely short — of the six full plea hearings I witnessed, the average length was 9.8 minutes, with two of the hearings lasting just five minutes each. The plea colloquies do not meet even the basic requirements of due process — there is an overreliance on defense counsel being responsible for properly advis[ing] the child of the charges, trial rights, and the possible outcomes. Jurists seem to focus on efficiency rather than ensuring the child subjectively understands. The hearings are rote . . . Often, it is not clear what the child has been charged with and what charges the child is admitting guilt to. There is not a formal adjudication entered on the record; instead the matter proceeds to a vague plea and then immediately to sentencing. In addition, several of the pleas that were taken were not lawful. After the cursory colloquy, I saw three cases where the factual basis was clearly insufficient. The child did not admit to doing the crime! One youth said, “I was just there,” then his lawyer jumped in to assure the judge that the youth did in fact do it.

In many instances, colloquies failed to ensure a youth’s understanding of what had taken place. Investigators observed plea hearings where the judge did not conduct a plea colloquy in court. Instead, the judge simply asked whether the attorney had reviewed the colloquy with the client. There was no in court review of the rights a child was waiving or the consequences of taking a plea. The judge acknowledged that practices related to reviewing collateral consequences of pleas should be improved.

Investigators spoke to one 17-year-old who had just entered a plea and been sentenced to probation with fines. He told the investigators that his defense attorney had not explained to him the charges in the plea, the requirements of probation, or the possible implications of his plea. It was clear the youth did not understand what happened in court or what he was required to do to comply with the court order.

F. Disposition

During the course of this Assessment, investigators did not observe adequate, independent defense advocacy at disposition. One investigator noted, “Although cases are adjourned for disposition when a psychological evaluation is ordered, no one with whom we spoke could remember a contested dispositional hearing.” In another county, a commissioner raised concerns about lack of disposition advocacy at hearings where children are represented. The commissioner worried that children are taking pleas because it is inconvenient for parents to come back to court and further shared that 15 to 20 percent of cases go to plea on the day of arraignment, followed immediately by disposition.

In observing pleas taken so that a youth could enter Mental Health Court, in many instances disposition proceeded when counsel was not even present. This may have been related to the rule that strips youth of the right to counsel when a guilty plea or plea of *nolo contendere* is entered.²¹⁰ Despite the rule, ODS has ensured that youth are represented by counsel at most disposition hearings even after a plea. Given the new rule on appointment of counsel and restrictions on waiver of counsel, it is not anticipated that children will appear at disposition without counsel in the

209. See DEL. FAM. CT. R. CRIM. P. 11 (2017).

210. See *supra* Section III.J. See generally DEL. FAM. CT. R. CRIM. P. 11(c)(8) (2017).

future,²¹¹ but it is critical that disposition advocacy be a regular part of zealous defense advocacy.

Also troubling is the imposition of restitution on youth who are adjudicated delinquent. One investigator commented, “There seems to be no rhyme or reason or uniformity in orders of restitution and no advocacy on that score. Additionally, it doesn’t appear that in-court orders of restitution adhere to mandatory guidelines regarding restitution.”²¹² Another investigator illuminated the point, “In one instance in which there was only one child responsible for damage, the judge entered restitution to be paid ‘jointly and severally’; and, because no explanation was given to the child about what that meant, no one in the court realized the error. There was never a discussion of ability to pay and no advocacy or explanation of restitution whatsoever.” A person can request an ability-to-pay hearing, but by all reports, this is rare. Yet, unmanageable restitution costs have long-term implications. In order to have records expunged, the law requires all monetary sanctions be paid. One attorney commented that “restitution, costs, and fines are ordered as a matter of course, but the orders are never enforced, so they don’t even matter.” However, a court administrator indicated that restitution orders are enforced even after court jurisdiction ends. This lack of clarity and understanding about the restitution requirements can lead to long-term detrimental consequences for youth because unpaid restitution can impede employment, education, military service, financial independence, and a range of issues necessary for youth success into adulthood.

Disposition is one of the most important phases of juvenile court proceedings. It is at disposition that youth are subject to the consequences of their adjudication, and many of the decisions made at this stage are at the discretion of the judiciary, often guided by the probation officer and prosecutor’s recommendations.

Juvenile defense counsel must be zealous advocates, representing their clients’ stated interests at this stage of the proceeding.²¹³ The IJA/ABA Juvenile Justice Standards state, “The active participation of counsel at disposition is often essential to protection of clients’ rights and to furtherance of their legitimate interests. In many cases, the lawyer’s most valuable service to clients will be rendered at this stage of the proceedings.”²¹⁴ Juvenile defenders have an obligation to consult with their clients, to ascertain their interests, and actively present a disposition recommendation, independent of the court or probation staff. The defender should be versed in dispositional guidelines and educated on alternatives that can be offered in lieu of more restrictive options such as out of home placement.²¹⁵

It is imperative that, prior to disposition, a child is counseled about the direct and collateral consequences that attach to a juvenile adjudication. These consequences may have lifelong implications, and it is necessary to inform and advise the child before moving forward. The young person must also be counseled on the future potential to expunge arrest and court records.

The need for heightened due process protections and rigorous disposition advocacy by juvenile defenders in Delaware is underscored by the fact that at least 50 percent of youth committed to DYRS are there for nonviolent, low-level offenses and technical violations of probation.²¹⁶

G. Post-Disposition

Delaware law makes almost no provision for juvenile defense attorneys to meet post-disposition legal needs of children beyond disposition. To ensure that 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 state

211. DEL. FAM. CT. R. CRIM. P. 44.1 (2017).

212. *See, e.g.*, DEL. FAM. CT. R. CRIM. P. 32(g) (2017).

213. NAT’L JUV. DEF. STDS., *supra* note 3, at 6.1 (comment) ROLE OF COUNSEL REGARDING DISPOSITION ADVOCACY. *See also* DEL. RULE OF PROF’L CONDUCT r. 1.2 (2013).

214. IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at § 9.1.

215. NAT’L JUV. DEF. STDS., *supra* note 3 at 6.2 FAMILIARITY WITH THE RANGE OF DISPOSITION ALTERNATIVES; IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at § 9.1.

216. YRS FACILITY POPULATIONS BY QUARTER, *supra* note 116.

agency.²¹⁷ The juvenile defender should prepare for, attend, and advocate zealously on behalf of a client at all post-disposition review hearings, including probation violation hearings, sentence modifications, appeals, or other collateral reviews; ensure that court orders are implemented and continue to be appropriate to the youth's needs; raise issues where a youth has difficulty accessing education or necessary treatment services; monitor institutions where the youth is held and challenge dangerous or unlawful conditions of confinement; advocate at institutional administrative proceedings; assist the youth to ensure juvenile records are expunged when eligible; advocate for removal from the sex offender registry when eligible; ensure youth are released from facilities at the earliest possible point, and that community programming is used effectively; and take other steps necessary to ensure children are given the opportunity to succeed while they are subject to continued state oversight.²¹⁸

Some states have legislated that attorneys have a continuing obligation to represent a youth while under the jurisdiction of the juvenile justice system.²¹⁹ In Delaware, court rules only extend the right to counsel post-disposition for a direct appeal.²²⁰ Even with this extension, juvenile appeals are uncommon. One investigator reported, “As far as we could ascertain, appeals are rare, if not nonexistent. As one defender put it, ‘After judgment, folks move on — they don’t belabor it after judgment is over.’” When appeals do occur, juvenile defenders handle their own appeals because the ODS appellate unit focuses its efforts on adult appeals. The appellate unit will reportedly provide assistance to juvenile defenders conducting an appeal if they make a request.

At the time of this Assessment, ODS attorneys did not maintain contact with their clients after disposition. Even with changes put in place to provide better post-disposition representation, given

the lack of continuity that results from horizontal representation, attorneys rarely become invested in an individual youth’s long-term success. Continuity in representation, including at the post-disposition stage, is important for improved youth outcomes. Where a youth allegedly violates probation and faces a revocation hearing, ODS will be reappointed to represent the youth. The attorney appointed at this stage is not necessarily the same attorney that represented the youth at earlier stages. ODS attorneys may also appear on sentence review hearings for the youth, but ODS is not funded to conduct any other type of post-disposition representation. Children in secure or non-secure out-of-home placements and those under continuing probation supervision have liberty interests and due process rights that are at risk after the disposition hearing, yet the current system largely leaves them to navigate this stage on their own.

Given the lack of a clear legal mandate, absence of funding, and ODS’s practice of horizontal representation, it is not surprising that investigators found post-disposition advocacy to be notably absent at the time of this Assessment. However, as discussed in Chapter 4, leadership at ODS is cognizant of the needs in this area and is working to garner stakeholder support in order to foster the development of creative solutions to provide greater post-disposition access to counsel — even if ODS is unable to directly provide it.

II. SYSTEMIC BARRIERS LIMITING ACCESS TO COUNSEL

There are many reasons juvenile defenders are not providing the constitutionally guaranteed protections to youth in Delaware’s Family Courts. Some of the most critical are the significant systemic and structural barriers impeding youth access to counsel.

217. See NAT’L JUV. DEF. STDS., *supra* note 3, at § 1.4 SCOPE OF REPRESENTATION, § 7.1 MAINTAIN REGULAR CONTACT WITH CLIENT FOLLOWING DISPOSITION, § 7.5 REPRESENT THE CLIENT POST-DISPOSITION. See also IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at § 3.1(a), 10.1(a).

218. See generally NAT’L JUV. DEF. STDS., *supra* note 3, at § 1.4 SCOPE OF REPRESENTATION, § 7.1 MAINTAIN REGULAR CONTACT WITH CLIENT FOLLOWING DISPOSITION, § 7.5 REPRESENT THE CLIENT POST-DISPOSITION. See also IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at § 3.1(a), 10.1(a).

219. See, e.g., 42 PA. STAT. ANN. § 6353 (West 2000); KY. REV. STAT. ANN. § 31.110(3) (West 2015). See also Tori J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 AM. J. CRIM. L. 611, 622-30 (1996). See generally ADDRESSING THE LEGAL NEEDS OF YOUTH AFTER DISPOSITION, NAT’L JUVENILE DEFENDER CTR. (2014), <http://njdc.info/wp-content/uploads/2014/01/Post-Dispo-Inno-Brief-2013.pdf>.

220. See DEL. FAM. CT. R. CRIM. P. 38.2 (2017).

A. Problems with Timely Appointment of Counsel

Juvenile defense systems should ensure that counsel is assigned at the earliest possible stage of the delinquency proceeding,²²¹ and attorneys should engage in meaningful consultation with their juvenile clients at the earliest opportunity possible following appointment.²²² This is essential for building an attorney-client relationship grounded in trust and confidence and is necessary for thorough case preparation.²²³ Meetings with the client should occur in a private setting to ensure communications with the youth are confidential and to maintain privilege.²²⁴ In this manner, youth can assist in their own defense, directing the attorney as to what the youth see as their own interests.

An immediate barrier to access to counsel exists when the first appearance and initial detention hearing occur at the Justice of the Peace Court. Youth are not represented by counsel, nor are they advised of a right to counsel even though they face critical detention and bail decisions at this stage.

As discussed earlier, the right to counsel for juveniles is not expressly conveyed by Delaware statute, although it may arguably now be presumed with the 2016 change in law, which provides that all children are automatically eligible for representation by the ODS.²²⁵ This policy means that the PDO accepts and represents every child who comes into Family Court on a delinquency petition, regardless of household income, unless there is a conflict. If there is no conflict, the PDO will commence representation immediately. However, while youth at this stage may be interviewed at the PDO by an “intake worker,” they may not meet their lawyer until the day of the hearing. After an intake interview, the PDO opens a file, sends a representation letter with the attorney’s name and contact information to each client and their

family, and leaves the onus on the client to reach out to the attorney and request an in-person meeting prior to a hearing.

When the PDO has a conflict, an attorney from the OCC must be appointed. However, it is at this juncture that children often experience significant delays in the assignment of counsel. Conflict counsel is not regularly in court for arraignments, even when there is an attorney who has the contract for first conflicts in the county. Once the OCC receives a case, it too must do a conflict check and, if necessary, refer the case to yet a different attorney if the lead contract attorney is conflicted out. As a result, at the time of the Assessment, many children were waiting for weeks after their arrest and bail hearing before conflict counsel was assigned. Even if the delay is not that extreme, a two-week delay before the child has any contact with a conflict attorney is not uncommon. One interviewee described the process, stating, “It is horrific — people come in for arraignments and are told by the judge that their attorney [the conflicts counsel] was supposed to be there. This results in parents and children having to come back another day.” Regardless of the cause, stakeholders — including some defenders — agreed that defense attorneys often do not meet their youth client until the first hearing. This practice renders impossible critical prehearing rapport-building, information gathering, and investigation. Since the Assessment, OCC has taken steps to ensure earlier contact between attorneys and clients.

B. Despite Rule Change, Waiver of Counsel Issues Remain

Following the site visits for this Assessment, in February 2017 the Family Court modified its Rules of Criminal Procedure to provide a right to counsel for all youth facing delinquency charges.²²⁶

221. AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

222. NAT’L JUV. DEF. STDS., *supra* note 3, at § 2.1, ROLE OF JUVENILE DEFENSE COUNSEL AT INITIAL CLIENT CONTACT. *See* IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at § 4.2.

223. NAT’L JUV. DEF. STDS., *supra* note 3, at § 2.1 cmt., ROLE OF JUVENILE DEFENSE COUNSEL AT INITIAL CLIENT CONTACT. *See* IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at § 2.2.

224. NAT’L JUV. DEF. STDS., *supra* note 3, at § 2.1 cmt., ROLE OF JUVENILE DEFENSE COUNSEL AT INITIAL CLIENT CONTACT. *See* IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at § 4.2.

225. DEL. CODE ANN tit. 29, § 4602 (2016).

226. DEL. FAM. CT. R. CRIM P. 44.1(a) (2017).

Data from the 2015 Family Court Annual Report revealed a total number of 4,999 young people with delinquency cases or violations of probation matters.²²⁷ Data from the PDO database, however, revealed that ODS provided representation in only 3,499 new delinquency cases. ODS was not counsel of record for the remaining 1,039 cases, meaning that neither PDO nor OCC counsel represented those youth.²²⁸ By the time of the investigative teams' site visits, all of the judges we spoke with reported that they no longer allow children to waive counsel in Family Court.

Almost all judges and commissioners also indicated they would not accept a plea from a youth without a lawyer present. It similarly appeared to investigators that children are largely represented by an attorney in proceedings against them — even though zealous advocacy does not necessarily ensue. However, the PDO reports that waiver of counsel is still an issue in Delaware, and that according to data collected, some children remain unrepresented by either the PDO or OCC. Stakeholders report that many juveniles appear *pro se* at arraignment and resolve their cases without the benefit of counsel.

This continued problem of waiver of counsel may be influenced by the attitudes of other stakeholders. One defense attorney stated, “Prosecutors see their job as being validation of a cop’s decision to arrest . . . That is not their job. Prosecutors are afraid to decline to prosecute; they go forward in 99.9 percent of arrests. I would have been in the juvenile justice system if I had been subject to that type of policing.” This becomes even more problematic when a youth may be waiving counsel, despite being automatically eligible for ODS representation.

Even under the new rule, waiver of counsel is still permissible in some instances, such as in a

misdeemeanor case where the child is over the age of 16.²²⁹ The systemic issue of police overcharging, especially where it appears that prosecutors do not exercise any discretion in filing decisions, results in law enforcement officers initiating court cases in virtually every arrest. Since nearly every case is pled, that means that every arrest itself becomes an adjudication if no defense attorney mounts a challenge.

Investigators were also troubled by the continued use of the “Rights of Juveniles” form in all three Family Courts in Delaware. Administrative court staff present this form to youth and their parents or guardian when a youth checks into family court. It is intended to provide youth with information on their rights, including a right to be represented by a lawyer, to remain silent, to a speedy trial, to confrontation of witnesses.²³⁰ The form also includes a *highlighted* “Waiver of Right to Counsel” box that youth can check if they want to waive their right to counsel.

Following the change in waiver rules, it is unclear whether the form is still used to allow youth to request waiver of counsel by checking this box. If it is, the practice should be stopped. Such a form is not age- nor developmentally appropriate, includes information and concepts that children must be able to discuss with an attorney, presumes a level of literacy that may not be present, and worst of all, actively encourages waiver of counsel. As the U.S. Department of Justice clarified, a state “deprives children of their right to counsel if its courts allow them to waive that right without first consulting with competent counsel.”²³¹

Finally, while the law ensures that Delaware’s children are now automatically eligible for a publicly funded juvenile defense attorney irrespective of their custodian’s income,²³² it is unclear whether the expense of the child’s representation can still be billed

227. Email from Mary Crabbe, Family Court Employee (May 19, 2016). Of these cases, 4,538 were new delinquency cases and 461 were violations of probation matters.

228. Matthew Albright, *Bill Would Guarantee Public Defenders for Juveniles*, THE NEWS JOURNAL (May 16, 2016), <http://www.delawareonline.com/story/news/politics/2016/05/16/public-defenders-juveniles/84437264/>. See also Schwartzkopf *Bill Would Guarantee Juveniles Legal Representation*, DELAWARE HOUSE DEMOCRATS <http://www.dehousedems.com/press/schwartzkopf-bill-would-guarantee-juveniles-legal-representation> (last visited May 30, 2017).

229. DEL. FAM. CT. R. CRIM P. 44.1(c)-(d) (2017).

230. See *infra* Appendix B, Delaware Rights of Juveniles Form.

231. See Statement of Interest in N.P., *supra* note 42, at 7.

232. H.B. 382, 148th Gen. Assemb. (2016), <http://legis.delaware.gov/BillDetail?legislationId=24598>. See also Matthew Albright, *Juvenile Justice Reforms Have Smooth Path in Legislature*, THE NEWS JOURNAL (Jun. 23, 2016), <http://www.delawareonline.com/story/news/politics/2016/06/23/juvenile-justice-reforms-have-smooth-path-legislature/86250680/>.

to nonindigent custodians.²³³ Since any billing of custodians for the child's representation creates undue pressure on the child to waive counsel, it would be inconsistent with the aims of the law change to allow for collection of this or other types of fees associated with ODS representation. The Family Court Rules of Procedure should be further amended to abolish any fees associated with juvenile defense representation.

C. Video Bail Hearings Deny Youth Access to Counsel

As discussed earlier, if a child is detained, bail or detention hearings are routinely conducted via video conference. The Division of Youth Rehabilitative Services (DYRS), which runs the detention centers, does not transport children to court for bail hearings,²³⁴ though it does for other types of hearings. Because DYRS is clearly capable of providing transportation, the failure to do so appears to be for administrative ease.

Typically, if a youth is arrested at night or on the weekend, the youth goes before a magistrate at a Justice of the Peace Court, the police make a recommendation to the magistrate as to whether the child should be detained pending a subsequent hearing, and the magistrate then sets a preliminary bond and makes a detention decision. Because officers make the vast majority of court-charging decisions, this situation gives law enforcement a tremendous amount of power over outcomes for youth. At no point in this process is a defense attorney appointed for the youth, despite the fact that police and the magistrate are conducting a hearing in which the youth's liberty interests are at stake. The magistrate

will make a preliminary probable cause determination and detention decision. If the youth is detained, the statute requires a hearing in Family Court by the next business day.²³⁵ Yet no transportation to court is provided, and children are not released to go to court on their own. Instead, youth must appear via a video link. It is at this point that the PDO is appointed and either appears at the detention facility with the youth or in court without the youth. In this video hearing, the Family Court reviews the magistrate's initial bail decision. If the youth is arrested during court hours, the youth will have the bail review and detention hearing by the Family Court that same day, but it too is conducted by video from the police station rather than an in-person hearing in court.

As discussed in Section I(A)(2), there are numerous problems with these scenarios. Video hearings are impersonal; studies show that adults, let alone children, are less likely to understand or be engaged in proceedings that are happening via video, and it is very difficult for decision-makers, lawyers, and defendants to adequately read body language and facial expressions accurately via remote link.²³⁶ Moreover, a national study of bail hearings found that conducting these hearings by videoconference resulted in judges setting higher bail.²³⁷ This is because, as additional studies show, people evaluate those with whom they interact face-to-face more favorably than those with whom they interact via video.²³⁸ There are also technological difficulties; investigators often observed a lag in the video, causing the client or attorney's response to a question to be heard only after the judicial officer had already moved on. Finally, video impairs the quality of the attorney's representation either by impeding the

233. DEL. FAM. CT. R. CRIM P. 44(a) (2017) (providing that when the custodian is not indigent but will not obtain counsel for the child, the Court may appoint counsel at the expense of the child's custodian).

234. For approximately six months, NCCDC transported youth to court for the daily juvenile bail hearings in NCC. They discontinued transporting the youth due to budgetary and staff shortages.

235. DEL. CODE ANN. tit. 10, § 1005(b)(3) (1995). See also DEL. FAM. CT. R. CRIM P. 5(b)(2)(c) (2017).

236. See, e.g., Lothar Muhlbach et al., *Telepresence in Videocommunications: A Study on Stereoscopia and Individual Eye Contact*, 37 HUM. FACTORS 290, 296-97 (1995) (discussing the challenges of videoconferencing technology); *People v. Guttendorf*, 723 N.E.2d 838, 840 (Ill. App. Ct. 2000).

237. FED. R. CRIM. PRO. 10(c) (2017) (committee notes) ("Much can be lost when video teleconferencing occurs. First, the setting itself may not promote the public's confidence in the integrity and solemnity of a federal criminal proceeding Second, using video teleconferencing can interfere with counsel's ability to meet personally with his or her client Third, the defendant may miss the opportunity to meet with family or friends and others who might be able to assist the defendant Finally, the magistrate judge may miss an opportunity to accurately assess the physical, emotional, and mental condition of the defendant — a factor that may weigh on pretrial decisions, such as release from detention.").

238. Gene D. Fowler & Marilyn E. Wackerbarth, *Audio Teleconferencing Versus Face-to-Face Conferencing: A Synthesis of the Literature*, 44 W. J. SPEECH COMM. 236, 245 (1980); Ederyn Williams, *Social and Psychological Factors*, 28 J. COMM. 125, 126 (1978).

attorney's access to confidential communications with the child when they are in different locations, or by rendering the attorney subject to the same limitations as the child if trying to advocate to the court via video.

When asked about this practice, PDO attorneys and supervisors indicated they disliked the system and wanted it to change. NJDC learned that the PDO has tried having two attorneys involved in the case, one in the detention facility and one in the courtroom. Reportedly this was not effective, as it was unclear who should take the lead in advocacy. Defense attorneys also spoke about the difficulty getting to the detention center while carrying a full case docket, as the detention centers are about 30 minutes from any of the three county courthouses.

The right of the accused to be present in proceedings against them is an all-encompassing right under the Due Process Clause of the Fourteenth Amendment. The U.S. Supreme Court has held that “a defendant has a due process right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence”²³⁹ Because video hearings are not the equivalent of face-to-face proceedings, the child's right to be present in person should not be trumped by administrative conveniences of DYRS or the courts.

Court proceedings held by videoconference raise substantial due process questions; these issues are significantly exacerbated when the hearing is for a child and their defense attorney is a minimal participant.

D. Disposition Rules Require Waiver of Counsel Upon a Plea

Though the recently amended Family Court Rules provide for automatic appointment of counsel for youth facing delinquency proceedings and requiring attorney consultation prior to waivers, which are

only permitted in certain circumstances,²⁴⁰ the Rules should be amended further to delete the subsection of Rule 11 that provides a plea of guilty or *nolo contendere* waives a youth's constitutional right to counsel at disposition.²⁴¹ This Family Court Rule significantly dilutes the role of counsel and, when enforced, clearly obstructs youth access to counsel. Disposition is a critical stage of the proceedings where juvenile defense advocacy should lift up the voice and perspective of the child client to inform the court of their interests and strengths before decisions are made about their liberty, education, housing, and future. Requiring youth to waive this critical right at disposition both introduces and enforces the notion that juvenile defense advocacy is a disposable element of the court process. Perhaps at no other hearing is liberty more at stake. In fact, the U.S. Supreme Court concedes that sentencing is a critical stage of the criminal prosecution that requires effective assistance of counsel.²⁴²

E. Lack of Post-Disposition Advocacy

At the time of this Assessment, post-disposition representation for adjudicated youth was virtually nonexistent. There was no post-disposition representation unless or until the public defender received notice that a child was doing poorly in a placement. Staff at the commitment facilities reported a complete absence of counsel at the facilities. There seemed to be virtually no active post-disposition representation at all. Although attorneys technically keep their clients until they exit the system, there was little to no advocacy that occurred and no sense of responsibility or obligation to check in with clients. Probation officers to whom investigators spoke said they never heard from or spoke to the defense attorney, either before or after sentencing. The only time they talked to the defenders is at court on the day of sentencing or at a violation of probation hearing. Since this Assessment, ODS has arranged for regular facility visits with all clients post-disposition. This includes visiting youth held at the YCOP adult correctional facility, where youth charged as adults or sentenced following transfer of jurisdiction are held.

239. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (internal citations omitted).

240. *See* DEL. FAM. CT. R. CRIM P. 44.1 (2017).

241. *Compare* DEL. FAM. CT. R. CRIM. P. 11 (c)(8)(b) (2017), *with* DEL. FAM. CT. R. CRIM P. 44.1 (2017).

242. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (“Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.”).

It is unclear whether defenders now participate in treatment meetings. When there are court-ordered post-disposition sentencing reviews, defenders are present.

F. Specialty Courts Denigrate Due Process

Many stakeholders spoke about specialty delinquency courts that exist or existed in Delaware. The three primary courts mentioned were gun court, drug court, and mental health court. Sometime during 2016, court administrators discontinued both gun court and drug court.²⁴³

Mental Health Court is still functioning in all three counties. Most of the people interviewed approved of the Mental Health Court, which is a specialty court for children with mental health needs. In order to participate, a child must enter a deferred guilty plea to the charge, attend periodic review hearings, and participate in recommended treatment programs. However, juvenile defenders typically only appear in the specialty courts for the purpose of the child's entering the deferred guilty plea, required for entry into the program, but they may also appear in cases where a child has been unsuccessful and is being terminated from the program. They do not attend status hearings in Mental Health Court. Children without counsel have no guidance on when it may be appropriate to exercise the right to remain silent and children without counsel have no advocate in cases where they may be struggling to comply. The Assessment team could not determine the possible net-widening effects of this program, however, and it did not appear that defense attorneys receive full discovery before their clients agree to enter a deferred guilty plea to participate in the program. Again, the practice appears to be service-driven, with due process relegated to a secondary position.

The benefit of the Mental Health Court is that if a child successfully completes the program, the guilty plea is not entered on the child's record and the case is dismissed without a finding of guilt. However, if a child is unable to successfully complete the requirements of the program, the court adjudicates the child delinquent and imposes a disposition. It is unclear whether an attorney is brought in to represent

the youth at this juncture. It is conceivable that youth go unrepresented at any further disposition, given current rules that divest youth of a right to counsel at disposition. The absence of procedural protections on the front end of Mental Health Court, the requirement of a deferred guilty plea without evidentiary testing, and the absence of a juvenile defender throughout the process raise significant concerns about the functioning of this specialty court.

III. SYSTEMIC BARRIERS LIMITING THE QUALITY OF JUVENILE DEFENSE SERVICES

In addition to barriers limiting access to counsel, the quality of juvenile defense counsel youth ultimately receive in Delaware is adversely affected by systemic weaknesses.

A. Inadequate Resources Impede Juvenile Defense Services

Delaware has a highly regarded statewide public defense system. However, effective juvenile defense delivery from initial appearance through post-disposition is impeded by insufficient resources. ODS does not have a chief juvenile defender or similar position in Central Administration to provide dedicated juvenile defense leadership and oversight or to strengthen and enhance the juvenile defense delivery system across the state. ODS's two Legal Services Divisions — the Public Defender's Office (PDO) and the Office of Conflicts Counsel (OCC) — have neither specialized juvenile defense units with attorneys dedicated to providing juvenile defense representation nor juvenile defense supervisors to ensure that that representation is high quality. Instead, at the time of the Assessment, attorneys representing juveniles in delinquency matters carried mixed caseloads that included adult misdemeanor cases in the Family Court. ODS also does not provide representation at initial appearance hearings in the Justice of the Peace Courts.

Equally troubling is that the horizontal representation model used by PDO attorneys representing youth precludes continuous or vertical representation. Any attorney is expected to be able to pick up a file on any child and conduct representation. In this system,

243. A number of people we interviewed expressed disappointment with this decision, particularly the dismantling of gun court, because it had enabled youth to avoid automatic transfer for prosecution as an adult in Superior Court.

a child is propelled through the court process without a clearly defined advocate. If the youth is ultimately adjudicated delinquent and placed on court-ordered probation or into a secure facility, that youth is then left to navigate the system on their own, because all ODS representation for a youth who takes a plea ends at disposition by court rule — although in practice, representation may continue. While ODS is able to provide some post-disposition representation, ODS does not have sufficient resources to fund a fully functional post-disposition unit, even though national standards on the representation of youth clients require it.²⁴⁴ In 2014, ODS began to implement vertical representation in adult criminal cases. Although ODS leadership recognize that vertical representation for youth in juvenile matters is also preferred, they cite scheduling conflicts as the reason it has not yet happened. ODS leadership did tell investigators they are committed to working towards vertical representation for all youth in Family Court to have one attorney throughout their case.

The reason for these gaps in ensuring high-quality juvenile defense service delivery is not that such specialization is viewed as unimportant by ODS. On the contrary, ODS leadership and many other stakeholders recognize that a system with a juvenile chief defender, specialized juvenile defense units, and supervision focused on juvenile defense using performance standards is an ideal model. Instead, investigators learned that inadequate resources for ODS, and allocation of those limited resources to other areas within ODS, have led to inadequate resources specifically for juvenile defense. For example, the 2015 creation of ODS, which served to restructure public defense services, pulling OCC

out from within the PDO,²⁴⁵ required reallocation of resources to facilitate the restructuring. Many attorneys interviewed also indicated a general practice of prioritizing funding and other support resources to so-called “more serious” cases in Superior Court. Limited funding results in juvenile delinquency cases receiving lower priority in accessing support resources, such as the allocation of defense investigators or psycho-forensic social work assistance.²⁴⁶

This finding is not to suggest that juvenile defense receives no attention. The chief defender recognizes that representing juveniles requires specialized expertise. The chief of legal services and director of training & development attest to being given wide reign to use available resources to improve the quality of juvenile defense practice. ODS leadership has also worked diligently to develop expertise in juvenile defense and share that expertise with attorneys on the front lines, while also working to support all attorneys under ODS’s Legal Services Division, and advocating for policy and legislative reforms statewide. Yet ODS leadership must do so in the face of inadequate resources for all aspects of public defense. Therefore, it is essential for supervisors and leaders in the local offices to ensure juvenile defense representation adheres to the roles and responsibilities that are unique to juvenile practice.

Many non-defender stakeholders felt strongly that the public defender system needs more resources. One judge commented, “They are stretched too thin. This is especially problematic when they have multiple calendars each day. This also poses a problem for the courts because they have to figure out how to stagger

244. NAT’L JUV. DEF. STDS., *supra* note 3, at § 1.4 SCOPE OF REPRESENTATION, § 7.1 MAINTAIN REGULAR CONTACT WITH CLIENT FOLLOWING DISPOSITION, § 7.5 REPRESENT THE CLIENT POST-DISPOSITION. *See also* TEN CORE PRINCIPLES, *supra* note 3 (urging juvenile defense attorneys to “provide independent post-conviction monitoring of each child’s treatment, placement or program to ensure that rehabilitative needs are met” and if their needs are not, to “intervene and advoca[te] before the appropriate authority”). *See also* IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 31, at xvi-xviii, 15, at § 2.3, 3.1(a), 10.1(a); NCJFCJ JUVENILE DELINQUENCY GUIDELINES, *supra* note 11 (Principle 13 calls on delinquency court judges to ensure post-disposition review is provided to adjudicated youth as long as they are involved in any component of the justice system.).

245. An Act to Amend the Delaware Code Relating to Criminal Defense for Indigent Persons, S.B. 47, 148th Gen. Assemb. (Del. 2015). Prior to this Act, in 2011, the OCC was separated from the court’s control and established as separate entity, with the PDO assuming responsibility from the courts for its operation. *See also* *About the Office of Defense Services*, DELAWARE.GOV, <http://ods.delaware.gov/office-defense-services/> (last visited May 30, 2017).

246. *The Crucible of Adversarial Testing: Access to Counsel in Delaware’s Criminal Courts*, SIXTH AMENDMENT CTR. 92, 119 (2014) (focusing on access to counsel in criminal courts and providing some preliminary observations on juvenile court practice, and noting that juvenile defenders do not have access to support services on a comparable level as DAG attorneys and have to make triage decisions on whether a client can request social worker or investigation support).

their calendars to respond to the public defender staffing issues.”

This lack of resources is one factor preventing ODS from funding a specialized juvenile defense unit, providing juvenile-specific supervision, and developing performance standards by which to measure accountability and quality of representation at all stages of the case; the absence of resources also presents a significant barrier to the provision of an effective juvenile defense delivery system.

B. Inadequate Juvenile Defense Specialization, Training, Supervision, and Standards

1. Specialization

Juvenile defense is a highly specialized area of practice requiring juvenile-specific training, supervision, standards, and supportive resources.²⁴⁷ However, in the face of limited resources, ODS has not prioritized the establishment of juvenile defense as a specialized practice. As discussed previously, ODS did not have a juvenile defense unit or a chief juvenile defender in Central Administration to oversee both the PDO and OCC and to be ultimately responsible for ensuring that the due process guarantees of *In re Gault* are realized for Delaware’s children facing delinquency proceedings. Since the investigators’ site visits, ODS has established a chief juvenile defender position at the PDO. However, the position currently requires a significant caseload and policy related responsibilities that do not allow adequate time to supervise attorneys, implement juvenile defense standards, or instill a culture of zealous advocacy in the delinquency courts. Additionally, the chief juvenile defender should have authority to supervise attorneys representing youth in both the PDO and OCC. Placing the position in the PDO fails to address the needs of the youth who are represented by OCC attorneys.

Furthermore, neither the attorneys within the PDO nor any of the attorneys in the OCC handle juvenile delinquency cases exclusively. PDO attorneys practicing in Family Court may handle other adult

matters.²⁴⁸ OCC attorneys may accept or be required to handle cases in other courts, such as the Superior Court or the Court of Common Pleas, and may also maintain private civil and criminal practices. While it is not uncommon for attorneys who take on conflict appointments to handle mixed caseloads, ODS is remiss in not requiring conflict attorneys to develop juvenile expertise and attend ongoing juvenile-specific training prior to accepting appointment to represent youth in delinquency courts. OCC attorneys who develop juvenile expertise should be prioritized for assignment to juvenile cases over those attorneys who do not have expertise or who carry mixed caseloads. In two of the three counties, the need for juvenile defense specialization is even more pronounced, given the lack of resources and funding that has contributed to a culture that prioritizes adult cases over juvenile practice. This second-tier status with regard to the allocation of support services necessary for juvenile representation, limited opportunities for local juvenile-specific training, and an almost total absence of supervision must change. Following the site visits for this Assessment, full-time supervising attorney positions were added to the OCC for those two counties without them, but these supervisors are not juvenile specialists, continue to carry independent caseloads, and have yet to define specific juvenile defense supervision and performance expectations. The current system for PDO and OCC attorneys restricts the opportunity to become a juvenile defense specialist and results in a juvenile defense delivery system that is simply inadequate to meet the due process protections guaranteed to youth 50 years ago in *Gault*.

2. Training

While the Commission on Continuing Legal Education requires Delaware lawyers to complete 24 hours of CLE credit every two years, there is no requirement that the credits relate to the attorney’s area of practice.²⁴⁹ Conversely, juvenile defense requires attorneys to have the skills of a criminal defense lawyer coupled with specific expertise in defending youth. Juvenile delinquency proceedings

247. NAT’L JUV. DEF. STDS., *supra* note 3, at § 1.3 SPECIALIZED TRAINING REQUIREMENTS FOR JUVENILE DEFENSE, Part IX SUPERVISORY STANDARDS.

248. *Our Services*, DELAWARE.GOV, <http://ods.delaware.gov/our-services/> (last visited May 30, 2017).

249. *The Delaware Rules for Continuing Legal Education*, DELAWARE COURTS (Jan. 2016), <http://courts.delaware.gov/rules/pdf/CLE-RULES-Effective-JAN012016.pdf>.

differ from adult representation in substantial ways; there are distinct legal standards for detention, competence, transfer, and disposition hearings as well as unique litigation strategies that require knowledge of the research on adolescent development and the constitutional jurisprudence related to youth.

In recognition of these differences, ODS has been offering high-level juvenile defense training to attorneys on a regular basis for several years. Leadership staff at ODS have been qualified as certified to provide trainings based in the Juvenile Training Immersion Program (JTIP), a national juvenile defense training curriculum specifically developed for juvenile defenders.²⁵⁰ ODS offers in-state, juvenile-specific training to attorneys within the PDO and the OCC at least once quarterly. ODS also provides some support for attorneys to attend nationally recognized juvenile defense trainings.²⁵¹ And unlike many jurisdictions, where handling juvenile delinquency cases in family court is a training ground to prepare lawyers to represent adult clients in criminal court, defenders in Delaware may elect to stay in Family Court for the course of their careers. However, this longevity has not necessarily resulted in these attorneys becoming highly skilled juvenile defense advocates.

Unfortunately, there are no requirements that attorneys obtain juvenile-specific training prior to being assigned delinquency cases, nor is attendance at juvenile training mandatory for attorneys that handle delinquency cases. Even where attorneys do attend juvenile defense delinquency trainings, this alone has not translated into zealous advocacy in the courtroom. Post-training, the pervasive mentality has been that “that can’t be done in this judge’s courtroom” and that advocacy skills learned at the juvenile defense trainings would disrupt the collegiality, camaraderie, and cooperation so highly valued throughout the

Family Court. Given the lack of zealous advocacy observed in all three counties, it was clear that training must be followed by court observation and supervision that ensures training skills are applied in practice and that defenders do not become complacent in a culture that values harmony over advocacy.

3. *Supervision and Standards*

Quality defense representation requires that attorneys be supervised and reviewed against national, state, or local performance standards or guidelines.²⁵² Standards provide guidance on the juvenile defense function, including the ethical obligations juvenile defense counsel have in representing youth, and provide clarity on performance expectations.²⁵³ They provide frontline attorneys with a benchmark to work toward and provide supervisors with criteria by which to assess performance. In Delaware, there are no juvenile specific defense practice standards or guidelines by which to measure attorney performance. When investigators inquired about how ODS attorneys were evaluated for quality and performance, they learned that while there are no statewide guidelines, the National Juvenile Defense Standards²⁵⁴ have been shared with attorneys practicing in Family Court. Other than the distribution of the Standards, however, no corresponding training has been offered, and no policy is in place requiring the attorneys to follow any standards of practice. Investigators learned that PDO court supervisors conduct an annual evaluation of each attorney, but no juvenile defense standards are used as a basis for these performance evaluations.

As one supervisor described it, the onus is placed on the attorney to let supervisors know “if they’ve done something great, and we will include that in the file.” Overall, investigators were told that “the goal is to be a good defense attorney,” and that in a small

250. JUVENILE TRAINING IMMERSION PROGRAM (JTIP): CERTIFIED JTIP TRAINERS AS OF AUGUST 2016, NAT’L JUVENILE DEFENDER CTR. (2016), <http://njdc.info/wp-content/uploads/2016/12/certified-jtip-trainers-as-of-Sept-2016.pdf>; JUVENILE TRAINING IMMERSION PROGRAM: COORDINATOR AND TRAINER’S GUIDE, NAT’L JUVENILE DEFENDER CTR. (2013), http://njdc.info/wp-content/uploads/2013/10/JTIP_Coordinator_Trainers_Guide_101513_nocrops.pdf; JTIP: *Juvenile Training Immersion Program*, NAT’L JUVENILE DEFENDER CTR., <http://njdc.info/our-work/jtip/> (last visited June 6, 2017).

251. ODS has sent multiple attorneys to the Summit since 2008 as follows: 2008 – two attorneys, 2009 – two attorneys, 2010 – two attorneys, 2011 – four attorneys, 2012 – two attorneys, 2013 – two attorneys, 2014 – eight attorneys, and 2015 – four attorneys.

252. TEN CORE PRINCIPLES, *supra* note 3, at 5-6. *See also* AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 10 (2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf; NAT’L JUV. DEF. STDS., *supra* note 3, at Part IX SUPERVISORY STANDARDS.

253. *See* NAT’L JUV. DEF. STDS., *supra* note 3; TEN CORE PRINCIPLES, *supra* note 3, at 10; DEFEND CHILDREN, *supra* note 3, at 22-25.

254. NAT’L JUV. DEF. STDS., *supra* note 3.

state like Delaware, “reputation follows you.” Since the ODS has “a close relationship with the Court,” if there are issues with an attorney, there is confidence that the supervisor will be contacted. This reliance on the court letting supervisors know whether a problem exists can logically extend only to those issues the court thinks are worth raising; it does not necessarily consider the role of the juvenile defense attorney nor whether clients have a strong advocate for their stated interests, much of which cannot be known by the court. Additionally, although the PDO maintains a case database, there is no evaluation of the way an individual attorney handles a case, such as how many cases go to trial or how many motions are filed. ODS shared with investigators that reports of such case actions can be run but acknowledge that it is not done on a consistent basis, nor are such reports used in attorney reviews. Investigators learned that a monthly list of client contacts is provided to each supervisor in the PDO; however, there was no indication that these are actively reviewed or discussed with line attorneys.

When investigators asked how a supervisor would deal with an attorney who was underperforming, they were told that the supervisors would talk to the attorney, but “we don’t have attorneys not performing well, we haven’t had complaints.” This signals that the supervisors are placing the onus for monitoring attorney performance on other stakeholders. Throughout the state, investigators were troubled by a pervasive lack of oversight and supervision of ODS attorneys.

Beyond the limited supervision of line attorneys, investigators were also concerned about the lack of training or supervision for the supervisors. ODS reports that supervisors attend a general training on how to conduct and draft performance reviews provided by the Delaware Office of Management and Budget. There is reportedly no other training provided to supervisors, and investigators gleaned that attorneys become supervisors based on years of attorney experience, not based on their ability. One investigator commented, “The supervisory issues in the [public defender] office were most troubling. First, the table of organization is murky at best. Time and time again we heard that ‘this person technically should be supervised by this person, but that they really report to a different person.’” The establishment of a chief juvenile defender position in the PDO provides

an opportunity to revisit reporting and supervision structures to ensure they lead to improved juvenile defense practices.

Additionally, across the board, all supervisors, including the chief juvenile defender who oversees all three counties, carry their own caseload. Investigators did not meet with any supervisors that carried less than half of a full caseload, and several supervisors carried a full caseload. Many supervisory caseloads included high-level felony cases. Additionally, some, if not all, of the supervisors also participate in additional administrative matters and meetings, are actively involved in multi-stakeholder work groups, and support legislative reform efforts. These obligations leave little time to supervise line attorneys.

Supervision and evaluation of OCC attorneys is also inadequate. Despite the creation of supervisory positions within OCC in two of the three counties, there remain few checks on whether a youth is receiving zealous advocacy. A chief juvenile defender in ODS Central Administration, in addition to supporting the PDO, could provide greater support to the OCC chief, help to develop a juvenile supervision structure, and begin to ensure, at a minimum, that defenders have ongoing, juvenile-specific training and comply with national and state standards in order to represent a child.

There is a complacency that transcends juvenile defense representation in Delaware. It may be rooted in an unconscious belief that the youth who come into Delaware’s courts — predominantly Black and brown children from impoverished communities — are in need of services that the court, by adjudicating them delinquent, can provide. Without statewide standards or clear directives to abide by national standards, and without corresponding supervision to ensure quality representation, children in Delaware are not receiving the due process protections that the Constitution affords, as affirmed 50 years ago in *Gault*.

C. Role Confusion Contributes to a Lack of Zealous Advocacy

To be effective, a juvenile defender must provide competent, diligent, and zealous advocacy to ensure the juvenile client’s procedural and substantive rights. At its heart, this requires juvenile defense attorneys to represent the stated interests of their clients, not

simply what the lawyers believe is “best” for them.²⁵⁵ While other actors in the Family Court, such as judges and probation officers, are looking out for the child’s best interests, the role of defense attorneys is to act as the voice of their youth clients in all proceedings and to provide candid, confidential counsel to their clients in order to help them understand and weigh their options.²⁵⁶

Investigators found that in theory, most attorneys representing youth in Delaware’s Family Courts understood the obligation to zealously represent the expressed interests of their juvenile clients. Indeed, when interviewed by investigators, attorneys representing youth in delinquency proceedings uniformly — whether PDO or OCC attorneys — stated that their role was to advocate for the youth’s expressed interests. Many spoke of attending trainings provided by ODS Central Administration that communicated this expectation. However, in practice, investigators observed that the representation provided by these same attorneys regularly defaulted to facilitating whatever the court or probation officers wanted to see happen with the case.

In a great majority of hearings, little to no advocacy was observed, let alone zealous advocacy. Even when continued detention or mental health concerns were at issue, defenders were not observed making any legal arguments. In one instance, an investigator observed that the prosecutor was more concerned than the defense attorney with the youth’s competence to proceed or whether the detention center could accommodate any perceived capacity issues. The prosecutor requested the judge order facility staff to institute wraparound services to support the youth. The defender made no motion for release or an attempt to obtain similar services in the community, no call for a new bail hearing, no argument regarding treatment, and no request that the youth be sent to a nonsecure detention facility. Equally troubling was

that during the entire interaction, the defender did not say a single word to the client. The only advocate for the child in the case was the prosecutor.

There seemed a sense by many of the attorneys representing youth that zealous defense advocacy was obstructionist, and youth and the community would be better served by getting to disposition quickly so that court-ordered services could be put in place. There was no discussion or acknowledgement of the long- or short-term impact a juvenile adjudication can have on children and their families. One attorney commented, “There are good lawyers in the PD[O], in [O]CC, and in the private bar. If you want to get the kid off, get a private attorney. If you want to get treatment, get a PD.” This stark admission suggests that advocacy that meets constitutional muster is out of reach for poor children. This mentality was coupled with a severe lack of advocacy in the courtrooms, with virtually no challenges to the evidence, no substantive motions practice, no objections, and practically no trial practice.

When defenders were asked about the lack of motions practice and trials, a common refrain was that the defense attorneys and prosecutors “worked things out” before coming into the courtroom, so there was no need for the defense attorney to speak up in the courtroom; everything had already been agreed upon. “Yes, we have a good collegial relationship with the prosecutors — at the end of day, we are all professionals and know we go into [a] courtroom to argue, but the nature of where we live and practice means you can’t be a Philly or NYC attorney. That won’t fly here. It just really won’t.” This attitude places an attorney’s personal feelings over those of a client and appears to be in direct conflict with the Delaware Rules of Professional Conduct.²⁵⁷

The practice of “working things out” in off-the-record, closed-door meetings outside of the courtroom in order to keep practice in the courtroom collegial

255. *In re Gault*, 387 U.S. 1 (1967); DEL. RULE OF PROF’L CONDUCT r. 1.2 (2013); NATIONAL JUVENILE DEFENSE STANDARDS, NAT’L JUVENILE DEFENDER CTR. (2012), <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>.

256. DEL. RULE OF PROF’L CONDUCT r. 1.2, 2.1 (2013).

257. Rule 1.7(a)(2) provides that a conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person *or by a personal interest of the lawyer.*” DEL. RULE OF PROF’L CONDUCT r. 1.7(a)(2) (2013) (emphasis added). Comment 10 of the same rule also states, “The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.” DEL. RULE OF PROF’L CONDUCT r. 1.7 cmt. (2013).

may be appropriate if it advances the client's interests and if the youth is informed of and consents to such advocacy. But if youth and their families sit separately, often for many hours, in crowded waiting areas unsure of what to expect or whom to trust, such exclusion from backroom dealings can be detrimental to juvenile clients and families in numerous ways. At the outset, exclusion impedes the attorney-client relationship because youth do not see their attorney as an advocate on their behalf. Instead, the attorney can be seen as yet another person who is trying to pull them deeper into the court system and who has no interest in explaining what is happening. It also impacts perceptions of fairness and denies youth a sense of procedural justice because it completely removes their active participation in their own defense. Additionally, a number of defense goals that may be furthered by filing motions — including compelling dismissal, exclusion of unlawfully obtained evidence, obtaining discovery, or evaluating the strength of the prosecution's case — are lost when defenders elect to cooperate rather than advocate. One investigator observed, "At every moment when advocacy could occur in the Family Court — at hearings for arraignment, detention, bail, suppression, plea, sentencing, or thereafter — that opportunity is stripped out by habit, collegiality, local practice, or home rule."

The juvenile defender should serve as a check on the power of the state at every turn to ensure the court system is fair. However, in Delaware's Family Courts this check was noticeably absent, and often replaced by someone actively facilitating the child's descent deeper into system involvement, which could be rife with punitive consequences. Overall, investigators concluded that juvenile defense attorneys in Delaware struggle with role confusion that leads to a lack of adversarial testing of facts or most other advocacy on behalf of youth, resulting in unnecessary and arbitrary court involvement at great expense to youth, families, and communities.

D. Lack of Pay Parity

Parity of pay among lawyers is key not only because it is fair, but also because it directly signals what those allocating the pay consider important. A policy of paying juvenile defenders less than public defenders who represent adults signals that juvenile work is of less value and provides an incentive to move into the more highly valued area of adult defense.²⁵⁸ Likewise, budget allocations that pay prosecutors and defenders at disparate rates demonstrate disparate priorities.

ODS provides pay for Assistant Public Defenders (APD) in the PDO who represent juvenile clients that is commensurate with the salaries of both APD who handle adult criminal cases and Deputy Attorneys General (DAG) who prosecute juvenile and adult cases. However, OCC attorneys receive a lower hourly rate of pay for representation of youth in Family Court as compared with the rate of pay for representation of adults in other courts.²⁵⁹ At the time of the Assessment, there was a flat fee contract for OCC representation, but OCC indicated their intent to move to an hourly rate system. Investigators learned that attorneys in one county are paid \$60 an hour for juvenile misdemeanor and felony cases and adult misdemeanor cases, but \$100 an hour for adult felony cases. Attorneys in the other two counties were paid using a flat rate contract. Since the Assessment, one of the counties that was using a flat-rate contract has moved to an hourly system at a rate of \$75 an hour. This rate is still below that paid to attorneys representing adults. These discrepancies should be remedied because they are a disincentive for skilled OCC attorneys to develop juvenile expertise and accept juvenile cases in Family Court.

The need for skilled juvenile OCC attorney representation is just as critical as with the PDO, especially given the high numbers of juvenile co-defendant cases that are filed in Delaware. It is a positive that the OCC does not impose a fee cap on the number of hours a court-appointed attorney

258. See DEFEND CHILDREN, *supra* note 3, at 22-25 (Recommendation 3.1 calls for equal pay and promotion between juvenile and adult defense units); TEN CORE PRINCIPLES, *supra* note 3, at Principle 3; JUVENILE DEFENSE SELF-ASSESSMENT TOOL, NAT'L JUVENILE DEFENDER CTR. & NAT'L ASSN. FOR PUB. DEFENSE (2016), http://njdc.info/wp-content/uploads/2016/03/NAPD_IssueBrief_030416.pdf; NAT'L JUV. DEF. STDS., *supra* note 3, at § 9.7 SUPERVISOR'S OBLIGATION TO ADDRESS SYSTEMIC BARRIERS cmt. (calling for pay parity with prosecution as well as with appointed counsel).

259. Previously there was a flat fee for OCC representation, but OCC is moving to an hourly rate system. Attorneys will be paid \$60 an hour for juvenile misdemeanor and felony cases and adult misdemeanor cases, but \$100 an hour for adult felony cases. The amount for adult felonies was "just raised" at the time of Assessment site visits.

or conflicts counsel can bill for representation on a case. However, the hourly pay discrepancy must be remedied.²⁶⁰

E. Lack of Continuity in Representation

National standards and guidelines require continuity in representation — the practice of having the same attorney represent a client for the entire course of system involvement.²⁶¹ This practice, also known as vertical representation, allows for the development of rapport with a client, ongoing investigation and witness interviews, and thorough examination of the evidence, and it is especially critical in working with youth clients. While it was discussed previously in terms of structural barriers to access, it is important to recognize that a lack of continuity of representation throughout the life of the case has implications for quality of counsel as well.

In Delaware, PDO attorneys handling juvenile delinquency cases do not provide vertical representation except in the most serious cases. Instead, PDO attorneys use horizontal representation in which a child who appears in Family Court may have one attorney for arraignment, another for a bail/detention hearing, a third at a case conference, and so on. This system of representation belies best practices, as it severely inhibits the development of rapport, trust, and confidence in the ever-changing attorney standing beside the youth at different court appearances. The practice of horizontal representation, particularly in the representation of children, is entirely contrary to the tenets of developmental research.²⁶²

Horizontal representation in Delaware is typically used for convenience of the court and the attorney, allowing one attorney to be assigned to a particular courtroom based on the court's calendar. During one county site visit, a public defender remarked, "Vertical representation would be great, but there are three floors in the family court, and attorneys would have to run up and down."

As indicated earlier, ODS is working towards addressing these issues. However, scheduling conflicts with multiple overlapping misdemeanor calendars create challenges in ensuring implementation of vertical representation in juvenile cases.

When horizontal representation is employed, the attorney does not have an opportunity to get to know the youth, to become invested in positive outcomes for the youth, or to see the youth as something more than another component of the day's caseload. All attorneys who touch the case must become familiar with the case, then introduce themselves to the client and the client's family, and become yet another rotating face in a system that seems perpetually against the youth. Worse yet, this rotating face is the one the youth is supposed to trust.

It should come as no surprise that many young people were unsure who their attorney was or whether their attorney was one of the people who spoke to them as they stayed in crowded waiting areas outside of the courtroom. On one occasion, the Assessment team observed that the PDO attorney who was covering the courtroom in the earlier part of the day had to leave and asked another attorney to appear on the youth's case. The youth was not introduced to this attorney in advance, and only upon being brought into the courtroom did the new PDO attorney explain the switch to the youth. At no time other than in the courtroom did the new attorney speak with the youth.

The detachment from clients that comes with horizontal representation likely also contributes to a lack of investment in outcomes for an individual youth and correspondingly results in a lack of zealous advocacy for the youth client. When an attorney is assigned to a courtroom based on a calendar, it is unquestionably challenging for the attorney to build a relationship with the client or to be familiar enough with the case to provide zealous advocacy. Having different attorneys standing up with a youth each time the youth is before the court means that these

260. See generally DEFEND CHILDREN, *supra* note 3 at 22-25 (recommending equal pay and promotion between juvenile and adult defense units); TEN CORE PRINCIPLES, *supra* note 3, at Principle 3; JUVENILE DEFENSE SELF-ASSESSMENT TOOL, NAT'L JUVENILE DEFENDER CTR. (2016), http://njdc.info/wp-content/uploads/2016/03/NAPD_IssueBrief_030416.pdf; NAT'L JUV. DEF. STDS., *supra* note 3, at § 9.7 SUPERVISOR'S OBLIGATION TO ADDRESS SYSTEMIC BARRIERS (calling for pay parity with prosecution as well as with appointed counsel).

261. TEN CORE PRINCIPLES, *supra* note 3, at Principle 7; NAT'L JUV. DEF. STDS., *supra* note 3, at § 1.4 SCOPE OF REPRESENTATION.

262. See *supra* Section 3.I.

attorneys are meeting with a youth client for the first time at each hearing and often have only briefly met with the youth client prior to offering advice on whether to take a plea offer or discussing alternatives to offer at a detention hearing or building a disposition plan. This situation accordingly detracts from the attorney substantively advocating for — or even understanding — the child’s expressed interests and impedes motion practice, independent investigation, and overall zealous advocacy.

Horizontal representation also denies youth procedural justice by reinforcing a belief that the justice system is unfair and biased.²⁶³ Procedural justice is the perception of fairness in the court system based on the client’s active participation and understanding.²⁶⁴ Research demonstrates that when a person perceives fair treatment in the legal system, that person is more likely to actively engage in the court process and find value and legitimacy in the case outcomes — even when the outcome is not the desired result.²⁶⁵ The juvenile defender is the child’s voice in the court system and the only advocate charged with protecting those rights and guaranteeing procedural justice — fairness — for the youth.²⁶⁶ The juvenile defender is thus the crux of procedural justice.

Unlike the PDO attorneys, OCC attorneys do provide much-needed vertical representation. Their advocacy is limited instead by not being appointed until after a child’s initial appearance.

It is important to note that except in the specialty courts, there is also no rule of vertical continuity for the judicial officers in Family Court. They often preside over a mixed caseload of child welfare and delinquency matters on a rotating basis that varies in term, sometimes for three weeks, other times for three months. From the outside, dockets seem randomly assigned. A continued hearing is scheduled on a certain date and time but can appear on any jurist’s docket. Judicial officers have an incentive to

clear the docket but no ownership over the matters before the bench. One judge told the investigators that continuances are freely granted, in part because the continued hearing is scheduled without regard to the judge or the lawyer’s calendar. A child may not ever see the same jurist twice, so the child cannot demonstrate to any single decision maker that they can follow through on requests or orders made by the court. This practice also undermines youth perception of procedural justice and makes continuity in representation even more critical. Another investigator commented, “I noticed that in some courtrooms, the defendant is on the right side, and in other court rooms, the defendant is on the left. I can imagine that this leaves the child and the parents feeling quite unsettled — never knowing who will be presiding, which floor the hearing may be on, and even on which side of the courtroom they are expected to sit. The psychological advantage over the child and parent in this type of setting cannot be overstated.” Given this court structure, it is critical that youth have a consistent defense attorney who provides stability in the proceedings. Moreover, a consistent, singular advocate would be able to contextualize past proceedings for the court and provide much-needed continuity in the overall case that cannot always be gleaned from simply passing along files.

For a youth client who “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.”²⁶⁷ the lack of vertical representation fails to adequately provide “the guiding hand of counsel at every step in the proceedings against him.”²⁶⁸

IV. ADDITIONAL BARRIERS TO JUSTICE AND FAIRNESS FOR CHILDREN

A. Juvenile Court Culture

263. See Jeffrey Fagan & Tom Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUSTICE RESEARCH 217 (2005).

264. DEFEND CHILDREN, *supra* note 3; Jeffrey Fagan & Tom Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUSTICE RESEARCH 217 (2005).

265. DEFEND CHILDREN, *supra* note 3, at 12. See also Jeffrey A. Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUDIES 715 (2007), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2818334/pdf/nihms-154757.pdf>; REFORMING JUVENILE JUSTICE, *supra* note 196, at 192-93, 197-98.

266. See REFORMING JUVENILE JUSTICE, *supra* note 196, at 198.

267. *In re Gault*, 387 U.S. 1 (1967) (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

268. See *generally Gault*, 387 U.S. at 1.

In some ways, Delaware's juvenile court system is the worst of both worlds: the language used in the hearings is the punitive adult language (criminal cases, defendant, guilty plea, sentencing) but the "kiddie court" mentality that pervades the system seems to be a cover for a lack of process and a lower level of practice.

Although Delaware law provides that "no child shall be deemed a criminal by virtue of an allegation or adjudication of delinquency" unless charged as an adult, the language commonly used in the family courts is that of an adult criminal court. The delinquency docket is referred to by attorneys as the criminal docket — juxtaposed perhaps with the handling of child welfare or other nondelinquency cases assigned to attorneys practicing in Family Court. Children plead guilty, are convicted, and sentenced — rather than adjudicated with a disposition entered. While the choice of language may seem minor, it speaks to a culture that on the one hand negates the importance of adversarial practice because the youth is in Family Court, while on the other still imposes harsh and long-term consequences that often result in a youth's incarceration.

As highlighted previously, contributing to the role confusion that pervades juvenile defense in Delaware is a juvenile court culture that places significant emphasis on collegiality, camaraderie, and cooperation among stakeholders in order to speed youth towards court-ordered services at disposition. Most of the stakeholders interviewed identified the court's culture of collegiality and shared sense of purpose as one of its greatest strengths. Almost all stakeholders spoke favorably about the juvenile public defenders. Indeed, one does not need to practice in contentious, animosity-filled courtrooms to respect the different roles each stakeholder plays. However, when the emphasis on collegiality results in the denial of due process for youth, all stakeholders must take stock. Such is the case in the family courtrooms in Delaware, where the prevailing focus on "civility" contributes to a systemic lack of adversarial testing of the facts by defense attorneys and an expectation by other stakeholders that defenders will go along in order to ensure services are put in place for youth. There seems to be a belief that justice professionals are incapable of disagreeing about facts, procedure, or what is "right" without being uncivil — that civility must be a synonym for harmony or universal agreement. Several system stakeholders appeared to lack a clear

understanding of the appropriate role of counsel to protect the due process rights of youth facing accusations of delinquency. One of the underlying problems in the system is the perception by many stakeholders, including juvenile defense attorneys themselves, that their role is a collegial partnership with the prosecutors, the judges, and commissioners, and that their job is to ensure that young people receive services.

Zealous advocacy by defenders in the courtroom, or any advocacy at all, appears to be frowned upon. One public defender who acknowledged the widespread belief that "troubled children" need delinquency court involvement to "get the help they need," mentioned that given the services emphasis, she has tried to move delinquency matters into dependency court. This has been discouraged, and apparently "the delinquency judges yell at the commissioners who try to move cases to dependency court because the dependency court judges have a 'huge problem' with that." When defense attorney advocacy is ignored, reprimanded, or discounted, it contributes to attorneys limiting their advocacy and feeling like they must go along to get along. Almost across the board, the consensus among those interviewed was that the defining characteristics of delinquency practice in Delaware are civility, cordiality, reasonableness, and a desire to "help" children. Defenders, including supervisors, justified this practice consistently. One investigator commented, "I find it troubling that the two aspects of the system that receive the most praise are that the public defenders are very good at getting kids treatment and that the dockets move very quickly. This 'best interest' mentality is coupled with a severe lack of advocacy in the courtrooms, with virtually no substantive motions practice, no objections, and practically no trial practice." Such a culture appears predicated on an acceptance of what the police say happened, without any checks or balances.

Achieving successful outcomes for youth adjudicated delinquent so they may become productive, contributing, law-abiding members of society is a common goal for juvenile justice systems around the country. Delaware law likewise provides that where a child is adjudicated delinquent, dispositional decisions are to provide the least restrictive interventions necessary to protect public safety and offer the youth opportunity for rehabilitation.

However, while youth success and public safety are the end goals for the delinquency system, “[ensuring] the essentials of due process may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.”²⁶⁹ Ensuring youth’s constitutional right to effective assistance of counsel and requiring that the prosecution prove its case beyond a reasonable doubt, prior to the Court’s making a finding, are the essentials of due process.

Across the country it is not uncommon for most cases to be disposed of through a plea bargain without going to trial. It is not unusual for attorneys to engage in off-the-record negotiations with the prosecutors and conversations with probation officers to attempt to get a better result for the client than what might be decided if the youth’s case went to trial. This certainly can be an element of zealous advocacy, but only if it keeps the central tenets of the youth client’s expressed interests in mind. Indeed, in Delaware, some of the backroom conversations lead to better outcomes for youth. For example, sometimes following informal discussions with prosecutors, defenders advise youth to accept pleas in cases in which they will be able to avoid a mandatory minimum sentence that would otherwise require out-of-home placement. If these negotiations truly enhance a child’s legal outcomes and are not simply aimed at rushing a child to an admission of guilt in the name of “saving” that child with services, then it qualifies as zealous advocacy. But if a child feels sold out, misled, or tricked into a guilty plea by the attorney, it is an altogether different scenario.

Unfortunately, in this system, the emphasis on collegiality, camaraderie, civility, and cooperation does not seem to extend to youth and their families. Instead, in all three counties, investigators observed that defense attorneys would spend their time between cases chatting with prosecutors or other court actors rather than talking to clients or their families. It was rare to see an attorney step outside the courtroom before or after a case to speak with a child to either explain what was going to happen or what had just happened. In one instance, an investigator approached a youth and his family after a case was called and asked if the youth understood what had just happened, and

the youth indicated they had no idea. As a calendaring matter, case reviews are frequently scheduled after the arraignment and prior to a separate trial date. These case reviews often take place without the child’s involvement at all. The child and the parent often sit in the waiting area for most of the day with little or no information until an attorney comes out to give them a new date to come back to court.

Juvenile appeals are also a rarity. Investigators observed a general feeling that people do not take delinquency cases seriously and want to push through the cases to clear their calendar; filing an appeal requires attorneys to litigate instances when they believe the court is violating children’s rights. An investigator in one county recounted that “no one could remember the last time a juvenile appeal was filed.” And without appeals, there is no system in place to assess whether the courts are complying with the law or the state or federal constitutions.

Throughout Delaware, investigators engaged in conversations with stakeholders who implied or stated outright that youth who come into contact with the justice system are better served if they are adjudicated delinquent and receive services and are removed from their communities. Given Delaware’s charging system where every arrest becomes a juvenile court case, there are few if any meaningful opportunities to engage a youth in preventative community-based services prior to court involvement. And from the moment of arrest to the decision to detain to an adjudication of delinquency, the requirements for due process seem secondary to the perceived need to ensure youth receive court-ordered services — even if that means commitment to DSCYF custody.

Some stakeholders expressed that they believed a stay in a high-level, secured DYRS-operated facility would be better for both the youth and community because it would rehabilitate the youth into a productive, contributing member of society and make society safer by removing the youth from the community. Few acknowledged the significant research on the harms of incarceration or how inappropriately intense interventions are actually linked with greater

269. *In re Gault*, 387 U.S. 1, 26 (1967).

recidivism and poorer long-term life outcomes.²⁷⁰ This thinking seems to underlie delinquency proceedings and, consciously or not, contributes to the less than zealous advocacy of most juvenile defense attorneys at dispositions that were observed in the Family Courts of the state.

Indeed, the investigative team who visited the Level IV and Level V secure care commitment facilities were impressed with the continuum of care offered at these DYRS operated facilities. Upon visiting the Level IV residential cottages, Snowden, Mowlds, and Grace, as well as the school the children attend, an investigator who has visited numerous juvenile facilities across the country stated, “In terms of the deep end of the system, I was extremely impressed with what I saw at the Level IV cottages. In over twenty years of national juvenile defense work, the Delaware cottage facilities were the best I have ever seen. It was awesome to feel such a positive energy at the school and to see how national best practices have been successfully implemented in Delaware.” The investigator highlighted practices that elevated the cottages above other facilities: 1) weekly shuttles for parents to visit; 2) elimination of solitary confinement; 3) co-ed school structure; 4) well-trained and diverse staff; 5) small group homes with eight to 16 youth per house; 6) attempts to engage the youth in positive activities such as ice skating, art museum visits, and social events with their families; 7) opportunities for

cottage meetings where youth can set the agenda and address issues; and 8) lengths of stay that rarely exceed six months. Staff members have regular trainings and employ Cognitive Behavioral Treatment (CBT), an evidence-based practice. Investigators were impressed by strong family engagement efforts, which have been documented as important to positive youth outcomes.²⁷¹ The school was described as having “a warm, welcoming feel, painted with cheerful colors, decorated with lots of inspirational posters and artwork made by the youth.” The cottages where the children resided were small and appeared “homey,” with individual rooms where youth could have photos of their families.

The Level V Ferris facility also had positive aspects, such as a clean, bright building with natural light; good school and gym facilities; a noncorrectional program design; frequent access to family for some youth; participation in Performance Based Standards (PbS);²⁷² favorable youth reports of the treatment specialists, who had a 3:1 youth ratio; and a culinary program where youth get paid for cafeteria work.

However, there were issues of concern, including the use of solitary confinement, called “Administrative Intervention” typically used for two to three days but sometimes for up to two weeks at a time; aggressive use of restraints — in one instance, a youth’s arm was broken and no investigation was conducted;

270. EDWARD P. MULVEY, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, HIGHLIGHTS FROM PATHWAYS TO DESISTANCE: A LONGITUDINAL STUDY OF SERIOUS ADOLESCENT OFFENDERS (2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf>; Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2908904/>; BARRY HOLMAN & JASON ZEIDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2 (2011), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf; REFORMING JUVENILE JUSTICE, *supra* note 196, at 91.

271. A 2013 Vera Institute of Justice study examined the effects of family visitation on incarcerated juveniles. The study provides evidence that youth receiving visitation performed better, academically and behaviorally. The existing social science evidence confirms that it is critical for an incarcerated juvenile to maintain his or her family connections. The results of a 2010 study show that family visitation also has a significant impact on the mental health of incarcerated children — youth who received parental visits were less likely to experience depressive symptoms. Lack of access to family can affect rehabilitation and re-entry, and attorneys can be the bridge to connect youth and families who struggle with the visitation process and transportation issues. See Sandra Villalobos Agudelo, *The Impact of Family Visitation on Incarcerated Youth’s Behavior and School Performance*, VERA INSTITUTE OF JUSTICE (Apr. 2013), <http://www.vera.org/sites/default/files/resources/downloads/impact-of-family-visitation-on-incarcerated-youth-brief.pdf>. See, e.g., Damien J. Martinez, *Family Connections and Prisoner Reentry* (Apr. 2009), <http://coppfs3.asu.edu/news-events/conferences/downloads/paper-martinez>; *Best Practices Tool-Kit: Family Involvement During Incarceration and Reentry*, OHIO DEP’T OF REHAB. AND CORR. (2008), <https://kb.osu.edu/dspace/bitstream/handle/1811/32499/1/Tool%20Kit%20Involving%20Family%20During%20Incarceration%20and%20Reentry.pdf>; Kathryn C. Monahan et al., *The Effects of Visitation on Incarcerated Juvenile Offenders: How Contact with the Outside Impacts Adjustments on the Inside*, 35 LAW & HUM. BEHAV. 143 (2011).

272. *Performance-based Standards (PbS)*, PERFORMANCE-BASED STANDARDS, <http://pbstandards.org/initiatives/performance-based-standards-pbs> (last visited June 6, 2017).

housing of youth on mandatory six-month or one-year sentences, even if it was the youth's first arrest; time extensions in the facility without access to an attorney; reported issues with re-entry planning that result in time extensions if no appropriate re-entry plan is in place. Additionally, DYRS facility staff, including members of the educational team, told assessment team members that credits are not transferred from the facility, and there is a significant issue with re-enrolling children in their local school once they have been in placement. One judge acknowledged this problem and said the school districts often refuse to accept credits from the cottages and require youth to attend alternative schools when they return home.

While these facilities and particularly the Level IV residential cottages provide promising services and programming, this does not negate the need for adequate due process protections at every stage of a juvenile delinquency proceeding. The prerequisite to incarcerating a child should be proof that a child committed a serious offense and that incarceration is the necessary disposition. Only the accused can decide whether to admit guilt short of government proof, and defenders have a responsibility to ensure that youth make this admission because it meets their goals, not because the lawyer or the court feels it "best."

In Delaware, there is an imbalance between acknowledging and protecting the basic rights established in *Gault* over 50 years ago and adjudicating youth delinquent in order to meet their perceived treatment needs. The constitutional due process rights of youth should not be disregarded simply to access services in facilities, even good ones, particularly

given the significant research in recent years that shows the reliance on juvenile incarceration has not paid off and is, in fact, a failed strategy for combating youth crime.²⁷³ As one investigator commented, "The children suffer from this collegiality and would be much better off if everyone didn't work so well together."

B. Monetary Bail Practices

A significant issue of concern in Delaware is that bail can be imposed on children facing delinquency charges. It is unusual for a state to have bail hearings for youth, and there are compelling reasons to prohibit the use of bail for juveniles.²⁷⁴ The IJA/ABA Juvenile Justice Standards state, "The use of bail bonds in any form as an alternative interim status should be prohibited."²⁷⁵ Most states have detention hearings, but money is not involved. Since young people rarely have their own money in the amounts typically required, bail effectively denies release.

In a 2016 "Dear Colleague" letter addressing common practices that run afoul of the United States Constitution, the U.S. Department of Justice stated that basic constitutional principles, grounded in the rights to due process and equal protection, require that "[c]ourts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release."²⁷⁶ Courts have long recognized that bail practices that result in incarceration based on poverty violate the Fourteenth Amendment.²⁷⁷

In Delaware, youth are appointed counsel based on the understanding that children have no financial means

273. See RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>; ISSUE BRIEF: NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION, ANNIE E. CASEY FOUND. (2011), <http://www.aecf.org/m/resourcedoc/AECF-NoPlaceForKidsIssueBrief-2011-Full.pdf>.

274. *Schall v. Martin*, 467 U.S. 253 (1984) (authorizing pretrial detention of youth accused of delinquency acts without the right to bail). See also Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children*, NAT'L JUVENILE DEFENDER CTR. (2004), <http://njdc.info/wp-content/uploads/2013/11/Legal-Strategise-to-Reduce-the-Unnecessary-Detention-of-Children.pdf>.

275. JUVENILE JUSTICE STANDARDS RELATING TO INTERIM STATUS, INST. FOR JUDICIAL ADMIN. 63 (1980).

276. Dep't of Justice, Dear Colleague Letter Regarding Law Enforcement Fines and Fees (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download>. See COUNCIL OF ECONOMIC ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1 (Dec. 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf (describing the disproportionate impact that fines, fees, and bail have on the poor).

277. See Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC 8 (M.D. Ala., Feb. 13, 2015), http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/02/13/varden_statement_of_interest.pdf (citing *Bearden v. Georgia*, 461 U.S. 660, 671 (1983); *Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970)).

of their own.²⁷⁸ Yet bail is imposed on these same youth, often in hearings without access to counsel, resulting in the incarceration of children because they cannot afford to pay bail.

Bail in Delaware is set either by the Family Court or, if the youth is arrested outside of Family Court hours, by a magistrate at the Justice of the Peace Court who may or may not be trained in law.²⁷⁹ No defense attorney is present at the Justice of the Peace Court, even though the youth's liberty interest is at stake. Conversely, since 2015, Deputy Attorneys General (DAG) now attend all hearings where a youth is alleged by law enforcement to have committed a serious felony, and the DAG requests detention and high bail amounts.²⁸⁰ Where the DAG is not present, law enforcement will make a bail and detention recommendation. A DYRS staff person may attend the hearing and also make recommendations. At this incredibly critical stage involving a youth's liberty, the youth stands alone before the court with no counsel to oppose recommendations for secure detention and high bail amounts that may be put forward by the DAG, the police officer, or DYRS. Decisions made at the Justice of the Peace Court are reviewed by the Family Court on the next open business day, but the decision of the magistrate is rarely modified upon the review hearing. One Judge admitted that she sets bail "more out of habit than anything else." The purpose of bail in her estimation is to get kids' parents' attention, but to also provide a carrot for returning to court for multiple review hearings. Further heightening concern over this practice is that if a child is detained, bail and detention review hearings in Family Court are conducted via video conference — which, as discussed earlier, raises serious due process concerns.

Regardless of whether the initial hearing is at the Justice of the Peace Court or the Family Court, the Court sets the amount and type of bail, which can be secured or unsecured, as well as any conditions.²⁸¹ A

juvenile risk assessment instrument is used to guide bail determinations.²⁸² Although bail is permissive and youth may be released on their own recognizance,²⁸³ investigators never observed or learned of a situation where this occurred. At a minimum, an unsecured amount was attached as a condition of release. Investigators observed one Mental Health Court proceeding in which a \$2,500 bail had been set for a twelve-year-old boy. Investigators came to understand that there are three typical ways bail is set: 1) The child is detained on secured or cash bail at the detention center; 2) the child is detained in a nonsecure detention facility — described as an alternative to detention — with a secured bail amount set but modified to an unsecured amount upon the child's arrival at the nonsecure detention facility; or 3) the child is released with an unsecured bail amount. In all of these scenarios, bail amounts can be substantial.²⁸⁴ This practice has an obviously inequitable and negative impact on poor children and their families and may contribute to the significant racial disparities observed by investigators during visits to the two secure juvenile detention facilities.

There seemed to be no rhyme or reason to the amounts or the justification for one placement or another. There was no discussion of the child's ability to pay. We observed one bail review hearing, in which the child had been held for more than a month in detention. Although there was impressive family support and advocacy concerning the good behavior of the child, the request was denied almost out of hand. The jurist did not praise or even acknowledge the child's positive progress and was dismissive of the child's family.

At the outset, to better protect the constitutional rights of children while ensuring a youth's appearance in court and the safety of the community, courts should consider transitioning from a system based on

278. This has been the customary practice of ODS over several years and was codified in June 2016 to find all youth automatically eligible for appointment of counsel. See discussion *infra* Section 4.III.

279. DEL. CODE ANN tit. 10, § 1007 (2012).

280. *Department of Justice Taking Tougher Stance on Juveniles with Guns*, DELAWARE DEP'T OF JUSTICE (Apr. 6, 2015), <http://news.delaware.gov/2015/04/06/departments-of-justice-taking-tougher-stance-on-juveniles-with-guns>.

281. See generally DEL. CODE ANN tit. 10, § 1005 (1995), 1007 (2012).

282. See *infra* Appendix A, Delaware Juvenile Risk Assessment Form.

283. DEL. CODE ANN tit. 10, § 1005(b)(1) (1995).

284. Jessica M. Reyes, *Six in 10 Delaware Inmates are Black*, THE NEWS JOURNAL (Oct. 17, 2015), <http://www.delawareonline.com/story/news/crime/2015/10/17/six-10-delaware-inmates-black/73585456/>.

secured monetary bail to one grounded in alternatives to detention.²⁸⁵ Beyond this step, having well-trained juvenile defense attorneys with youth in court must become standard practice in every hearing where a child faces loss of liberty.

C. Youth Prosecuted as Adults

Children can be prosecuted as adults in Delaware. Many stakeholders reported an increased number of youth being prosecuted in adult court and being sentenced to adult prison, some of them receiving mandatory minimum sentences associated with the charged offense.

Statutory exceptions to the Family Court's jurisdiction provide that if a child is charged with certain offenses, or if there is a determination that the child is not amenable to the Court's rehabilitative process, the child shall be proceeded against as an adult.²⁸⁶ Where children are under adult court jurisdiction, their cases may be transferred to the Family Court if, in the opinion of the Attorney General, "the interests of justice would best be served" or if the Superior Court, upon the youth's application for transfer, conducts an amenability hearing and determines it is in the interest of justice to do so.²⁸⁷ Unfortunately, under the current statutory scheme in Delaware, where the prosecution charges a youth with certain weapon-related crimes, there is no judicial discretion to consider individualized circumstances or amenability to rehabilitation and the child is subjected to adult court jurisdiction in the Superior Court.²⁸⁸ The prosecutor, irrespective of whether sufficient evidence exists, can ensure a youth is prosecuted in adult court simply by charging one of these weapon-related offenses if the child is of a certain age. Since 2015, in a new anti-gun program initiated by Delaware's Attorney General, prosecutors with Delaware's

Department of Justice have purposefully charged youth carrying firearms as adults to ensure they face punishment rather than Family Court jurisdiction.²⁸⁹ Once charged as an adult, youth charged with these offenses cannot be returned to Family Court — even if the judge presiding over the case believes that there is insufficient evidence that the youth committed the crime or that the youth would benefit from Family Court's rehabilitative interventions. This unfettered power of the prosecution without any judicial oversight is troubling and inconsistent with U.S. jurisprudence over the last decade holding that children are different from adults and that they are entitled to individualized decisions that consider their developmental maturity and mitigating characteristics.²⁹⁰

Even when a case cannot be transferred back to Family Court because of the weapon enhancements, a defender with juvenile expertise is still essential to effectively advocate for youth.²⁹¹ When there is potential for youth to request a reverse amenability hearing to transfer jurisdiction to the Family Court, a skilled juvenile defender with specialized training and expertise in adolescent development and a youth's capacity for rehabilitation is necessary for effective advocacy.

The transfer of youth to criminal court has detrimental effects on youth and society. Assessment team investigators conducted a site visit to the Youthful Criminal Offenders Program (YCOP) unit where youth facing adult prosecution, or those sentenced after an adult prosecution, are held. Investigators conducted this visit upon hearing of significant concerns related to the housing and treatment of children in YCOP. Investigators found that the physical conditions in which young people are held are unconscionable. One investigator described the conditions of confinement as "absolutely horrible —

285. See, e.g., D.C. CODE § 23-1321 (2016); COLO. REV. STAT. ANN. § 164-104 (West 2014); KY. REV. STAT. ANN. § 431.066 (West 2012); N.J. S.B. 946, 2014-2015 Reg. Sess. (N.J. 2015). See also Jessica M. Reyes, *Will Delaware End Cash Bail?*, THE NEWS JOURNAL (Nov. 6, 2015), <http://www.delawareonline.com/story/news/crime/2015/11/07/doing-away-cash-bail/74619298/>.

286. DEL. CODE ANN tit. 10, § 1010 (2012).

287. DEL. CODE ANN tit. 10, § 1011 (2002).

288. DEL. CODE ANN tit. 11, § 1302 (1995), 1338 (1989), 1447 (2001), 1449 (1995).

289. *Department of Justice Taking Tougher Stance on Juveniles with Guns*, DELAWARE DEP'T OF JUSTICE (Apr. 6, 2015), <http://news.delaware.gov/2015/04/06/departments-of-justice-taking-tougher-stance-on-juveniles-with-guns>.

290. *Miller v. Alabama*, 567 U.S. 469 (2012) (holding that children, as a class, are categorically less culpable and more capable of rehabilitation); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

291. NAT'L JUV. DEF. STDS., *supra* note 3, at PART VIII ROLE OF JUVENILE DEFENSE COUNSEL WHEN CLIENT FACES RISK OF ADULT PROSECUTION.

an ancient cell block that was filthy, dark, and dank, with very limited and obscured indirect natural light well away from the cells.” The furniture consisted of a steel bed, toilet, and sink. Youth described a significant pest problem on the cell block, with mice and bugs regularly observed at night.

No cameras were anywhere in the unit, calling into question the youths’ security as well as allowing for potential abuses to go unobserved. The boys held there attend school for only three hours a day, five days a week. Although the boys were in school when the investigators visited, no teaching was observed, nor did the teacher have any interaction with the students, who sat silently in the room with workbooks on the desk. The youth said that all work is done out of books rather than through lectures or interactive teaching. These children are never afforded outdoor recreation — despite there being “a huge and relatively nice yard that is available to adult inmates.” This is in part attributed to the requirement that youth have sight and sound separation from adult prisoners. However, during lunch investigators observed youth sitting in utter silence while surrounded by correction officers *and* adult prisoner cafeteria workers — calling into question why outdoor recreation was not available to youth in this unit. Those held in this unit receive neither the rehabilitative services and programming afforded to youth of the same age held in facilities run by DYRS nor the programming and services available to adult prisoners held in the same facility. Youth charged with disciplinary violations can be locked down and confined to a cell 23 hours per day for up to 15 days, during which time they are prohibited from attending school or receiving visitors. Neither a functional grievance process nor a system for rewarding positive achievements and behavior exists. All investigators felt strongly that conditions in the YCOP unit were likely unconstitutional and absolutely unacceptable for housing children.

Youth in criminal court need experienced specialized juvenile defense lawyers to fight against long periods of confinement and placement in programs unsuited for treatment and rehabilitation. Sentencing youth in adult court significantly diminishes their opportunities to become successful and productive contributing members of society. Children are not “miniature adults,” and reducing the number of youth who are charged as adults is critical to reducing disparities and improving outcomes for youth who too often are channeled away from opportunities for growth and improvement and into the depths of incarceration.

D. Racial and Ethnic Disparities

“Racism is rampant in Delaware.”

- Delaware Juvenile Court Stakeholder

As the youth’s advocate, juvenile defense attorneys are positioned to defend against the institutional bias, conscious or unconscious, that results in disparate treatment of youth of color in the justice system. In Delaware, it was readily apparent that youth of color, particularly Black boys, are arrested, petitioned, detained, transferred to adult court, adjudicated, and subsequently committed to DYRS facilities at disproportionate rates as compared with white youth.²⁹² Well- trained and qualified juvenile defense counsel is critically needed to advocate for these youth during all phases of their legal proceedings in order to ensure that they are not pulled deeper into the system when less restrictive alternatives are available. In 2014, children of color in Delaware were arrested 3.38 times more than white children, detained 3.19 times more than white children, sentenced to confinement 1.56 times more than white children, and prosecuted in adult court 1.92 times more than white children.²⁹³

292. YRS FACILITY POPULATIONS BY QUARTER, *supra* note 116.

293. DELAWARE CRIMINAL JUSTICE COUNCIL, STATEWIDE AFRICAN AMERICAN/WHITE VOLUME & RRI VALUES BY CONTACT POINT REPORT (2014).

Delaware is not alone; national studies show that youth of color are arrested, referred to the court system, detained pretrial, committed to out-of-home facilities, and transferred to the adult system at disproportionate rates compared with white youth.²⁹⁴

Many stakeholders did not believe that there are significant racial disparities among the youth that are arrested and prosecuted in family court. Others felt it important to tell investigators, “There are a lot of white kids too.” However, it was clear to investigators that most children that come before the courts are Black youth. The numbers of youth in detention and residential facilities also show an overwhelming disparity for Black and Hispanic youth as compared with white youth. Investigators’ observations in court and in the facilities support the conclusion that the percentage of Black youth is much higher. For example, at the detention facility, of the 52 boys, 50 were Black and two were white (94 percent Black); of the eight girls, six were Black and two white (75 percent Black).

There is complacency with the racial biases and stereotypes that transcend juvenile defense representation in Delaware. Many juvenile court stakeholders interviewed shared their belief that the youth who come into Delaware’s courts — predominantly Black and Hispanic children from impoverished communities — are in need of services that only the juvenile court can provide, by adjudicating them delinquent. Rather than focusing on strengths

within youth, families, and communities, there was a noticeable lack of cultural competence among justice system stakeholders, including, at times, the defenders. Many stakeholders held the notion that the best way to protect children was to remove them from their communities and families. One judge went so far as to say, “It would be nice if we could not send them home again.” Several investigators commented on the sense of “otherness” that pervades the court process. One investigator shared that “the negative demeanor of the judge was awful. [The judge] treated the children as if there was no hope whatsoever for a destiny other than adult jail.”

Another judge recognized that the police contacts are much higher in Black neighborhoods because those neighborhoods are policed more heavily and that every police contact becomes a charge. However, throughout Delaware’s juvenile justice system, investigators found little recognition of how over-policing of communities of color, followed by referral to the justice system and disproportionate removal of youth of color from their communities in order to provide “rehabilitative services,” is a result of inequities in the system that impose harsher treatment on children of color and actually fail youth and society.²⁹⁵

294. HARTNEY & VUONG, RACIAL AND ETHNIC DISPARITIES, *supra* note 33. See generally Robert Brame, et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).

295. See generally RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>; DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM, THE SENTENCING PROJECT (2014), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf>.

“ Youth and families too often appeared to have little understanding of what was happening during the court process — a pervasive sense of being on the outside looking in — with little or no control over their futures.”

“Office of Defense Services leadership recognizes that improved outcomes for youth require not only effective juvenile defenders but also progressive law change.”

CHAPTER FOUR

Strengths and promising practices

While significant barriers to effective juvenile defense were identified throughout Delaware, also evident was a strong commitment to improving and enhancing the quality of representation. Investigators have no doubt the leadership team in the Central Administration of the Office of Defense Services (ODS) is dedicated to achieving the promise of *In re Gault* through the provision of high-quality juvenile defense representation for all children who come before the courts. Despite the pervasive impediments outlined earlier, ODS leadership has actively worked to develop juvenile defense expertise and bring specialized training to frontline juvenile defenders, to educate other juvenile justice system stakeholders about how effective advocacy by juvenile defenders contributes to public safety and leads to better long-term outcomes for youth, and to engage in legislative reform efforts necessary to achieve systemic change and strengthen the overall juvenile justice system. While the juvenile justice system's culture of collegiality, camaraderie, and cooperation has detracted from the provision of quality juvenile defense, it was also apparent to investigators that stakeholders have significant respect for ODS and have demonstrated a desire to work together in order to achieve juvenile justice reform.

In Delaware, both through interviews with various stakeholders and firsthand observations, investigators learned about several innovative and promising practices in the state.

I. JUVENILE DEFENSE IS NOT A TRAINING GROUND

In many jurisdictions around the country, representing juveniles in family or juvenile court is

seen as a training ground for advancement to adult felony representation, and juvenile defenders are not paid the same salary as defenders representing adults in criminal cases — even in the same public defender office. Salary increases are attached to moving “up” from delinquency representation into adult criminal court, and some offices have forced rotations so that juvenile defenders who want to devote their careers to representing youth are forced to represent adults if they want promotions or raises. Unlike in those jurisdictions, attorneys in the Public Defender's Office (PDO) who practice in Family Court are allowed to remain there for the entirety of their career. While the current practice does not allow for juvenile defense specialization, ODS must be commended for supporting careers in family law and can build upon this strength by promoting juvenile defense specialization and supporting the creation of specialized juvenile defense units.

II. STRONG LEGISLATIVE ADVOCACY

ODS leadership recognizes that improved outcomes for youth require not only effective juvenile defenders but also progressive law change to provide better opportunities for youth facing system involvement. Over the last five years, ODS has actively engaged in joint stakeholder legislative reform efforts regarding juvenile law, including establishing limitations on the minimum age for prosecution,²⁹⁶ developing juvenile-specific competency standards,²⁹⁷ creating discretion in sex offender registration/notification for children,²⁹⁸ eliminating mandatory life without parole sentences for children,²⁹⁹ expanding the juvenile expungement

296. An Act to Amend Title 10 of the Delaware Code Relating to Delinquency Proceedings in the Family Court, H.B. 126, 148th Gen. Assemb. (2015) (prohibiting the prosecution of children ages 10 and under unless a competency evaluation is simultaneously requested and a finding of competency is made).

297. An Act to Amend Title 10 of the Delaware Code Relating the Juvenile Competency, H. Sub. 1, H.B. 235, 146th Gen. Assemb. (2012) (establishing competency procedure for children).

298. An Act to Amend Titles 10 and 11 Relating to Certain Offenses, H.B. 182, 147th Gen. Assemb. (2013) (providing court discretion to register children on sex offender registry).

299. An Act to Amend Title 11 of the Delaware Code Relating to Criminal Sentences, S.B. 9, 147th Gen. Assemb. (2013) (eliminating life without parole sentences for children).

statute,³⁰⁰ and eliminating financial obligations for children in delinquency court.³⁰¹

As site visits for this Assessment were conducted, investigators learned of several bills being promulgated that had the potential to achieve significant juvenile justice reform in Delaware. Before the close of the 148th General Assembly's legislative session, several of these bills were passed.³⁰² This included a bill providing that all children are automatically eligible for appointed counsel,³⁰³ a bill codifying the civil citation program,³⁰⁴ a bill to end the indiscriminate shackling of children in delinquency court,³⁰⁵ and a bill modifying provisions for mandatory and discretionary expungement to make it easier for juvenile records to be expunged where an individual has demonstrated rehabilitation despite multiple youthful indiscretions.³⁰⁶ ODS continues to work to achieve youth-specific legislative reforms and to codify waiver of counsel, limit transfer to adult court, limit release of identifying information, expand civil citation, and expand expungement.

A. Presumption of Indigence Codified

All children by virtue of their status should be appointed a juvenile defense attorney any time they are facing court involvement, irrespective of their parents' or custodian's income. In 2016, after investigators conducted their Assessment site visits, Delaware joined a growing group of states that presume all youth are automatically eligible for appointment of counsel.³⁰⁷ Prior to this, ODS had a practice of representing all children who came before their office, regardless of the income of the child or the custodian. The law, however, was inconsistent on these practices.³⁰⁸ As informal practices are subject to end with no legal recourse, legislators were urged to institutionalize the practice so that new leadership or tight budget times would not adversely affect the representation of youth.³⁰⁹ In June of 2016, the Delaware governor signed legislation to amend the statute and codify the existing practices.³¹⁰ The new law provides that "[a]ny person under the age of 18 arrested or charged with a crime or act of delinquency

300. An Act to Amend Title 10 of the Delaware Code Relating to Family Court Juvenile Expungement, H.B. 75, 148th Gen. Assemb. (2015) (expanding juvenile expungement).

301. An Act to Amend Title 10 of the Delaware Code Relating to Proceedings in the Interest of a Child and Adjudications of Delinquency, H.B. 290, 147th Gen. Assemb. (2014) (allowing court to waive financial obligations in delinquency cases).

302. See Matthew Albright, *Juvenile Justice Reforms Have Smooth Path in Legislature*, THE NEWS JOURNAL (Jun. 23, 2016), <http://www.delawareonline.com/story/news/politics/2016/06/23/juvenile-justice-reforms-have-smooth-path-legislature/86250680/>.

303. An Act to Amend Title 29 of the Delaware Code Relating to the Office of Defense Services, H.B. 382, 148th Gen. Assemb. (2016), <http://legis.delaware.gov/BillDetail?legislationId=24598>. See also DEL. FAM. CT. R. CRIM P. 44.1 (2017).

304. An Act to Amend Title 10 of the Delaware Code Relating to the Establishment of a Juvenile Offender Civil Citation Program, H.B. 405, 148th Gen. Assemb. (2016), <http://legis.delaware.gov/BillDetail?legislationId=24076>.

305. An Act to Amend Title 10 of the Delaware Code Relating to Juvenile Delinquency Proceedings and the Use of Restraints on a Child, H.B. 211, 148th Gen. Assemb. (2016). See also <http://www.delawareonline.com/story/news/local/2016/07/01/juvenile-shackling-other-bills-pass-early-hours/86570178/>.

306. An Act to Amend Title 10 of the Delaware Code Relating to Juvenile Expungements, S.B. 198, 148th Gen. Assemb. (Del. 2016), <https://legis.delaware.gov/BillDetail?legislationId=24753>.

307. Indiana, Louisiana, Michigan, New York, North Carolina, and Pennsylvania have a presumption that all youth are indigent for the purpose of appointment of counsel, while Arkansas, California, Idaho, Kansas, Kentucky, South Carolina, Virginia, and now Delaware have an initial presumption of indigence but may then require parents or the juvenile's custodian to reimburse costs. See IND. CODE ANN. § 31-32-4-2 (West 1997); LA. CHILD. CODE ANN. art. 320(A) (2010); N.Y. FAM. CT. ACT § 249 (2012); N.C. GEN. STAT. ANN. § 7B-2000(b) (West 2017); 42 PA. STAT. AND CONS. STAT. ANN. § 6337.1 (West 2012). New Jersey and Washington statutorily authorize courts to appoint provisional counsel before a formal indigence assessment. N.J. STAT. ANN. § 2A:158A-14 (West 1967); WASH. REV. CODE ANN. § 10.101.020(4) (West 1997).

308. DEL. FAM. CT. R. CRIM P. 44(a) (2017); DEL. CODE ANN tit. 29, § 4602(a) (2016). A determination of indigence is made by the Office of Defense Services prior to arraignment, but by statute, at or after the arraignment, the determination is made by the court. DEL. CODE ANN tit. 29, § 4602(b) (2016).

309. Matthew Albright, *Juvenile Justice Reforms Have Smooth Path in Legislature*, THE NEWS JOURNAL (Jun. 23, 2016), <http://www.delawareonline.com/story/news/politics/2016/06/23/juvenile-justice-reforms-have-smooth-path-legislature/86250680/>; Matthew Albright, *Bill Would Guarantee Public Defenders for Juveniles*, THE NEWS JOURNAL (May 16, 2016), <http://www.delawareonline.com/story/news/politics/2016/05/16/public-defenders-juveniles/84437264/>.

310. An Act to Amend Title 29 of the Delaware Code Relating to the Office of Defense Services, H.B. 382, 148th Gen. Assemb. (2016), <http://legis.delaware.gov/BillDetail?legislationId=24598>.

shall be automatically eligible for representation by the Office of Defense Services.”³¹¹

B. Rule Change to Address Waiver of Counsel

In February 2017, Rule 44 was amended to add a new section, 44.1. The new Rule became effective April 10, 2017, and explicitly states that juveniles have a right to counsel at all stages in delinquency proceedings.³¹² If a juvenile is not represented by counsel at the initial Family Court appearance, “the Court shall order the Chief Defender to assign counsel.”³¹³

The new rule provides that in certain cases the right to counsel may not be waived.³¹⁴ No waiver of counsel is permitted in the following instances: The child is charged with a felony; the child is in the custody of the Division of Family Services or under the age of 16; the alleged victim is a family member, guardian, or custodian of the juvenile or is deemed by the court to have an interest adverse to the juvenile.³¹⁵ Outside of those instances, a child may waive the right to counsel in certain circumstances.³¹⁶ In order to waive counsel, the child must be “fully and effectively informed, through an in-person meeting with counsel, of the disadvantages of self-representation.”³¹⁷ If after this meeting the youth still wishes to waive counsel, the court must conduct an in-court hearing to determine that the waiver is knowing, intelligent, and voluntary.³¹⁸ Factors to be considered in making a knowing, intelligent, and voluntary finding include but are not limited to the youth’s mental and emotional health and maturity; whether the youth understands the consequences of waiver, the seriousness of the offense, the potential direct and

collateral consequences of an adjudication; whether the parent, guardian, or custodian understands the consequences of waiver; and whether the waiver of right to counsel is the result of any coercion, force, or inducement.³¹⁹ Before accepting the waiver, the child must provide the court with a written statement, signed by the child and the parent, guardian, or custodian.³²⁰ Additionally, the new rule makes clear that if a youth waives counsel for a proceeding, the waiver only applies to that proceeding and the youth may revoke the waiver of counsel at any time.³²¹ ODS continues to work to codify limitations on waiver of counsel.

C. Creating Civil Alternatives to Arrest and Prosecution

In September 2016, a civil citation pretrial diversion program was signed into law.³²² This discretionary program provides law enforcement a civil alternative to the arrest and prosecution of children who are first time offenders alleged to have committed one of six low-level misdemeanor offenses: criminal trespass third degree, disorderly conduct, possession of alcohol, possession of marijuana, shoplifting, and loitering.³²³ A “first-time offender” is defined as any juvenile who has no prior adjudication of delinquency or referral to the Juvenile Offender Civil Citation Program or any other diversion program.³²⁴ A youth who participates and successfully completes the program receives preventative services without an arrest, court involvement, or record.³²⁵ If a youth does not successfully complete the program, the youth will be unsuccessfully discharged; law enforcement will be advised of the youth’s unsuccessful termination from

311. DEL. CODE ANN tit. 29, § 4602 (2016).

312. DEL. FAM. CT. R. CRIM P. 44.1(a) (2017).

313. FAM. CT. CRIM. P. 44.1(b).

314. FAM. CT. CRIM. P. 44.1(c).

315. FAM. CT. CRIM. P. 44.1(c)(1)-(4).

316. FAM. CT. CRIM. P. 44.1(d).

317. FAM. CT. CRIM. P. 44.1(d)(1).

318. FAM. CT. CRIM. P. 44.1(d)(2) (The youth has the burden of proving by clear and convincing evidence that waiver is knowing, intelligent, and voluntary.).

319. FAM. CT. CRIM. P. 44.1(d)(3).

320. FAM. CT. CRIM. P. 44.1(d)(4).

321. FAM. CT. CRIM. P. 44.1(d)(5).

322. An Act to Amend Title 10 of the Delaware Code Relating to the Establishment of a Juvenile Offender Civil Citation Program, H.B. 405, 148th Gen. Assemb. (2016), <http://legis.delaware.gov/BillDetail?legislationId=24076>.

323. DEL. CODE ANN tit. 10, § 1004A(b)(1)-(2) (2016).

324. DEL. CODE § 1004A(b)(3).

325. DEL. CODE § 1004A(f)-(g).

the program and is then authorized to arrest the youth and proceed with juvenile court prosecution.³²⁶

Codifying this alternative to system involvement is a significant step towards ensuring it is uniformly offered to all youth, including youth of color. If successfully implemented it could be used to address issues like the common school-based charge, “offensive touching,”³²⁷ — a misdemeanor that is typically charged when a youth is alleged to have intentionally pushed, shoved, kicked, or spit on another youth but is not eligible for the civil citation program. An expansion of the program beyond first-time youth offenders to include other offenses, such as offensive touching, would help to ensure that youth receive positive interventions without system involvement — involvement that too often pulls them out of school, exposes them to harm in detention, and, especially for youth of color, disproportionately pulls them into deeper system involvement rather than steering them towards opportunities. ODS is supporting efforts to expand the civil citation program.

D. Eliminating Indiscriminate Shackling of Youth in Juvenile Court

In the fall of 2016, legislation was passed prohibiting the use of indiscriminate shackling of youth.³²⁸ DYRS began unshackling children in January of 2017.³²⁹ This was a drawn-out reform process due to differing opinions about the effort. During the Assessment, investigators in all three Delaware counties observed children appearing in court with shackles. Shackling was more prevalent in some courtrooms than others. Investigators quickly became aware that ending

automatic shackling was one of the most controversial issues in the state. One person, who spoke with great pride about the many collaborative reforms stakeholders had achieved stated, “We’ve stopped working together on this shackling thing — everyone has a different end goal.”

Begrudgingly or not, change is taking hold. One judge shared that “there is a now a presumption against handcuffs and belly chains, unless DYRS requests them for safety.” Investigators observed this to be the practice in most instances. The courtroom was cleared as a youth was brought in by DYRS staff in full shackles — handcuffs, belly chains, and leg irons. The handcuffs and belly chains were then removed before anyone could return to the courtroom. The leg irons remained on during the court hearing. In several of these cases — a violation of probation or a nonviolent property offense, for example — the alleged offense did not suggest that the youth presented a safety risk. Almost universally, youth facing transfer to adult court were brought before the court in full shackles, including during amenability hearings.

Investigators observed no instances where the youth’s attorney requested that the shackles be removed, nor were there any individual determinations made that the youth before the court presented a safety or flight risk. While the legislative reform is an important first step in recognizing the harms of shackling³³⁰ and ending the indiscriminate use of shackles, juvenile defenders must make individualized arguments when DYRS requests for youth to remain shackled in court. And Delaware’s stakeholders must continue to address

326. DEL. CODE § 1004A(h).

327. DEL. CODE ANN tit. 11, § 601 (2013).

328. An Act to Amend Title 10 of the Delaware Code Relating to Juvenile Delinquency Proceedings and the Use of Restraints on a Child, H.B. 211, 148th Gen. Assemb. (2016). See also Jessica Masulli Reyes & Matthew Albright, *Juvenile Shackling, Other Bills Pass in Early Hours*, DELAWARE ONLINE (July 1, 2016, 4:35 PM), <http://www.delawareonline.com/story/news/local/2016/07/01/juvenile-shackling-other-bills-pass-early-hours/86570178/>.

329. ODS reported to investigators that on January 9, 2017, DYRS began removing all shackles after an agreement was reached with the Court’s Capitol Police to provide extra security when needed.

330. In 2015, the American Bar Association passed a resolution declaring that “[c]hildren in juvenile court should be restrained in only the rarest of circumstances.” Resolution 107A, Am. Bar Ass’n (2015), http://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/107a.pdf. That same year, the National Council of Juvenile and Family Court Judges passed a similar resolution. *NCJFCJ Resolves to Stop Shackling of Children in Juvenile Court*, NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (Aug. 10, 2015), <https://www.ncjfcj.org/Shackling-Resolution>. See also *Campaign Against Indiscriminate Juvenile Shackling*, NAT’L JUVENILE DEFENDER CTR., <http://njdc.info/campaign-against-indiscriminate-juvenile-shackling> (last visited Jun. 2, 2017) (listing various medical and mental health organizations opposed to shackling, including the American Academy of Child and Adolescent Psychiatry, American Orthopsychiatric Association, Association of Prosecuting Attorneys, Child Welfare League of America, National Center for Mental Health & Juvenile Justice, National Prevention Science Coalition to Improve Lives, and National Association of Counsel for Children, among many others).

the entrenched reliance on shackles that has made some hesitant to implement the legislative reforms.

E. Expansion of Expungement Provisions

A longstanding myth that family and juvenile courts are “kiddie” courts, for which a youth will bear no long-term consequences, still pervades much of Delaware’s associations with a youth’s involvement in and adjudication following a delinquency proceeding. However, reforms in 2016 recognize the harms of juvenile court involvement and expand opportunities to expunge juvenile arrests and adjudications so that youth who have demonstrated rehabilitation are not hampered by a juvenile criminal history from becoming successful and contributing members of society.

A few months after the Assessment site visits, Delaware legislators introduced and then passed Senate Bill 198, making it easier for formerly system-involved youth to expunge their juvenile delinquency histories upon demonstrated rehabilitation.³³¹ The governor signed the bill into law in September 2016. The law eases requirements for individuals to obtain the mandatory expungement to which they are entitled and gives the court discretion to order an immediate expungement of a misdemeanor offense terminated in favor of a child. The law also modifies discretionary expungement provisions to allow more children the ability to petition the court for an expungement. While certain offenses and any adult convictions bar the ability to obtain an expungement, the law does enhance opportunities for individuals who have demonstrated rehabilitation, even in the face of multiple youthful indiscretions, to have the juvenile record expunged.³³² While the statute still includes many limitations to obtaining expungement, including lengthy waiting periods to apply for relief³³³— waiting periods that can be devastating when they preclude a youth from applying for college or employment — these changes open the door for a larger number of deserving youth to move beyond juvenile court involvement and toward successful futures.

III. CREATIVE SOLUTIONS TO ENHANCE ACCESS TO COUNSEL

A. Federal Award to Focus on Juvenile Defense in Delaware

In October 2015, Delaware was selected to be one of four state recipients of a State Reform Planning Grant award from the U.S. Department of Justice’s 2015 *Smart on Juvenile Justice: Enhancing Youth Access to Justice Initiative*. This paved the way for Delaware to develop a statewide strategic plan to improve the quality of juvenile public defense services in the state. The initial focus on juvenile defense reform planning led to a successful implementation award from the U.S. Department of Justice in September 2016. This two-year award is ongoing and provides an opportunity to make significant progress toward ensuring effective juvenile defense for children across the state. Through this award Delaware has been able to focus on juvenile defense reforms, draft a specific juvenile defense strategic plan, present juvenile-specific trainings, focus on juvenile defense specialization, and hire specialized juvenile defense staff. ODS will need to secure future funding to sustain these efforts.

B. Law School Partnerships to Enhance Post-Disposition Representation for Youth in Secure Facilities

At the time of the Assessment, plans were in the works for ODS to partner with Rutgers Law School to conduct interviews with youth being held in the Level V Ferris School and the Level IV Cottages — Grace, Mowlds, and Snowden Cottage — in an effort to begin providing post-disposition access to counsel to all youth in Delaware’s secure facilities. Following the Assessment, in March and April 2016, the Director and Clinical Professor of Law from Rutgers Children’s Justice Clinic led several clinic students in conducting the first interviews set up by ODS. Upon completion of interviews at each facility, the clinic provided ODS with a report identifying the needs or questions of individual youth clients in the facilities, general areas of concern, and recommendations for legal action where necessary. Based on the success of this

331. An Act to Amend Title 10 of the Delaware Code Relating to Juvenile Expungements, S.B. 198, 148th Gen. Assemb. (2016), <https://legis.delaware.gov/BillDetail?legislationId=24753>.

332. DEL. CODE ANN tit. 10, § 1015(b) (2016), 1017 (2017), 1018 (2016).

333. DEL. CODE ANN tit. 10, § 1017 (2017), 1018 (2016).

pilot program, ODS entered into a partnership with Delaware Law School and commenced an externship program beginning the summer of 2016 to facilitate ongoing communication and representation of youth sentenced to secure placement. Law school students enrolled in the program work as externs under the supervision of ODS and the externship professor each semester. Students receive an initial orientation and ongoing training from ODS. The students have in-person meetings with the youth in secure facilities on at least a monthly basis and additionally maintain contact with the youth by phone or videophone. Areas of concern are conferenced with ODS attorneys, and the attorneys then take appropriate action such as filing motions to modify the disposition, attending meetings on behalf of the youth with DYRS staff, and appearing in any hearings related to the youth. This externship is an important step in providing post-disposition access to counsel and legal advocacy for ODS youth clients confined to secure facilities. Additionally, beginning in June 2016, the now chief juvenile defender and several law students began visiting all sentenced youth in placements in Delaware, including YCOP — the adult correctional facility where youth charged or convicted as adults are placed — from one to three times a month. Visits are ongoing and allow for post-disposition contact, as well as representation when needed, of youth in facilities.

C. Pro Bono Legal Representation for Youth in Expungement Proceedings

The consequences of a juvenile arrest and adjudication have a long-lasting and detrimental impact on youth beyond the time period where they are under the jurisdiction of the juvenile court. Arrests and adjudications become a permanent part of a Delaware criminal record. They can lead to a host of consequences that impede a youth's overall rehabilitation and ability to become a productive and contributing member of society. They can affect where youth may live, or their ability to obtain an education, get a job, or enter military

service. Juvenile records are not confidential and can be accessed under certain circumstances by third parties.³³⁴

Due to limited resources that encumber ODS post-disposition representation on direct and collateral matters, ODS does not represent children in expungement proceedings. This is even the case where a youth is eligible for mandatory expungement.³³⁵ Given legal complexities, navigating the expungement process without skilled legal representation is extraordinarily difficult and unmanageable for most people. Other barriers exist that impede the process, such as a requirement that a certified criminal record, available only in three locations in the state, be obtained at a cost of \$52.00.³³⁶ Most families and children lack the wherewithal, knowledge, expertise, and financial means, or even transportation, to file a petition on their own — if they even realize the juvenile record is eligible to be expunged.

In an effort to fill this gap and provide access to counsel in expungement proceedings, at the time of the Assessment ODS leadership began working to develop partnerships with private law firms, nonprofit agencies, a network of pro bono attorneys, bar associations, and law schools to attend statewide expungement clinics and serve as voluntary attorneys in these proceedings. Following the assessment, ODS began coordinating these clinics and providing training, guidance, mentorship, and other assistance to the volunteer attorneys so they can provide legal representation in expungement proceedings related to juvenile arrests and adjudications. ODS is also notifying potentially eligible clients and conducting community forums and outreach through media, schools, state agencies serving children, and other community organizations to educate the public about the availability of legal representation to expunge juvenile records. Volunteers conduct interviews to determine whether interested individuals are eligible for a mandatory or discretionary expungement. Where the expungement is mandatory, the volunteer attorney completes the petition and the individual files the petition in family court directly. Where the

334. See *Juvenile Delinquency Adjudication, Collateral Consequences, and Expungement of Juvenile Records: A Survey of Law and Policy in Delaware, Virginia, North Carolina and Florida*, UNC CTR. FOR CIVIL RIGHTS, <http://www.law.unc.edu/documents/civilrights/centerforcivilrightsexpungementreport.pdf>.

335. See *supra* Section 4.II.E.

336. *State Bureau of Identification*, STATE OF DELAWARE, http://dsp.delaware.gov/state_bureau_of_identification.shtml (last visited Jun. 2, 2017).

expungement is discretionary, the case is referred to a volunteer attorney to file the petition and represent the individual in the more complex hearings. Additionally, ODS has sought funding sources to pay the criminal record fee for individuals who cannot afford to pay, so that cost is not a barrier to obtaining expungement where eligible. ODS conducted three expungement clinics in 2016, conducted one in March 2017, and has two more scheduled to occur over the summer of 2017. Clinics will be scheduled periodically throughout the state on an ongoing basis. These clinics have the potential to improve the lives of many Delawareans.

D. Grant-Funded Attorney to File Retroactive Motions for Removal from Sex Offender Registry

The application of registration and notification laws to children ignores developmental differences between adult and juvenile offenders, ignores youths' capacity for rehabilitation and does little to address the multiple determinants of juvenile offending in a manner that is responsive to these youths' developmental needs.³³⁷ The collateral consequences of having a sex-offender adjudication impede a youth from growing to become a productive member of society.³³⁸ It limits options for employment, education, college and financial aid, military service, and housing, among other things. In Delaware, youth who are adjudicated of certain statutorily enumerated unlawful sexual behaviors will be required to register as sex offenders, but the Family Court can order relief from the requirement to register.³³⁹ The Court, in its discretion, may relieve the youth of the registration requirement if they make

a finding by a preponderance of the evidence that the child does not pose a threat to public safety.³⁴⁰ In some circumstances the Family Court will have no discretion to modify registration requirements.³⁴¹ However, in other circumstances, the youth may affirmatively petition the court for discharge from this obligation via a registry review hearing after either the conclusion of treatment or two years from date of adjudication, whichever comes first.³⁴²

As with obtaining an expungement, filing a petition and advocating for registry review is a complicated process that makes removal unattainable for most people without the assistance of counsel. Recognizing the importance of review, ODS sought and obtained grant funding to hire an attorney to file motions for removal from the sex offender registry. The attorney has limited resources and as such cannot provide representation for all eligible individuals placed on the sex offender registry in Delaware as children. However, this is a commendable starting point. By all reports, having an attorney in this role has made a significant difference in the lives of clients who might otherwise not have been able to pursue college, employment, housing in certain areas, and other opportunities.

337. See Elizabeth J. Letourneau & Michael H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 293, 303-07 (2005).

338. See Robert Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41 (2000), <http://www.abanet.org>; Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?* 79 N.Y.U. L. REV. 520, 570 (2004); Michael Pinard, *The Logistical and Ethical Dilemmas of Informing Juveniles about the Collateral Consequences of Adjudication*, 6 NEV. L.J. 1111, 1114 (2006).

339. Family Court has broad discretion over the disposition of a juvenile under DEL. CODE ANN tit. 10, § 1009. The Court may order registration or relief under DEL. CODE ANN tit. 11, § 4123 where a child is adjudicated delinquent for an offense that would otherwise render the juvenile a sex offender under DEL. CODE ANN tit. 11, § 4121(a)(4) (2015). See DEL. CODE ANN tit. 10, § 1009(c)(18) (2014).

340. DEL. CODE ANN tit. 11, § 4123(c)(2) (2013).

341. If the child was at least 14 years old on the date of the sex offense and was adjudicated delinquent for an enumerated list of offenses that include the following, then the child will be immediately registered as a sex offender: an offense that specifies "without the victim's consent"; an offense with a purpose of violating or abusing the victim sexually; or an offense where the victim of the felony was 5 years old or younger. DEL. CODE ANN tit. 11, § 4123(c)(1) (2013).

342. DEL. CODE ANN tit. 11, § 4123(c)(2) (2013).



CHAPTER FIVE

Recommendations and implementation strategies

The core recommendations were developed in response to the findings of the Assessment and call for collaborative action to remedy systemic deficiencies at the state, county, and local levels. The implementation strategies, which follow, derive from the recommendations and provide more detailed suggestions relevant to state, county, or local entities.

I. CORE RECOMMENDATIONS

ELIMINATE SYSTEMIC BARRIERS TO JUSTICE FOR CHILDREN

1 End Monetary Bail for Juveniles

Monetary bail for children should be abolished and replaced with developmentally appropriate, community-based alternatives. Monetary bail disproportionately affects poor children of color who, by virtue of their status as children, rarely have their own money in the amounts typically required for bail. This effectively denies their release without any consideration of what is appropriate for them as children.

2 End the Use of Video Bail Hearings and Transport Youth to Court for Hearings

Delaware should end the use of video bail hearings for youth and allow youth to appear in court for all bail/detention hearings. The Division of Youth Rehabilitative Services should be required to transport youth to all court appearances.

3 Eliminate Mandatory Minimum Sentences for Youth

Mandatory minimum sentences should be abolished for youth in the delinquency system.

4 Eliminate Racial Disparities

Delaware should provide mandatory training and education for juvenile justice stakeholders to work toward ending the disparate treatment of youth of color at all stages of system contact.

5 Reduce and Ultimately End Prosecution of Youth in the Adult System

All efforts should be made to ensure youth are not subject to adult court jurisdiction. Youth who are subject to prosecution in the adult criminal justice system should be afforded a reverse amenability hearing that provides individualized consideration to determine whether a youth would be better served in the rehabilitative juvenile justice system rather than the punitive adult system. The Office of Defense Services should establish a Youthful Defender Unit composed of a small group of juvenile defense attorneys with specialized training and skills necessary to represent youth charged as adults.

6 Eliminate “Once an Adult, Always an Adult” Statutory Provision

Delaware should abolish the “Once an Adult, Always an Adult” statutory provision in recognition of the developmental status of youth.

STRENGTHEN JUVENILE DEFENSE

1 Foster Zealous Advocacy and Address Role Confusion

Juvenile defense attorneys should zealously advocate to protect the due process rights of children throughout their involvement in the juvenile justice system. All juvenile court stakeholders, including those within the defense system, must understand that juvenile defense attorneys are ethically bound to provide meaningful advocacy for their client’s expressed interests. The role confusion that prevails in Delaware’s juvenile court practices leave far too many children without effective representation.

2 Recognize Juvenile Defense as a Specialized Area of Practice

Juvenile defense should be recognized as a highly specialized area of law. Attorneys handling juvenile delinquency cases should be required to receive ongoing training, supervision, and support to ensure comprehensive knowledge and expertise specific to the representation of children.

3 Establish Juvenile Defense Leadership Positions

The Office of Defense Services should create a position for a chief juvenile defender, who reports to the chief defender in Central Administration, to support, strengthen, and enhance the juvenile defense delivery system across the state. The chief juvenile defender should provide dedicated juvenile defense leadership to both the Public Defender’s Office and the Office of Conflicts Counsel.

The Office of Conflicts Counsel, housed along with the Public Defender’s Office under the Office of Defense Services, should create a juvenile managing attorney position to provide supervision and support to conflict attorneys who accept juvenile cases and ensure juvenile-specific expertise is maintained by its attorneys through requiring attendance at ongoing mandatory juvenile trainings. The Office of Conflicts Counsel should maintain a list of conflict attorneys who are specialists in juvenile delinquency representation and ensure that youth cases are assigned to juvenile specialists on this list. Court observation, performance feedback, and mentoring should be essential components of supervision for all attorneys handling juvenile cases both in the Public Defender’s Office and Office of Conflicts Counsel.

4 Establish Specialized Juvenile Defense Practice Units

The Office of Defense Services should establish statewide, specialized juvenile defense practice units within the Public Defender's Office and the Office of Conflicts Counsel that are dedicated to representing youth.

5 Promulgate Statewide Juvenile Defense Standards of Practice and Establish Protocols for Monitoring and Oversight

Juvenile defense practice standards that outline ethical obligations and performance expectations for attorneys representing youth in delinquency proceedings should be adopted and implemented statewide to promote uniformity of practice and end "justice by geography," whereby children's access to quality representation depends on where they reside or are arrested.

6 Ensure Timely Appointment of Counsel and Afford Representation at All Stages

Children, by virtue of their status as children, should be appointed a juvenile defense attorney at all court appearances, including at the Justice of the Peace Court. Appointment should be irrespective of the income of their parents or guardians. Delaware should expand upon the recent reforms to ensure that appointment occurs at children's earliest point of contact with the juvenile court system. Counsel should continue their representation throughout the duration of young people's court involvement. This includes through all post-disposition stages of a case. Defense representation should also be provided, either directly or through the development of partnerships, for collateral matters such as school suspensions or expulsion hearings, expungement proceedings, and sex offender registry review hearings.

7 Ensure Continuity of Representation

Youth should be represented by the same attorney ("vertical representation") throughout the duration of their involvement in the justice system. Horizontal representation — where a child has a different lawyer at each phase of the court process — precludes the ability of a child and a lawyer to establish a meaningful attorney-client relationship.

8 Allocate or Reallocate Sufficient Resources

Resources must be allocated or reallocated to support juvenile defense practice and specialized juvenile defense units within the Public Defender's Office and the Office of Conflicts Counsel, with training and supervision that allows for reasonable caseloads and effective advocacy. Adequate funds must be allotted to ensure that pay and resources for Office of Conflicts Counsel attorneys who accept juvenile delinquency cases in Family Court are on par with accepting an adult felony case in Superior Court.

9 Establish a Comprehensive Juvenile Defense Data Collection System

The Office of Defense Services should prioritize tracking data regarding juvenile representation to inform future decision-making and foster improvements in policy. Externally, the Office of Defense Services should work with stakeholders, including the Criminal Justice Council and the Delaware Judicial Information System staff, to ensure data specific to juvenile defense is collected, and that other data that may be unavailable — such as instances of waiver of counsel — can be accessed statewide. Best practices and innovations should be identified and promoted through data collection.

II. IMPLEMENTATION STRATEGIES

In Delaware, it is perhaps not surprising that the culture of collegiality, camaraderie, and cooperation among stakeholders has resulted in diminished due process rights for youth in the justice system. However, there are great strengths in those same features of collaboration when channeled into achieving reform. In order to implement the core recommendations put forward and improve the quality of juvenile defense in Delaware, these collaborations are essential. The Legislature; Judiciary; Office of Defense Services; Criminal Justice Council; the Delaware Department of Justice Office of the Attorney General; law enforcement agencies; Division of Youth Rehabilitative Services under the Department of Services for Children, Youth and their Families; the Delaware Department of Correction; law schools; state, county, and local bar associations; and nonprofit, advocacy, and community groups can and must all participate in a concerted effort to reform policy and practice.

The implementation strategies set forth below are designed to address the core recommendations with specific multi-systemic reforms. Delawareans must work together to ensure that any child brought before the juvenile justice system receives the fairness and due process to which all children are entitled.

THE LEGISLATIVE BRANCH SHOULD:

- Allocate adequate funding to the Office of Defense Services so that the office can create a chief juvenile defender position; develop specialized juvenile practice units within the Public Defender's Office and the Office of Conflicts Counsel to provide ongoing oversight and supervision; and offer juvenile-specific defense training to support, strengthen, and enhance the juvenile defense delivery system.
- Amend Title 10, Chapter 9 of the Delaware Code to clarify that juveniles have a right to counsel at every stage of the proceedings, from the initial appearance, including at those proceedings which may be before the Justice of the Peace Court, through any post-disposition reviews, including supervision, placement, expungement, or sex offender registry reviews, and to specifically include the right to counsel at disposition hearings even where a plea has been entered. This amendment should be consistent with the 2016 amendment to Title 29, section 4602(c), which provides that "any person under the age of 18 arrested or charged with a crime or act of delinquency shall be automatically eligible for representation by the Office of Defense Services," with no financial eligibility determination of the child or custodian necessary.
- Ensure adequate funding for representation of youth at every stage of the proceedings.
- Eliminate requirements of fees for juvenile representation, including fees assessed on the custodian.
- End the practice of monetary bail for young people.
- Prohibit mandatory minimum sentences for youth.
- Prohibit the use of video hearings for any proceeding for a person under the age of 18.

THE JUDICIAL BRANCH SHOULD:

- Amend the new court rule on waiver of counsel to clarify that waiver of counsel is the child's right, not the right of the custodian or any other person.

- Examine the court rules to ensure that youth are afforded adequate due process protections at all times when the youth is under the jurisdiction of the juvenile justice system.
- Assure that counsel is appointed and present with the child at all stages of the proceedings, including initial bail review hearings, before the Justice of the Peace Court, and at disposition whether a guilty plea has been entered or not, and in any post-disposition proceedings.
- Ensure that colloquies in all juvenile cases are developmentally appropriate and legally adequate.
- Support the collection of data regarding appointment of counsel, waiver of counsel, and other key metrics.
- Hold truancy court proceedings, particularly contempt hearings on valid court order cases where a child's

THE OFFICE OF DEFENSE SERVICES SHOULD:

- Create a chief juvenile defender position in Central Administration to support, strengthen, and enhance the juvenile defense delivery system.
- Establish statewide specialized juvenile defense practice units within the Public Defender's Office and the Office of Conflicts Counsel.
- Establish a Youthful Defender Unit to provide specialized juvenile defense representation to youth charged as adults in reverse amenability hearings and related proceedings in Superior and Family Courts.
- Improve upon the supervisory structure so that it better supports, mentors, and enhances individual juvenile defenders and the overall juvenile defense practice.
- Implement vertical representation in all juvenile defense cases.
- Increase opportunities for training and technical support specific to juvenile defense in each of the three counties.
- Identify and suggest changes in Delaware statutes and court rules that support improvements in access to counsel and quality of representation for youth facing delinquency proceedings.
- Work with juvenile defense experts and others to promulgate comprehensive juvenile defense practice standards and/or guidelines.
- Actively partner with law schools to increase student interest in juvenile defense as a career, to expand post-disposition representation through law school clinics, and to fill other gaps in juvenile representation, such as educational and civil advocacy, including, but not limited to, school suspension and expulsion hearings, expungement proceedings, and sex offender registry reviews.
- Provide training and legal support to the defense bar, including the pro bono attorney network, and provide training to other system stakeholders and the community on the role of the juvenile defender and the due process rights of youth.
- Work with the Criminal Justice Council and other system stakeholders to advance juvenile defense and achieve necessary policy reforms.

THE CRIMINAL JUSTICE COUNCIL SHOULD:

- Support juvenile defense as a specialized practice in criminal justice planning, the establishment of priorities and standards for the reduction of crime, making recommendations on legislation, and any coordination of reform efforts among justice system stakeholders and the community.
- Work with other juvenile justice stakeholders to eliminate racial and ethnic disparities in the juvenile justice system.
- Work with the Delaware Criminal Justice Information System and all juvenile justice system stakeholders to identify key data indicators, such as appointment of counsel, waiver of counsel, and other areas that should be collected to assess access to counsel.
- Pursue grant and other funding opportunities to enhance juvenile defense.

THE DELAWARE DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL SHOULD:

- Work with the Criminal Justice Council and other juvenile justice stakeholders to eliminate racial and ethnic disparities in charging, diversion, community supervision, detention, probation, and placement decisions.
- Work with the Office of Defense Services, the judiciary, and other justice system stakeholders to ensure youth and their families who appear in court are afforded due process and receive effective assistance of counsel.
- Oppose the use of video hearings for youth.

DELAWARE LAW ENFORCEMENT AGENCIES SHOULD:

- Work with the Criminal Justice Council and other juvenile justice stakeholders to eliminate racial and ethnic disparities in charging and diversion decisions.
- Work with the Criminal Justice Council and other juvenile justice stakeholders to eliminate racial and ethnic disparities through training and education.

THE DIVISION OF YOUTH REHABILITATIVE SERVICES UNDER THE DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES SHOULD:

- Work to ensure the least restrictive option is always afforded youth in the justice system.
- End the practice of shackling youth.
- End the practice of solitary confinement of youth.
- Attend juvenile-specific training on providing needs- and strengths-based guidance and supervision to confined young people.

THE DELAWARE DEPARTMENT OF CORRECTION SHOULD:

- Shut down the Youthful Criminal Offenders Program unit and in the interim address and ameliorate the unconscionable treatment, conditions of confinement, programming, and use of solitary confinement for the children housed in the unit.

DELAWARE LAW SCHOOLS SHOULD:

- Offer increased opportunities to cultivate law students' interest in juvenile defense through increased courses in juvenile law, internships, externships, clinical programs, and fellowships.
- Continue to expand the partnership with the Office of Defense Services to coordinate and enhance post-disposition representation by creating juvenile defense clinics and externship programs to represent youth who remain under the jurisdiction of the juvenile justice system; to also represent youth on collateral matters such as expungement proceedings and sex offender registry reviews; to provide general support and leadership on juvenile public defense issues and the treatment of youth in the juvenile justice system; and to engage and work to identify other areas of need.

STATE, COUNTY, AND LOCAL BAR ORGANIZATIONS SHOULD:

- Recognize juvenile defense as a specialized area of practice; develop and promote policies that will support and improve juvenile defense reform efforts.
- Work with the Office of Defense Services and other stakeholders to promulgate legislation enacting juvenile defense reform.
- Provide specialized training and support to the defense bar and the pro bono attorney network; encourage increased partnerships with private law firms to support juvenile defense and enhance post-disposition representation in expungement cases and petitions for removal from the sex offender registry or in other areas beyond the resource capability of the Office of Defense Services.

NONPROFIT, ADVOCACY, AND COMMUNITY GROUPS SHOULD:

- Call for the collection of data regarding juvenile defense practice and the impact of court processing, fees, and waiver of counsel on youth and families.
- Champion the role of juvenile defenders and zealous advocacy for children in Family Court.
- Support and develop community-based alternatives to secure detention and commitment.
- Engage court-involved youth and family in advocacy efforts.
- Educate youth and families about the consequences of juvenile adjudications.

APPENDIX A

The Family Court of the State of Delaware

In and For New Castle Kent Sussex County

DELAWARE JUVENILE RISK ASSESSMENT

Name:	_____ Last _____ First _____	D.O.B.	_____ MM/DD/YYYY
Initiated:	_____ MM/DD/YYYY	DUC #	_____ ID Confirmed <input type="checkbox"/> Yes <input type="checkbox"/> No
History		<i>Circle the number and then enter the appropriate score</i>	
1. Age at first offense: The child's age when first charged with a misdemeanor or felony that resulted in adjudication, diversion, deferred adjudication, or deferred disposition.			1 - 16 2 - 15 3 - 13 to 14 4 - Under 13
2. Misdemeanor adjudications: Total number of offenses in which the most serious charge resulted in adjudication, diversion or deferred adjudication was a misdemeanor			1 Point for each one
3. Felony adjudications: Total number of offenses that resulted in adjudication, diversion, deferred adjudication, or deferred disposition of a felony.			2 Points for each one
4. Firearm/ Weapon adjudications: Total number of offenses that resulted in adjudication, diversion, deferred adjudication, or deferred disposition of a charge involving possession of a firearm or deadly weapon			4 Points for each one
5. Against-person misdemeanor adjudications: Total number of offenses that resulted in adjudication, diversion, deferred adjudication, or deferred disposition of a misdemeanor that involved threats, force, or physical harm to another person such as an assault, sexual contact, menacing, terroristic threatening, unlawful imprisonment, etc.			1 - One 2 - Two or more
6. Against-person felony adjudications: Total number of offenses that resulted in adjudication, diversion, deferred adjudication, or deferred disposition of a felony that involved force or physical harm to another person which as homicide, murder, manslaughter, assault, rape, sexual contact, robbery, kidnapping, aggravated menacing, etc.			2 - One or two 4 - Three or more
7. Frequency of adjudications: Total number of offenses committed within the past 12 months which resulted in adjudication, diversion, deferred adjudication, or deferred disposition.			1 - One 2 - Two 3 - Three or more
8. Disposition orders where youth was sentenced to level IV or V: Total number of disposition orders in which the youth was sentenced to level IV or level V.			2 - One 4 - Two or more
9. Escapes: Total number of adjudications for attempted or actual escapes.			3 - One 4 - Two or more
10. Failure-to-appear in court: Total number of failures-to-appear in court that resulted in a warrant or capias being issued.			1 - One 3 - Two or more
11. Runaways (from home or placement): "Runaway" is defined as absconding from home or any placement and not voluntarily returning within twenty-four (24) hours. Count the actual number of days missing within the last 6 months.			1 - 1 to 4 3 - 5 to 10 4 - more than 10
12. Failure/refusal to comply with rules of home (including curfew)			0 - No 2 - Yes
13. Lack of cooperation with present supervision or court ordered placement.			0 - No 3 - Yes
14. Released on other charges at the time of offense			0 - No 3 - Yes
15. Known use of alcohol or drugs during past 12 months.			1 - Weekly 2 - Daily
16. School attendance/employment: Is child regularly attending school or gainfully employed?			0 - Yes 2 - No
17. Facing mandatory commitment/Trial as an adult			0 - No 4 - Yes
TOTAL HISTORY SCORE			

PRESUMPTIVE OUTCOME

History Score	A-B Felony	C Felony Violent	D Felony Violent	E Felony Violent	F Felony Violent	G Felony Violent	C-G Felony Nonviolent	10 \$1007 Misd.	All other Misd. Violations
1 - 7	Detain	Alternative	Alternative	Alternative	Release	Release	Release	Release	Release
1 - 10	Detain	Detain	Alternative	Alternative	Alternative	Alternative	Release	Release	Release
1 - 13	Detain	Detain	Detain	Detain	Detain	Alternative	Alternative	Alternative	Release
4 or more	Detain	Detain	Detain	Detain	Detain	Detain	Detain	Detain	Release

APPENDIX B

The Family Court of the State of Delaware

In and For New Castle Kent Sussex County

RIGHTS OF JUVENILES

I, _____, fully understand that:

- (1) I have the **RIGHT TO BE REPRESENTED BY A LAWYER** in all hearings in Family Court. I also have the right to ask the Court to appoint a Public Defender to represent me if the Court finds that my parents/custodians cannot afford one.
- (2) I have the **RIGHT TO REMAIN SILENT** and cannot be forced to testify against myself.
- (3) I have the **RIGHT TO A SPEEDY TRIAL**.
- (4) I also have the **RIGHT TO QUESTION**, myself or through my lawyer or parents/custodians, **ANY WITNESS WHO TESTIFIES AGAINST ME**.
- (5) I have the **RIGHT TO HAVE WITNESSES TESTIFY FOR ME**.
- (6) I am **PRESUMED INNOCENT** until either:
 - (a) I plead delinquent to the charge(s) or,
 - (b) I plead not delinquent and am found delinquent beyond a reasonable doubt of the charge(s) based on admissible evidence.
- (7) If I plead delinquent to or am found delinquent of the charge(s), I understand that the Judge/Commissioner will impose a sentence within the limits set forth by law.

WAIVER OF RIGHT TO COUNSEL

(Check Box to Indicate if Waiving Your Right to Counsel)

- I have not retained a lawyer, privately or through the public defender's office, and I waive my right to be represented by a lawyer at my arraignment today. I understand that it is my responsibility to obtain a lawyer immediately if I want to be represented by a private lawyer or public defender at the trial.

I HAVE READ AND UNDERSTAND MY RIGHTS AS STATED ABOVE.

Parent or Custodian

Juvenile Respondent

Court Staff
Witness as to Signatures

Date

APPENDIX B, CONT.

The Mandatory Commitment Statute is intended to warn the first offender of the consequences of a second delinquency adjudication. A delinquency adjudication refers to an offense that would have been a felony had the juvenile been an adult when the act was committed.

I, _____, fully understand that:

1. The Court must and will commit a juvenile to the Division of Youth Rehabilitation Services for at least six months if he or she has been adjudicated delinquent of a felony by this Court and subsequently within the twelve months commits one or more felonies and is thereafter adjudicated delinquent of said offense(s).
2. A juvenile committed to the Division of Youth Rehabilitation services under the Mandatory Commitment Act will not be released on pass, leave, or aftercare during the first six months unless the Director of Youth Rehabilitation Services, in his discretion, determines that it is in the best interests of the juvenile's treatment to participate in the programs which may require the juvenile to leave the institution. Upon filing of a petition, the juvenile must appear before the original Trial Judge or a Judge designated by the Chief Judge before such a release will be considered.
3. An amenability hearing will be conducted for the juveniles who are charged with felony offense(s) after having been committed under the Mandatory Commitment act; that is, a hearing will automatically be conducted to determine if the juvenile should be heard in Family Court (as a juvenile) or in Superior Court.

We have read or had read to us the above explanation and understand the implication of the Mandatory Commitment Act.

Date

Juvenile Respondent

Witness

Parent/Guardian

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

NATIONAL JUVENILE DEFENDER CENTER

1350 Connecticut Ave NW, Suite 304
Washington, DC 20036
202.452.0010 (P)
202.452.1205 (F)

www.njdc.info
www.gaultat50.org

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twitter.com/natjuvdefend

