

Due Process in the Time of COVID

Defenders as First Responders in a Juvenile Court System Struggling with the COVID-19 Pandemic



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Introduction

In February and March 2020, as COVID-19 spread throughout the United States, NJDC recognized a crisis facing youth involved in the juvenile courts and the attorneys tasked with defending them. The contagious nature of COVID-19 and the public health protocols meant to mitigate transmission heightened risks to the health and wellbeing of youth entering the juvenile delinquency system, where placement in secure and non-secure residential institutions is an ever-present threat.

Although the impact of COVID-19 on children can be different than on adults, it can still be severe,¹ particularly for youth with pre-existing conditions.² One in three youth hospitalized for COVID-19 were in the ICU, with Latinx and Black youth more likely to have COVID-19-associated hospitalizations than other youth.³ Given numerous reports of COVID-19 outbreaks in locked facilities for court-involved youth,⁴ the dire situation of many young people involved in the delinquency system has made the role of defenders in protecting their rights and liberty interests more critical than ever.

Recognizing the challenges attorneys have faced representing youth in the delinquency system during a pandemic, NJDC set out to investigate the impact of the COVID-19 pandemic on juvenile defense attorneys and their clients. Drawing from our network of defenders across the country, we interviewed 51 juvenile defenders from 38 states during June, July, and August 2020, inquiring about the health and safety risks defenders and their clients faced, and about how the pandemic was impacting their ability to provide effective legal representation for their clients.

1 See Mubbasheer Ahmed et al., *Multisystem Inflammatory Syndrome in Children: A Systematic Review*, 26 *ECLINICALMED.* 100527 (2020), <https://www.thelancet.com/action/showPdf?pii=S2589-5370%2820%2930271-6>.

2 See Lindsay Kim et al., *Hospitalization Rates and Characteristics of Children Aged <18 Years Hospitalized with Laboratory-Confirmed COVID-19 – COVID NET, 14 States*, 69 *MORBIDITY & MORTALITY WKLY REP.* 1081, 1082 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6932e3-H.pdf>.

3 *Id.*

4 JOSH ROVNER, *THE SENT’G PROJECT, YOUTH JUSTICE UNDER THE CORONAVIRUS: LINKING PUBLIC HEALTH PROTECTIONS WITH THE MOVEMENT FOR YOUTH DECARCERATION 7-11* (2020), <https://www.sentencingproject.org/wp-content/uploads/2020/09/Youth-Justice-Under-the-Coronavirus.pdf>.

Several key themes emerged from these interviews. Defenders have demonstrated enormous self-sacrifice to advocate for and protect the rights, health, and wellbeing of some of our nation's most vulnerable children, reaffirming the role of juvenile defenders as first responders. The shift to technology-based communications and remote hearings threatens young people's constitutional rights, including fundamental aspects of effective legal representation, due process, and access to courts. And the pandemic has magnified the disparate treatment of youth of color in the delinquency system and the disproportionate danger youth of color face due to their overrepresentation in facilities and the system as a whole.

Our findings raise serious concerns about the future operations of juvenile courts once the pandemic subsides. The concessions many defenders have made during the pandemic to keep the system operational, such as agreeing to remote hearings, should not continue after the pandemic. Technology-based communications have caused significant barriers in client communication and access to counsel, and the digital divide has created serious concerns about equal access to courts. The pandemic has also proven that the population of young people removed from their homes and held in congregate care facilities can safely be drastically reduced.

The role of defenders in protecting their clients' rights and liberty interests has never been more apparent or more essential to the health and wellbeing of young people in conflict with the law. But what has passed as due process in this time of COVID threatens to unravel the fabric of the Constitutional protections that stand between young people and injustice.





Juvenile Defenders as First Responders

While not traditionally thought of as an emergency service, juvenile defense is first responder work even without a global pandemic threatening the health and lives of clients and attorneys. Juvenile system involvement is an emergency in slow motion for youth. It can have severe consequences not only in the immediate moment, but also over the course of a young person's life, especially if a case is handled improperly or without an understanding of the specific complexities involved in juvenile defense. The juvenile defender is the only person in the juvenile delinquency system who is there solely to support and advocate for a youthful client's goals and wishes and to give them a voice as they navigate a legal system that could potentially take away significant liberties and create lifelong obstacles to success.

“Juvenile system involvement is an emergency in slow motion for youth.”

While traditional first responders are relieved of their crisis duties after their initial period of response, a juvenile defender has no secondary responder to whom the emergency is passed for follow-up care. Juvenile defenders are expected to see their crisis care all the way through, from intake to disposition and beyond.

As the COVID-19 pandemic has raged across America, traditional communities of first responders such as firefighters, law enforcement, and EMT workers have been celebrated alongside healthcare providers. Yet, juvenile defenders also have been critical to preserving life, recognizing early on the dangers facing court-involved youth amidst a pandemic. Entry into the delinquency system always runs the risk of detention or residential placement, precisely the type of environment where COVID-19 flourishes. Our nation's juvenile defender first responders have engaged in herculean efforts to mitigate that danger.

Risking Self-Safety for Client Liberty

For the past year, juvenile defenders have doubled down on their specialized work. Despite the new challenges COVID-19 has presented to them and their clients, such as obstacles to accessing counsel, delayed court proceedings, and virtual technology issues, many of the juvenile defenders interviewed

expressed that they often set their own health and safety aside to continue advocating for their young clients in new and creative ways. A major theme that emerged from the interviews was that defenders often felt a tension between their duty to “flatten the curve” of COVID-19 and protect themselves and their families against the pandemic by adhering to public health safety guidelines, and their professional and moral obligations to their clients.

*“I’m sacrificing
and putting
myself at risk for
a worthy cause.”*

One defender put it succinctly: “I am putting my clients above my own health and safety, but it’s my job.” Another commented, “We have concerns, but public defenders perceive ourselves as first responders. Morally, we should be there for our clients. We take these risks. I’m sacrificing and putting myself at risk for a worthy cause. No one wants to NOT come in.”

While stay-at-home orders were issued in many jurisdictions, several juvenile defenders mentioned they found themselves continuing to leave the house, not because they wanted to, but because their work demanded it. When asked about what concerns they may have regarding health and safety, most defenders interviewed noted that they were less concerned about exposure to COVID-19 in the field (e.g., during an investigation or a socially distanced client visit) than they were about potential exposure to COVID-19 in courthouses and detention facilities. One defender expressed concern that when advocates return to court in her jurisdiction, they would be “picked off one by one” by the virus due to other court staff not wearing personal protective equipment (PPE).

Despite attempts to advocate for their own health boundaries, several defenders expressed concern that courthouse and facility personnel were not wearing PPE. Some defenders were frustrated that courts were allowing court personnel, prosecutors, and other government employees to appear remotely while still requiring defenders and their clients to make in-person appearances. Others noted that courts in their jurisdiction failed to provide PPE to youth or others, like the defenders themselves, despite the court’s insistence that they appear in person.

Several defenders expressed the sentiment that courts were not sufficiently considering the safety of defenders when implementing public health protocols, leaving defenders to choose between their professional, ethical obligations and their public and personal health obligations. One attorney explained that the pandemic has forced attorneys to make new calculations they never thought they would have to face: “Knowing that now, every time an attorney takes a case to trial, there’s a huge health risk involved, it’s just a terrible thing to weigh against professional ethics/standards. No one should have to be making these decisions.”

Overall, however, the concerns voiced by juvenile defenders were not about themselves. Of the 51 interviews conducted, only seven defenders expressed serious concern for their personal safety. More than getting sick, those interviewed expressed worry about their work putting them in the position to become a disease vector for an immunocompromised partner, children in their home, or their clients. They also worried about their colleagues in the office, anxious about the impact one juvenile defender falling ill may have on the workload and mental health of others who would then have to shoulder their work.

Protecting Clients' Health & Safety

The defenders we interviewed seemed keenly aware that there was far more at stake than “freedom” when fighting for a client’s liberty interests during the pandemic. A prominent theme discussed by defenders was their concern for the health and safety of clients, particularly those in facilities. Outbreaks in facilities have been documented across the nation,⁵ and several defenders we spoke with discussed COVID-19 outbreaks in facilities in their own jurisdiction. For example, one attorney’s recounting of an outbreak in a facility used by her jurisdiction highlights how staff who come and go place youth at significant risk of infection:

One of my clients tested positive, along with seven kids in the cottage [a locked mental health facility]. All the kids have it, and six staff have it. And it was from a staff member. The PO [probation officer] admitted it. Some kids in detention facilities have gotten it. This is a facility where kids are detained for months.

Another defender voiced that her biggest concerns regarding the health and safety of clients was the lack of masks and social distancing protocols in facilities, which left many youth confused and vulnerable:

When the pandemic first started around April, I asked children [in the detention facility] what policy and procedures were in place to protect them. They said they don’t have enough hand soap. No children were wearing masks, even if staff were. No extra opportunity to wash hands. Definitely no social distancing. They didn’t understand why they were being told to do something by the news, but it was not being enforced where they are.

Other defenders noted that the risk of exposure youth faced was both a health issue and a significant stressor for many youth. As one attorney explained:

I have one client—we learned that a staff member tested positive—he has asthma, and he has said his life is in danger. They are restricted now to their unit. He says all they do is watch tv and learn about how more and more people are dying. He is scared. He calls multiple times a day. He is concerned because he says if he is sick and dying, he can’t even hold his family. Every client that I have has some sort of pre-existing condition—most of my clients have asthma—they have expressed exactly the same thing. I only have one client who is not afraid of dying.

“He is concerned because he says if he is sick and dying, he can’t even hold his family.”

5 *Id.*

Along with the stress brought on by increased risk of exposure to a potentially lethal disease, another prominent theme was concern for the mental wellbeing of clients in facilities, directly resulting from measures aimed at mitigating transmission of the virus. Many defenders discussed how schooling and other facility programming had been cancelled, leaving many young people in a void with little to break up the monotony of confinement. One defender explained, “Clients were asking for schoolwork because they were so bored. They were very concerned—some were literally losing their minds. I had one client who was literally banging his head against a wall.” Additionally, defenders commented on home visits and/or in-person family visitation being cancelled. As one defender reported, such measures have serious consequences for children:

Kids who are in facilities or programs can’t earn home visits anymore, so they have no incentive to achieve interim goals and have a lot less communication with family. I have one client who’s started cutting herself, partly because she doesn’t have a connection with the outside world.

One of the most severe threats to youth health and wellbeing discussed by defenders was the implementation of quarantine measures for newly admitted youth or youth who had been exposed to or infected by the virus while in facilities. Several defenders commented that the quarantine measures essentially translated to solitary confinement, which defenders recognized as having a deleterious effect on the health and wellbeing of youth. One defender reported:

In our district, before we started going to WebEx for hearings, if we had a client that needed to be transported to the courthouse, when they went back to detention, they were quarantined for 14 days. I have a serious problem with that because it puts them in a solitary confinement situation. They are not able to access services, schools, and normal support team. I don’t want them to have any more support taken away from them.

Solitary confinement can have profound impacts on the mental, physical, and emotional health of young people⁶ that can continue for years after young people are placed in solitary.⁷ During the pandemic, advocates and medical professionals have decried the use of medical quarantine strategies that resemble the punitive and inhumane elements of solitary confinement, and have pushed for the release of people who are being held in facilities so that resources could be used for more humane and compassionate practices if medical quarantine was necessary.⁸

As one defender surmised, for many youth “the consequences of COVID are more frustrating to them than COVID itself. They want to be out of their cell.”

6 See AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, JUV. JUST. REFORM COMM., SOLITARY CONFINEMENT OF JUVENILE OFFENDERS (2012), https://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx; see also Laura Dimon, *How Solitary Confinement Hurts the Teenage Brain*, ATLANTIC, June 30, 2014, [https://www.theatlantic.com/health/archive/2014/06/how-solitary-confinement-hurts-the-teenage-brain/373002/..](https://www.theatlantic.com/health/archive/2014/06/how-solitary-confinement-hurts-the-teenage-brain/373002/)

7 Dimon, *supra* note 6.

8 Letter from Unlock the Box et al. to Ctrs. for Disease Control & Prevention et al., (Sep. 24, 2020), <https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5f6cd953dd3f256dc949ed61/1600969043976/CDC-Petition-to-Update-COVID-19-Guidelines-Jails-and-Prisons.pdf>; David H. Cloud et al., *Medical Isolation and Solitary Confinement: Balancing Health and Humanity in US Jails and Prisons During Covid-19*, 35 J. GEN. INTERNAL MED. 2738 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7338113/>; ROVNER, *supra* note 4, at 20.



The Digital Divide

Every person accused of a crime has a constitutional right to be present at hearings in which their participation may affect the outcome.⁹ Due to young people’s still-developing cognition and socioemotional maturity,¹⁰ the lack of physical presence at hearings makes it more likely “that a fair and just hearing would be thwarted by [the young person’s] absence.”¹¹

The “digital divide”—i.e., the gap between those who do and those who do not have access to broadband internet and/or the technology to use it—is more than just a geographic or economic issue, as data indicates that communities of color have systematically been denied equal access to broadband internet.¹² While much public attention has been paid to how the digital divide has impacted remote learning and left youth in disenfranchised communities and youth of color at a greater disadvantage, there has been little attention paid to how the shift to “remote justice” leaves these same youth at a greater disadvantage when facing the legal system.

Lack of Access to Technology

A majority of defenders interviewed raised general concerns about communication during the COVID-19 crisis that revealed the number of clients caught on the less fortunate side of the digital divide. For example, one juvenile defender noted that he had been doing a lot of Zoom appointments with clients as a “dry run” for hearings, but noticed that most of his clients of color did not have laptops or tablets and often did not have phones, or if they did, their devices did not have a camera.

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

10 See generally, NAT’L. RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 89-118 (Richard Bonnie et al. eds., 2013).

11 See Kentucky v. Stincer, 482 U.S. at 745.

12 Kelsey Berkowitz & Jim Kessler, *The Racial Equality and Economic Opportunity Case for Expanding Broadband*, THIRD WAY, Feb. 1, 2019, <https://www.thirdway.org/report/the-racial-equality-and-economic-opportunity-case-for-expanding-broadband>.

It was unclear from our interviews the extent to which the shift to remote hearings impacted case outcomes for youth, particularly youth who lacked reliable access to broadband internet, the necessary technological hardware, and the know-how to use it. However, it did become clear through interviews that lack of access to technology caused significant issues for clients and advocates alike. Several defenders we interviewed expressed concerns about youth not being able to participate in virtual hearings, except by phone.

One attorney explained that the shift to remote operations has created more problems than solutions for the people who must navigate the system. She noted that virtual solutions presuppose that a young person:

“The entire workaround for in-person hearings presupposes a position of privilege.”

Has (1) an email; (2) access to video conferencing app/software; (3) the means to obtain the tools necessary for a virtual appearance; and (4) technological savvy. The entire workaround for in-person hearings presupposes a position of privilege. Now that Family Court is physically closed, there is a lack of transparent means to obtain information about Family Court and how to navigate the court system. The workaround does not serve the people who primarily navigate and rely upon this system.

Lack of Access to Services

At the time of our interviews, defenders were careful to note that their concerns surrounding their clients' due process rights were not limited to youth whose cases were still unresolved; they also had concerns about obstacles youth faced in the post-disposition phase regarding access to programs and services the court required that they complete. The concerns expressed were both substantive and procedural, with defenders describing youth feeling disengaged due to the virtual format or their lack of technology to access it.

One defender stated that, without showing up for programming, “some kids have just fallen off the face of the planet,” and there was no practical way to get in touch with them, let alone find ways to help them complete their probation requirements. Even with alternatives like telehealth counseling, defenders seemed to share a common worry that their young clients were barely aware of what needed to be done to comply with court obligations and were not actually engaging with the new services, let alone benefitting from them.

New virtual methods of providing programming exposed an assumption made by the juvenile court system that, defenders asserted, did not prove true in practice: universal access to technology. Defenders relayed their belief that the pandemic has exacerbated issues of poverty in the juvenile court system. Several defenders expressed that making their clients' access to services contingent upon a degree of privilege (i.e., access to technology and knowing how to use that technology) has had a markedly negative impact on their clients.

Without accommodations or support for youth living in the digital divide, the shift to providing all court system interactions and services virtually has become a significant due process concern for defenders, and could become a constitutional crisis for young people if allowed to persist after the pandemic.



Obstacles to Attorney–Client Communication

For young people to have constitutionally required access to counsel and be fully afforded due process of law, they must have meaningful opportunities to communicate with their defender.¹³ “The essence of access to justice for children is access to counsel.”¹⁴

Communication is the core construct of the attorney-client relationship. It is not only a means to exchange critical information, but also the basis for establishing rapport and building a foundation of “mutual confidence, trust, and respect.”¹⁵ These intangible qualities play a critical role in the young person’s relationship with their attorney throughout their court experience.

At the time of our interviews, a majority of the 51 juvenile defenders reported that the courts in their jurisdiction had moved either entirely or partially to remote operations. A number of defenders indicated that their office’s and/or county-wide COVID-19 policies suspended or limited professional in-person meetings. This shift required many of the defenders we interviewed to abandon more personal and confidential face-to-face meetings in favor of technology-based communication (e.g., phone, text, videoconferencing) to meet, counsel, and confer with their clients.

Although in the minority, there were attorneys who noted advantages to the shift to technology-based communications, suggesting it increased their accessibility to clients and clients’ accessibility to defenders. Nonetheless, a major theme that emerged through the majority of interviews was that this shift to technology-based communication presented enormous obstacles for juvenile defenders in their representation of youth clients.

13 See Statement of Interest of the United States at 7, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Sept. 25, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/09/25/hurrell_soi_9-25-14.pdf (“constructive denial of counsel may occur when . . . defenders are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation . . .”).

14 NAT’L JUV. DEF. CTR., *TALKING POINTS: DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES 1* (2016), <https://njdc.info/wp-content/uploads/2016/11/Talking-Points-NJDC-Blueprint.pdf>.

15 RANDY HERTZ ET AL., *TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES: THE CLIENT INTERVIEW 125* (2020), <https://njdc.info/wp-content/uploads/Chap-005-Client-Interview-2020.pdf> (quoting language used to describe attorney-client communications).

Defenders who highlighted the obstacles presented by communicating with youth via technology understood the shift was to protect the health and safety of both clients and attorneys; however, they voiced concerns about the negative impact these adjustments had on the manner in which they communicated with clients both outside and inside the courtroom. In regard to communicating with clients outside of the courtroom, the three major challenges that repeatedly emerged throughout the interviews focused on 1) establishing trust with clients, 2) ascertaining client comprehension, and 3) contacting clients.

Establishing Trust

Confidential and privileged attorney-client communication is central to the attorney-client relationship. A major concern voiced by many defenders we interviewed was that the shift to technology-assisted communications impeded the defender's ability to build trust with clients by impeding confidential communications and hampering rapport-building.

Confidential Communications

A unique element of attorneys' building trust with clients is assuring clients that their secrets will be kept. Attorney-client confidentiality:

contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.¹⁶

Particularly with youth clients, a private means of communication with their defender is essential to building trust. If a youth does not feel their communication with their attorney is confidential, they may not be as forthcoming with key information regarding their case. This precise theme was raised repeatedly by defenders we interviewed, as they described their struggles to establish means of truly confidential communication with youth clients.

Due to office, local, or state mandates, or out of concern for their clients' and their own health and safety, most of the attorneys we interviewed during the summer of 2020 had shifted from face-to-face meetings with youth to phone or videoconference meetings. Attorneys expressed much frustration about establishing confidential communication through both of these mediums. In part, the challenge was because adults (e.g., parents, counselors, correctional or probation officers) often were the gatekeepers to communicating with youth.

While the issue presented itself for youth both inside and outside facilities, concerns about establishing private communication within facilities was voiced most frequently. Many defenders specifically voiced concerns about videoconferences being either recorded or somehow excluded from privacy requests in facilities because youth were using staff offices and/or equipment.

“Particularly with youth clients, a private means of communication with their defender is essential to building trust.”

¹⁶ MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

Even ascertaining whether a conversation was confidential appeared to be a challenge. As one attorney explained:

There is no opportunity for confidential communication with video. Now they bring youth into the supervisors' office to communicate—the facility claims they have confidential information in the office and can't walk out and leave the client alone. They say to us what we are saying is confidential as attorneys, but it's more important for our clients' confidentiality because they are giving details about arrest.

This highlights the ethical dilemma for attorneys. Confidential communication is not simply about keeping potentially harmful information out of court; it is about ensuring that youth and their information are protected in all venues. This is critical for establishing a relationship in which youth see their attorneys as dedicated to the youth's perspective and to protecting the youth's rights and interests.

Concerns about privacy and internet stability drove a number of attorneys to rely on phone calls. However, multiple defenders reported that even phone calls presented confidentiality issues, thus impeding trust between the defender and youth clients. As one attorney explained:

For the first six weeks, we did have clients in detention, and we couldn't communicate directly or confidentially before detention hearings. We could be sitting on the Zoom call with the judge, and that was first contact. Because they were locking down the facility, the PO [probation officer] would bring the phone to kids, and was usually standing there and could hear the conversation. I don't think they were thinking of how to harm kids with the confidential information they were hearing, but it limited our clients' trust in us and limited our questions. We were getting information but didn't have time to build trust and rapport—so made me suspicious of information we were getting.

While most of the concerns were related to youth in facilities, there were a few attorneys who voiced similar concerns about establishing confidential communication with youth even when they were in the home of their caretakers. One attorney offered that she often tried to make phone calls to clients when she knew their caretakers would not be home so the youth could speak more freely about the context of the charges. Another attorney explained the difficulties trying to communicate with youth who had domestic violence charges against them but were still living at home, where others in the home might overhear the conversation.

Rapport-Building

Opportunities for juvenile defenders to build rapport with their clients are important in the early stages of a case, as they contribute to strengthening the attorney–client relationship. Clients grow to trust their advocates with information they would otherwise consider embarrassing or uncomfortable, and juvenile defenders, in turn, have opportunities to show clients how they handle receiving that information in a supportive and non-judgmental manner.

As many offices shifted from in-person to remote operations, attorneys’ concerns around network stability and confidentiality drove many defenders we interviewed to rely on the phone as the primary method by which to meet with clients. It was those attorneys who voiced the most concerns with rapport-building, highlighting it as an important condition for establishing trust, particularly with new clients. As one defender explained, “I feel like they need to see you in person in order to size you up a bit, really tell if you’re on their team or not.”

Another attorney explained the difficulties communicating via phone posed:

The problem has been with our new clients because they do not know us, they do not see our faces, it is hard to build our trust with them as all they hear is our voices in most cases. How will they know we are who we are? They have to trust that we are the defense attorney, and we are there to help them out.

“When I tell them, ‘You can tell me the truth,’ why should they believe me? They do not know me.”

She went on to explain how establishing rapport is more than just a nicety in the attorney-client relationship, and how the inability to do so undercuts the reliability of the information clients share: “When I tell them, ‘You can tell me the truth,’ why should they believe me? They do not know me.” Particularly in cases involving more serious charges, another attorney stressed that building trust by developing rapport with clients is even more critical, as “You can’t have uncomfortable conversations without a relationship, and it’s hard to develop that electronically.”

As noted earlier, a few attorneys did have some positive experiences communicating with youth via videoconferencing and/or phone. These defenders felt that it improved accessibility, making them more available to youth and vice versa. A few also recounted how making youth come to the attorney’s office for meetings imposed a hardship on some clients and suggested

that videoconferencing was an important adaptation that could be used after the pandemic to reduce transportation burdens on youth and families.

But, by far, the predominant sentiment was, as this attorney put it:

There’s no substitute for being able to make a relationship with your client, or your client being able to make relationships with mentors in person. It is so hard to do this work without that ability, and I don’t know if that’s going to change.

Some attorneys and public defender offices may attempt to use videoconferencing technology even after the pandemic subsides to make attorneys more accessible to clients; however, the convenience of videoconferencing or other forms of technology-assisted communication will have to be balanced with the benefits of in-person communication. As many defenders we interviewed expressed, communication via technology does not promote those intangible qualities of “mutual confidence, trust, and respect,”¹⁷ in the same manner as in-person communication. These intangible qualities are fundamental to creating and sustaining the attorney-client relationship. Furthermore, while videoconferencing may provide some benefits over phone interactions, academic research comparing videoconferencing and in-person communication clearly demonstrates that video is not as effective as in-person communication.¹⁸

Ascertaining Comprehension

A second overarching communication challenge that emerged from the interviews were concerns about the impact technology-assisted communication had on clients’ ability to understand the legal process and the impediments that posed to counseling clients. Most of the defenders we interviewed specialized in working with youth clients, and as such seemed attuned to developmental differences between adult and youth clients regarding a youth’s capacity to understand the legal system, and the need to accommodate those differences.¹⁹

For several of those interviewed who were forced to rely on phone as the primary source of communication, counseling clients and conveying case strategy was a daunting task:

Explaining terminology to kids over the phone is hard. They do not understand most of the language and I have no way to read their faces and see if more explanation is needed. All I hear over the phone is silence or a yes, but I am not sure if they really understood what I was saying or explaining. Before this pandemic hit, one thing I would do, is draw a picture of the process so they understand what is going on and what comes next. This is how I prepare them before entering court. This can’t be done over the phone.

17 Hertz, *supra* note 15.

18 See LISA BAILEY VAVONESE ET AL., CTR. FOR CT. INNOVATION, HOW VIDEO CHANGES THE CONVERSATION: SOCIAL SCIENCE RESEARCH ON COMMUNICATION OVER VIDEO AND IMPLICATIONS FOR THE CRIMINAL COURTROOM (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/Monograph_RemoteJustice_12032020.pdf.

19 See generally Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003), https://www.researchgate.net/publication/10615937_Juveniles'_Competence_to_Stand_Trial_A_Comparison_of_Adolescents'_and_Adults'_Capacities_as_Trial_Defendants (discussing youth competency and decision-making); see also Jodi L. Viljoen et al., *Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: A Comparison of Legal Standards*, 25 BEHAV. SCIS. & L. 1 (2007), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/bsl.714> (discussing how *Miranda* warnings are used to demonstrate impaired understanding, decision-making, and competency in youth).

Similarly, another attorney commented:

The only thing it has changed for me is it has made me realize even more how important our role is with our client and how important face-to-face contact is with my client. I have a much higher appreciation for face-to-face contact. I could see and hear if they were understanding and they could ask more questions and be sure they are engaged. I don't get that from telephone. I can't really hear their cues on the phone, and often don't know if it is them or their parents asking. I have a better appreciation for the attorney-client relationship.

Attorneys who could meet with clients, confidentially and reliably, through videoconferencing technology, seemed less concerned about the efficacy of technology as a replacement for in-person meetings and appeared to prefer video to phone calls. With the burden of transportation lifted, one attorney noted that clients, along with parents, were more likely to attend meetings to discuss case strategy and the legal decisions to be made. Also, as one attorney noted, if clients were on video as opposed to the phone, she could better "gauge if the client is getting upset about something and pivot." While videoconferencing that was confidential and reliable appeared to be preferred over phone contact, there were still those who thought that counseling clients through video was impersonal and limited the use of visual aids, explained as important elements when counseling young clients. By far, the majority of defenders found technology-based counseling of clients much more limiting than in-person interactions.

Contacting Clients

The communication challenge most often mentioned by defenders was simply getting in touch with clients both in facilities and at home. As one defender stated, "You can't represent someone you can't communicate with." The inability to ensure confidential communication, whether via telephone or videoconferencing, presented numerous challenges for juvenile defenders to speak with their youth clients both in and out of custody. A few defenders mentioned that, pre-pandemic, they could meet with out-of-custody youth at schools or libraries, or even at court if necessary, all places where defenders could take steps to be reasonably assured of confidentiality. However, during the pandemic, these options were often unavailable or impractical for defenders or their clients.

Asking clients to come to the attorney's office was often not an option, either. A number of defenders indicated that their office's and/or county-wide COVID-19 policies suspended or limited professional in-person meetings, including meetings with clients. Other defenders noted that their offices had made larger conference rooms available for client meetings, but that it was still difficult to get in touch with clients to coordinate meetings.

Some defenders interviewed echoed concerns about youth and/or families not having phones, let alone access to computers and broadband internet. Even when youth had their own phone, defenders lamented that youth had run out of minutes, forgot to charge the phone, or—in a world where social media and texting have become dominant forms of communication—were just not accustomed to speaking on the phone.

"You can't represent someone you can't communicate with."



Obstacles to Representing Youth

The Fourteenth Amendment of the United States Constitution guarantees that all youth who are prosecuted in juvenile courts have a right to counsel.²⁰ For the right to counsel to be meaningful, it requires that the attorney appointed to represent the youth be effective.²¹

Overwhelming & Unmanageable Caseloads

When speaking about their experiences handling cases in the midst of a pandemic, defenders uniformly stressed how the near-constant delay of proceedings as a result of COVID-19 made already overwhelming caseloads even more difficult to manage. Defenders spoke about continuously delayed hearings and cases dragging on far longer than they should, and about the need to continually help clients access programming and services that had been significantly altered or curtailed. Some defenders spoke about the effective suspension of critical case services like competency evaluations and psychosocial profiles, with appointments postponed repeatedly and no sense of when they may be conducted. In one interview, a defender characterized navigating the constant changes and lack of predictability in court proceedings as “the hardest work I’ve ever had to do.”

It became apparent through our interviews that the delay and chaos caused in courtrooms by COVID-19 has radically changed defenders’ calculus regarding whether they took a matter to trial or resolved it some other way, like taking a plea deal. The majority of defenders expressed concern over the impact delayed hearings had on their capacity to counsel clients and make strategically sound decisions regarding their cases. Even when juvenile defenders were committed to seeing a case all the way to trial, they believed the uncertainty caused by the pandemic wore on youth clients and, in some cases, coerced youth into accepting case resolutions that were not in their legal interests.

20 *In re Gault*, 387 U.S. 1, 34 (1967).

21 *Id.* at 30 (quoting *Kent v. United States*, 383 U.S. 541 (1966)).

As one attorney pointed out, delays required more “judgment calls about resolving/pleading out versus holding over for litigation that otherwise wouldn’t be made.” As a result, she suggested that delays predisposed youth to give up on their cases: “Clients get frustrated and give up because they don’t know when they’ll get their day in court.” Moreover, for those youth who languish in facilities—without any finding of guilt—the choice between trial and plea may literally mean life or death.

“Clients get frustrated and give up because they don’t know when they’ll get their day in court.”

The ability to manage a caseload and navigate a court system in chaos has implications for defender efficacy. When the system overloads defenders and negatively impacts their ability to provide adequate defense, including proper advice during plea negotiations, defense attorneys risk being ineffective. Young people who are prosecuted by the state have a constitutional due process right to effective assistance of counsel, and our interviews suggest that this right is being significantly impinged in many jurisdictions due to court responses to the pandemic.

Representing Youth at Virtual Hearings

Effective representation of young clients requires meaningful and effective communication during delinquency proceedings, or else it risks depriving a young person of their ability to participate in the proceedings.²² Yet, court responses to the COVID-19 pandemic have eliminated effective attorney-client courtroom communication, as many jurisdictions switched to videoconferencing technology to conduct court hearings. While the use of such technology is not new, before the pandemic it was largely limited to bail hearings²³ and certain immigration proceedings.²⁴ The pandemic saw its usage in other hearings gain widespread acceptance, as courts struggled to keep cases moving while also attempting to keep youth, families, and personnel safe from the virus.

At the time of our interviews, a majority of the 51 juvenile defenders reported that videoconferencing technology was being used to conduct the majority of juvenile court hearings in their jurisdiction. Although the use of remote technology to conduct juvenile court hearings may be necessary to “flatten the curve,” the fear is that such emergency usage could lead to permanent usage post-pandemic, especially given efficiency advantages enjoyed by some court system stakeholders who are not ethically or constitutionally responsible to an individual client.

During our interviews, it appeared that jurisdictions varied widely in their protocols governing the use of remote hearings, but what seemed to remain consistent was that the defense attorney and client were not in the same room. Such an arrangement hinders the attorney-client relationship and stymies confidential communication during hearings. Attorneys mentioned significant challenges this arrangement created: an inability to effectively confer confidentially with clients, difficulty providing emotional support and guidance to clients, and concerns about the ability to facilitate a youth client’s understanding of the proceedings.

One attorney, for example, explained how the use of Zoom for hearings meant that they could not whisper in a client’s ear, write them private notes, or answer the young person’s questions confidentially. Additionally, the lack of direct physical proximity to the client made it difficult to effectively de-escalate sensitive situations or mitigate client behaviors as effectively as they would be able to in the courtroom. One attorney even gave the example of a client not wearing a shirt during a hearing, due to the informality associated with videoconferencing in that child’s experience.

22 MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 1 (AM. BAR ASS’N 1983) (“Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.”).

23 See Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010).

24 See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933 (2015) <https://scholarlycommons.law.northwestern.edu/nulr/vol109/iss4/2>.

Another attorney explained how having clients on camera highlighted typical adolescent responses that would be less impactful in an actual courtroom:

In an in-person hearing, you prepare youth for that judge and prepare for body language issues. But on the screen, they have to be cautious for little movements, like mumbling or cursing under their breath. I've asked the person who is running Zoom to mute my clients unless we decide they should speak.

Another attorney reported similar challenges when their clients were frustrated during a hearing, explaining that the subtle cues, gestures, and whispers he could use to ensure clients would not say things to harm their cases now required much more intrusive interactions. "I am silencing my client more than I ever did in person."

There were a few attorneys who had developed strategies to overcome these obstacles. One attorney discussed how she had developed baseball signals with her client, such as tugging on an ear if the child couldn't hear something or raising a hand if the child wanted to talk privately. "Then I ask for a private Zoom room to conference with my client and have another attorney stay in main Zoom room to see what the other stakeholders are talking about during the break."

Those interviewed also expressed concerns that the challenges of remote hearings led to their clients being dehumanized. Many defenders voiced their frustrations that their advocacy efforts were diminished because of the "emotional distance with the screen," or because they and their clients were "confined to a little box." One attorney pointed out that strategies she could use in person to remind the court that her client is actually a child and persuade the judge that a youth was not a threat, such as standing next to her client to emphasize his small size, were difficult to do in remote hearings. Another attorney commented on the difficulty in conveying the "passion of advocacy" through a "TV screen." And another attorney simply stated, "If there is a young person trying to get a case dismissed, it's a different decision-making process for the judge because they don't have to say it [no] to the child's face." This attorney's experience led them to feel that judges were "more reluctant to dismiss" and that there would be better outcomes if hearings were held in person.

"...remote hearings led to their clients being dehumanized."

The majority of attorneys interviewed felt the efficacy of their legal representation for youth and the ability of youth to meaningfully participate in their defense were severely hampered in the virtual environment. While there were a few instances of attorneys who said that the virtual hearings made it easier for some youth and parents to attend hearings, they were outweighed by examples of how a lack of proximity and connection to their clients during virtual hearings negatively impacted the attorney's efficacy in the case.



Magnifying Disparities

The Fourteenth Amendment's Equal Protection Clause imposes on states the duty to enforce laws impartially, with no distinction in application based on similarly situated individuals. Even without a pandemic, youth of color have consistently been overrepresented in the juvenile delinquency system.²⁵ And as a nation, our courts incarcerate children at the highest rate in the world,²⁶ with youth of color vastly overrepresented in the nation's detention and correctional facilities.²⁷

During interviews, defenders discussed the various ways the COVID-19 pandemic has exposed the results of this unequal protection of the laws for children of color. Some defenders noted that COVID-19 seemed to generate a new excuse for differential treatment of clients of color. One defender mentioned that in her jurisdiction, it appeared Black children were being detained for longer periods of time during the pandemic, presumably for "their own safety." Another defender expressed concern that children of color were being treated differently and detained more often during the pandemic because judges "don't trust families to care for kids." Yet another defender explained:

"...COVID-19 seemed to generate a new excuse for differential treatment of clients of color."

It's pretty stark in my county how youth of color are disproportionately represented in juvenile court, period. The population of kids detained are also disproportionate. The pandemic magnifies all the problems that were already there. They are more likely to be stopped, investigated, and questioned, so during the shelter-in-place order, there was

25 THE BURNS INST., *United States of Disparities*, <https://usdata.burnsinstitute.org/#comparison=&placement=&racess=&offenses=&year=1997&view=map> (last visited Mar. 23, 2021).

26 Patrick McCarthy et al., *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model*, NEW THINKING CMTY. CORR. BULL. (U.S. Dep't of Just., D.C.), Oct. 21, 2016, at 15, <https://www.ojp.gov/pdffiles1/nij/250142.pdf>.

27 JOSH ROVNER, THE SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH INCARCERATION PERSIST (2021), <https://www.sentencingproject.org/publications/racial-disparities-in-youth-incarceration-persist/>.

not a single white kid charged for curfew violation. It presents an additional opportunity to criminalize behavior.

Several defenders admitted they did not feel qualified to answer the question about the impact of the pandemic on racially disparate treatment, not because they saw no difference in impact, but because their clients were overwhelmingly youth of color, and they simply did not have enough white youth on their caseload to make meaningful observations. However, the key theme expressed amongst defenders in this arena was a recognition that any disparate treatment of youth due to COVID-19 was neither special nor unique; it simply amplified the disparate treatment that already existed.

Acknowledging their role in preserving not only the constitutional rights of youth, but also the health and safety of their young clients, particularly clients of color during a pandemic, several of those interviewed spoke about how they intensified their advocacy efforts during the COVID-19 crisis. Some defenders said they succeeded in securing the release of vulnerable clients from detention, truncating post-disposition programming requirements, or even having cases outright dismissed in the interests of justice, health, and safety.

Some defenders interviewed sounded as if they were now entrenched in a battle with not only COVID-19, but also the court system itself. Several defenders described how they found themselves deadlocked with prosecutors and judges who were unreceptive to arguments about the dangers of residential facilities amidst a universal public health crisis. This, despite evidence that Black and Latinx youth are more vulnerable to COVID-19-related hospitalization and death.²⁸

Unwilling to let cases drop, these judges and prosecutors were also unwilling to set clear timelines for cases, leaving pre-adjudicated youth with no clear path forward and further dehumanizing youth by continuing to deny the health risks posed by incarceration. As one attorney stated, “It has made me feel more strongly that the courts, the state, and the [state juvenile corrections system] do not care about our clients. They fail to recognize the risk our clients are in. They fail to recognize our clients as human beings.”

Another attorney referred to the current state of the system as a “dystopian nightmare,” explaining:

Watching all this play out shows what a farce the justice system is. The decisions are for convenience—they are for ease of court. They are not for care and safety of the kids. In this bizarre dystopian future where we are all online, it’s challenging to be an attorney and still participating in it—worrying about your own safety and safety of your family. I have tried to get every child out with at least two motions. We have participated in policy, helped put out a statement. The racism—that is really what it is—the racism has been so pronounced since this whole thing started. It’s just been awful.

“...any disparate treatment of youth due to COVID-19 was neither special nor unique; it simply amplified the disparate treatment that already existed.”

28 See Kim, *supra* note 2, at 1082; Danae Bixler et al., *SARS-CoV-2—Associated Deaths Among Persons Aged <21 Years—United States, February 12–July 31, 2020*, 69 *MORBIDITY & MORTALITY WKLY. REP.* 1324, 1325 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6937e4-H.pdf>; Ellen H. Lee et al., *Race/Ethnicity Among Children with COVID-19-Associated Multisystem Inflammatory Syndrome*, 3 *JAMA NETWORK OPEN* 1, 3 (2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2773289>.

“We have absolutely shown we need to have fewer youth in detention”

Defenders largely expressed that the push to decarcerate their young clients and the lack of uptick in new cases after those releases validated their perception that the detention of their clients not only was unnecessary, but also exacerbated the differential treatment of youth of color by the courts. As one attorney stated, “We have absolutely shown we need to have fewer youth in detention. If you can reduce the population and not have chaos, then what are we doing with so many children locked up? Shows that it was more punitive than a necessity for public safety.”

Another defender echoed: “It has changed our view and [I am] even more convinced that the court function is to lock up disadvantaged children. The number of youth detained is lower, so it brings me to the opinion that if we can do this during a pandemic then we can do this every day.”



Conclusion

Our interviews laid bare the critical role juvenile defenders have played as first responders during the pandemic. The conditions many youth have faced are not only a threat to their mental and physical health, but also to their very lives. Across the country, juvenile defenders have risked their own health and safety to help the courts see and understand the plight of young people during this global health crisis.

We found that far too many juvenile court systems have created “solutions” to the COVID-19 crisis that make inaccurate assumptions about privilege and access to resources. The realities of the digital divide infringe upon youth access to the courts, services, and justice. When youth in underserved communities experience justice delayed or denied because they lack sufficient access to technology, there is no equal protection under the law.

Our interviews revealed that juvenile defenders have necessarily made concessions to their attorney-client communications that hinder the defense young people are afforded. Post-pandemic, these concessions cannot be continued without jeopardizing the constitutional fabric of our court system.

We discovered that virtual hearings are impeding juvenile defenders’ meaningful representation of their clients, and that many defenders fear courts may decide to continue virtual hearings after the pandemic. The persistence of virtual hearings after the pandemic—when no public health crisis requires such drastic action—risks permanently undermining the effectiveness of juvenile defense attorneys for the convenience of other court stakeholders, a systemic deprivation of the right to effective assistance of counsel.

Finally, the safe release of youth from detention and correctional facilities during the pandemic has revealed how implicit racial bias, masquerading as public safety and paternalism, is woven into the very fabric of the nation’s juvenile court system.

Recommendations

During the pandemic:

- Juvenile defenders should be recognized as front-line first responders and be provided priority vaccination status and access to personal protective equipment in all judicial and justice-system spaces in which they need to appear in person.

During the pandemic, juvenile courts must:

- Recognize COVID-19 as a threat to the health, safety, and wellbeing of youth in the delinquency system, particularly those in secure and non-secure facilities, and make every effort to keep youth at home with their families and out of congregate care.
- Afford virtual technology accommodations to young people and their defense lawyers to ensure confidential attorney-client communication during court hearings, outside of court hearings, and inside facilities.
- Recognize the due process deprivations related to virtual hearings, and mitigate them in favor of the youth, not in favor of convenience and efficiency. Where hearings are virtual:
 - mandate private and confidential in-hearing attorney-client communication;
 - take breaks whenever youth need them; and,
 - do not conduct evidentiary hearings virtually without consent of the defense.
- Understand the drivers that prevent youth from engaging in remote hearings and counseling and work to mitigate them.
- Recognize the implicit racial bias inherent in decisions to detain children of color due to public health paternalism and perceptions of safety in their communities, and make every effort to keep children out of custody and at home with their caretakers.

During the pandemic, juvenile congregate care facilities must:

- Recognize that COVID-19 mitigation strategies can have unintended negative consequences on the health and wellbeing of youth, and make every effort to ensure that mitigation strategies, such as medical quarantine, are not punitive and are implemented in a humane and compassionate manner.

During the pandemic, juvenile defense attorneys should:

- Continue to zealously advocate for their clients' health, safety, and legal rights.
- Where systemic issues have negatively impacted their ability to zealously advocate for their clients, litigate those issues and demand full due process for their clients.
- Maintain effective communication with their clients. Young clients need more information, not less, when the system is not operating as it should.
- Identify and litigate disparate treatment of and decisions made about youth of color.

After the pandemic, juvenile courts should:

- Discontinue all virtual hearings, as court convenience does not outweigh the 14th Amendment.
- Ensure court processes and procedures do not infringe upon young people's access to counsel.
- Ensure all youth are equally protected under the law, and examine and address drivers of racially disparate treatment of youth.
- Provide all services in-person unless the court can ensure equity and resolve the digital divide.

After the pandemic, juvenile defense attorneys should:

- Object to virtual court hearings unless they are in line with a client's stated interests.
- Utilize virtual communication options only to increase communication opportunities, not as a substitute for in-person client contact.
- Advocate for in-person services where they are in line with a client's stated interests.
- Through litigation and policy advocacy, ensure that constitutional shortcuts put in place during the pandemic do not continue, paying particular attention to the rights afforded to and the treatment of youth of color.



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