OVERDUE FOR JUSTICE:

AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN MICHIGAN

NJDC | NATIONAL JUVENILE DEFENDER CENTER

Nat. Juvenile Defender Ctr., Overdue for Justice: An Assessment of Access to and Quality of Juvenile Defense Counsel in Michigan (2020)

Report design by Jason Killinger

OVERDUE FOR JUSTICE:

AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN MICHIGAN

A report of the National Juvenile Defender Center

Primary Author:
Kim Tandy
Criminal and Juvenile Justice Consultant
Justice by Design, LLC

Contributors & Editors:
Amy Borror
Justice Systems Analyst

Tim Curry
Legal Director

Yolanda Long
2019–2020 Gault Fellow

Jaime Michel
Research Manager

Mary Ann Scali
Executive Director

ACKNOWLEDGMENTS

The National Juvenile Defender Center would like to express its most sincere appreciation to the many juvenile court stakeholders in Michigan who provided assistance to our assessment team. Your insights and perspectives have added significant value to this report and have made our report stronger and more relevant to the needs of your state.

We thank the judges, referees, and court administrators who welcomed us and provided essential information about the operations of their courts. We also thank defense attorneys, prosecutors, probation officers, facility directors and staff, policymakers, advocates, and others who shared their experiences and knowledge as we visited counties across Michigan.

This assessment would not have been possible without the guidance and support of many others, particularly Supreme Court Chief Justice Bridget McCormack and Justice Elizabeth Clement; Loren Khogali and Kristen Staley of the Michigan Public Defense Commission; Jonathan Sacks, Executive Director of the State Appellate Defender Office; Kim Thomas, University of Michigan; Mary Beth Kelly, Chair of the Governor's Juvenile Justice State Advisory Group; Tom Clement, General Counsel for the Michigan Supreme Court; and Terri Gilbert, University of Michigan. Special thanks to former Chief Justice Stephen Markman for his support of this project at its inception. Thank you also to Kim Thomas and her student Allie Horwitz for their work on the summary of Michigan law and court rules.

Sincere thanks to Arnold Ventures for its support of this assessment and the work of the National Juvenile Defender Center. The views expressed herein are the authors' and do not necessarily reflect the views of the funder.

The 20 individuals who made up the assessment team were an exceptional group, bringing decades of experience in juvenile defense systems to the counties in Michigan. This team conducted comprehensive interviews, observed delinquency courts, toured detention facilities, participated in meetings, and engaged in pre- and post-site visit briefings. Their individual and collective perspectives throughout the process were invaluable in ensuring this report reflects the best possible understanding of the juvenile defense system in Michigan. We thank each and every one of them.

Assessment team members included:

Cindy Aragon
New Mexico Legal Aid
Bernalillo, NM

Amanda Bear
Children's Law Center, Inc.
Lexington, KY

Jill Beeler
Office of the Ohio Public Defender
Columbus, OH

Amy Borror
National Juvenile Defender Center
Washington, DC

Jackie Bullard
Illinois Juvenile Defender Resource Center
Springfield, IL

Brooke Burns
Office of the Ohio Public Defender
Columbus, OH

Angela Chang
Hamilton County Public Defender
Cincinnati, OH

Stacie Colling
Colorado Office of the Alternative Defense Counsel
Denver, CO

Jill Johnson
Marion County Public Defender Agency
Indianapolis, IN

Amy Karozos
Indiana Public Defender Council
Indianapolis, IN

Aneesa Khan
National Juvenile Defender Center
Washington, DC

Chris Kleiser
Knox County Public Defender's Community Law Office
Knoxville, TN

Jeff Liston
Law Offices of Jefferson Liston
Columbus, OH

Marie Osborne
Consultant
Miami, FL

Diane Rondini
Wisconsin State Public Defender
Madison, WI

Amanda Powell
Consultant
Columbus, OH

Ji Seon Song
Stanford Law School
Stanford, CA

Kim Tandy
Justice by Design
Indianapolis, IN

Tasha Williams
Utah Juvenile Defender Attorneys
Salt Lake City, UT

Jennifer Woolard
Georgetown University
Washington, DC

National Juvenile Defender Center staff, consultants, and law clerks provided myriad assistance over the course of this assessment. They supported the compilation, coding, and analysis of data; synthesized notes; prepared briefing materials; edited drafts; and completed final production of this report.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The National Juvenile Defender Center (NJDC), in partnership with its regional juvenile defender centers and other key stakeholders, has embarked on a nationwide strategy to assess access to and quality of juvenile defense afforded to youth in conflict with the law. Because juvenile legal systems are a state and local responsibility, rather than a federal one, this requires a state-by-state assessment of access to and quality of juvenile defense counsel. To date, NJDC has conducted such assessments in 27 states.

NJDC's assessment of Michigan's juvenile defense system is both necessary and timely. Michigan has already recognized its constitutional obligation to ensure and fund an effective system of indigent defense for adults. Following litigation and a report critical of the state's public defense system, Michigan is undertaking significant reform of its system of providing publicly funded counsel to people facing prosecution in adult criminal court. For the first time, the state is requiring county public defense services to meet minimum standards, and the state legislature has dedicated significant funding to support improvements in counties' systems.

These reforms and the state's financial investment, however, do not apply to counsel provided to youth who face prosecution in the state's juvenile courts.

This assessment report provides an overview of Michigan's system of juvenile defense. It examines the extent to which youth in delinquency court are provided with well-qualified and effective counsel at all critical stages and addresses systemic barriers that may impede effective representation and hamper due process and equal protection of the law. It measures structure, funding, and service delivery against the traditional markers of an effective juvenile defense delivery system based upon constitutional protections, national standards, and ethical obligations of juvenile defenders.

Some of the key findings of the assessment include:

- Michigan has no state-level system of oversight or enforcement mechanisms to ensure that county based juvenile defense delivery systems provide effective trial-level or post-disposition services, as constitutionally required.
- The absence of state funding for juvenile defense has perpetuated local juvenile defense systems in which attorneys frequently lack the training, resources, and time necessary to provide the quality of defense services youth deserve. As a result, young people's constitutional rights are often inadequately protected, their voices are not heard, and they may miss opportunities to be connected to successful pathways forward.
- Youth and families are too often saddled with fees, fines, and costs assessed by juvenile courts, including attorney fees. There is little advocacy by lawyers or others to limit these costs and to mitigate the hardships families face as a result.
- Requiring youth and parents to reimburse counties for the cost of constitutionally required defense counsel creates a barrier to the appointment and/or scope of representation.
- Michigan juvenile courts show a strong commitment to ensuring that youth are provided with representation at all critical stages, but some jurisdictions can improve to guarantee the early appointment of counsel, restrict youth waiver of counsel, and require counsel to remain on a case until all orders of the court are terminated.

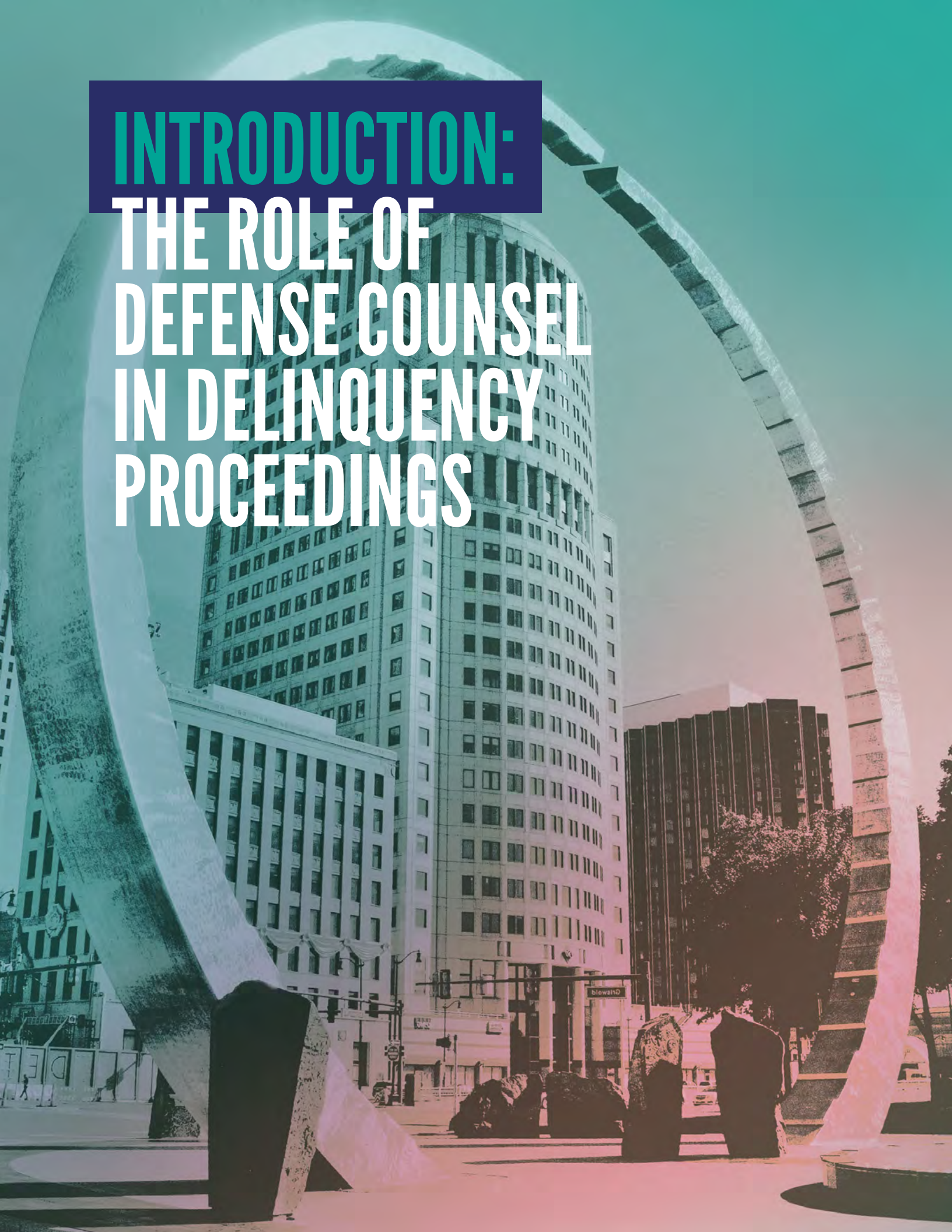
The assessment team was encouraged by the enthusiasm across the state, including at the highest governmental levels, to strengthen and improve defense services for youth in delinquency court. The report identifies promising practices and makes recommendations for reform at the state and local levels.

Among other recommendations, this report encourages Michigan to:

- Create a system of state oversight of juvenile defense delivery systems to ensure youth have access to effective representation at all critical stages.
- Establish mandatory state standards for trial-level juvenile defense delivery systems that are juvenile-specific and provide sufficient independence from the judiciary.
- Expand the role of the State Appellate Defender Office to include appeals of juvenile delinquency and status offender cases, juvenile-specific training, and other support to trial-level delinquency defenders.
- Ensure adequate funding to support a system of juvenile defense services that provides effective assistance of counsel.
- Eliminate juvenile court-related fees, fines, and costs imposed on youth and families.

The areas of improvement recommended by this assessment can and should be addressed by a broad spectrum of both private and public stakeholders. By building on its existing strengths, Michigan can meet its obligation to ensure that all youth have access to well-trained, effective lawyers in delinquency proceedings and ensure better outcomes for its young people, their families and communities, and the entire State of Michigan.

Young people are guaranteed the right to counsel by the United States Constitution; the quality of representation they receive cannot be dependent upon the county in which they reside. The State of Michigan has both a constitutional obligation to provide every youth with a qualified defense attorney who has the resources needed to properly defend their client and a moral imperative to ensure its young people are provided every opportunity for success.



INTRODUCTION: THE ROLE OF DEFENSE COUNSEL IN DELINQUENCY PROCEEDINGS

It has been more than 50 years since the landmark Supreme Court decision in *In re Gault* established the right to counsel for children in delinquency proceedings.[1] Yet in many jurisdictions across the country, youth still navigate the juvenile court system without an attorney or are appointed a lawyer who lacks the skills, resources, and support to provide effective representation.

The right to effective assistance of counsel throughout the entirety of a youth's involvement in the legal system is critical.[2] The Supreme Court has recognized that, in certain circumstances, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[3] Where there are severe structural limitations or the absence of traditional markers of effective representation, appointment of counsel may be superficial and represent a constructive denial of counsel.[4] This is equally, if not more true in juvenile cases, where the unique qualities of juvenile defense demand specialized training and skills on the part of counsel.[5] The failure to provide counsel, whether actual or constructive, is a denial of due process.

Juvenile defenders must insist on fairness of proceedings and ensure the child's voice is heard throughout all stages of the process, in order to safeguard the due process and equal protection rights of the child.[6] The juvenile defender is the only legal 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.[7] This role differs from other juvenile court stakeholders such as the judge, probation officer, guardian *ad litem*, or prosecutor, who are to consider the perceived "best interests" of the child. The *Gault* decision made clear that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts."[8] Juvenile defense counsel must abide by the "expressed interest" of the child, or the child is consequently denied the fundamental right to counsel.[9]

---

1 *In re* Gault, 387 U.S. 1, 36 (1967).
2 *See* McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970) (stating that "the right to counsel is the right to the *effective* assistance of counsel" (emphasis added)).
3 United States v. Cronic, 466 U.S. 648, 659-60 (1984).
4 *See* Statement of Interest of the United States, 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.
5 *See* Statement of Interest of the United States, N.P. v. State, No. 2014-CV-241025 (Ga. Super. Ct. Mar. 13, 2015) [hereinafter Statement of Interest in N.P.], https://www.justice.gov/file/377911/download.
6 *See Gault*, 387 U.S. at 36.
7 "Expressed-interest" (also called stated-interest) representation requires that counsel assert the client's voice in juvenile proceedings. 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. *See* Nat'l Juvenile Defender Ctr., National Juvenile Def. Standards, Standards 1.1, 1.2 (2012) [hereinafter National Juvenile Defense Standards], https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf; *see also* Model Rules of Prof'l Conduct r. 1.2 - 1.4, 1.8, 1.14 (Am. Bar Ass'n 1983).
8 *In re* Winship, 397 U.S 358, 365-66 (1970).
9 *See* Statement of Interest in N.P., *supra* note 5.

Effective juvenile defense requires specialized practice, wherein the attorney meets the same obligations due to an adult client, but which also requires expertise in juvenile-specific law and policy, the science of adolescent development and how it impacts the charges against a young person, skills and techniques for effectively communicating with youth, the consequences of legal system involvement specific to youth, and the ability to navigate numerous other systems impacting the trajectory of the case, such as families, schools, and adolescent mental health.[10] Children differ from adults in their cognitive, emotional, and behavioral capacity, requiring defenders to thoughtfully engage when communicating with them to craft legal arguments based upon reduced culpability and increased capacity for rehabilitation.[11]

Juvenile defenders must ensure a client-centered model of advocacy to empower and advise the child client, and to better equip children to understand and make important and well-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 dispositional plan proffered by the state, or to offer alternatives.[12]

Indigent defense delivery systems must provide juvenile defenders with the necessary training, support, and supervision. Attorneys must have sufficient time to communicate and build rapport with child clients, conduct a proper investigation into the facts and law of the case, engage in motions practice, adequately prepare for hearings, and monitor the rights and interests of their clients after disposition and while they are still under the jurisdiction of the juvenile court.[13]

States have an obligation to ensure that children are afforded the due process protections enumerated more than 50 years ago in the *Gault* decision, including the vital role of qualified defense counsel. Merely having counsel present for children in these proceedings is inadequate if appointed counsel do not have sufficient time, resources, and expertise to provide effective advocacy. For this reason, both access to counsel and quality of representation are essential elements of protecting due process rights.

10 National Juvenile Defense Standards, *supra* note 7, Standard 1.3.

11 See 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) [hereinafter Ten Core Principles], http://njdc.info/wp-content/uploads/2013/11/10-Core-Principles.pdf.

12 *See* Nat'l Juvenile Defender Ctr., Role of Juvenile Defense Counsel in Delinquency Court 9 (2009) [hereinafter Role of Juvenile Defense Counsel], https://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf; *see also* Ten Core Principles, *supra* note 11.

13 Statement of Interest in N.P., *supra* note 5, at 14.

NJDC's Assessments of Juvenile Defense Systems

The National Juvenile Defender Center (NJDC) is devoted to promoting justice for all children by ensuring excellence in juvenile defense. For nearly 25 years, NJDC has worked to better understand how the defense of young people in juvenile court is delivered, state by state, and to support improvement in the delivery of those services.

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

NJDC has conducted statewide assessments of juvenile defense systems in 27 states.[14] These assessments not only gather information and data about the structure and funding of defense systems, but also examine whether youth receive counsel at all critical stages, the timing of appointments, waiver of counsel, resource allocation, supervision and training, and access to investigators, experts, social workers, and support staff. Reports note promising practices within a state and offer recommendations for improvements.

Several consistent themes have emerged across these state assessments, including: an array of systemic barriers prohibiting youth from receiving timely access to qualified juvenile defense counsel, juvenile defense not being recognized or acknowledged as a specialized legal practice, and juvenile defense being significantly under-resourced. Since the *Gault* decision, juvenile defense systems have faltered and failed in many jurisdictions, leaving far too many children defenseless in courts of law across the country.[15]

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

14 Nat'l Juvenile Defender Ctr., State Assessments, https://njdc.info/our-work/juvenile-indigent-defense-assessments/.

15 *See generally* Nat'l Juvenile Defender Ctr., Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel (2017) [hereinafter Access Denied], https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf.

Methodology

NJDC began its assessment process in Michigan in early 2018 with the support of then-Chief Justice Stephen Markman, who issued a letter to local courts asking for their participation and cooperation in conducting the assessment. NJDC staff and consultants conducted a series of meetings with multiple stakeholder groups from private and public entities to gather information and initial insights into Michigan's juvenile defense delivery system.

Simultaneously, NJDC and partners began a deep dive into the juvenile code, caselaw, and statutes related to juvenile defense, as well as a review of existing reports and analyses of the indigent defense and juvenile legal systems. After evaluating a wide range of factors, NJDC identified ten counties for site visits considered to be representative of the heterogeneity found in counties across the state, along such criteria as population size, geographic location, presence or absence of a detention facility, ethnic/racial diversity, urban/suburban/rural setting, type of juvenile defense delivery system, and the number of delinquency petitions filed annually.

Site visits to these ten counties were conducted by a 20-member assessment team that included current and former public defenders, private practitioners, academics, and juvenile justice advocates. Each assessment team member had several years of experience and in many cases was considered a national expert in the field of juvenile defense. The assessment team was trained on assessment protocols and participated in briefings regarding their respective counties, as well as research, reports, and background information about Michigan's juvenile court and indigent defense systems.

Two assessment team members were sent to each of the ten selected jurisdictions, where they conducted interviews, court observations, and tours of courthouses and juvenile detention centers. Using interview questionnaires developed by NJDC and specifically adapted for use in Michigan, the assessment team interviewed defense lawyers, prosecutors, judges and referees, court administrators, probation officers and supervisors, detention facility staff, and staff involved in the collection and reimbursement of fees, fines, and other costs. Interviews included questions about the role and performance of defense counsel, access to counsel at all critical stages, and systemic impediments to effective representation. Jurisdictions are not specifically identified in the report in order to maintain confidentially ensured to interview participants and so that the report is focused on statewide issues and not individual county issues.

Jointly, the assessment team completed 162 confidential interviews and observed 121 court proceedings across the ten counties. They also collected documentation regarding local administrative orders describing the appointment of counsel, data and forms regarding appointment of counsel and waiver of counsel, juvenile court data and financial information, and relevant information concerning the imposition, collection, and enforcement proceedings regarding fees, fines, and other costs in juvenile court. Completed questionnaires, court and facility observation forms, and other documentation were submitted to NJDC for incorporation into this assessment report. The interview questionnaires and court and facility observation forms were coded and analyzed using NVivo, a qualitative data analysis computer software, to identify trends and outlying practices and policies.

This report, including its recommendations and implementation strategies, is the result of a yearlong assessment of Michigan's system of providing counsel to youth in delinquency proceedings. It assesses Michigan's juvenile defense system in the context of what is constitutionally required and uses national standards, research, and best practices to exemplify what juvenile defense systems should minimally provide. The report can provide a roadmap to reforms that can further the integrity of the juvenile legal system by ensuring adequate due process and equal protection of the law through well-trained, effective lawyers for all youth, regardless of geography.

Michigan has already proven its commitment to improving its juvenile court system and its system of indigent defense. It can take the next step in ensuring justice for children by carefully considering the findings, recommendations, and discussion of best practices that follow.

Michigan's Juvenile Defense Systems

> ***"The framework for justice in this nation is the United States Constitution and leaders of all branches of government must champion, uphold, and defend the rights it endows—especially rights for children . . . Effective juvenile defense reform begins with championing the due process rights of children."***
>
> Nat'l Juvenile Defender Ctr., Defend Children: A Blueprint For Effective Juvenile Defender Services Recommendation 1.0 (2016).

This assessment of Michigan's juvenile defense system is both necessary and timely. Michigan has demonstratively recognized its constitutional obligation to ensure and fund an effective system of defense for adults by creating the Michigan Indigent Defense Commission (MIDC) and developing enforceable standards.[16] These changes are intended to address longstanding constitutional deficiencies in the criminal legal system identified by various reports and litigation.

The Michigan legislature recognized that requiring counties to comply with increased standards, monitoring, and enforcement must be accompanied by an influx of funding from the state. MIDC began with an initial appropriation of $2.4 million, which funded 14 full-time staff, who aided the Commission in developing initial standards and acted as liaisons to counties as they created and submitted individual plans to comply with those standards.[17] In the first year of implementation, the legislature appropriated $84 million to fund all MIDC-approved county compliance plans.[18]

The state has formally adopted four initial standards approved by the MIDC—regarding training and education, initial client interviews, experts and investigators, and counsel at first appearances. The MIDC has also approved its next group of standards and is currently awaiting formal state adoption—regarding independence from the judiciary, defender workload limitations, qualification and review of attorney assignments in adult criminal cases, and attorney compensation.[19] MIDC has also made recommendations in three areas: adequate funding to support and maintain standards, a statewide data collection system to enable MIDC to assess the impact of the new standards and identify best practices, and establishing continuity to support local systems in institutionalizing best practices.[20] All of these changes are welcome news for those who have advocated for systems change in Michigan's defense services.

16 Mich. Comp. Laws §§ 780.981-780.1003 (2020).
17 Mich. Indigent Def. Comm'n, 2018 Impact Report Correcting the Crisis: Ten Years After the NLADA's Evaluation of Michigan's Trial Level Indigent Defense System 8 (2019) [hereinafter 2018 Impact Report], https://michiganidc.gov/wp-content/uploads/2019/05/2018-Impact-Report.pdf.
18 *Id.* at 13.
19 *Id.* at 21.
20 *Id.* at 26-27.

Juvenile defense practice in Michigan is not subject to any state standards, receives no state funding, and has no consistent, effective monitoring or enforcement mechanism in place to ensure youth receive effective counsel at all critical stages.

But these reforms specifically exclude the system for delivering juvenile defense services to youth in delinquency courts.[21] In fact, the appointment of counsel in Michigan trial courts was historically governed by Michigan Court Rule 8.123.[22] The rule required trial courts to adopt administrative orders describing the procedures used for the selection, appointment, and compensation of lawyers appointed by the court to represent indigent parties.[23] Plans required approval by the State Court Administrator to ensure they "protect the integrity of the judiciary."[24] Under the rule, trial courts were mandated to submit an annual report of the total public funds paid to each attorney or collectively to an affiliated group of attorneys for appointments by that court.[25] That rule was rescinded, however, in September 2019 and there is no current law governing or oversight body monitoring the administration of juvenile defense services in the state of Michigan.[26]

Despite sweeping reforms of the criminal defense system, little attention has been given to whether youth in Michigan receive well-trained, competent representation in juvenile courts. Juvenile defense practice in Michigan is not subject to any state standards, receives no state funding, and has no consistent, effective monitoring or enforcement mechanism in place to ensure youth receive effective counsel at all critical stages. By failing to address the shortcomings in the juvenile system, the state risks creating large disparities in the state's obligations to those charged with offenses, simply due to their age.

This report makes clear that Michigan's current service delivery for delinquency representation is inadequate to ensure constitutional guarantees for children are protected. The teams that visited counties across Michigan for this assessment were encouraged by the enthusiasm across the state, including at the highest governmental levels, to strengthen and improve defense services for youth in delinquency court. The areas of improvement recommended by this assessment can and should be addressed by a broad spectrum of both private and public stakeholders. By addressing the gaps in policy and practice identified herein, youth in Michigan will be ensured a more fundamentally fair and just judicial process.

Michigan's current service delivery for delinquency representation is inadequate to ensure constitutional guarantees for children are protected.

21 Mich. Comp. Laws § 780.985(3) (2020) (stating "The MIDC shall propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout this state."). Adult is defined in § 780.983(a) as an individual 17 years of age or older, or an individual younger than 17 if they are subject to adult criminal jurisdiction by virtue of their charges.

22 *See* Mich. Ct. R. 8.123 (repealed 2019).

23 Mich. Ct. R. 8.123(B) (repealed 2019).

24 Mich. Ct. R. 8.123(C) (repealed 2019).

25 Mich. Ct. R. 8.123 (D) (repealed 2019).

26 Rescission of Rule 8.123 of the Michigan Court Rules, No. 2018-27 (Sept. 19, 2019) [hereinafter Rescission of Rule 8.123], https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2018-27_2019-09-18_FormattedOrder_RescissionOfMCR8.123.pdf.

KEY FINDINGS

I. ACCESS TO COUNSEL & QUALITY OF REPRESENTATION

Children charged with delinquency have a fundamental constitutional right to notice of the charges against them, the right to counsel, the right to confront and cross-examine witnesses against them, and the right against self-incrimination.[27]

As to the appointment of counsel, the United States Supreme Court in *Gault* noted:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that with respect to proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel that counsel will be appointed to represent the child.[28]

Counsel for children in the delinquency system must be recognized as an essential component of a developmentally appropriate juvenile justice system.[29] "The essence of access to justice for children *is* access to counsel."[30] It is defense counsel who must insist upon the fairness of the proceedings, ensure the child's voice is heard throughout every stage of the process, and safeguard the due process and equal protection rights of the child.[31] Defense counsel is the only stakeholder in the proceeding who is mandated to advocate for the protection of the youth's rights in a manner consistent with the youth's express wishes.[32]

National best practices call for juvenile courts to ensure and safeguard the right to counsel for youth. The National Council of Juvenile and Family Court Judges (NCJFCJ), in conjunction with the 50th anniversary of the *Gault* decision, issued a judicial information card reminding jurists that access to counsel is essential to due process.[33] Beyond being a foundational matter of justice, having counsel appointed increases the perception of fairness and strengthens the legitimacy of the court.[34] When youth believe that they are being treated fairly by the system, the chances for recidivism are reduced.[35]

---

27 *See Gault*, 387 U.S. 1.
28 *Id.* at 41.
29 Nat'l Juvenile Defender Ctr., Defend Children: A Blueprint For Effective Juvenile Defender Services 13 (2016) [hereinafter Defend Children], https://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf.
30 *Id.*
31 *See* Model Rules of Prof'l Conduct r. 1.2 - 1.4, 1.8, 1.14 (Am. Bar Ass'n 1983).
32 *See* National Juvenile Defense Standards, *supra* note 7.
33 Nat'l Council of Juvenile & Family Court Judges, Honoring Gault: Ensuring Access to Counsel in Delinquency Proceedings (2016) [hereinafter Honoring Gault], https://www.ncjfcj.org/wp-content/uploads/2016/08/Access-to-Counsel-Policy-Card-Final-8.18.16.pdf.
34 *Id.* at 1.
35 *Id.* quoting Nat'l Research Council, Reforming Juvenile Justice: A Developmental Approach 6 (Richard Bonnie et al. eds., 2013).

Michigan appellate courts have affirmed this constitutional right to counsel in matters where a youth may face commitment to an institution or be transferred to adult court.[36] Michigan statutes and court rules go farther, however, and require that courts appoint counsel for youth in delinquency proceedings[37] and for certain status offenses if one of the following circumstances is present:

> (a) The child's parent refuses or fails to appear and participate in the proceedings.
>
> (b) The child's parent is the complainant or victim.
>
> (c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.
>
> (d) Those responsible for the child's support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.
>
> (e) The court determines that the best interests of the child or the public require appointment.[38]

Michigan court rules require that youth who are not represented by retained counsel be advised of the right to counsel "at each stage of the criminal proceedings," and if the youth has waived that right, the court must affirm the youth does not want an attorney.[39]

Under current Michigan law, the right to counsel continues after disposition in some circumstances. The court must appoint an attorney to represent a child at a review hearing and at a parole revocation hearing.[40] Attorneys appointed by the court to represent a party in a delinquency action must serve until discharged by the court.[41]

Michigan Family Division court orders that may be appealed as a matter of right include orders that place a youth under court supervision or remove the youth from home, or "any final order."[42] No court rule requires Family Division courts to advise youth of the right to appeal following a disposition involving court supervision or placement outside of the home.[43]

---

36 *See* Walls v. Director of Institutional Services Maxie Boy's Training School, 269 N.W.2d 599, 602 (Mich. Ct. App. 1978) (recognizing the right to counsel in delinquency proceedings that occur after an adjudication if the youth may face commitment to an institution); People v. McGilmer, 291 N.W.2d 128, 129 (Mich. Ct. App. 1980) (recognizing the constitutional right to counsel in all adjudicatory proceedings); People v. Hana, 504 N.W.2d 166, 174 (Mich. 1993) (recognizing the constitutional right to judicial or "traditional waiver" proceedings).

37 Mich. Comp. Laws § 712A.17c(2) (2020); Mich. Ct. R. 3.915(A)(2)(a)-(e).

38 Mich. Comp. Laws § 712A.17c(2)(a)-(e) (2020).

39 Mich. Ct. R. 3.915(A).

40 Mich. Comp. Laws § 712A.18d (4) (2020); Mich. Ct. R. 3.945(B)(2).

41 Mich. Ct. R. 3.915(D)(1).

42 Mich. Ct. R. 3.993(A)(1)-(4).

43 *See* Mich. Judicial Inst., Juvenile Justice Benchbook: Delinquency and Criminal Proceedings 20.2 (3d ed. 2020), https://mjieducation.mi.gov/benchbooks/juv-just. *But see* Mich. Ct. R. 3.915(A) (requiring the advisement of the right to counsel at all stages of a criminal proceeding). Appeals in many instances are a matter of right.

A. Waiver of Counsel

> ***"Every child who faces prosecution or sanctions imposed by the state, including children accused of status offenses, should be represented by counsel throughout the duration of their case. Counsel is the gateway through which a child receives crucial rights, protections, and entitlements—and those can only be meaningfully guaranteed if a child first has access to an attorney."***
>
> Nat'l Juvenile Defender Ctr., Defend Children: A Blueprint For Effective Juvenile Defender Services Recommendation 2.0 (2016).

Juvenile courts should be wary of allowing youth to waive the right to counsel. NCJFCJ suggests that such waivers should only occur "after a child has had meaningful consultation with a qualified juvenile defense attorney about the potential direct and collateral consequences of such a decision."[44] Without that, a finding that the waiver was knowingly, intelligently, and voluntarily made would be difficult to determine in light of the developmental capacity of children before the court.[45]

NCJFCJ also admonishes courts not to accept an admission or plea at an initial hearing without first finding that the youth has had a meaningful consultation with an attorney.[46]

For a child to waive the right to counsel in Michigan, the court must ensure the waiver is made in open court, on the record, and with a finding that it was voluntarily and understandingly made.[47] Youth may not waive if a parent, guardian, legal custodian, or guardian *ad litem* objects, or if the court determines the best interest of the youth or the public requires appointment.[48] If a youth is unrepresented during plea proceedings, the court must advise the youth of the right to the assistance of counsel at each stage of the proceedings.[49] It is best practice for courts to require that the youth and their parent, guardian, or custodian sign a waiver form.[50] However, there is nothing in Michigan law that allows any party to waive the youth's right to counsel without the youth's express agreement.

---

44 Honoring Gault, *supra* note 33, at 2.
45 *Id.*
46 *Id.*
47 Mich. Comp. Laws § 712A.17c(3) (2020) states: "Except as otherwise provided in this subsection, in a proceeding under [§ 712A.2(a) or § 712A.2(d) (violations of law or ordinance and status offenses)], the child may waive his or her right to an attorney. The waiver by a child shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made. The child may not waive his or her right to an attorney if the child's parent or guardian ad litem objects or if the appointment is made under [§ 712A.17c(2)(e) ("The court determines that the best interests of the child or the public require appointment.")]."
48 Mich. Ct. R. 3.915(A)(3) states: "Waiver of Attorney. The juvenile may waive the right to the assistance of an attorney except where a parent, guardian, legal custodian, or guardian ad litem objects or when the appointment is based on [r. 3.915(A)(2)(e) (best interest of public or juvenile require appointment)]. The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made."
49 Mich. Comp. Laws § 712A.17c(1) (2020); *See also* Mich. Ct. R. 3.915(A)(1) (stating that this advice is required "at each stage of the proceedings on the formal calendar, including . . . plea of admission").
50 *In re* Bennett, 355 N.W.2d 277, 280 (Mich. Ct. App. 1984).

Michigan has affirmed the constitutional requirements for ensuring counsel for children through both legislation and court rules, including in post-disposition hearings. In practice, courts appear to take this responsibility seriously.

In several of the counties visited, the right to counsel and the appointment of counsel occur automatically and almost without exception. Many judicial officers interviewed were adamant that they did not permit youth to waive counsel, or that it was extremely rare. Most of the other stakeholders interviewed also responded that youth seldom, if ever, waive counsel in their counties.

Of the 121 court hearings observed during site visits, more than 70 percent of youth were represented from preliminary and/or pre-trial hearings through disposition and post-disposition hearings. Of those youth who were unrepresented, the highest percentages were in post-dispositional hearings such as reviews (31%) or violations of probation (17%). A few youth without lawyers were in drug court (although an attorney from the public defender sat in those hearings, they did not represent the youth) or were charged with truancy. Of those youth who were unrepresented, more than half were from one county.

Court observations conducted during site visits revealed that in some instances, unrepresented youth were not properly advised of their right to counsel, nor was an appropriate waiver-of-counsel colloquy conducted to ensure the youth understood the possible consequences of waiving counsel.

For example, during a probation revocation hearing, observers reported that the court asked a youth and their guardian if they wanted an attorney, and they said no. The referee informed the child that *if he denied the allegation*, he would have the right to a hearing, the right to an attorney, the right to subpoena and cross examine witnesses, the right to testify, and the right to silence. The referee did not state that the young person had these rights regardless of whether he denied or admitted the allegation. In this case, the court ordered the youth be detained for four days until another review hearing. Had the right to a lawyer not been conditioned on the child denying the allegation, had the potential consequences of self-representation and the choice not to waive the right to counsel been explained, and had a lawyer been present to provide alternatives beyond detention, the case might have had a different outcome.

Court observers reported another instance in which a hearing to "re-evaluate detention" was held without counsel present, or any advisement of the right to counsel. Although the mother tried to advocate for her son and talked about his history of trauma, the youth did not get an opportunity to read a prepared letter he had written for the court. The youth was remanded to detention, and the court observer remarked, "it was a forgone conclusion that he was going to be remanded [back to detention]." Defense counsel could have made a difference in providing the youth with a voice during the hearing and advocating for the youth's release based upon statutory criteria and a prepared plan providing an alternative to detention.

Interviews and court observations revealed that some youth were not appointed counsel if it appeared their case would move to the consent calendar, essentially a "hold open" diversion status. For example, court observers saw an 11-year-old child with disabilities who entered into a post-filing diversion agreement without an attorney and with no meaningful advisement of the charges, consequences, or rights of the youth. The youth had retained counsel, but decided to proceed without counsel. There was no advisement given about the dangers of proceeding without counsel, nor was an appropriate waiver of rights made. Representation by counsel is important even in these cases, however, as this diversionary status may not be successful and the youth may return to court, having already made an admission in court in order to be diverted.

Multiple factors can directly or indirectly influence whether a youth waives the right to counsel. For example, youth may be offered a quick resolution to their case during the first hearing, either as a plea or acceptance of a diversion program. On its face, this can be an appealing option to some youth and families who feel like diversion will help them quickly move past the case. However, when the decision is made without consideration of the potential lifelong collateral consequences, implications of longer-term court supervision, the extent of the programming or services the youth and family will be required to comply with, and the wide range of fees, fines, and other costs that may be assessed and accumulate[51] — all things around which an attorney could advocate — the perceived benefits of waiving quickly disappear.

Where, as in Michigan, there is no presumption of indigence for youth, and/or the cost of counsel is likely to be imposed on the youth or family, financial factors may well influence whether and to what extent counsel is appointed in the case, or the duration of that counsel's involvement. The indigence determination itself may serve to delay the appointment of counsel or hinder the willingness of the parents or youth to seek counsel for the child.[52]

During a site visit, one lawyer hypothesized that the high waiver rate in that county could be attributed to "those who have figured out they are getting charged for their attorney." The family gets a packet of information before pretrial and "can check a box if they want an attorney." "Kids look to the parent for advice and the parent says no, especially by the time they have seen the bill and their kid is not facing a probation violation. Kids know it costs money too."

The Michigan State Court Administrative Office posts on its website a form for the Waiver of Attorney/Request for Appointment of Attorney to be signed by a youth, parent, and judicial officer.[53] That form states:

> I am a juvenile and I understand I have the right to be represented by an attorney at all hearings in the family division of the circuit court. If I or the person responsible for my support cannot afford an attorney or refuses or neglects to retain an attorney for me, the court will appoint an attorney to represent me. Knowing this, I freely waive the right to the assistance of an attorney. (Youth Signature)
>
> I have explained the right to the assistance of an attorney as provided by law and court rule and am satisfied that the above waiver is voluntarily and understandingly made. I accept the waiver. (Judicial Signature)

This language requires that the youth be advised of the right to counsel, but conditions the appointment of counsel on the inability of a parent to pay or refusal on the part of the parent to retain an attorney. It does not require the court to advise the youth about the dangers of self-representation or otherwise explain to the youth why it is advantageous to have an attorney. It provides no explanation as to what factors a judge might consider to determine whether the waiver is "voluntarily and understandingly made," and it does not require that youth first consult with an attorney prior to waiving the right to counsel.

51 *See* Defend Children, *supra* note 29, at 17 Recommendation 2.3.
52 *Id.* at 16 Recommendation 2.2.
53 Mich. Judicial Circuit Waiver of Counsel or Request for the Appointment of Counsel, https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/jc06.pdf (last visited Feb. 20, 2020).

Youth should be provided lawyers in all cases, uniformly, without requiring a determination of indigence and without the added constraint of parent reimbursement looming over the proceeding. The cost of counsel, when imposed on the guardian—often at full cost—may have a deterrent effect on whether and for how long youth receive the benefit of counsel guaranteed to them through all proceeding types. As noted throughout this report, the imposition of attorney fees can create conflict between the child and guardians when payment creates financial hardship on the family, and must be weighed against the cost of housing, food, and other household expenses.

Youth should also receive counsel during probation revocation hearings, truancy proceedings, and proceedings resulting in placement on the consent calendar, particularly where such proceedings require admissions of guilt prior to diversion. Each of these types of cases carry with them the potential of restrictions on youth's liberty—whether that be incarceration, placement in non-secure settings, or other restrictions on a youth's freedom of movement—as well as the potential for other life consequences, such as obstacles to education, housing, employment, and community integration. Counsel should remain on the case throughout the pendency of proceedings until the court terminates jurisdiction; termination of counsel's services at disposition should not be driven by costs which will be assessed to the guardian. A more detailed discussion of this issue can be found in section III. B. regarding fees, fines, and other costs.

While most youth receive the benefit of counsel at critical stages, Michigan courts can do better to ensure that waiver of counsel does not occur unless a child first consults with an attorney, and that representation is not hampered by the imposition of attorney fees.

B. Timing of Appointment of Counsel

Counsel's effectiveness can be severely impacted if they are not appointed early in the process. As the National Council of Juvenile and Family Court Judges has recommended, courts should ensure that counsel be appointed for all youth prior to the first court appearance to allow time for the attorney to meet with the youth and be present and prepared for the first hearing.[54]

The requirements for early appointment of counsel may well extend to counsel for youth during police interrogation. The United States Supreme Court has recognized the inherent imbalance of power when children are interrogated by police,[55] which can be particularly true for youth of color, due to disparate policing practices.[56] Research has demonstrated that compared to adults, youth have more difficulty understanding the elements of *Miranda* and its significance.[57] Having access to an attorney at interrogation can reduce the likelihood that coercive police tactics result in false confessions or other statements that can be used against young people facing prosecution.[58]

Developmental research suggests that youth may be more susceptible than adults to interrogation pressures because they:

- Are more susceptible to immediate rewards and have more difficulty in anticipating the consequences of their actions
- Are less likely to understand the legal process or their rights
- Have less impulse control and are more prone to risky decision-making
- Are more likely to comply with authority
- Are more susceptible to peer influence

Nat'l Juvenile Defender Ctr., Special Caution Required: The Realities Of Youth Interrogations (2019).

54 Honoring Gault, *supra* note 33, at 2.; Defend Children, *supra* note 29, at 15 Recommendation 2.1; *see also* Nat'l Council of Juvenile & Family Court Judges, Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases 78-79 (2005), https://www.ncjfcj.org/wp-content/uploads/2019/10/Juvenile-Delinquency-Guidelines.pdf.

55 Haley v. Ohio, 332 U.S. 596, 599-600 (1948).

56 *See* Joshua Rovner, *Racial Disparities in Youth Commitments and Arrests*, The Sentencing Project (Apr. 1, 2016), http://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/; U.S. Dep't of Justice Civil Rights Div. & U.S. Attorney's Office N. Dist. of Ill.., Investigation of the Chicago Police Department 143 (2017), https://www.justice.gov/opa/file/925846/download; U.S. Dep't of Justice Civil Rights Div., Investigation of the Baltimore City Police Department 63, 65, 67, 87, 101 (2016), https://www.justice.gov/opa/file/883366/download.

57 Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1160 (1980) (finding that "[a]s a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension . . . The vast majority of these juveniles misunderstood at least one of the four standard Miranda statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the Miranda rights" and that the level of comprehension of youth 16 and older was comparable to that of adults, but was inadequate when using adult norms of Miranda.

58 *See* J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011) (noting that the inherent coercion of custodial interrogation "is all the more troubling — and . . . all the more acute — when the subject . . . is a juvenile"); Joshua A. Tepfer, Laura H. Nirider, & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887 (2010) (exploring the reasons that youth are particularly vulnerable to false confessions).

Under the Michigan Juvenile Code, youth have a statutory right to counsel "at each stage of the proceedings on the formal calendar, including trial, plea of admission, and disposition."[59] For youth who are charged with an offense that would be criminal if committed by an adult, courts must advise the youth of the right to counsel at each stage of proceedings.[60]

Michigan Court Rules require the court to advise a child of their right to an attorney if the court plans to conduct a preliminary hearing.[61] Appointment of counsel may be required before a preliminary hearing is conducted, because a youth may not waive the probable cause phase of a preliminary hearing if the youth is not represented by counsel,[62] and preliminary hearings may not be conducted without a parent or guardian present unless an attorney appears with the youth.[63]

The right to counsel attaches to corporeal identifications conducted at or after initiation of adversarial proceedings.[64] There is no right to counsel during photographic lineups.[65] Youth are not entitled under Michigan law or court rules to have appointed counsel during police interrogations.

Assessment site visitors found that courts do not consistently appoint attorneys prior to an initial hearing to ensure sufficient time and preparation.

Stakeholder interviews and court observations revealed that while it was common for youth to be advised of their right to counsel at an initial preliminary hearing, if the youth was detained, counsel was not always appointed prior to that hearing, limiting case preparation time or even the attorney's availability for court. Similarly, youth in the community appeared to be advised of the right to counsel during pre-trial hearings, but not all counties provided counsel at these proceedings. Regardless of the youth's custody status, a probation officer may have advised the youth of their right to counsel in advance, or the youth may have received paperwork by mail that advised them of this right. However, knowing there is a right to counsel is not the same as being afforded the opportunity to access that right in an effective way.[66]

For example, the assessment team found that some counties informed youth of the right to counsel during the first preliminary hearing, but no counsel was present. If the child wanted an attorney, there would be a one- to two-week delay regardless of whether the child was detained. That same practice was true for youth not detained, where counsel was appointed at pre-trial proceedings, but the hearing was adjourned until a lawyer received the appointment.

> ***If the child wanted an attorney, there would be a one- to two-week delay.***

In one county, stakeholders explained that when the family comes to court for the first time, they are asked if they have an attorney, and if not, they are asked if they would like one. They are not advised of the youth's *right* to an attorney. In that county, the guardian is given the waiver form, and if the guardian signs the form, there is no separate requirement for the child to waive their right to counsel despite the fact that it is the child's right, not the guardians'. Rights are read in the courtroom after the right to an attorney has already been waived. In the same county, however, youth are automatically appointed counsel for preliminary hearings.

59 Mich. Comp. Laws § 712A.17c(2) (2020).
60 Mich. Comp. Laws § 712A.17c(1) (2020). By Court rule, however, the requirement of this advisement is "at each stage of the proceedings on the formal calendar, including trial, plea of admission and disposition." Mich. Ct. R. 3.915(A)(1).
61 Mich. Ct. R. 3.935 (B)(4), 3.915(A)(1).
62 Mich. Ct. R. 3.935(D)(2).
63 Mich. Ct. R. 3.935(B)(1).
64 People v. Hickman, 684 N.W.2d 267, 272 (Mich. 2004).
65 People v. Kurylczyk, 505 N.W.2d 528, 534 (Mich. 1993).
66 *See* Gault, 387 U.S. at 42 ("This knowledge is not a waiver of the right to counsel . . . If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel.").

For youth detained on weekends, stakeholders stated that preliminary hearings were often conducted without counsel being present, and that hearings were rescheduled for the following Monday when an attorney could be present. In at least one county, however, a system was developed for counsel to be available and present on weekends to cover preliminary hearings.

> ***If the guardian signs the form, there is no separate requirement for the child to waive their right to counsel despite the fact that it is the child's right.***

Site visitors did find that some courts had a rotation system or standby counsel available to provide representation for youth who were detained. These attorneys were expected to be present during a preliminary hearing and to meet with youth prior to the hearing. In a larger county, a group of attorneys provided the representation automatically for youth who were detained and had not retained counsel, although that representation did not continue after the preliminary hearing.

All courts should have a system in place to ensure that youth receive timely access to an attorney, in advance of their first appearance before the court and with sufficient time for the attorney to prepare for the hearing, including weekend preliminary hearings. Such systems promote more efficient handling of cases and help youth navigate the complexities of the juvenile court system in order to make better decisions at each juncture.

Several attorneys interviewed for this assessment noted that many of their clients had already spoken to the police prior to counsel being appointed, and as a result, plead out early in the process. As one noted, "Most kids have already confessed before the first preliminary hearing, so most of the pleas happen at that first hearing." Only one attorney interviewed mentioned the idea of challenging a *Miranda* waiver for a client, which is concerning given the research that highlights how developmental capacity and maturity can affect the ability of youth to waive *Miranda* rights (see sidebar on page 23).

A young person whose family is able to hire private counsel would do so at the time the youth is interrogated by police. Michigan should recognize interrogation as a critical stage and require the automatic appointment of counsel to all children.

> ***"Most kids have already confessed before the first preliminary hearing, so most of the pleas happen at that first hearing."***

C. Client Contact & Communication

The attorney-client relationship is fundamental to providing effective representation. Early and frequent contacts are also important to enable the attorney to build rapport, confidence, and trust with the youth.[67] Juvenile defense counsel must be aware of the unique characteristics of each client and take the necessary time to get to know the child's strengths and to integrate them into the case at each step.[68]

Regular contact with child clients is important to ensure they have information about and understand the proceedings in which they are involved.[69] This contact is also essential to obtaining key information about potential witnesses, preserving evidence, preparing motions, understanding the client's mental and physical health—including competence to stand trial or mental state at the time of the incident—and gathering other records, including any delinquency history or reports about prior arrests detention, school, or other services.

Counsel should use age-appropriate language with youth clients to ensure they are fully informed and proactive participants in their representation.[70] Youth should have the benefit of previewing hearings before they occur and reviewing hearings with counsel afterwards, with ample time to ask questions and raise any concerns.[71] Communication outside of the courtroom is also important to keep youth informed about how the case is proceeding.[72] Youth should have a safe and confidential environment and sufficient time in which to speak with their counsel.[73]

Assessment team members found that lawyers often have limited communication with their child clients, regardless of whether the child is detained throughout the proceedings. Many, if not most, of the defense attorneys interviewed said they made efforts to meet with the youth prior to a preliminary hearing, even if just for 15 minutes. One noted, "I meet with them before the detention hearing in an ordinary case. It can be pretty chaotic because there is nowhere to place them." One attorney noted he does not get to speak to his clients until they are brought to lockup a few minutes before a hearing, and that he cannot go to the detention center because he does not yet have the appointment order.

Several attorneys interviewed enumerated challenges with maintaining contact with child clients, including children and guardians not showing up for appointments, transportation problems, and lack of phone access. One defender noted that "since they don't pay us by the hour, there is no incentive to talk to the client." Another noted that they don't have information ahead of time to talk to the youth about. Some lawyers noted that they meet with the clients on the day of court, although there is a lack of space available in some courthouses for these meetings. One noted the somewhat private place available was in the stairwell.

The response from attorneys about their communication with their detained child clients varied significantly. Location of the facility was one factor attorneys cited as having an impact on their ability to communicate with their youth clients. In one county where there was no local facility, attorneys noted that they did not typically travel to the facility to meet with their clients, but spoke with them by phone. In another county, where facilities are one to three hours away, attorneys noted that phone contact was not satisfactory so they request youth be transported to court earlier so they can spend time with them prior to the hearings. Communication with child clients over the phone can make it even more difficult to engage in meaningful conversations about the case and raise concerns about confidentiality.

In counties with detention centers close by, regular contact was noted more frequently by several attorneys. One noted he went once a week, and also sent social work interns over when youth had questions. Others noted that while they met with their clients at the courthouse when they

67 National Juvenile Defense Standards, *supra* note 7, Standard 2.1.
68 *Id.* Standard 2.1 cmt.
69 *Id.* Standard 2.4 cmt.
70 Role of Juvenile Defense Counsel, *supra* note 12, at 23; *see also* Model Rules of Prof'l Conduct r. 1.4. (Am. Bar Ass'n 1983).
71 Role of Juvenile Defense Counsel, *supra* note 12, at 23.
72 *Id.* at 24.
73 *Id.*

were brought from detention, the rooms were not conducive to private conversations. In one larger county, one of the regular juvenile defense lawyers noted, "Other than in the courtroom, or just outside the courtroom, there are no formal client appointments and no formal interview processes."

Detention facility staff interviewed had strong feelings about this issue. In one county with full-time defenders, the facility had notably positive comments about the interaction of youth with attorneys. "[Staff] sometimes hear the youth saying positive things about their lawyers: 'Youth are getting information when they need to.' 'I'm a fan of their public defender office and feel as though they communicate very well about a complex system.' 'Their hearts are in the right place in terms of advocacy.' 'They're doing things to support youth and families in the community.'" If there was a criticism, it was that there were not enough public defenders for the number of clients, so they were not able to spend enough time with the youth.

But more commonly, facility staff felt that attorneys could do a better job of visiting and communicating with their detained clients. One noted, "[T]here is a disconnect in contact between defense attorneys and the children. Private attorneys do come to meet with the children. No one would stand for a private attorney not coming. But all children should have this contact. Attorneys should be required to maintain contact with their clients even if by phone."

In another facility, a staff member noted that they rarely see attorneys. "I'm unsure of how many attorneys see the kids at court but very few attorneys visit kids in the facilities. We've had kids here for extended periods of times, and they'll see attorneys only once. For more high-profile cases, regular visits."

Staff at another facility noted that the lack of attorney communication impacts youth and staff: "Most kids tell me they don't understand what goes on in the hearings. It's hard on my staff because while we can discuss the situation somewhat, we cannot discuss the hearing. Kids think it's Law and Order: let me tell you about my case. We're not here for that."

Funding seemed to factor into the time that lawyers were spending visiting youth in detention. One facility administrator thought the attorneys in his small rural jurisdiction were experienced and understood the rehabilitative purposes of the juvenile court. Yet, he did not see many attorneys visit youth who were detained, and believed the money being paid to these lawyers limited the amount of time they spent on cases. "I think that sometimes this court is second fiddle for the attorneys." There were reports by attorneys paid by proceeding type who noted they were not able to bill for visiting their client in detention unless it was tied to a specific hearing, and even then it was not always approved for payment.

> ***"Most kids tell me they don't understand what goes on in the hearings."***

Some facility administrators also expressed concern that attorneys did not sit in when their detained client was being interviewed by police. In one jurisdiction, a facility administrator noted that there are probably about ten requests a year from officers who want to interview youth at the facility. "I will always make sure that a staff member reaches out to the child's attorney. Some attorneys say no, some say okay, and some will call the police officer directly to discuss the situation. Most of the time if there is a police interview the attorney will not sit in on it."

> ***Most of the time if there is a police interview the attorney will not sit in on it.***

Attorneys need more time to build rapport with their child clients in confidential settings. Attorneys should be compensated for time spent reaching out to clients and their guardians, and the contact should not be limited to short periods of time just before hearings. For youth who are detained, it is particularly important that attorneys have the capacity to maintain regular contact as part of rapport building, to ensure the youth is safe in the facility, and to continue to explore options to secure release where possible.

D. Preliminary Hearings

It is well-established U.S. Supreme Court precedent that the government must establish probable cause for detained persons within 48 hours of arrest.[74] Detaining youth for more than 48 hours without a finding of probable cause has been interpreted as unconstitutional.[75]

It is incumbent upon defense lawyers to prepare as best as possible for detention hearings, often with limited time, and to make probable cause arguments relative to lack of evidence regarding a charged offense or a sufficient nexus between the client and the offense.[76] "Defense counsel have a duty 'to explore promptly the least restrictive form of release, the alternatives to detention, and the opportunities for detention review, at every stage of the proceedings where such an inquiry would be relevant.'"[77]

Under Michigan law, youth can be detained or continue to be detained if there is probable cause to believe that the youth committed the offense and if there are other factors that suggest it would be unsafe to release the youth or that if released, the youth would not return to court.[78] Generally, youth must be placed "in the least restrictive environment that will meet the needs of the juvenile and the public," and otherwise meets the statutory requirements.[79]

If probable cause is found and if there are other factors that suggest detention is warranted, the court must also consider a number of factors to determine whether a youth can be released, with or without conditions. Those factors include the youth's relationship with family, prior delinquency record, nature of the offense, history of failure to appear, character and mental condition, and others.[80]

The assessment team observed 27 preliminary hearings, either initial or extended. Court observations and stakeholder interviews provided a snapshot of how these proceedings were conducted and how defense attorneys challenged probable cause and advocated for release from detention.

According to nearly three-quarters of stakeholders interviewed, probable cause was seldom or never challenged by defense attorneys, and a handful of those interviewed did not believe it applied in juvenile proceedings. One defense lawyer noted that it was the standard in adult court, but in juvenile court, "state the phrase 'probable cause' and people roll their eyes." At least one noted that "we don't have the paperwork in time," so he never challenged probable cause. Some defense lawyers noted that the court had the police report and packet at pretrial stages, but the defense attorney did not, because prosecutors claimed there was not time to do redactions beforehand. This failure of courts to provide defense with initial paperwork leaves defense counsel without sufficient information about the charges against their clients

74 Cty. of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991).

75 U.S. Dep't of Justice Civil Rights Div., Investigation of the Shelby County Juvenile Court 17-18 (2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv_findingsrpt_4-26-12.pdf.

76 Nat'l Juvenile Defender Ctr., Ten Principles for Providing Effective Defense Advocacy at Juvenile Detention Hearings 3 (2008) [hereinafter Ten Principles for Juvenile Detention Hearings], https://njdc.info/wp-content/uploads/2014/07/Ten-Principles-for-Providing-Effective-Defense-Advocacy-at-Juvenile-Detention-Hearings.pdf.

77 *Id.* at 1 (quoting Inst. For Judicial Admin. & Am. Bar Ass'n, Juvenile Justice Standards, Standards Relating To Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition, Standard 8.2 (1979)).

78 Mich. Ct. R. 3.935(D)(1) (Factors, in addition to probable cause, that are necessary before a youth may be detained include: "(a) the offense alleged is so serious that release would endanger the public safety; (b) the juvenile is charged with an offense that would be a felony if committed by an adult and will likely commit another offense pending trial, if released, and (i) another petition is pending against the juvenile, (ii) the juvenile is on probation, or (iii) the juvenile has a prior adjudication, but is not under the court's jurisdiction at the time of apprehension; (c) there is a substantial likelihood that if the juvenile is released to the parent, guardian, or legal custodian, with or without conditions, the juvenile will fail to appear at the next court proceeding; (d) the home conditions of the juvenile make detention necessary; (e) the juvenile has run away from home; (f) the juvenile has failed to remain in a detention facility or non-secure facility or placement in violation of a valid court order; or (g) pretrial detention is otherwise specifically authorized by law.").

79 Mich. Ct. R. 3.935(D)(4).

80 Mich. Ct. R. 3.935(C)(1).

to either challenge probable cause or otherwise adequately raise issues pertinent to the youth's defense.

Many defense lawyers and judicial officers noted that probable cause could be challenged and that defense attorneys could request an evidentiary hearing. It appeared rare, however, that probable cause was *not* found during a preliminary hearing or that it was even tested. The preliminary hearings were held by referees, and in some counties, prosecutors did not attend. Evidentiary rules do not apply in these hearings. Generally, no witnesses were called, except perhaps a caseworker who discussed the child's status in detention.

Probable cause was seldom or never challenged by defense attorneys.

In contrast to what was observed regarding probable cause, stakeholders noted that defense counsel were much more aggressive in advocating for their clients' release from detention. A strong majority of those interviewed noted that lawyers regularly advocated for youth to be released, but noted that it could sometimes be an uphill battle if parents resisted having a child returned, there were safety factors in the home, and/or there was a lack of good detention alternatives.

Observers and interviewers identified other key systemic barriers that inhibited effective detention advocacy and noted some general concerns with detention practice.

During court observations, some assessment team members reported that courts conducted hearings by video from the detention center, rather than bringing the youth to the courtroom, where they would have easy access to their attorney. One attorney noted that in his jurisdiction, it was up to the detention supervisor to determine if they would bring the child to the courtroom for the hearing, even though the detention center was next door. Observers noted that this created a structural impediment to effective advocacy at these hearings. Youth were unable to speak privately with their lawyers when hearings were conducted in this manner, and in some cases, the hearing had to be stopped and the room cleared so that the attorney could speak with the youth without others hearing. It is hard to imagine that lawyers would stop proceedings each time they wanted to consult with their client privately.

Effective detention advocacy is critical for every aspect of a youth's case, including developing initial theories of defense, establishing rapport with the client, and gathering critical information about client strengths and interests.[81] It sets the stage for building trust and developing a working relationship. It is important, therefore, that the youth know who will be representing them during a preliminary hearing and thereafter, particularly if the youth remains in detention.

In one of the larger counties, attorneys who handled preliminary hearings routinely did not remain on the case. Some of those interviewed suggested that the practice of reassigning lawyers after a preliminary hearing may play a role in their not appearing invested in individual clients. As noted by one detention center staff member, "PDs are judged on how many cases they close. Some kids should not be here at all—there are kids sitting here after a preliminary hearing with no lawyer for weeks until a new one is assigned. The detention lawyer does not follow the case most of the time. It could be the next week or several weeks."

Some kids should not be here at all—there are kids sitting here after a preliminary hearing with no lawyer for weeks.

81 Ten Principles for Juvenile Detention Hearings, *supra* note 76, at 1.

Other structural impediments to effective detention advocacy include insufficient resources dedicated to detention alternatives, the disproportionate confinement of youth of color and other over-represented groups at this stage, and inadequate time to meet with clients.[82] In counties where hearings are conducted by video from the detention center rather than in person in the courtroom, counsel should ensure they have adequate access to the youth, including the ability for confidential communications throughout the process. Otherwise, they should advocate for their clients to be present with them the courtroom.

Michigan courts should ensure that youth do not go unrepresented at this critical stage and that counsel is appointed in advance of the hearing with sufficient time to consult with the client, review police reports or other necessary documents, and have access in person to their clients for advice and consultation. Attorneys should be well-versed in the statutory elements of the offenses and able to challenge probable cause findings and the grounds for continuing detention. Defenders should receive training on and understand current research on the risk of harm from detention and use this research in framing arguments against detainment.[83]

82 *Id.*
83 *Id.* at 4.

E. Case Preparation, Discovery, Investigation, Motions, & Experts

The Supreme Court in *Gault* recognized the importance of the assistance of counsel in juvenile proceedings, comparing it in seriousness to a felony prosecution.[84] "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."[85] In order to provide that guiding hand, the attorney needs to look beyond cursory information about a case and assess possible defenses and mitigation. In most cases, it requires a combination of independent investigation, review of discovery, motions practice, and consideration of experts.

Counsel has an obligation to thoroughly and promptly conduct an independent investigation into the facts and circumstances of each client's case.[86] Investigations are important even when a client has expressed the desire to admit to the allegations. They may yield information that could support suppression of key evidence or otherwise limit the client's culpability, or may uncover information useful in negotiating a more favorable plea agreement or disposition alternative.[87] This includes having a theory of the case from which counsel will operate while preparing for trial or mitigation,[88] interviewing defense and state witnesses,[89] obtaining and reviewing discovery,[90] and representing the client through pre-trial motion practice.[91]

Proper investigation and case preparation also requires that defenders have access to the use of expert services throughout the process.[92] This includes access to services such as "evaluation by and testimony of mental health professionals, education specialists, forensic evidence examiners, DNA experts, ballistics analysts and accident reconstruction experts."[93] It must also include litigation support services, including "interpreters, court reporters, social workers, investigators, paralegals and other support staff."[94]

Assessment team members found that pre-trial practices tended to be informal, with sparse motion practice, lack of access to experts, and limited tools to assist defenders in effective investigations and case preparation.

When asked about the preparedness of attorneys during the pre-trial stage, responses from judicial officers and prosecutors were mostly positive. Most felt that the attorneys in their courtrooms were "always" or "often" prepared. One referee noted that usually the cases were pretty straightforward, and that "there isn't much they need to do to prepare." She also provided extra time for the parties to confer to make sure everyone was ready to proceed. Another court official noted that attorneys in his courtroom were of high caliber and came prepared, although occasionally when an attorney was substituted this was not the case. One judge noted that the preparedness of lawyers in his courtroom showed they cared about the youth and their families and are invested in their success.

But not all judicial officers felt the lawyers in their courtrooms were properly prepared. In one county, a referee noted that "[v]ery few attorneys prepare for pre-trial. It's just the reality. Unless the child is facing a very serious charge, the attorneys don't get excited." Another referee from the same county noted, "Overall the level of advocacy is terrible. There are attorneys who literally do not talk to their clients before the hearing. I love it when kids are represented by good attorneys—it makes me think and act like a lawyer." Judicial officers in another county noted that lawyers frequently substitute

84 *Gault*, 387 U.S. at 36.
85 *Id.*
86 National Juvenile Defense Standards, *supra* note 7, Standard 4.1.
87 *Id.* at n.146.
88 *Id.* Standard 4.2.
89 *Id.* Standard 4.3.
90 *Id.* Standard 4.5.
91 *Id.* Standard 4.7.
92 Ten Core Principles, *supra* note 11, Principle 4.
93 *Id.* Principle 4A.
94 *Id.* Principle 4B.

for one another, and that those substitute lawyers do not always understand the case, and in some instances, do not even practice criminal law or understand it.

One indicator of effective case preparation is an active motions practice. Motions practice in delinquency proceedings was reportedly very limited in the courts visited. Almost without exception, defenders interviewed said they "seldom" or "never" file pre-trial motions. Doing so may, in fact, be discouraged.

One referee noted that it was rare "for various reasons. In one county the prosecutor won't give you a plea if you file pre-trial motions. In another, it's very hard to get a court date [if you file a pre-trial motion]." Such systemic barriers discourage the defense from fully understanding the breadth of the case and favor a system that does not test the state's accusations. A referee in a larger county noted she has had only one substantive motion in her delinquency court in the last four to five years.

Discovery motions were reportedly seldom filed in delinquency proceedings in the counties visited. Many of the defenders interviewed noted that they get discovery without a written motion, although sometimes it was very last minute. In one county, defenders noted a court rule regarding discovery, which although a civil proceeding, did not allow for depositions or interrogatories in delinquency proceedings. In another county, with "open discovery practice," attorneys noted that the relationship between the prosecutors and defense counsel was generally good, and there was generally no need for discovery motions.

Motions may be filed more often in cases with a judge demand, since referees do not conduct trials. A defender in a larger county noted that while they sometimes see Fourth or Fifth Amendment issues in cases, prosecutors often tried to resolve those issues through negotiation.

Defenders, prosecutors, and judges disclosed that the use of experts was minimal in the counties visited. The vast majority of defenders, prosecutors, and judicial officers interviewed noted that defenders seldom use experts in juvenile cases. One referee noted that she has not seen an expert used in her 20 years on the juvenile delinquency bench.

One referee noted that she has not seen an expert used in her 20 years on the juvenile delinquency bench.

Some gave examples, such as requests for a competency expert or a sex offender assessment. Only one defender noted she frequently obtained competency experts, but the experts were court experts and not independently retained defense experts. Only one judicial officer noted having a competency hearing with a non-court ordered evaluator, and that was done by a privately retained attorney. One defender noted that she did not believe they had access to expert funds.

While the use of experts was reportedly minimal, the use of investigators was for the most part reported to be non-existent in juvenile delinquency cases. An attorney in a large county noted, "I do my own investigations. I don't have access to them." Almost without exception, defenders noted they never use the services of an investigator. Well-trained and well-resourced investigators are a vital part of a young person's defense team. Lawyers who do not utilize an independent investigator run the risk of being unable to effectively cross-examine witnesses if their stories change over time.

Assessment findings suggest that the somewhat more informal nature of juvenile court proceedings may be impeding the right to due process of law and the rigorous investigation and pre-trial preparation essential to effective defense. While a majority of stakeholders felt that pretrial advocacy was sufficient, many admitted that key basic defense practices related to case preparation were commonly unfulfilled. Whether that was due to a belief that juvenile cases are less serious or to a culture of practice was unclear. Nonetheless, defenders in Michigan who practice in juvenile court must have the resources they need to adequately prepare a defense, including access to experts and investigators, and sufficient time to file and litigate motions when appropriate.

F. Adjudication Hearings

Youth clients have the ultimate authority to accept a plea offer or to proceed to trial, but should do so only after counsel has conducted an investigation and assessed the strengths and weaknesses of the case.[95] Defense counsel must work to understand the goals and expectations of their youth clients prior to engaging in plea negotiations or conveying any offers made by prosecutors.[96] This is particularly critical in juvenile courts, where there is the likelihood of fees, fines, and restitution, as well as other collateral consequences such as the impact of juvenile court involvement on education, public housing, immigration status, and more.[97]

Only a small percentage of juvenile delinquency cases go to trial in Michigan, as is the case in many states. Michigan Family Division Courts disposed of 23,928 juvenile delinquency cases in 2018.[98] Of this number, 55 percent (13,295) were not charged or were diverted, placed on the consent calendar, or dismissed by a party or the court.[99] Of the remaining cases, 12 jury trials and 134 bench trials were conducted, and 7,991 cases were resolved by guilty plea or admission.[100] The remainder were waived, transferred, dismissed for incompetency, or inactive.[101]

1. Admissions & Guilty Pleas

If a youth client decides to plead guilty, it is incumbent upon defense counsel to ensure the client understands the rights being forfeited by entering into a plea agreement and is aware of the consequence of doing so.[102]

Most stakeholders interviewed confirmed that the vast majority of juvenile cases result in a plea agreement. When asked about how frequently cases were resolved by admission/plea, it was clear that this was by far the most common case disposition if the case was not diverted or otherwise dismissed. There were many factors noted that account for this high number.

The level of preparation prior to pleading varied from county to county and attorney to attorney. Some attorneys noted that they work closely with their youth clients and enter a plea only after a thorough review of the case. In one small jurisdiction, an attorney noted, "I go through everything to make sure the kid understands what guilty means . . . There is an ongoing plea negotiation and I never plead straight up. I bring the youth into my office for a face-to-face meeting . . . I advise the client about what to expect. I go over the evidence and look for witnesses, if any. I do some investigation. I do law enforcement interviews. I do pretrial interviews with the state's witnesses if they will talk to me. I use the subpoena mechanisms . . ."

Other attorneys focused their response to the plea process on the fairness of offers. "The offers are usually fairly reasonable. If not, I ask for a trial which puts pressure on the state to make a better offer—which usually happens."

95 National Juvenile Defense Standards, *supra* note 7, Standard 4.9.
96 *See id.* Standards 1.2, 4.9.
97 *Id.* Standard 4.9 cmt.
98 Mich. Ct., Statewide Circuit Court Summary: 2018 Court Caseload Report 2 [hereinafter Mich. 2018 Court Caseload Report], https://courts.michigan.gov/education/stats/Caseload/reports/statewide.pdf.
99 *Id.*
100 *Id.*
101 *Id.*
102 National Juvenile Defense Standards, *supra* note 7, Standard 4.10.

But while some cases may be resolved by plea after a thorough investigation and in consideration of the fairness of the plea offer, others appear to plea as a result of less positive circumstances. One lawyer noted that in the counties in which he practices, some plea agreements happen at the first preliminary hearing. "The kid has already confessed before the first preliminary hearing, but I make sure he understands the plea agreement." As discussed earlier, very few stakeholders interviewed for this assessment acknowledged any defense challenges to the admissibility of statements youth make to the police. There were reports of pressure to resolve cases in some counties at the magistrate level. A referee noted, "[A]s a result of limited resources, the attorneys want to settle cases quickly and at all costs. This is a disservice to youth. Sometimes they [the youth] are reluctant and then all of the sudden they want to plead. They [the defenders] get too much pressure from judges to keep cases off of the judges' docket."

Out-of-court meetings would improve representation. But they don't get paid to meet with clients.

In some counties, there appears to be a financial incentive for attorneys to prefer plea agreements, given the payment structure related to taking a case to trial. As one member of the court noted, "Representation by appointed counsel depends on the person. Some attorneys have nothing to add on behalf of their kid. One attorney pleads kids to whatever is charged. Some just want to plead kids and others don't make any money and don't receive any benefit but they do a better job." "Out-of-court meetings would improve representation. But they don't get paid to meet with clients," noted another judge.

2. Trials & Fact-Finding Hearings

In those cases where the client chooses to proceed to trial, defense counsel must engage in effective trial practice activities including filing relevant motions,[103] preparing witness testimony,[104] making appropriate motions and objections throughout the course of the proceedings,[105] preparing and conducting cross-examination of the government's witnesses, and presenting witnesses for the defense and other necessary and relevant evidence.[106]

In 2018, of all the petitioned cases that were not dismissed or diverted, less than two percent went to a fact-finding hearing. A judicial officer from a larger county noted that in the past year, she had only two trials. There were no defense witnesses, no defense motions, no defense pre-trial interviews of any state witness, no presentation of any physical evidence on behalf of the child, and only cursory preparation. In another mid-sized county, a judicial officer noted that there is little advocacy on the part of the lawyers, and that she has only seen one trial in the last four years. In another larger county, a judicial officer noted that the prosecutor has a "no plea negotiation policy," and that attorneys do not push back by setting cases for trial and trying them to counter this.

There were no defense witnesses, no defense motions, no defense pre-trial interviews of any state witness, no presentation of any physical evidence on behalf of the child, and only cursory preparation.

103 *Id.* Standard 4.7.
104 *Id.* Standard 5.2.
105 *Id.* Standards 5.2, 5.3, 5.8.
106 *Id.* Standards 5.5, 5.6, 5.8, 5.9.

Although Michigan allows youth the right to have a jury trial, very few juvenile cases are tried to a jury. In 2018, state court statistics show only 12 jury trials were conducted in juvenile cases.[107] Some judicial officers noted that they have had several jury trial demands, but that they are usually resolved before trial. Defenders noted that they may use jury demands for leverage in cases where they feel they should get a better offer.

Recognizing the lack of juvenile defense specialization, one court official noted that defenders need to "raise juvenile-specific law—especially in making determinations about decisions to detain, recidivism, home environment. Ninety percent of delinquency cases are really abuse/neglect cases that were never investigated."

> ***Defenders need to raise juvenile-specific law—especially in making determinations about decisions to detain, recidivism, home environment.***

Judicial officers had many opinions about the strengths and challenges of their juvenile defense system and the ways in which cases were disposed. Some felt they were fortunate to have such a strong, talented pool of attorneys on their list with significant experience handling major crimes. Others cited the lack of training, experience, and resources as a significant concern.

While many delinquency cases get resolved through diversion, dismissal, or other informal means, the vast majority are resolved by plea agreement, often at a preliminary hearing or pretrial. Attorneys must have sufficient time, resources, training, experience, and skills to conduct a proper investigation and examine the best options for case resolution in consultation with the client. Public defense systems must pay juvenile defense attorneys sufficiently to meet the legal and ethical obligations of representing youth clients, avoiding disincentives for conducting tasks necessary for effective representation.

107 Mich. 2018 Court Caseload Report, *supra* note 98, at 2.

G. Disposition Hearings

> ***"[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability."***
>
> *Miller v. Alabama*, 567 U.S. 460, 476 (2012) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)).

Effective disposition planning begins at the start of the case, with the first meeting between the lawyer and the youth. The role of counsel at disposition is essentially the same at earlier stages of the proceedings: to advocate, within the bounds of the law, for the best outcome available under the circumstances according to the client's view of the matter.[108]

Counsel must be well-versed in the range of dispositional alternatives and identify least restrictive options that can be provided to the youth.[109] Counsel should understand the unique nature of the client's interests, including educational and mental health status and family dynamics.[110] In courts that assess fees for placement costs, supervision, and other services, counsel should be familiar with these financial assessments and advocate against the burden of such expenses to the youth and family.[111]

Across stakeholder groups, it was noted that advocacy by defense counsel was likely to occur during the disposition phase. More than two-thirds of those responding to interview questions about disposition advocacy indicated that defense counsel regularly challenged the recommendations made by probation officers. At times, however, defenders may be challenged by a lack of resources or a lack of understanding of the available resources and how to utilize them. In some cases, assessment team members and stakeholders noted that defenders could do a better job of advocating for alternatives to placement or diversion of the case on the consent calendar.

Defenders had strong opinions about working with probation officers as part of the dispositional hearing process. Several defenders expressed satisfaction overall with the recommendations made by the probation officers, even if they opposed some of them or asked for modifications. One noted, "I have a lot of confidence in the probation department, but I might challenge recommendations like substance abuse counseling, jail tours, or other restrictions. I also request reviews several times a year—judges can reverse dispositions."

But other defenders expressed frustration with probation officers and the system of care generally, noting concerns about lack of communication and over-reliance on services. "We have concerns about the qualifications of the POs doing intake. We have a hard time getting a copy of the recommendations 24 hours in advance. Many kids stay on probation too long, although the current model is helping to shorten that time," noted one defender.

108 *See* Inst. For Judicial Admin. & Am. Bar Ass'n, Juvenile Justice Standards Annotated: A Balanced Approach 89-91 (Robert E. Shepherd. Jr., ed. 1996), https://www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf; National Juvenile Defense Standards, *supra* note 7, Standards 1.1, 6.1.

109 National Juvenile Defense Standards, *supra* note 7, Standard 6.2.

110 *Id.* Standard 6.2 cmt.

111 *Id.*

Another defense attorney felt that probation officers "start to sound like the prosecutors—they start getting worn out with the client and behaviors" rather than focusing on ways to promote success. He also noted that the review committee for placements was given too much latitude and it was hard to challenge. Many youth in his jurisdiction were sent out of state.

In one county visited, a number of individuals felt the defense attorneys could be better advocates for keeping youth out of the system and for getting them out earlier. As one detention center official noted, "Once kids enter the system it is very hard to get out. Parents have little control over when kids get out. The lawyers could be better advocates for keeping kids out of the system and shortening the length of stay in detention or placement. Kids know lots of decisions are being made but do not know when or by whom. Providers often cherry pick kids and are not focused on returning them home."

> ***The lawyers could be better advocates for keeping kids out of the system and shortening the length of stay in detention or placement.***

In another county, a referee noted, "Counsel make no individualized advocacy at disposition—probation does, but attorneys really don't. Most are not prepared and agree with recommendations with no negotiation."

A group of service providers in one county noted the lack of information and training among defense attorneys in understanding the unique needs of youth in their system. One stated, "[W]e have one training about our system with prosecutors—we cannot ever think of a time when [the defense bar] has asked us for training on what we do and how we do it."

Another service provider noted that their caseloads now have more youth with long-term trauma exposure, and they have very specific needs. "Attorneys need to understand this better and ask more questions about whether and which placements can deal effectively with this population."

Court observations and interviewee responses noted that dispositions often occur on the same date as the pretrial hearing after a youth has entered a plea or admission, although this will usually not happen unless the parties agree. In some jurisdictions, it is common for the defense attorney to get a disposition report the day of the hearing without having spoken previously to the probation officer.

Disposition hearings can have a profound impact on youth and family over the course of months, and often years. They can result in fees, fines, and other costs depending upon the level of services imposed on the youth, and can require significant time and effort from the youth and other family members. They may or may not be tailored to the individual needs of each child, which is concerning in light of research that links the proper matching of services with a child's individually identified needs as a factor in reducing recidivism.[112] Disposition is one of the most critical stages, requiring well-trained, well-resourced defense attorneys who understand the impact of adolescent development, disabilities, and trauma exposure, and can effectively advocate for the clients' wishes.

Public defenders must have access to information about their clients in advance of disposition hearings, including disposition recommendations that will be made by probation staff, and effectively advocate for alternatives in line with their client's wishes and in keeping with the least restrictive alternatives. Juvenile-specific training in effective disposition advocacy should be a requirement for attorneys defending young people in juvenile court.

112 Tracey A. Vieira, Tracey A. Skilling & Michele Peterson-Badali, *Matching Court-Ordered Services with Treatment Needs: Predicting Treatment Success with Young Offenders*, 36 Crim. Just. & Behav. 394 (2009) (finding that youth who were given services that did not match their actual needs were 18 times more likely to recidivate than youth who received services targeted to match their individualized needs).

H. Post-Disposition Representation

It is critical for youth to have access to counsel after disposition when they remain under the jurisdiction of the court or a state agency. Because juvenile courts are supposed to be, at least in part, predicated on rehabilitation and helping youth successfully return to their communities, defense attorneys can play an important role in eliminating obstacles to success in the post-disposition phase of a case. National standards recognize that counsel should remain in contact with their clients and continue advocacy on the client's behalf at post-disposition hearings such as reviews, conditions of confinement, modification or termination of dispositional orders, right to release, placement issues, and revocation hearings.[113]

Counsel is also required to assist youth who wish to appeal. Regardless of whether the trial attorney intends to represent the youth on appeal, counsel must advise the client of the right to appeal a final order and the potential outcomes of doing so, and must take appropriate steps to preserve the right to appeal.[114] It is the responsibility of trial counsel to file a notice of appeal and preserve the right when the client chooses to appeal, and to assist the youth with obtaining appellate counsel.[115]

1. Appeals

Appeals provide an essential mechanism to review the work of trial courts, further develop and interpret the law, and correct errors, yet very few cases get appealed from juvenile courts in Michigan. A search of appellate cases in delinquency matters in the Michigan Supreme Court and Court of Appeals over a five-year period from July 1, 2014 to June 30, 2019 found only 45 opinions and orders issued. All of these were Court of Appeals opinions, and only two were published opinions.[116] Eighty-five percent of counties had no juvenile appeals resulting in a decision or order within that five-year period.

Interviewers sought to better understand what barriers, if any, exist that contribute to the low number of appeals, and how this could be improved. The assessment found inherent problems with the structure, funding, and service delivery methods used by counties to afford the right to appeal to youth, and that juvenile appeals may be hampered by the lack of advisement by courts and defenders and inadequacies in the oversight, funding, and service delivery models used at the local level.

Eighty-five percent of counties had no juvenile appeals resulting in a decision or order within that five-year period.

Several judicial officers and attorneys who responded to the question about advisement of appellate rights noted that advisements were generally not given by the courts, and that youth may not understand the right. One judge acknowledged that youth would be given an attorney if asked, but they do not understand, so they do not ask. Another judge indicated he "did not think" his court gave advisements about the right to appeal, although they do this in abuse and neglect cases, where appeals are more frequent.

One attorney noted, "I've never had a referee give an advice of rights form for kids informing them of their right to appeal. Once I asked for one and it took a long time for them to find one—had to go to the filing room to get it—not readily available. They just don't know they have a right for an appeal." Another lawyer noted that, "the court tells the kids about appeals, but usually by then it has drug on so long that kids just want to do what they need to do to complete disposition, so they don't have an interest in it."

113 National Juvenile Defense Standards, *supra* note 7, Standard 7.5.
114 *Id.* Standard 7.2.
115 *Id.* Standard 7.3.
116 Opinion and Order Search, Mich. Courts, https://courts.michigan.gov/opinions_orders/Pages/default.aspx (follow "Opinion & Order Search" hyperlink; then follow "Advanced" hyperlink; then search Case Type for "Delinquency" and search Date "7/1/2014" Through "6/30/2019").

For the most part, local administrative orders that describe the defense service delivery model for the court did not include detailed provisions for appeals, if any at all. In the larger counties, however, the administrative orders regulating defender practice required specific qualifications, even if minimal, designating lawyers to handle juvenile appeals, although the criteria were not clear.

Very few attorneys interviewed could articulate how the juvenile appellate process worked in their county. Most defenders interviewed had never done an appeal, and several indicated they were not sure who did the appeals for their county. Only three defenders noted they had done an appeal in a juvenile case. In some cases, lawyers admitted they had never discussed the right to appeal with a client. One suggested, "You have to be very prudent with your time. If you do an appeal, will there be repercussions?"

Few if any qualification standards appeared to exist with respect to defense practice in juvenile appeals in most counties included in this assessment. One attorney noted, "I don't think there are any qualification to be put on the [appellate] rotation list—I don't think I ever even submitted a writing sample here. It may be because I handled neglect appeals and criminal appeals, but I didn't have to submit anything." Another noted, "Usually there is a local roster of attorneys. Generally, they go with trial counsel as a criteria. Usually the trial attorneys turn it down. For the local bar process, there is no requirement criteria as long as they have a law license." In one county, the local administrative order required appellate training, but it was minimal.

When asked about possible barriers to youth appealing their cases, there were a number of opinions. Some felt the process itself was too cumbersome. "Lots of paperwork. And it takes a lot of time." Getting copies of the record was also noted as time-consuming and burdensome.

Compensation for handling appeals varied by county. Some attorneys noted it was already included in their flat fee contract, and that no additional money would be paid if they appealed a case. In other counties, where attorneys were paid on an hourly rate basis, the same rate applied to appeals. Some lawyers noted $50 or $60 per hour, and in one county there was a cap set at $1,000 per case.

Most attorneys, when asked, could not articulate any issues they would like to see clarified in the appellate courts through the appellate process. "Most attorneys probably didn't know whether they had an appealable issue or not," a former public defender said of the practice. In some cases, however, lawyers and judges could articulate where there is a void in juvenile case law, particularly in areas of juvenile confessions, *Miranda* issues, jurisdictional issues, competency, sex offender registration, and ineffective assistance of counsel claims in delinquency matters.

Appeals are separate from "reviews" by a judge of a magistrate's decision. At the request of a party, and before signing an order based upon findings and conclusions recommended by a referee, a judge shall review the recommendations.[117] The judge must adopt the referee's recommendations, however, unless it is likely that the judge would have reached a different result, or the referee committed a clear error of law.[118] Several attorneys and judges noted that while reviews are more common, there are still few of them. In one county, attorneys noted that they would not be paid for processing the review of a magistrate decision by a judge unless a hearing is set.

Juvenile appeals play an essential role in upholding due process protections and ensuring accountability and transparency of the juvenile court process. Courts should ensure that advisements are given regarding the right to appeal, and attorneys should speak with their clients about the right to appeal, the process for appealing, and the pros and cons of appealing a trial court decision. Juvenile appellate representation is a specialized area of practice requiring specific skills and training, including a knowledge of juvenile delinquency laws, constitutional protections, and developmental differences concerning youth that may impact various stages of proceedings. Michigan should develop a more robust appellate delivery

117 Mich. Ct. R. 3.991 (A)1.
118 Mich. Ct. R. 3.991 (E) 1-2.

system that provides the necessary oversight for quality representation by well-trained attorneys, ensures access to appellate counsel is not impeded by financial or other constraints, and fosters a well-developed body of appellate caselaw to guide juvenile practice.

2. Reviews & Revocations

Michigan Court Rules require that an attorney appointed to provide representation in a delinquency matter continue until dismissed by the Court.[119] This rule is consistent with national standards that recognize the post-disposition period is often the longest period of court contact and a time when youth are subject to probation, out of home placement, or other orders.[120] Yet the assessment found that in a few counties, representation was regularly terminated prematurely and before orders of the court were fully terminated.

In most jurisdictions visited, interviews and court observations indicated that attorneys provided representation through the post-disposition stage. "Once we represent a client, we represent until the case goes away. We'll attend any review hearings, get probation reports prior to the hearings, and get a notice if there is a probation violation," noted one of the contract attorneys in a small jurisdiction. Court observations showed that in the majority of cases observed, counsel was present during review hearings.

But in at least three counties, defense counsel was dismissed at the disposition stage unless the youth was in placement, and at times they were dismissed even if the young person was in placement. One defender noted, "Neither the prosecutor nor the defense attorney attend the 90-day reviews. Attorneys are discharged at disposition. They are reappointed for a parole violation." One defender noted he did not see a role for defense counsel at post-disposition hearings generally.

One reason for terminating representation at disposition appears to be financial. The assessment team found that counsel was released at disposition in some cases "so that no additional attorney fees need to be paid," according to a judicial officer in one county. Because attorney costs are often passed to families, several lawyers noted that they were conscious of how much time and/or how many proceedings they attended, and tried to balance their time on the case against the cost to the families.

Assessors observed that for the most part, counsel was present for hearings on alleged probation violations, because either their representation never ended or they were reappointed for that purpose. It was observed that some youth were unrepresented for probation violation hearings, although these were generally confined to one county.

Observers in one county sat in on review hearings where two youth were present by phone, along with the facility staff. The attorney asked questions of the youth on the record. It did not appear that the attorney had any contact with the youth prior to this. If either youth were having problems in placement, such a blind, on-the-record, non-confidential approach would have negatively affected the youths' legal interests and would have been highly inappropriate.

Some stakeholders noted that attorneys need to remain in contact with their clients after disposition, particularly with youth who were in placement. A detention facility administrator noted that youth "could be here for a lot of 'dead time.' Some kids are ordered to lots of treatment and there are limited numbers of beds available. A ten-year-old has been here for three months now."

Michigan courts should ensure that lawyers remain actively involved with their clients in delinquency court throughout the pendency of all proceedings, until all orders by the court are terminated. Courts should expect that attorneys maintain contact, seek and review pertinent records between hearings, and continue to advocate for their clients' interests regarding fees, fines, costs, placement issues, appeals, and revocation issues. The costs for such critical defense advocacy should not be passed to youth and families.

119 Mich. Ct. R. 3.915 (D)(2).
120 *See* National Juvenile Defense Standards, *supra* note 7, Standards 1.4, 7.1, 7.5.

I. Youth in Adult Court

Youth prosecuted in adult criminal courts face more severe, sometimes mandatory penalties compared to youth who proceed though juvenile courts.[121] They are often victims of abuse, suffer from mental illness, and/or are disproportionately youth of color.[122] They may lose certain rights of adulthood, such as the right to vote, before they have even achieved the status of adulthood.[123] As such, specialized training and experience are necessary to provide effective representation to youth facing prosecution in adult court.[124]

Historically, Michigan law considered 17-year-old youth as adults and tried them in adult courts. Youth 16 and under can be tried as an adult through various mechanisms. For example, under certain circumstances, jurisdiction is automatically vested in the adult criminal court, including youth over the age of 14 accused of specific categories of offenses ranging from first-degree murder to attempted possession of controlled substances,[125] unless the prosecuting attorney elects to file a juvenile petition instead.[126] Youth may also be waived into adult court by the family court division if a youth is 14, 15, or 16 years of age and is accused of an act that, if committed by an adult, would be a felony.[127] This judicial waiver requires a hearing in front of a judge.[128]

Additionally, youth of any age can be tried as an adult in juvenile court in a "designated" proceeding.[129] In these proceedings, a prosecutor can designate a youth charged with any offense to be tried as an adult.[130] If the court authorizes a petition to designate a youth for an offense outside a statutory list of specified violations,[131] the judge must conduct a hearing to determine whether it is in the best interest of the youth and the public to try them as an adult.[132] If a youth is designated and found guilty, they are given a criminal conviction; however, the judge may impose either a juvenile disposition or an adult sentence, based on the individual circumstances of the case and the child.[133]

The Michigan Indigent Defense Commission Act applies to youth who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings, and requires standards for representation in these cases.[134]

---

121 Malcolm C. Young, Providing Effective Representation for Youth Prosecuted as Adults 1 (Bureau of Justice Assistance Bulletin 2000), https://www.ncjrs.gov/pdffiles1/bja/182502.pdf.
122 *Id.*
123 *Id.*
124 National Juvenile Defense Standards, *supra* note 7, Standard 8.1.
125 *See* People v. Veling, 504 N.W.2d 456, 458 (1993) (citing People v. Brooks, 459 N.W.2d 313 (1990) (stating that Mich. Comp. Laws § 600.606(1) (2020) presumptively "divests the juvenile court of jurisdiction over certain juvenile offenders and vests that jurisdiction in the circuit courts.").
126 Mich. Comp. Laws § 712A.2(a)(1) (2020).
127 Mich. Comp. Laws § 712A.4(1) (2020).
128 Mich. Ct. R. 3.950(D).
129 Mich. Comp. Laws § 712A.2d (2020).
130 *Id.*
131 Mich. Comp. Laws § 712A.2d(9)(a)-(i) (2020).
132 Mich. Comp. Laws § 712A.2d(2) (2020).
133 Mich. Comp. Laws § 712A.18(1)(m) (2020) (providing in relevant part: "In determining whether to enter an order of disposition or impose a sentence under this subdivision, the court shall consider all of the following factors, giving greater weight to the seriousness of the offense and the juvenile's prior record: (i) The seriousness of the offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim. (ii) The juvenile's culpability in committing the offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines. (iii) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior. (iv) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming. (v) The adequacy of the punishment or programming available in the juvenile justice system. (vi) The dispositional options available for the juvenile."); Mich. Ct. R. 3.955(A).
134 Mich. Comp. Laws § 780.983(a)(ii)(A)-(D) (2020).

The Michigan 2018 Case Load Report for trial courts indicates there were 61 designated cases disposed of in 2018, of which ten were dismissed by the court or a party, four are inactive, and 45 cases were pled out.[135] Only two cases had trials, both bench trials.[136] A total of 72 juvenile criminal felony cases are noted in the 2018 statistics as being disposed of in adult court, including 53 guilty pleas, seven dismissed by the parties or the court, seven that are inactive, two that were transferred, one tried before a judge, and two disposed of by jury trials.[137]

Michigan's Raise the Age legislation will dramatically change the landscape in juvenile court when the law goes into effect in October 2021.[138] The new law treats most youth under the age of 18 in the juvenile system, and addresses the mechanisms for detention, trial, and transportation.[139] Some violent offenses may still be prosecuted in adult court.[140]

Once the law goes into effect, it is estimated that more than 4,000 17-year-olds charged with both felony and misdemeanor cases per year will be handled in juvenile courts.[141] In a survey conducted by a research organization relative to projected costs of Raise the Age legislation, nearly two-thirds of counties noted they would need additional services, including residential, intensive and general probation, and community services such as counseling, mental health, and tether monitoring.[142]

While it seems clear that juvenile courts will face challenges absorbing 17-year-olds in their jurisdiction, the projections did not include the number of youth who may be eligible for transfer or designation hearings.

Even after raising the age of juvenile court jurisdiction, the law will still allow for certain categories of youth to be tried as adults. Representing these youth requires knowledge of both juvenile and adult court services.[143] A review of model programs among defender systems found several key elements are important in providing effective advocacy for this population, including defining the scope of representation to include a multi-disciplinary approach, providing vertical representation, becoming involved at the earliest stage of proceedings, and using experts in disposition/sentencing planning.[144]

Maintaining a cadre of skilled and experienced attorneys to take these cases, with appellate, social worker, and other support, is critical.[145] Defenders should be child-focused, have access to youth-specific resources, maintain strong communication with clients, and be prepared to raise substantive defenses specific to youth clients.[146]

Michigan's public defender system should provide specialized training and enhanced resources to attorneys who represent youth subject to trial in adult criminal courts. As Michigan joins the ranks of states that keep jurisdiction of most 17-year-olds in juvenile court, the public defender system and juvenile and criminal courts must recognize how developmental differences are important in the context of youth whose cases are direct filed or transferred to adult court.

135 Mich. 2018 Court Caseload Report, *supra* note 98, at 2.
136 *Id.*
137 *Id.* at 1.
138 *Governor Whitmer Signs Bipartisan Bill to Raise the Age for Juvenile Offenders*, Michigan.Gov (Oct. 31, 2019) [hereinafter *Governor Whitmer Raise the Age*], https://www.michigan.gov/whitmer/0,9309,7-387-90487-511513--,00.html.
139 *Id.*
140 *Id.*
141 Hornby Zeller Assocs., The Cost of Raising the Age of Juvenile Justice in Michigan: Final Report 13 (2018), https://council.legislature.mi.gov/Content/Files/cjpc/MIRaisetheAgeFinalReport03.14.2018.pdf.
142 *Id.* at 32.
143 Young, *supra* note 121, at 2.
144 *Id.* at 2-4.
145 *Id.* at 4.
146 *Id.* at 5.

J. Equitable Treatment of All Youth

Like many states, Michigan enacted "tough on crime" policies during the 1980s and 1990s and dramatically changed its criminal and juvenile legal systems. These changes contributed to massive increases in the adult prison population, with Michigan now having one of the ten highest racial disparity rates in the country.[147] Legislators eliminated the minimum age at which youth could be tried in adult court and sent to adult prison, created a system that allowed prosecutors to directly file charges against youth in adult court without judicial approval, expanded adult sentencing options, tightened expungement rules, and increased arrest rates for status offenses like missing school or curfew violations.[148]

Michigan ranks sixth highest in the country for the confinement of youth, with a disproportionate number being youth of color.[149] In Michigan's two public and more than 50 private juvenile facilities, nearly two-thirds of young people who are incarcerated are youth of color, despite being only 20 percent of the state's population.[150] Many youth in these facilities have also often experienced trauma, been involved in the child welfare system, and had difficulties in school.[151] In the last decade, 11 youth facilities have closed, but the expansion of community-based alternatives remains limited.

Beyond racial disparities, the system has some notable holes in its ability to provide services for lesbian, gay, bisexual, transgender, queer, and gender-nonconforming youth (LGBTQ-GNC) and youth with serious mental illness. While Michigan has developed a research-based model for providing re-entry services using youth

147 *See Best States for Prisoners, Corrections Rankings*, U.S. News and World Report, https://www.usnews.com/news/best-states/rankings/crime-and-corrections/corrections.
148 Michelle Weemhoff, & Kristen Staley, Youth Behind Bars: Examining the Impact of Prosecuting and Incarcerating Kids in Michigan's Criminal Justice System 4 (2014), https://www.miyouthjustice.org/publications-1.
149 Mich. Safety & Justice Roundtable, 2019 Report: Co-Creating a Vision for Effective & Equitable Solutions for Justice-Involved Youth 28 (2019) [hereinafter Justice Roundtable], https://hudson-webber.org/wp-content/uploads/2019/02/MISafteyJusticeRoundtableJuvJusticeRPT.pdf.
150 *Id.* at 29.
151 *Id.* at 28.

development principles, these programs have few individuals with expertise to work with young people who have additional vulnerabilities, like LGBTQ-GNC youth and youth with serious mental illness.[152]

Despite the reported disparities within Michigan's juvenile justice system, many defenders interviewed for this assessment did not necessarily view equitable treatment as an integral part of their representation, and many did not identify any concerns regarding the lack of equitable processes and opportunities for their clients. Most defense attorneys did not express specific concerns about the treatment by the system of youth of color, LGBTQ-GNC youth, youth with disabilities, or youth for whom English is a second language. Moreover, few non-defender stakeholders saw a lack of defender advocacy that touched on these disparities as a problem.

This sentiment was not universal, however. A number of defenders said they believed that much more work needs to be done in this area. One defender described how the youth of color she represents simply can't win. "If they run, they are charged with resisting; if not, then they are pressured into confessing to something. Judges don't necessarily understand trauma and poverty and how it impacts behavior. POs tend to be regimented with not a lot of room for asking 'why.'"

Some defenders told egregious stories of youth in placement punished for their ethnicity and religious practices, including a boot camp that required pledges that Muslim youth were exempt from, but were then punished for their nonparticipation.

One defender passionately noted, "Advocacy has not bubbled up among defenders (to address equity issues)." This could be for many reasons already discussed in this report, but in the opinion of one administrator, "We require our (service providers) to be culturally competent. There are very few African American lawyers providing defense services to this population. There should be more diversity training as this is critical to best serve this population."

> ***"Advocacy has not bubbled up among defenders (to address equity issues)."***

Another defender noted that in her jurisdiction, "implicit bias is operating throughout the whole system. Kids of color are more likely to be arrested for being a kid than an upper-class kid. These kids are charged with everything. The police report will start with them noticing a suspicious subject—well, who is a suspicious subject? It is very troubling. We have a lot more work to do to deal with this issue."

Defenders can play a unique role in identifying and addressing disparate treatment and ensuring equitable processes and opportunities for all youth. Assessment team members noted a lack of awareness on the part of many defenders about disparities among various populations of youth. Some observers noted, even without access to the statistics at the time of their observations, that there appeared to be a racial imbalance among youth who ended up in the system. Several noted that youth with mental illness presented unique challenges for defenders and the justice system generally.

Advocacy for equitable treatment is an essential part of the role of the juvenile defender.[153] Defenders have a duty to educate themselves about the special needs of the populations they serve, and to confront their own biases and those inherent in the justice system.[154] Effective advocacy should include not only addressing bias through individual cases, but also playing a role in policy advocacy.[155]

---

152 *Id.* at 35.
153 *See Case Advocacy*, Racial Justice for Youth: A Toolkit for Defenders, https://defendracialjustice.org/case-advocacy/.
154 *See* Kristin Nicole Henning, Annotated Bibliography, Empirical Studies: Implicit Racial Bias in the Criminal/Juvenile Justice Systems 1 (2019), https://defendracialjustice.org/toolkit-files/Confronting-Bias/Annotated-Bibliography-of-Implicit-Bias-Studies.pdf.
155 *See Policy Advocacy*, Racial Justice for Youth: A Toolkit for Defenders, https://defendracialjustice.org/policy-advocacy/.

KEY FINDINGS

II. INDIGENT DEFENSE SYSTEM BARRIERS TO JUSTICE & FAIRNESS FOR YOUTH

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

Nat'l Juvenile Defender Ctr., Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel 6 (2017).

Michigan's system of public defense is being transformed after years of studies, attempts at policy reform, and litigation. A 2008 report by the National Legal Aid and Defender Association (NLADA)[156] evaluated trial-level indigent defense delivery systems across ten representative Michigan counties to gauge compliance with the ABA Ten Principles of a Public Defense Delivery System.[157]

The report concluded that none of the ten counties studied were constitutionally adequate, as they did not provide an effective, efficient, high-quality, ethical, conflict-free system of legal representation for defendants who were unable to afford an attorney.[158] It also found that as a county-funded system, Michigan ranked 44th of 50 in per capita indigent defense spending.[159]

A state civil rights class action lawsuit filed in 2007 alleged that Michigan had abdicated its constitutional obligation to provide indigent defense by delegating to individual counties and failing to fund or provide oversight.[160] The case wound its way through the appellate process until legislative reforms were underway to address many of the deficiencies noted, at which time the lawsuit was voluntarily dismissed.[161]

To address these deficiencies, then-Governor Rick Snyder established by Executive Order the Indigent Defense Advisory Commission in October 2011, a group of stakeholders charged with making recommendations to improve the state's legal representation system.[162] These recommendations formed the basis of the Michigan Indigent Defense Commission Act, signed into law in July 2013, which created the Michigan Indigent Defense Commission (MIDC).[163]

156 Nat'l Legal Aid & Def. Ass'n, Evaluation of Trial Level Indigent Defense Systems in Michigan: A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis (2008) [hereinafter A Race to the Bottom], https://www.in.gov/publicdefender/files/NLADA%20Report%20-%20Michigan.pdf.

157 Ten Principles of a Public Defense Delivery System (Am. Bar Ass'n 2002) [hereinafter ABA Ten Principles], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

158 A Race to the Bottom, *supra* note 156, at i.

159 *Id.* at ii.

160 *See* Duncan v. State, 774 N.W.2d 89 (Mich. Ct. App. 2009). The Plaintiffs in *Duncan* were individual criminal defendants from 3 counties, and the Defendant was Governor Jennifer Granholm. Plaintiffs complained of a number of resulting deficiencies including: underfunding, inadequate training, overwhelming caseloads, and the lack of standards for performance and workload. Plaintiffs claimed that the resulting system failed to provide indigent defendants with constitutionally adequate representation. The plaintiffs requested that the court declare the current public defense system unconstitutional and order (via injunctive relief) that the State provide representation consistent with the requirements of the U.S. and Michigan constitution.

161 *See Reforming the Broken Indigent Defense System*, Mich. ACLU, https://www.aclumich.org/en/cases/reforming-broken-indigent-defense-system (noting that, "The new law establishes a permanent indigent defense commission to set minimum standards, train criminal defense attorneys, monitor their performance, and ensure that competent legal representation is being provided throughout the state. Because the new law puts in place many of the reforms the lawsuit called for, the ACLU voluntarily dismissed the case in July 2013.").

162 Mich. Exec. Order No 2011-12 (Oct. 13, 2011), https://www.michigan.gov/documents/snyder/EO_2011-12_366247_7.pdf.

163 Mich. Comp. Laws §§ 780.981-780.1003 (2020).

The MIDC is charged with proposing "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout this state."[164] The intent of the standards is to ensure "criminal defense services that meet constitutional requirements for effective assistance of counsel."[165] The statute enumerates specific principles to guide those required standards, based in large part on the ABA Ten Principles of a Public Defense Delivery System.[166] It also creates a system to audit and review the operation of local indigent defense programs to assure those services comply with the MIDC standards.[167]

The Michigan legislature recognized that requiring counties to comply with increased standards, monitoring, and enforcement must be accompanied by an influx of funding from the state.[168] The MIDC began with an initial appropriation in 2018 of $2.4 million for agency operations, including 14 full-time staff who aided the Commission as they developed initial standards (training and education, initial client interviews, experts and investigators, and counsel at first appearances) and reviewed and approved individual county plans for the increased funding needed to comply with those standards.[169]

The 2019 budget reflected an unprecedented commitment by the state to address its constitutional crisis with an appropriation of $84 million to fund all MIDC-approved county compliance plans.[170] Counties are still responsible to contribute a "local share," the average spent on indigent defense in the three years prior to the MIDC Act's passage in 2013. These local dollars are combined with the newly approved state allocation to comprise the total system cost for that county.[171]

The MIDC's work is just beginning. While initial plans have been funded and are being implemented, the next group of standards are awaiting formal state adoption and will be required of all counties.[172] This includes standards on "independence from the judiciary, defender workload limitations, qualification and review of attorneys accepting assignments in adult criminal cases, and attorney compensation."[173]

To maintain its reforms, the Commission has made recommendations in three areas: 1) adequate funding to support and maintain all eight areas of standards, 2) a statewide data collection system to enable the MIDC to assess the impact of the new standards and identify best practices, and 3) establishing continuity to support local systems in institutionalizing best practices.[174]

These changes are welcome news for those who have advocated for systems change in Michigan's indigent defense services. But the reforms specifically exclude youth unless they are being tried in adult criminal court.[175]

The reforms specifically exclude youth unless they are being tried in adult criminal court.

164 Mich. Comp. Laws § 780.985(3) (2020).
165 *Id.*
166 *See* Mich. Comp. Laws § 780.991 (2020); *see also* ABA Ten Principles, *supra* note 157.
167 Mich. Comp. Laws § 780.989(1)(b) (2020).
168 Mich. Comp. Laws § 780.989 (2) (2020) of the legislation states: "Upon the appropriation of sufficient funds, the MIDC shall establish minimum standards to carry out the purpose of this act, and collect data from all indigent criminal defense systems. The MIDC shall propose goals for compliance with the minimum standards established under this act consistent with the metrics established under this section and appropriations by this state."
169 2018 Impact Report, *supra* note 17, at 8.
170 *Id.* at 13.
171 *Id.* at 14.
172 *Id.* at 21.
173 *Id.*
174 *Id.* at 26-27.
175 Mich. Comp. Laws § 780.985(3) (2020) notes, "The MIDC shall propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout this state." Adult is defined in § 780.983(a) as an individual 17 years of age or older, or an individual younger than 17 if they are subject to adult criminal jurisdiction by virtue of their charges.

Interviews with state and local stakeholders revealed that juvenile defense practices in Michigan are not subject to any state standards, receive no state funding, and have no consistent, effective monitoring or enforcement mechanism in place to ensure youth receive effective counsel at all critical stages. The intense criticisms levied against the adult system in the NLADA report and ACLU litigation did not include juvenile defense, although youth were subject to the same service delivery systems. The wave of current reform efforts has yet to specifically identify or address needed improvements in trial-level juvenile defense services. By failing to address shortcomings in the juvenile system, Michigan risks creating large disparities in the state's obligations to those charged with offenses, simply due to their age.

By failing to address shortcomings in the juvenile system, Michigan risks creating large disparities in the state's obligations to those charged with offenses, simply due to their age.

A. State Oversight & Funding of Trial-Level Juvenile Defense Services

The NJDC/NLADA Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems emphasize the need for competent and diligent representation through all stages of juvenile delinquency proceedings, personnel and resource parity, the use of expert and ancillary services, effective dispositional advocacy, and comprehensive training and education for attorneys and support staff.[176] They also emphasize the need for supervision and monitoring of attorney work and caseloads and supervision of attorney performance consistent with national, state, and/or local standards.[177]

Public defense delivery systems must recognize the differences between children and adults.[178] Youth do not possess the same cognitive, emotional, or behavioral capacities as their adult counterparts, and require counsel who are trained to understand the stages of child and adolescent development accordingly.[179] Delinquency cases are governed by different laws and practices. Their outcomes can have significant, lifelong implications for youth and families. Consequently, public defender delivery systems should adhere to standards designed specifically to address the needs of this population and that fully implement the due process protections recognized in *In re Gault*.[180]

Much of this report is devoted to a discussion about policies and practices observed throughout the state during selected site visits to delinquency courts through interviews, observations, and review of documentation. One cannot ignore, however, the disparities that exist between the state's role in criminal defense services for adults and the total void in its role concerning the oversight, regulation, and funding of juvenile defense.

It appears that Michigan has not yet recognized the specialized nature of juvenile defense, nor afforded the necessary state funding and oversight of trial-level service delivery to ensure that youth in delinquency proceedings receive quality trial-level representation guaranteed by the Fourteenth Amendment. Juvenile defense practices in Michigan are not subject to any state standards, receive no state funding, and have no consistent, effective monitoring or enforcement mechanisms in place to ensure youth receive effective counsel at all critical stages.

Juvenile defense practices in Michigan are not subject to any state standards, receive no state funding, and have no consistent, effective monitoring or enforcement mechanisms in place to ensure youth receive effective counsel at all critical stages.

176 Ten Core Principles, *supra* note 11, Principles 1, 3-4, 7-8.
177 *Id.* Principles 5-6.
178 *Id.* at 1.
179 *Id.*
180 387 U.S. 1 (1967).

The MIDC standards for the appointment of defense counsel and the delivery of defense services do apply to youth who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings.[181] But the state has no similar mechanisms in place to ensure that the constitutional protections afforded to youth ensure timely access to effective, well-trained counsel in juvenile court.

Although state-level reforms are underway in the criminal court system, the county-based delivery system for providing defense services remains in place for all juvenile court representation, and those individual systems remain solely responsible for the oversight of quality, attorney performance, and the financial resources needed to ensure the system meets constitutional requirements. Local delivery systems are not bound by any minimum standards and are not required to impose minimum qualifications or training requirements on the attorneys practicing in those courts.

Michigan must meet its constitutional obligation for ensuring youth have access to effective counsel in delinquency proceedings, and should create a state-based system of oversight and enforcement of juvenile court-specific standards. These standards should address, at a minimum, the specialized nature of juvenile defense, including the need for early appointment of counsel and counsel at all critical stages, initial client contact, restrictions on waiver of counsel, training and education of defense counsel, access to experts and support staff, workload limits, independence from the judiciary, qualifications of juvenile defenders, and attorney compensation. Service delivery models must provide adequate supervision, oversight and mentoring of juvenile defenders, and pay parity with adult defenders.

Michigan must meet its constitutional obligation for ensuring youth have access to effective counsel in delinquency proceedings, and should create a state-based system of oversight and enforcement of juvenile court-specific standards.

181 Mich. Comp. Laws § 780.983(a)(ii)(A)-(D) (2020).

B. State Oversight & Funding for Juvenile Appellate Representation

Effective juvenile appellate representation serves three essential functions: 1) it is the opportunity to correct legal errors in initial proceedings; 2) it provides an opportunity to further develop the law; and 3) it ensures that laws are applied uniformly.[182]

Appeals are particularly important in juvenile court, where transparency may be limited and where there is often a need to address underlying systemic problems, including disparate treatment of minority youth and disparate confinement.[183] Juvenile adjudications have increasingly severe consequences, including DNA collection and registration, sex offender registration, and a host of non-criminal consequences that make it harder for youth to reintegrate to their communities, such as long-term obstacles to schooling, employment, and housing.[184] Appellate review is a critical part of the development of juvenile law.[185]

In order to provide effective appellate representation for youth, it is important for judges and attorneys to receive training to recognize the importance of juvenile appeals.[186] Adequate resources should be in place to ensure youth have access to effective appellate lawyers and timely appellate review that can provide relief while the court-ordered disposition is being completed.[187] Collecting data on the number of delinquency appeals is likely important to better understand any barriers to representation and examine geographical disparities in appellate practice.[188]

Adult appeals are handled by the Michigan State Appellate Defender Office (SADO), established in 1979 by legislation and governed by the Appellate Public Defender Commission.[189] The Commission is charged with developing standards for SADO's administration and for the performance of criminal appellate representation, and is located in the State Court Administrative Office.[190] Michigan's Appellate Defender Act provides for defense services for felony appeals through SADO and by locally appointed private counsel.[191] The Act also requires that a statewide roster be maintained to handle the remainder of cases not represented by SADO, known as the Michigan Appellate Assigned Counsel System (MAACS).[192] This roster, jointly administered with SADO, is governed by regulations regarding membership and classification of lawyers, performance review and reclassification procedures, requirements for continued membership, suspension and removal, and selection and assignment of appellate counsel.[193]

SADO administers the Criminal Defense Resource Center to provide training and education for the criminal defense bar. The Center provides, free of charge, live and live-streamed trainings for defense attorneys throughout the state.[194] It also provides website access to defenders and publishes manuals and other resources to assist defenders in the field.[195]

182 Mathias H. Heck, Jr., *Resolution 103A*, 2014 A.B.A. Crim. Just. Sec. 1 [hereinafter *Resolution 103A*], https://www.americanbar.org/groups/legal_aid_indigent_defendants/indigent_defense_systems_improvement/standards-and-policies/policies-and-guidelines/ (citing Megan Annitto, *Juvenile Justice on Appeal*, 66 U. Miami L. Rev. 671 (2012)).
183 *Id.* at 1.
184 *Id.* at 3; *see also In re* M.F., 828 S.E.2d 350, 351 (Ga. 2019) (stating that ". . . significant adverse collateral consequences inherently and unquestionably can flow from the adjudication.").
185 *Resolution 103A*, *supra* note 182, at 3.
186 *Id.* at 11.
187 *Id.*
188 *Id.* at 6-7.
189 *See* Mich. Comp. Laws §§ 780.711-780.719 (2020).
190 Mich. Comp. Laws § 780.712(1), (5) (2020).
191 Mich. Comp. Laws § 780.712(4) (2020).
192 Mich. Comp. Laws § 780.712(6) (2020).
193 Mich. State Appellate Def. Office & Crim. Def. Res. Ctr., Michigan Appellate Assigned Counsel System Regulations (2019), http://www.sado.org/content/pub/11101_Amended-MAACS-Regulations-.pdf.
194 Mich. State Appellate Def. Office, 2018 Annual Report: Fighting Injustice Through Access, Advocacy, Compassion, and Education 18 (2018), http://www.sado.org/content/temporary/11141_2018-Annual-Report.pdf.
195 *Id.* at 20.

Conversely, appeals from juvenile delinquency cases remain the responsibility of individual county public defender systems and are not handled by SADO. There are no statewide standards or regulations that provide for the oversight, qualifications, training, or other means of quality control as exists for adult appeals. Counties vary in the service delivery model used to litigate juvenile appeals.

Michigan has very few appeals from juvenile delinquency cases, and the vast majority of counties have not had a single appeal for years. As stated earlier in this report, a search of cases in the Court of Appeals database for the period of July 1, 2014–June 30, 2019 found 45 opinions and orders issued during that five-year period. All of these were Court of Appeals opinions, and only two were published opinions.[196] During that time, the largest number of appeals by far came from two of the state's largest counties (22 from one, and nine from the other).[197] Only a handful of other counties had one or two appeals during that five years. Of the 92 counties in Michigan, 85% have not had a juvenile appeal in at least the last five years.[198]

The very low number of juvenile appeals may be attributable to several factors in Michigan. Appellate representation at the county level in delinquency cases varies in structure, funding, and method of delivering services. In a number of jurisdictions visited, trial lawyers were expected to handle their own appeals, without consideration as to whether they had sufficient training or experience to do so, and without supervision or oversight.

Advisements of the right to appeal are not consistently given by trial courts. The vast majority of delinquency cases are resolved by plea agreement, without legal issues being developed that might suggest an appeal. Appeals may be perceived as interfering with the rehabilitative process inherent in juvenile court proceedings, and/or moot given the length of time it takes to resolve an appeal.[199] A more detailed discussion of concerns in local jurisdictions can be found in Section I. H. 1.

Michigan must establish a strong system for appellate representation that adheres to national standards and ensures access to effective appellate counsel for youth in delinquency cases. Other states have improved juvenile appellate representation after state juvenile defense assessments, including creation of a state juvenile office focused on appellate and post-disposition representation[200] and changes to court rules to allow for expedited appeals in delinquency cases.[201]

Michigan already has an effective model of providing adult representation through SADO and MAACS, which could be replicated for juvenile delinquency cases, including trial-level training, consultation, and other support. It could incorporate juvenile appellate representation within that office and examine other ways to strengthen appellate rules and practices.

196 Opinion and Order Search, Mich. Courts, https://courts.michigan.gov/opinions_orders/Pages/default.aspx (follow "Opinion & Order Search" hyperlink; then follow "Advanced" hyperlink; then search Case Type for "Delinquency" and search Date "7/1/2014" Through "6/30/2019").

197 *Id.* This includes Wayne (22) and Oakland (9).

198 *Id.* This includes Saginaw (2), Washtenaw (2), Van Buren (1), Kent (1), Bay (1), St. Joseph (1), Berrien (2), Cass (1), Sanilac (1), Muskegon (1), Montmorency (1).

199 *Resolution 103A*, *supra* note 182, at 4.

200 *Id.* at 5-6 (noting that the Office of the Ohio Public Defender reallocated funding for a juvenile division, leading to improved appellate defense representation for youth, particularly those incarcerated in the Ohio Department of Youth Services).

201 *Id.* at 6.

C. County-Based Oversight of Service Delivery Systems

The appointment of counsel in Michigan trial courts was historically governed by Michigan Court Rule 8.123.[202] The rule required trial courts to adopt administrative orders describing the procedures used for the selection, appointment, and compensation of lawyers appointed by the court to represent indigent parties.[203] Plans required approval by the State Court Administrator to ensure they "protect the integrity of the judiciary."[204] Under the rule, trial courts were mandated to submit an annual report of the total public funds paid to each attorney or collectively to an affiliated group of attorneys for appointments by that court.[205]

With the passage of the Michigan Indigent Defense Act, the provision of public defense services is now governed by statute, which charges the Michigan Indigent Defense Commission (MIDC) with the duty and authority of "overseeing the implementation, enforcement, and modification of minimum standards, rules and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state."[206] An "indigent criminal defense system"[207]at the local level now submits to the MIDC its plan to provide indigent defense services consistent with MIDC standards, including a cost analysis for meeting those standards.[208]

This assessment found that, because MIDC's mandates do not include juvenile delinquency proceedings, a number of the juvenile courts visited still refer to Court Rule 8.123 for the operation of juvenile defense systems. That rule was rescinded, however, in September 2019, and there is no law currently governing the administration of juvenile defense in the state of Michigan.[209]

> ***There is no law currently governing the administration of juvenile defense in the state of Michigan.***

Michigan primarily uses three types of local delivery systems for public defense, whether for adults or youth: 1) court appointment rotations, 2) flat-fee contracts, and 3) full-time public defender offices. Of the ten counties visited for this assessment, only one had a full-time office that included juvenile defense, while six provided defense services through a rotation system of appointments, two contracted with lawyers on a flat-fee basis, and one ran a hybrid system with flat-fee contracts with lawyer groups and a large rotation system that in part handled delinquency cases.

202 *See* Mich. Ct. R. 8.123 (repealed 2019).
203 Mich. Ct. R. 8.123(B) (repealed 2019).
204 Mich. Ct. R. 8.123(C) (repealed 2019).
205 Mich. Ct. R. 8.123 (D) (repealed 2019).
206 Mich. Comp. Laws § 780.989(1)(a) (2020); *see also* Regulations for Governing a System for Appointment of Counsel for Indigent Defendants in Criminal Cases and Minimum Standards for Indigent Defense Services, No. 2016-2 (June 1, 2016) (provisionally approving MIDC proposed standards to regulate the manner in which counsel is appointed to represent indigent defendants in criminal cases and establishing requirements for training, experience, and continuing legal education for attorneys seeking appointment in these types of cases).
207 Mich. Comp. Laws § 780.983(h) (2020) defines "indigent criminal defense system" as either the local unit of government which funds a trial court, or if a trial court is funded by more than one local unit of government, those local units of government, collectively.
208 Mich. Comp. Laws § 780.993(3) (2020).
209 *See* Rescission of Rule 8.123, *supra* note 26.

The NJDC/NLADA Ten Core Principles stress the need for public defense systems to provide mechanisms to supervise attorneys and staff and to monitor work and caseloads.[210] The delivery system should provide supervision and management direction for attorneys and team members[211] and ensure systematic reviews for all attorneys and staff representing youth, whether they are contract defenders, assigned counsel, or employees of defender offices.[212]

Juvenile defense delivery systems should recognize delinquency representation as a specialty that requires continuous training,[213] including skills-based training such as detention advocacy, trial skills, and disposition planning. Additionally, defenders should be trained to recognize issues that may require the skills of other specialists such as administrative appeals, immigration, mental health, substance abuse, child welfare and entitlements, and special education.[214]

The Ten Principles recognize that well-trained defenders must understand the unique needs of children, including child and adolescent development; racial, ethnic, and cultural understanding; communication skills with a younger population; ethical issues; youth competency; and the role of parents and guardians in the process.[215]

Defenders in juvenile court also deal with non-adult issues, such as the prospect of youth clients being transferred to adult court; a myriad of school-related issues such as zero tolerance policies, suspensions, and expulsions; and the need to understand the variety of systems and programs with which their clients may interact.[216]

Most of the courts visited operated from an Administrative Order or provided to assessment team members copies of contracts used with attorneys handling juvenile cases. When measured against standards for effective delivery of juvenile defense services, these controlling documents provided little to no quality assurance of adequate oversight and did not provide assurances that youth receive well-trained, qualified, and effective counsel.

For example, the qualifications for attorneys to provide representation to youth in delinquency matters in roughly two-thirds of the jurisdictions were either non-existent or simply required applicants to be licensed in Michigan and in good standing. Others contained vague language such as "must satisfy judges they are competent" or "must have substantial and relevant experience." Only two counties had a requirement of prior training or required written competencies.

None of the administrative orders or contracts reviewed contained any restrictions on caseload, although one indicated that attorneys may engage in private practice where there are no conflicts. Many of the attorneys in counties with rotation systems are also assigned abuse and neglect cases, criminal cases, and other appointments, and may also have a private practice.

Only half of the counties required any form of ongoing training, although only three were specific as to juvenile content. One county required eight hours of training related to child abuse and neglect or delinquency and reimbursed up to $200 for travel per year. Another county required lawyers on their panel to attend a basic skills seminar on practice in that county and juvenile-specific training offered by the county bar association. There is no state agency or organization in Michigan that regularly provides juvenile defender-specific training.

---

210 *See* Ten Core Principles, *supra* note 11, Principle 5 (stating "A. The leadership of the public defense delivery system monitors defense counsel's workload to promote quality representation. The workload of the public defense attorneys, including appointed and other work, should never be so large that it interferes with competent and diligent representation or limits client contact.").
211 *Id.* Principle 6A.
212 *Id.* Principle 6C.
213 *Id.* Principle 7A.
214 *Id.* Principle 7C.
215 *Id.* Principle 7D.
216 *Id.* Principles 7D, E.

There is no state agency or organization in Michigan that regularly provides juvenile defender-specific training.

Oversight and review of attorney performance was minimal, at best, in the systems with flat-fee contracts or court appointment by rotation. Most often, oversight was only the review of applicant qualifications and expectations at the time a contractor or private attorney was approved for appointment. One county required "mandatory meetings on an as needed basis" and indicated that lawyers are reviewed twice a year by judges "for knowledge of the law, readiness and personal representation." Another county required attorneys to have an evaluation with a committee, while another indicated they do "performance reviews" by committee, and that lawyers can be sanctioned, suspended, or removed by the chief judge.

While there appear to be mechanisms in most of these counties to remove poorly performing lawyers, contracted and court-appointed lawyers do not receive the type of supervision and oversight embodied in the Ten Principles. Those who could remove attorneys from the list may be hesitant to do so, and the lack of oversight makes it easier for poorly performing lawyers to continue on the list.

As one judicial officer noted, "There is no oversight as to the quality of representation. Once the attorneys are on the list, they can only get removed if they are chronically not showing up, showing up intoxicated, etc."

Only the full-time public defender office had a supervisory review process per personnel rules of its salaried lawyers and annual reviews of conflict counsel with specific criteria and input from judges.

Some courts interviewed recognized the discrepancies between what is now expected in the adult defense system and what is available for youth representation. One judge noted that "it would be a good idea for the [adult] public defender system to trickle down to the juvenile defender system." But some expressed concern as to whether they would lose good defense attorneys who may not want to work full-time for the public defender system.

While adult defense services are now mandated to follow standards driven by constitutional protections for effective representation and have oversight and enforcement mechanisms in place through the Michigan Indigent Defense Commission, such protections do not exist at the county level for juvenile defense services. Michigan's county-based delivery systems for juvenile indigent defense do not provide adequate mechanisms for oversight to ensure that youth receive well-trained, qualified, and effective counsel.

Michigan's county-based delivery systems for juvenile indigent defense do not provide adequate mechanisms for oversight to ensure that youth receive well-trained, qualified, and effective counsel.

D. County-Level Funding to Ensure Effective Representation

> ***"While the vagaries of the legal system afford differences in attorney quality, principals of fundamental fairness mandate that these differences should not fundamentally prejudice an entire class of youth, nor should the prejudice be a simple function of how a municipality decides to compensate the attorneys."***
>
> Cyn Yamashiro, Tarek Azzam & Igor Himmelfarb, *Kids, Counsel and Costs: An Empirical Study of Indigent Defense Services in the Los Angeles Juvenile Delinquency Court*, Loy. Crim. L. Bull. (forthcoming).

Juvenile defense is its own specialty practice. While it would benefit from inclusion in some of the reforms happening on the adult criminal defense side, there are distinct concerns specific to providing adequate juvenile defense. Reaching constitutional and ethical thresholds in a juvenile defense delivery system necessitates sufficient "resources to be effective, due-processed-based, specialized, developmentally and procedurally sound, technologically equipped, community oriented and respectful of and responsive to cultural differences."[217]

Funding strategies should support dedicated juvenile defense leadership positions and promote policies to ensure that juvenile defense has sufficient autonomy from the adult juvenile defense system.[218] Autonomy—including some level of budgetary and structural independence—will help ensure that budget or resource shortfalls are not disproportionally shifted to juvenile defense.

Juvenile defenders should have equal opportunities for pay and advancement as those in adult defense units, and should not be required to "advance" to an adult practice to earn more.[219] Staffing resources should be sufficient to ensure that juvenile defenders have a workload that is reasonable, and which views cases more holistically to ensure effective advocacy.[220]

Adequate funding should also be in place to ensure that juvenile defense systems are on par with other agencies that prosecute juveniles, such as prosecutors, police, and crime labs.[221] That should include competitive pay for experienced juvenile defense attorneys equipped to provide representation at all critical stages and resources for training, appeals, support staff, social workers, and investigators.

Michigan's county-based delivery systems for juvenile defense services receive no state funding and were found to be inadequately funded by counties to ensure effective assistance of counsel for youth at all critical stages. Nearly all of the counties visited relied upon either flat-fee contracts or an appointed counsel system that was not part of an autonomous juvenile defense office or program.

217 Defend Children, *supra* note 29, at 22 Recommendation 3.1.
218 *Id.*
219 *Id.* at 23 Recommendation 3.1.
220 *Id.*
221 *Id.*

Michigan's county-based delivery systems for juvenile defense services receive no state funding and were found to be inadequately funded by counties to ensure effective assistance of counsel for youth at all critical stages.

Administrative orders with rates for appointed counsel often designated payment based on proceeding type, with maximum pay allotments established regardless of the type or severity of the case. For example, in one county visited, the maximum allowable rates were: $105 for a preliminary hearing, $157 for a pretrial, $340 for a pretrial case with a plea agreement, $471 for a trial, and $131 for a review hearing. Other "extraordinary time" could be billed at $52/hour with prior approval. No other expenses were allowable.

In other counties, the comparable rates also noted that case preparation must be included in the total. Another county had a basic one-time fee payment and then paid for additional proceedings, but only one preliminary hearing, one pretrial, one settlement conference, and one disposition unless previously arranged. The basic fee rates varied from $250 to $400, but included preparation and the first day of trial.

In one instance, an attorney related that she drove an hour each way for a review hearing that would pay $50, and if that hearing were cancelled for some reason, she received no payment. Another attorney, when asked about visiting clients in detention, noted that it is not specifically reimbursed since it is not a proceeding, and would have to be included in an already minimal amount afforded that type of hearing.

In counties where there are fees-for-service, such fee schedules often drive advocacy. When the county or court is unwilling to pay for a service, such as investigation, hearing preparation, motion drafting, or legal research, it suggests to defenders that these are not important parts of practice or that, at a minimum, no one will expect that they do it.

For those counties that paid by the hour, the rates ranged from $50 to $60 per hour, with one county planning to increase the hourly rate to $75 per hour. Even in those counties, however, there were presumptive limits that required prior approval to exceed. For example, it was estimated that opening a file and related matters would be one hour, while attending and preparing for an initial hearing would not exceed 1.5 hours.

Flat-fee contracts typically paid a specific annual or monthly rate without restriction on the number of cases, but did not cover costs associated with office-related expenses, training, or insurance. One county included a provision in its contract for requesting funds for investigators or experts and permitted mileage and other expenses directly related to the representation. For the most part, training is not required or is minimally required, and is not reimbursed.

While there are excellent lawyers who practice in each of Michigan's three types of delivery systems, studies have consistently shown that individuals represented by appointed counsel fare worse than those represented by retained counsel or full-time public defender offices.[222]

For example, an empirical study in the Los Angeles juvenile courts comparing two distinctive models—contract panels and a full-time public defender office—found that contract panel attorneys were less active in their cases, that youth represented by contract panel attorneys were convicted of more serious crimes, and that dispositions imposed were generally more serious.[223]

222 See Cyn Yamashiro, Tarek Azzam & Igor Himmelfarb, *Kids, Counsel and Costs: An Empirical Study of Indigent Defense Services in the Los Angeles Juvenile Delinquency Court*, Loy. Crim. L. Bull. (forthcoming); Miriam S. Gohara, James S. Hardy & Damon Todd Hewitt, *The Disparate Impact of an Under-Funded Patchwork Indigent Defense System on Mississippi's African Americans: The Civil Rights Case for Establishing a Statewide, Fully Funded Public Defender System*, 49 How. L. J. 81, 88-89, 94-95 (2005).

223 Yamashiro, *supra* note 222 (manuscript at 16-24).

The lack of training, mentorship, and qualifications, combined with funding constraints, provides little incentive in some counties to attract quality talent. As one defender in a county with a large appointment roster explained, "I only got two delinquency cases last year. The cases are so spread out that no one attorney gets very many. There's no money, and it's hard to get quality lawyers. There's minimal training. There are no requirements, basically, to be on the list."

The lack of training, mentorship, and qualifications, combined with funding constraints, provides little incentive in some counties to attract quality talent.

In another large county, a judge noted that "there is a roster system of over 100 attorneys. Most could never make a living off of appointments. They do it because they love it. I would like to see them make more, and I wish the attorneys did not have to make decisions based upon money issues."

A court administrator opined: "We are woefully underfunding juvenile defense. We have a very well-funded prosecutor's office with a gorgeous facility. But we do not do the same for the defense side. There are no written motions, no research, etc. We should build an equally well-equipped PD system—it is a core function of justice."

Poorly funded juvenile defense systems have other challenges—they neither promote an identity for attorneys who want to specialize in juvenile defense practice nor attract new and diverse talent to the field.

As one seasoned juvenile defense practitioner noted, "We have a split identity because most of us do work in criminal court and abuse and neglect cases as well. There is no independent identity for juvenile defense attorneys here."

Some of the counties visited for this assessment had a noticeably aging bar that accepted juvenile defense appointments, in some cases for decades. As one attorney noted, "[T]here is little incentive for new and younger lawyers to get into the field. Many of us have been here for years, and we'll be retiring soon." This is particularly true in smaller and/or rural counties where the options are more limited.

One judge noted, "[I]f you don't have the caliber you'd like to see [in juvenile defense attorneys], you don't have 20 guys waiting in the wings to fill this role. Not only are there not 20, there aren't any."

Michigan must find ways to fund and support effective juvenile defense services, including services in rural, remote, and underserved areas where the challenges are exacerbated. Establishing pathways for young lawyers to practice juvenile defense requires greater opportunities in juvenile defense clinics, leadership positions, and other opportunities to engage in the field as a viable career choice.[224]

Attorney compensation is often restricted by flat-fee contracts and payment-by-proceeding systems, which can create disincentives for spending adequate time to effectively investigate, research, and prepare a zealous defense for all youth clients. Access to experts, investigators, and other resources is limited or non-existent in many counties. Funding must be sufficiently enhanced for representation of youth in delinquency proceedings to ensure that the constitutional rights of youth are adequately protected.

"We are woefully underfunding juvenile defense. We have a very well-funded prosecutor's office with a gorgeous facility. But we do not do the same for the defense side. There are no written motions, no research, etc. We should build an equally well-equipped PD system—it is a core function of justice."

224 Defend Children, *supra* note 29, at 37 Recommendation 5.

E. Data, Research, & Evaluation on Juvenile Defense Practices

> ***"Data, assessment, evaluation, and research are necessary to advance juvenile defense and to help jurisdictions successfully meet the constitutional requirement that youth receive a vigorous defense from qualified attorneys."***
>
> Nat'l Juvenile Defender Ctr., Defend Children: A Blueprint For Effective Juvenile Defender Services Recommendation 7.0 (2016).

There is little juvenile defense data available at the state or local level in Michigan. Former Michigan Court Rule 8.123 required courts to adopt local administrative orders describing their procedures for selecting, appointing, and paying for counsel.[225] The rule also required trial courts to annually compile an electronic report of the total funds paid to each attorney for appointments for that year.[226] That rule has been rescinded, however,[227] and to date, nothing has replaced it that would require courts to report this information relative to juvenile defense practices and funding.

For this assessment, it was the exception and not the rule when courts had data to share on the number of juvenile court appointments of counsel. But even then, there was no indication of when in the process counsel was appointed or for which proceedings.

Public defenders, even in full-time offices, were not found to have any systematic way of recording and tracking caseload information, and none was required. The amount of time spent on a case was sometimes maintained, but only if the attorney could bill for the time they incur, which was not always the case. There were no case management systems in place and no research initiatives identified for juvenile defense services.

The Michigan Safety and Justice Roundtable, which recently convened with multiple partners to hear from experts about promising practices and common challenges, has made multiple recommendations that can create a blueprint for developing a fair and effective justice system in Michigan.[228] The report noted challenges in the collection of juvenile justice data generally, including missing data, inconsistent reporting, inadequate funding, and an uncoordinated data management system.[229]

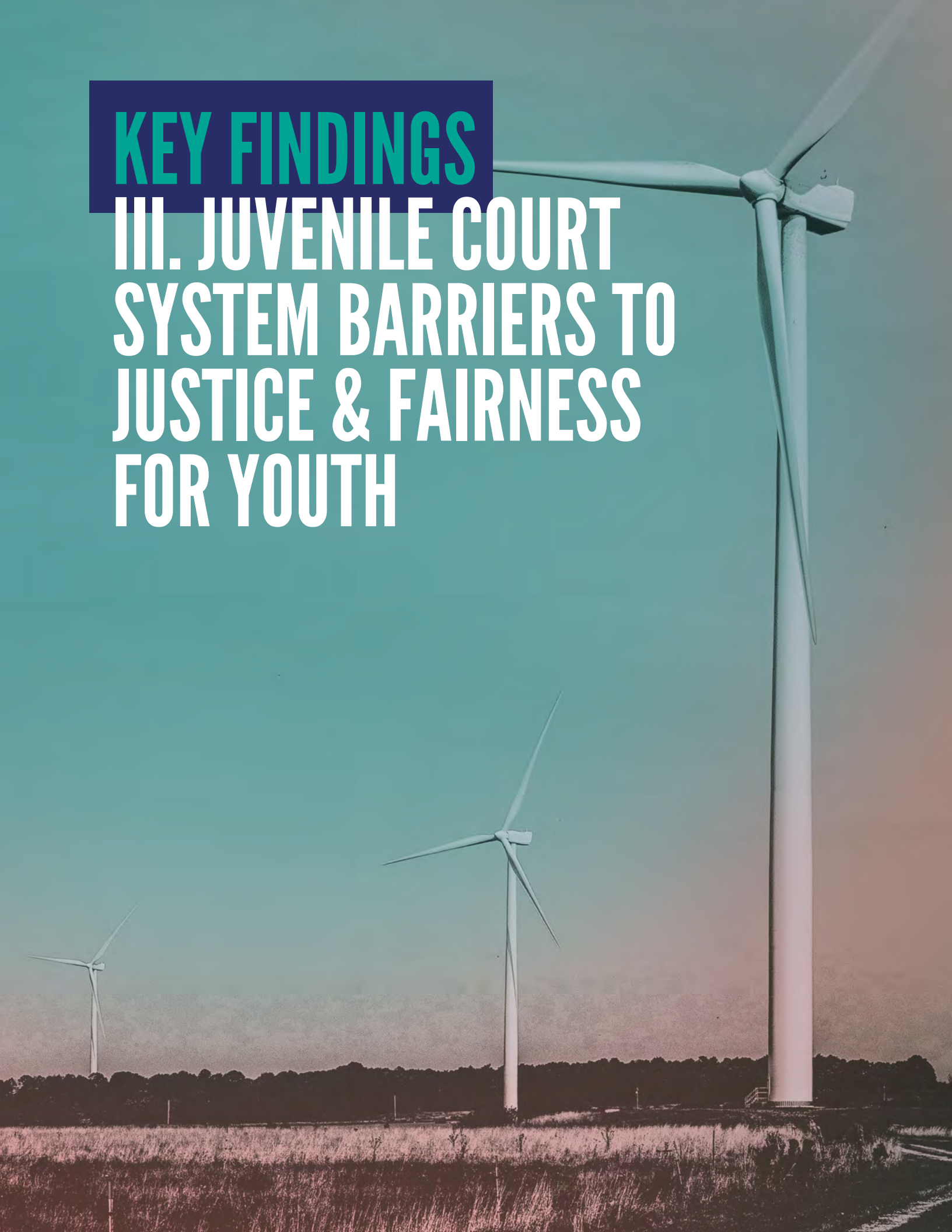
A list of several projects underway suggests some promising approaches to improving data collection, and the additional recommendations for possible action could also incorporate data important for juvenile defense practice if implemented.[230]

The MIDC reported in 2018 that "[a] statewide system to collect data must be developed and implemented in public defender offices and assigned counsel systems, which will enable the MIDC to assess the impact of standards implementation and identify best practices."[231] Such systems must likewise be in place at the state level for juvenile defense services.

225 Mich. Ct. R. 8.123(B) (repealed 2019).
226 Mich. Ct. R. 8.123(D) (repealed 2019).
227 *See* Rescission of Rule 8.123, *supra* note 26.
228 *See* Justice Roundtable, *supra* note 149, at 6, 30-31.
229 *Id.* at 8.
230 *Id.* at 10-11.
231 2018 Impact Report, *supra* note 17, at 26.

KEY FINDINGS

III. JUVENILE COURT SYSTEM BARRIERS TO JUSTICE & FAIRNESS FOR YOUTH



The justice system presents other challenges to youth and their families, as well as defense counsel who provide representation to them. Counsel should address systemic problems that may impede the rights of their clients to a just and fair tribunal, one which abides by constitutional, legislative, and ethical requirements.[232]

A. Indigence Determination & Attorney Fees

> ***"The right to counsel for children is meant to balance the scales of justice; to ensure that every child, no matter their circumstance, is cloaked within the protections of the Constitution. Charging fees for a publicly funded attorney—the very advocate through whom such protections become accessible—renders the right to counsel meaningless for children."***
>
> Nat'l Juvenile Defender Ctr., Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel 23 (2017).

According to the U.S. Supreme Court in *Gault*, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution mandates that youth who are unable to afford an attorney in a delinquency proceeding are entitled to counsel provided by the state.[233]

There is no provision in Michigan law that presumes children indigent for purposes of appointment of and payment for an attorney. But Michigan statutes echo *Gault* in requiring that courts appoint an attorney to represent a youth if the youth or the youth's guardian are unable to financially retain an attorney and the youth does not waive their right to counsel.[234] Despite this, however, Michigan's criminal rules still allow courts to assess the cost for court-appointed representation, in whole or in part, against the youth or person responsible for the support of the youth, or both.[235] How that determination is made varies from county to county. It is problematic to tie a child's access to

232 National Juvenile Defense Standards, *supra* note 7, at 152.
233 *Gault*, 387 U.S. at 41.
234 Mich. Ct. R. 3.915(A)(2)(c).
235 Mich. Ct. R. 6.905(D) (stating "The court may assess cost of legal representation, or part thereof, against the juvenile or against a person responsible for the support of the juvenile, or both. The order assessing cost shall not be binding on a person responsible for the support of the juvenile unless an opportunity for a hearing has been given and until a copy of the order is served on the person, personally or by first class mail to the person's last known address.").

counsel to the financial status of their family for several reasons. Making a determination into the income of the parents can be a lengthy and invasive process, and may be ongoing while the child is being detained without an attorney.[236]

The initiation of charges against youth who cannot afford an attorney, without providing an attorney to them, may also cause financial tension in the family and influence a child's decision to waive counsel and plead before a proper investigation can be initiated or completed.[237]

In Michigan, the State Court Administrative Office is charged with creating guidelines for courts to utilize in determining the ability of parents and youth to pay for care and the cost of services.[238] This includes the reimbursement of attorney fees.[239]

When an attorney is appointed in a delinquency proceeding, Michigan courts can assess the cost of that representation against the party or parties responsible for the support of that party.[240] An order assessing attorney costs may be enforced through contempt proceedings and other mechanisms.[241]

The assessment team found that Michigan's practice of requiring parents and youth to reimburse attorney fees may work to discourage the appointment of counsel, terminate representation prematurely, and create conflicts of interest for attorneys.

Michigan's practice of requiring parents and youth to reimburse attorney fees may work to discourage the appointment of counsel, terminate representation prematurely, and create conflicts of interest for attorneys.

Often, parents who fall just above the eligibility threshold, but for whom payment of counsel fees still imposes a substantial hardship, are required to pay for counsel.[242] These fees, which are imposed after disposition, can cause hardship for the parents and child during an already stressful time and create conflicts between the child, parent, and other family members just as the youth is embarking on period of post-disposition supervision that necessarily requires family engagement and their cooperation with service providers.

Parents who are above the eligibility threshold may nonetheless decide the burden is too great and not hire an attorney for the youth, forcing the child to navigate the system without counsel. For parents who do pay the price of having an attorney, the potential for real or perceived conflict can exist between the attorney's loyalty to the child and the perception of loyalty to the parents.[243]

236 Access Denied, *supra* note 15, at 11.
237 *Id.*
238 Mich. Comp. Laws § 712A.18(6) (2020).
239 Mich. Comp. Laws § 721A.18.(5) (2020); Mich. Ct. R. 3.915(E), 3.916(D).
240 Mich. Comp. Laws § 712A.17c(8) (2020); *see also* Mich. Ct. R. 3.915(E).
241 Mich. Comp. Laws § 712A.17c(8) (2020).
242 Access Denied, *supra* note 15, at 11.
243 *Id.*

There is no standardized format for determining financial ability to pay for attorney fees, which are assessed in addition to the possibility of multiple other service fees, placement costs, fines, and/or restitution. Rather, a determination of income is made by the collections program established in the respective county.[244]

The State Court Administrative Office guidelines recommend determining income based upon the Michigan Child Support Formula Manual, which provides courts with direction as how income should be determined.[245]

Recommendations based upon net income are made to the judge after a disposition, "done in writing, so that the court can present and defend the method and data used to arrive at the recommendations for reimbursement."[246]

Recommendations should be submitted to the judge at the initial disposition.[247] If necessary information is unavailable to complete the recommendation, the recommendation should note that the cost will be "$0 . . . pending receipt of complete information," or that the "party is responsible for the 'full costs' of care of service, pending receipt of complete information."[248]

Assessment interviews suggested that the cost of counsel is one reason that waiver of counsel occurs in Michigan. Some parents and youth, particularly those with knowledge of the system, make choices that are driven by financial considerations. One judge noted, "Parents are concerned about the cost of counsel and want to waive counsel due to that. I tell the parents that if they were the one charged, they'd want an attorney. Some parents say yes, but that it's different for a child. I appoint counsel anyway."

A prosecutor noted that these fees have a detrimental impact on families in other ways. Where there is parent-child conflict and the parent receives a fee assessment, including attorney fees, they will be less likely to report additional problems in the future, including probation violations or possible incidents of victimization.

While judges and referees appeared to appoint counsel in the majority of cases in juvenile courts, the cost of these attorneys was passed to the parents and child, often for the entire amount billed by the attorney. Stakeholder interviews and document reviews suggest that attorney fee assessments to youth and parents were often based upon the level of work done by the attorney (e.g. trial versus plea, motions, post-disposition work, etc.) and created a conflict of interest for attorneys when effective advocacy on their part resulted in increased financial burdens for clients and their families.

Many attorneys were painfully aware—and indeed conflicted—about the reimbursement of attorney fees and how it impacted their performance. One defender noted that in his county, "I don't think the attorney fees are ever waived. The attorney fee is based on what the attorney's bill. The court sends the family the amount the attorney billed as their bill. In the past, sometimes kids were not released from probation because they still owed fees."

In another county, one of the public defenders also told interviewers that he doesn't think attorney fees were ever waived, and the fee process doesn't involve the lawyers. "The imposition of fees and cost of counsel affect how parents are advising their kids on whether to waive their right to counsel."

"The imposition of fees and cost of counsel affect how parents are advising their kids on whether to waive their right to counsel."

244 Mich. Sup. Ct., State Ct. Admin. Office, Guidelines for Court Ordered Reimbursement 4 (2018) [hereinafter Guidelines for Court Ordered Reimbursement], https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cor.pdf.
245 *Id.*
246 *Id.* at 7.
247 *Id.* at 8.
248 *Id.*

Fees can also limit the time attorneys remain involved in cases. Several attorneys and judicial officers noted that attorneys were released after disposition because the court and the attorneys were cognizant of the fees that would continue to be charged to the parents and youth. Several attorneys and defense counsel also told interviewers that their representation was terminated at disposition in most cases out of concern for the additional cost to parents and youth every time an appearance was made. Rather than waiving the fee, which courts were permitted to do, the youth was without counsel for any subsequent hearings.

In practicality, some counties have created a pass-through system that is predicated on limiting access to counsel to avoid fees that the system itself has the authority to waive but chooses not to. Youth and parents should not be assessed the cost of an attorney in delinquency proceedings.

Juvenile courts should appoint counsel in every case regardless of the financial status of the parents and without imposition of fees later, and should waive the cost of a publicly funded attorney for children.

B. Fees, Fines, & Other Costs Imposed by Juvenile Courts

It is well documented that many juvenile courts routinely impose financial obligations on youth and families in delinquency matters without regard to the child's ability to pay. This may apply to bail, fines, fees, costs, and restitution, and can have long-term, serious consequences, including being pulled deeper into the justice system for longer periods of time.[249] The imposition of these fees can also magnify class, race, and ethnic disparities already apparent in many juvenile courts.[250] These costs are unrelated to public safety and are counterproductive to rehabilitative goals enshrined in juvenile court history.

The National Council of Juvenile and Family Court Judges passed a resolution in 2018 calling for juvenile and family courts to work toward the reduction and elimination of fees, fines, and other costs by addressing financial ability to pay prior to the imposition of such obligations.[251] The resolution also recognizes that the core functions of juvenile courts should be fully funded by government revenue sources and not by revenue generated from those appearing before the court.[252]

In March 2016, the U.S. Department of Justice (DOJ) called for a national review of policies conditioning release from confinement or supervision on financial terms without consideration of the ability pay, noting this essentially "punishes a person for his poverty."[253]

A separate advisory by the DOJ in January 2017 applied this concept to youth, stating that, "[I]n addition to fines [juvenile] courts often impose fees on children for diversion programs, counseling, drug testing and rehabilitation programs, mental health evaluations and treatment programs, public defenders, probation, custody and court costs. These fines and fees can be economically debilitating to children and their families and can have an enduring impact on a child's prospects."[254]

> Walk into almost any delinquency courtroom in the United States and you will find that the vast majority of children in the system are living at or below the poverty level. One or both of their parents are unemployed. If their family members have jobs, they earn minimum wage. Their homes are in low-income neighborhoods. There are no book stores, libraries, or playgrounds within walking distance. They qualify for food stamps. They attend low performing public schools. They are chronically absent or have developmental delays, learning disorders, or mental illnesses. They have minimal health care coverage and rely on visits to the emergency room for routine treatment. They are sad, angry, or completely lack affect.
>
> If you spend enough time in these courtrooms, you begin to ask why. Why is it that poor children are arrested, charged, and prosecuted at higher rates than children of means? Why are fewer poor children diverted from the system than wealthy children? Why does the standard of proof seem to depend on the socioeconomic level of the child's family? Why do so many poor children violate the terms and conditions of their probation? Why are so few middle- and upper-class children sent to detention?
>
> Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J. L. & POL'Y 58, 106-07 (2012).

249 Nat'l Council of Juvenile & Family Court Judges, Resolution Addressing Fines, Fees and Costs in Juvenile Court 1 (2018), https://www.ncjfcj.org/wp-content/uploads/2019/08/resolution-addressing-fines-fees-and-costs-in-juvenile-courts.pdf.
250 *Id.*
251 *Id.* at 2.
252 *Id.*
253 U.S. Dep't of Justice, Dear Colleague Letter: Law Enforcement Fees and Fines (Mar. 14, 2016), https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf.
254 U.S. Dep't of Justice, Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles 1 (Jan. 2017), https://ojp.gov/about/ocr/pdfs/AdvisoryJuvFinesFees.pdf.

POTENTIAL COSTS AND FEES IN MICHIGAN'S JUVENILE COURTS

From the day a young person enters the juvenile court system, the cash register begins to toll.

After a potentially long and drawn-out process of deciding whether their family is financially qualified to receive a court-appointed attorney, youth or their family may ultimately be billed for:

The services of their court-appointed attorney's advocacy, whether or not they are found involved in the offense

If detained, placed in foster care, or put into some out-of-home placement, the costs of their stay out of their family's custody

Any probation supervision

Any clothing provided to them by the system

Any medical or dental care they receive

Any specialized treatment services (e.g. anger management, drug treatment, grief counseling, etc.)

Any psychological evaluations that are ordered and any counseling they're required to participate in

Any in-home services provided to them or their family as part of their court involvement

An assessment to be paid to the Crime Victim Rights Fund

A fee for a conviction of each misdemeanor or felony offense

Any "other reimbursable costs of care or services as identified by the court"

The imposition of fees and fines in some juvenile courts in Michigan unnecessarily places burdensome costs on children and families. Fines and fees are sometimes imposed without uniform indigence determinations and excessive documentation may be required to mitigate costs. Moreover, the assessment of costs, the efforts to collect, and sanctions for non-payment often occur with limited involvement of judges, referees, and attorneys.

1. Reimbursement System Requirements

Michigan's State Court Administrative Office (SCAO) guidelines provide courts with recommended procedures to create and improve collections processes and allow for greater uniformity of reimbursement orders.[255] The assessment team reviewed these guidelines and other administrative documents to learn about the expectations for local courts to collect fees, fines, and other costs. The guidelines provide statutory references for the collection of reimbursements and procedures for courts in their operation of collections programs.[256] The stated purpose for the collection of court-ordered reimbursement from parents and youth is to "reinforce accountability for the cost of care and services in the community, place emphasis on deterrence, and assist the courts in working with its funding unit in budget development."[257]

Michigan law states that disposition orders placing a youth in out-of-home care **must** include a provision for reimbursement.[258] Orders maintaining a youth in their own home **may** include a provision for reimbursement for the cost of services.[259] These costs can include detention, foster care, residential care, clothing costs, medical costs, dental expenses, probation services, counseling fees, evaluations, in-home care services, specialized treatment services, and/or attorney fees.[260]

Statutes also allow courts to assess additional service fees for other court-provided services, although the fee must not exceed the actual cost of the service rendered.[261] The reimbursement costs for these services are ordered to be paid by the youth, parent, guardian, or custodian, whether in home or out of home.[262] The cost of an appointed attorney may also be assessed against the party or other person responsible for the support of that party, and may be enforced through contempt proceedings.[263]

In addition to these costs, courts must impose certain fines in juvenile proceedings, such as the Crime Victim Rights Assessment ($25 per dispositional order for felony or misdemeanor) and the minimum state costs for each felony or misdemeanor adjudication ($50 for each misdemeanor and $68 for each felony).[264]

SCAO requires that reimbursement orders be reasonable and take into account the income and resources of the youth or parent.[265] Courts are required to establish a method to determine what is reasonable, whether the court orders payment of the total amount or an interval payment schedule.[266] Out-of-home placement costs may be calculated by using the Michigan Child Support Formula Manual to determine income.[267]

Many counties use a state-created financial statement form to obtain income information. Net income may be determined by using a prior year's tax return.[268] Imputed potential income is also calculated if it is believed that the individual "is voluntarily unemployed or underemployed, or has an unexercised ability to earn."[269]

---

255 *See* Guidelines for Court Ordered Reimbursement, *supra* note 244, at 2.
256 *Id.*
257 *Id.*
258 Mich. Comp. Laws § 712A.18(2) (2020).
259 Mich. Comp. Laws § 712A.18(3) (2020).
260 Guidelines for Court Ordered Reimbursement, *supra* note 244, at 2-3.
261 *Id.* at 3.
262 Mich. Comp. Laws § 712A.18(2)-(3) (2020).
263 Mich. Comp. Laws § 712A.17c(8) (2020).
264 *See* Circuit Court Fee and Assessments Table, Juvenile Assessments 7 (2020), https://courts.michigan.gov/Administration/SCAO/Resources/Documents/other/cfee.pdf.
265 Guidelines for Court Ordered Reimbursement, *supra* note 244, at 3.
266 *Id.*
267 *Id.* at 4.
268 *Id.* at 7.
269 *Id.*

After a disposition order is entered by a court, a separate order of reimbursement is prepared using the calculated net income, if the youth or parents have provided sufficient information, and computing all or a portion of the costs for placement, services, and other fees, including attorney fees.[270] While the issue of reimbursement must be addressed at the disposition hearing, the final amount of the reimbursement is often not set at that time. Courts can set a "reasonable *interval amount*" to be paid during the time the youth is out of home or receiving services, or a "*definite total amount*" at a reasonable interval payment.[271]

A court can, at any time, order the review of a parent's or youth's compliance with the reimbursement order and forgive any or all of the debt, continue it, seek a wage assignment, or amend the order.[272]

Circuit Court family divisions must have a collections program to track reimbursements and follow policies regarding collections as established by that court.[273] Enforcement may include delinquent notices, direct contact by phone or in person, voluntary wage assignments, petitions and orders to show cause, contempt proceedings, involuntary wage assignments, bench warrants, tax intercepts, collection from government benefits, and alternatives to reimbursement such as community service or volunteer services.[274] Payment is expected quickly by law, meaning "at the time of the assessment, except when the court allows otherwise for good cause shown."[275]

Reports made annually to SCAO show tens of millions of dollars in unpaid juvenile court fees, fines, and other costs, including state childcare costs for out-of-home placements. For example, a review of one of the annual reports to SCAO in an assessment county showed unpaid receivables in juvenile delinquency cases totaling $5.4 million in one jurisdiction, with $3.7 million of that assessed against out-of-home placement costs and nearly $80,000 in attorney fees.

In another jurisdiction, financial documents showed more than $8 million outstanding, of which $1.4 million was for the cost of detention, $1.9 million was in agency reimbursements, $1.9 million was for intensive probation costs, and $848,489 was for late fees. Another county had outstanding delinquency receivables of nearly $87 million over a multi-year period.

Potential Sanctions for Failing to Pay Court-Related Costs

- *Late fees added to the costs*
- *Voluntary wage assignments*
- *Petitions and orders to show cause*
  - Contempt proceedings
  - Involuntary wage assignments
- *Bench warrants*
- *Tax intercepts*
- *Collection from government benefits*

Once assessed, unless a court relieves families of the debt incurred, collections continue indefinitely. One administrator explained that, "[D]ebts are kept open indefinitely. I have open accounts still on children who are deceased." In another county, efforts to digitize and archive files were complicated by the number of case files with outstanding debt.

> *"[D]ebts are kept open indefinitely. I have open accounts still on children who are deceased."*

270 *Id.* at 9.
271 *Id.*
272 *Id.* at 12.
273 *Id.* at 12-13.
274 *Id.* at 14-16.
275 Mich. Ct. R. 1.110.

2. Parent & Child Burden to Prove Financial Inability to Pay

The assessment team learned that the process for determining and imposing specific amounts for fees, fines, and other costs is often strikingly separate from judicial proceedings and remarkably burdensome for those impacted. The process appears to shift responsibility to the parents and youth to prove inability to pay or, by default in some counties, they are assessed the entire amount.

Attorney fees, cost of placement, cost of detention, probation and other user fees, mandatory fees for each misdemeanor and felony adjudication, tether fees, crime victim fees, and others are calculated after disposition, by a collections or reimbursement agent. Given this disconnect between court proceedings and final payment calculations, judges and defense attorneys, and by extension families, have little voice in whether the assessments are reasonable.

The focus on assessing financial ability begins in some counties before the youth ever passes the courtroom door. One judge noted, "[I]t's assumed that the family can pay. The court orders the family to fill out a financial statement. If there is an acquittal then no fees are charged except for the mandatory state fee for an attorney."

In one county, for example, the court website lists the items that parents, guardians, or youth should bring to court *at their initial meeting*, including paystubs; their most recent tax return; recent W-2 forms; documentation of other income; current savings/investments, including checking, savings, and deferred compensation accounts, IRAs, 401K, and stocks; mortgage or rent payments; and vehicle payments.

Similarly, in another county, it is required that the parents, guardian, or other legally responsible person complete a financial statement and bring the following documentation for calculation of costs: prior year federal tax return and W-2 forms; three current paycheck stubs; statement of Social Security if applicable; statement of any government assistance, including Department of Health and Human Services, Workers' Compensation payments, Unemployment Insurance, and disability insurance; copy of divorce decree (if applicable); medical insurance information; and a copy of a driver's license or other photo ID. It is hard to imagine that most parents would be able to quickly assemble such information to "prove" their inability to pay.

The actual determination made about whether and how much can be paid, if such documentation was provided to satisfaction, appeared to be unclear in most counties visited and, in some cases, was seemingly arbitrary. Most individuals with a working knowledge of the financial assessment process indicated that assessable debt is "determined based upon verifiable income and will be adjusted according to federal poverty guidelines." Whether and to what extent financial obligations are considered is not clear.

In one particularly egregious case, a public defender reported that his client's parent received Social Security, and that the parent's entire benefit was taken for reimbursement of services. He noted, "[A]fter it's imposed, now they just say people have ability to pay and then assess them for $40,000 and take their state tax returns forever. One kid was home three days and in a program for four days—they assessed the full amount every day even when not in the program. The mother was receiving Social Security, so they took her entire Social Security check."

In other counties, however, parents receiving Social Security benefits or other benefits were viewed as having financial hardship, and therefore had fees waived or significantly reduced.

Mandatory fees, however, are not waivable, and are assessed in addition to other costs based upon financial ability to pay. Costs continue to accrue during the time the youth is receiving reimbursable services, including attorney fees. For youth in placement or who spend time in juvenile detention, those costs can become exorbitant over time.

Those involved in the collection of fees and fines were quick to indicate that once assessed, parents and others can ask that some or all of the fees be waived by the court. But that is generally after an assessment has been made and costs incurred. One judge noted, "It's up to the finance officer to assess

and determine if fees can be waived. A judge or referee can't waive without the family first meeting with the finance officer." To dispute the assessments, a family or youth would have to go back before the court, take more time off school and work, have another hearing at which they may be charged for the use of court-appointed counsel, and potentially add to the already snowballing debt.

To dispute the assessments, a family or youth would have to go back before the court, take more time off school and work, have another hearing at which they may be charged for the use of court-appointed counsel, and potentially add to the already snowballing debt.

One judge explained, "[T]he finance people send out the information about the fees—public defenders don't have anything to do with it once the finance department gets it. Referees only hear about it if folks complain. They seem to purposefully make the fees high to get people's attention—make them start paying the bill, even though there is no intention of actually going after the money." Another judge noted that because most youth and families are poor, trying to collect is "like squeezing money out of a beet."

Trying to collect is "like squeezing money out of a beet."

Court Costs in Juvenile Court vs. Costs of Higher Education in Michigan

Juvenile court involvement in Michigan can generate extremely high debts.

"I've seen outstanding fees as high as $300,000 to $400,000, but this was a family with multiple kids and a lot of services. Most are under $100,000." Another judicial officer reported, "Some families may owe more than $100,000—more money than they will ever see in their lifetime ..."

It should not cost more to go through the juvenile court system than it does to get a degree.

Compare that debt with the cost of higher education in Michigan:

University of Michigan School of Law:
One year of in-state tuition is estimated to be $30,763* (or three years at approximately $92,300)

Michigan State University undergraduate degree:
One year (two semesters) of in-state tuition alone is estimated to be $14,524. With room and board, full yearly attendance is estimated at $25,046 (or four years at just over $100,000).†

Wayne County Community College:
One year of in-state, non-county resident tuition and fees is estimated to be $3,633 (or just over just under $15,000 for four years).‡

* Based on 2019-2020 full term in state tuition estimates. See *Tuition & Fees* Search, Univ. of Mich. , https://ro.umich.edu/tuition-residency/tuition-fees?academic_year=153&college_school=26&full_half_term=35&level_of_study=38 (last visited June 12, 2020).

† Based on 2020 1 year (2 semesters) estimates of in-state freshman tuition. *See Cost and Aid*, Mich. State Univ., https://admissions.msu.edu/cost-aid/tuition-fees/default.aspx (last visited June 12, 2020).

‡ Based on 2018/2019 Annual Cost of Attendance. *See Tuition and Fee Rates*, Wayne Cty. Comty. Coll. Dist., http://www.wcccd.edu/dept/pdf/TP/Cost%20of%20attendance%202018-19.pdf (last visited June 12, 2020).

3. Geographic Disparities in Assessments

Courts visited during the course of this assessment varied significantly in how they assessed non-mandatory fees and other costs. Where changes have been made, it has been because of the recognition of the hardships imposed on families and the often-futile efforts at collecting from those without resources.

In one larger county, non-mandatory fees and fines have stopped altogether. A local judicial officer confirmed that, "[T]he court has stopped ordering attorney fees. Court costs are now gone. In the past they were ordered at every hearing. Collection of fees has been disbanded, except those which cannot be waived." Even with that, however, some costs are mandatory and cannot be waived, even when the county knows it will never collect on them or the collection will be minimal. It is important to note that even if the county does not intend to collect, the imposition of the costs remains a public debt that the youth or family owes, which can impact other areas of their life such as their credit and financial status.

In other counties, non-mandatory fees were imposed but judges seemed more likely to waive or reduce them when asked. One judge noted, "I look at their ability to pay. The county is extremely lenient regarding payment plans over long terms. I have never seen a juvenile having to show cause for nonpayment." In some cases, as long as the family is making an effort, enforcement proceedings won't be imposed against them. But even in these counties, the cost may hang over the heads of families for years.

Some families may owe more than $100,000—more money than they will ever see in their lifetime . . . Sometimes I think, 'What am I doing to these people?'

Those scenarios are very different from counties where fees and fines are more rigorously imposed and collections efforts are more aggressive. Assessment team members heard stories of large amounts being imposed on youth and parents and of unpaid amounts being used to prevent release from probation or otherwise terminate the court's jurisdiction.

One attorney noted, "I've seen kids and parents assessed tens of thousands of dollars. Clients get billed. Sometimes I can ask for information on the basis of the billing and at times I can get the fee issue before the court. Parents are resentful to kids and the system as a result." A judge in one jurisdiction remarked, "I've seen outstanding fees as high as $300,000 to $400,000, but this was a family with multiple kids and a lot of services. Most are under $100,000."

To report that many were concerned about the imposition of costs on families is an understatement. One judicial officer aptly noted, "The assessment occurs after disposition in the reimbursement office. Some families may owe more than $100,000—more money than they will ever see in their lifetime . . . Sometimes I think, 'What am I doing to these people?'"

4. Limited Judicial Involvement or Advocacy by Attorneys

Because financial assessments in Michigan are generally not completed until after a disposition, it is apparent in some counties that judges and defense attorneys do not know what has been assessed, or how it was done. Orders of Reimbursement are entered separately after the reimbursement amounts are determined, so judges and referees do not always see amounts assessed against youth or parents.

One court official noted that while it is a court order, it is prepared by the collections office, which uses a judge's signature stamp. She was not sure who finalized the orders, if anyone. One judge noted, "We order them to see the finance department. Those officials make the determination about fees and fines." These extrajudicial procedures counter the guarantees of due process, especially in the context of juvenile court where the goal is rehabilitation.

In another county, a judge confirmed that, "[A]t disposition, we don't do anything except order them to pay according to a chart schedule. There isn't a specific determination about whether they can afford it. Then it is sent to Intake to compute the fee. It never comes back to us to see the total assessment amount—they [Intake] take care of it. I've asked multiple times, 'Why would they do that to people?'"

> ***We don't do anything except order them to pay according to a chart schedule. There isn't a specific determination about whether they can afford it. I've asked multiple times, 'Why would they do that to people?'***

In one county, judicial officers attempted to revamp the system to alleviate some of the burden on families after learning of the effects these assessment were having. One referee noted, "[A] judge signs the form but they then never see them again. No one is challenging these. I wish they would do away with fees and fines. It makes it worse on kids hitting families with these costs. They are responsible for brothers and sisters not being able to do extracurricular activities as a result of the costs."

As noted by some court officials, parents and youth can contest their ability to pay *after the fact.* But this is admittedly not common. And in most cases, it would require advocacy by an attorney who could help navigate the system—if the attorney is still involved with the case. But most attorneys do not get involved with challenging fees and fines after they have been imposed.

"The attorneys make an argument for fee waiver. The criteria is financial. They do a pretty good job. But they have to be asked by the client. They are not looking for the issue," one judge explained. In one court, the judge noted that while defense attorneys will occasionally raise the issue, "it is the probation officer who brings it to the court's attention since they know more about their financial situation."

In one county, an enforcement clerk noted how time-consuming the process is. Her staff did dozens of show-cause proceedings in a day to work out agreements and then get them ordered and signed for enforcement. If someone contests it, it can go before a referee, but this is generally without an advocate. If the family does not attend the hearing, the court can order them arrested. In some counties, there is a heavy reliance upon voluntary and involuntary wage garnishment and interception of state tax returns.

The current practices of imposing fees, fines, and other costs against youth and their families does not ensure adequate due process of law. Juvenile defenders should have an opportunity to advocate against these financial assessments on behalf of their clients, at no additional cost to their client. And youth and families should be fully informed of their right to contest these financial obligations.

5. Unequal Access to Justice

Juvenile courts have been noted as "courts of the poor and impoverished."[276] While most juvenile delinquency courts do not track the income levels of youth and families with whom they come into contact, those that do have reported that 60 percent of families were on public assistance or had an income level of less than $20,000 annually.[277] An additional 20 percent had annual incomes of less than $30,000.[278]

The delinquency court system should never be used solely to connect youth to services, but low-income youth and families may indeed be directed into the juvenile justice system to "help the youth and facilitate the services, accountability, and discipline" that system stakeholders perceive are needed for youth to achieve productivity as an adult.[279] This troubling "needs-based" concept of delinquency courts is deeply rooted in the earliest *parens patriae* history of juvenile courts[280] and, despite clear due process mandates, remains the norm in many places.[281]

Research has shown that the "socioeconomic status of the child serves as a thumb on the scale at each stage of the adjudicatory process."[282] Tying financial obligations to the rehabilitation or punishment of children the system deems "most in need" of services is counterintuitive and harmful, as youth involved in the juvenile court system overwhelmingly live in deep poverty.

Michigan's legislature recently took steps to address the state's trial court funding system and to create a stable and consistent funding source that removes trial court judges from the responsibility of raising money for the operation of the courts.[283] For what has been described as a "broken"[284] system, the legislatively prescribed Trial Court Funding Commission has made a series of recommendations for the legislature to consider.

The Commission recognized that there are real and perceived conflicts of interest between a judge's impartiality and the requirement to generate revenue to use for the court's operation.[285] In juvenile court, this "unequal access to justice" harms youth and families who are most vulnerable and who have the least access to resources.[286]

The inequity in juvenile court fees, fines, and other costs must be re-examined as part of the state's efforts to restructure the funding of trial courts and accompanying services.

Courts should eliminate fees and costs that are not mandated by law. For costs mandated under current law, courts should increase their involvement in assessing financial ability-to-pay and hardship determinations and in ongoing collections efforts. Defense counsel need to be present and involved in protecting the interests of their clients in this process by challenging assessments, seeking waivers of costs, and advocating for other remedies to reduce or eliminate costs to their clients and families.

276 Tamar R. Birckhead, *Delinquent by Reason of Poverty, 38* Wash. U. J. L. & Pol'y 58 (2012).
277 *Id.* at 58-9.
278 *Id.* at 59.
279 *Id.* (quoting H. Ted Rubin, *Impoverished Youth and the Juvenile Court: A Call for Pre-Court Diversion, 16* Juv. Just. Update 2 (Dec.–Jan. 2011).
280 *Id.* at 70.
281 *Id.* at 81.
282 *Id.* at 61.
283 Mich. Trial Court Funding Comm'n Final Report 4 (2019) 9/6/19, https://www.michigan.gov/documents/treasury/TCFC_Final_Report_9-6-2019_665923_7.pdf.
284 *Id.*
285 *Id.*
286 *Id.*

C. Shackling of Youth Appearing in Court

The routine shackling of youth for juvenile court proceedings, without individualized determinations as to risk to safety or risk of flight, has been increasingly condemned as physically and psychologically harmful.[287] The practice of shackling—generally including leg irons, belly chains, and handcuffs—can cause unnecessary trauma, stigmatization, and humiliation.[288] It can also impede the attorney-client relationship, is contrary to the presumption of innocence, and calls into question the rehabilitative goals of the juvenile court.[289] Indiscriminate shackling can also serve to re-traumatize youth previously exposed to trauma.[290] And while it is generally unconstitutional to shackle adults during trial,[291] youth who do not appear in front of juries are permitted to be shackled at the whim of the adults in the system.

At least 32 states have now instituted laws, court rules, or administrative orders prohibiting or limiting the indiscriminate shackling of youth.[292] Michigan is not one of those states.

Michigan courts generally have not created policies and practices that limit the indiscriminate shackling of youth, nor has the legislature barred such practices. As such, indiscriminate shackling of youth is commonly used in Michigan juvenile courts without individualized determinations as to risk of flight or safety.

Assessment site visitors observed 27 hearings where youth were detained. Seventy percent of those youth attended those hearings in shackles. Interviewers consistently acknowledged that this practice is common in their courts, but did not share the same opinion about the practice.

As one defender noted, "They can't raise their hand. They can't sign any waivers. They have a different experience than other kids who aren't shackled. The officer stands with them during the client interview." Shackling bothered other defenders, one of whom noted, "It's awkward for them. It's hard for them to get into the room. It's demoralizing and treating them like criminals." Yet, most defenders interviewed reported that they did not ask that youth be unshackled, even if they were uncomfortable with it.

Some defenders were adamant that the practice is harmful and should be challenged routinely. One noted that it makes for a very difficult atmosphere to discuss and build rapport with the youth. "It's dehumanizing."

Several defenders felt it was useless to ask for shackles to be removed. They noted safety concerns and told interviewers that there had been incidents when a youth bolted from the courtroom or picked up a table and threw it. Some noted that the policies were those of the sheriff and not the court, and that the court will defer to the sheriff's deputy.

Another defense attorney noted that they are allowed to ask to remove the shackles in their jurisdiction, since "this is a law enforcement initiative," and most of the judges will have them removed.

287 *See generally* Nat'l Juvenile Defender Ctr., Issue Brief: Campaign Against Indiscriminate Shackling (2016), https://njdc.info/wp-content/uploads/2016/01/NJDC_CAIJS_Issue-Brief.pdf.
288 *Id.* at 1.
289 *Id.*
290 *Id.*
291 Deck V. Missouri, 544 U.S. 622, 629 (2005).
292 *See generally* Nat'l Juvenile Defender Ctr., *Campaign Against Indiscriminate Juvenile Shackling*, *at* https://njdc.info/campaign-against-indiscriminate-juvenile-shackling/ (The campaign's website has a list of these states and other valuable resources for better understanding the harms of shackling and how states and jurisdictions have undergone successful changes). *See also* David Shapiro, Model Statute and Court Rule (2015), https://njdc.info/wp-content/uploads/2014/09/CAIJS-Model-Statutes-Court-Rules-May-15.pdf.

In one court, a judge explained that the deputies in his courtroom uncuff youth and that he was unaware of any shackling issues in other courtrooms; yet one of his magistrates noted that deputies refuse to uncuff the youth in her courtroom (who are handcuffed behind their backs) and she has complained to the judges about it. Another referee noted that there have been no formal motions or requests from defenders about shackling, but that others "at the system level" have been discussing ending the practice.

In some cases, judges were reportedly sympathetic to youth coming into court with shackles and would routinely instruct that youth be unshackled. A defender noted that he objected to that practice, noting, "I don't like it. I motion that the shackles stay on. Shackling is safer for everyone; some of my clients are angry, irrational." Another defender noted, "If they didn't shackle, they would run out of the courtroom. Some kids are just too dangerous to be out." These comments coming from defense attorneys raise concerns of a conflict of interest, if attorneys are not advocating for the rights and interests of their clients.[293]

In one case, a magistrate was unaware of whether the youth in his court were shackled, noting, "I'd have to ask my bailiff. I know that at trial their hands are free . . . well, maybe not free. I don't notice it and no one talks about it."

> ***"I don't notice it and no one talks about it."***

Michigan can improve its policies at the state and local level to restrict indiscriminate shackling of youth in court. For those youth who the court is concerned may pose an actual flight or safety risk, determinations can be made by judicial officers on a case-by-case basis. Defenders should take a more active role in challenging shackling, and in some cases, need training and education to better understand the harms of shackling and effective ways to minimize risks.

293 *See* Model Rules of Prof'l Conduct r. 1.7 (Am. Bar Ass'n 1983); National Juvenile Defense Standards, *supra* note 7, Standard 1.6 cmt.

D. The Imposition of Juvenile Bail

Bail is a mechanism that, at its best, ensures the right to liberty and allows for release of individuals until trial.[294] Currently only 19 states allow for youth facing delinquency charges to be released on cash bail.[295] A recent study of practices in these states suggests that while it may be a right, it is often not the reality of what occurs.[296] Where it is imposed, it may be unaffordable for children, resulting in the prospect of prolonged detention, encouraging youth to accept plea agreements and waive trial, and contributing to the disproportionality of youth who are detained.[297]

The American Bar Association adopted a resolution in 2017 that admonished the use of financial conditions or collateral for release in any form in juvenile cases.[298] Some states have examined and begun to incorporate changes in juvenile bail, either legislatively or through local policies.[299]

Juvenile courts in Michigan may order a youth released to a parent or guardian on the basis of any lawful condition, including the posting of bail.[300] Youth may be detained without bail for specific high-level offenses, or if the court determines they

294 Nat'l Juvenile Defender Ctr., A Right to Liberty: Reforming Juvenile Money Bail 3 (2019), https://njdc.info/wp-content/uploads/2019/NJDC_Right_to_Liberty.pdf (citing Stack v. Boyle, 342 U.S. 1, 3-9 (1951)).

295 *Id.* at 4.

296 *Id.* at 7.

297 *Id.* at 10-11, 16, 18.

298 Matt Redle, *Abolishing Financial Conditions of Pretrial Release in Juvenile Cases, 2017* A.B.A. Crim. Just. Sec., https://njdc.info/wp-content/uploads/ABA-Report-112D-2017.pdf.

299 *See* S.B. 10, 2017-18 Leg., Reg. Sess. (Cal. 2019); Katie Honan & Ben Chapman, *New York City's Latest Bill Reform Aims to Keep More Teens Out of Jail*, Wall St. J. (May 28, 2019), https://www.wsj.com/articles/new-york-citys-latest-bail-reform-aims-to-keep-more-teens-out-of-jail-11559083485.

300 Mich. Ct. R. 6.909(A)(1).

are likely to flee or they clearly present a danger to others.[301] Otherwise, the court must advise the youth of the right to bail as provided for adults who are accused.[302]

If bail conditions are met, the court must discharge any surety,[303] but bail money posted by the parent must be applied first toward any reimbursement or cost if imposed during disposition.[304]

The way in which bail factors into preliminary hearings varies by county. In one county, a defender with considerable delinquency experience questioned whether bail was even available in delinquency cases, noting that it had never come in up her years of practice. It did not appear to be considered in that particular county.

In counties where cash bail tends to be used, there did not appear to be a consistent way in which bail amounts were set. One defender noted that "prosecutors will phone in their bond request and why they are seeking a certain bond. We don't get to negotiate with them before detention hearings. Everyone just makes their arguments and the referee makes the decision."

In another court where cash bail is used, a defender noted that the court will often set a "personal bond" (without a fee), and address this at the first court date. It was noted in another county that there were few options available for youth: either keep in detention or send home. A defender in that county noted that they only recently began doing cash bonds, and that she believed "they are reasonable—like $5,000/10 percent." This statement did not seem to include an awareness of the inherent inability of youth to post cash bail or the restraint cash bail poses to youth liberty interests. But other defenders in that county found the bail amounts to be totally unrealistic. For example, one young man on an armed robbery had a bail set of $300,000, while his codefendant with the gun (not a real one) had no bail required.

Whether bail is paid depends upon not only the resources available to the youth, parents, or guardian, but also the willingness of that individual to pay. One detention center administrator noted, "Many kids get bond—70 percent can pay it, it is mostly low. Some get personal bonds. Parents refuse to pay for some."

There was a perception in some counties that bail was set high in cases where it was assumed there would be significant restitution or other costs. In those cases, bail payments are applied against the costs imposed and are not returned to the parent or guardian. If true, this suggests that there is not a presumption of innocence in those cases, since the pretrial liberty interests are being linked to the loss incurred by a potential victim, not the guilt or innocence of the individual youth.

A closer look at the bail system in Michigan's juvenile proceedings may be beneficial, given its inconsistent use, potential for misuse, and the protections already in place in juvenile proceedings to keep youth detained when they pose a substantial risk. Michigan should consider abolishing cash bail in delinquency courts. Predicating release on the ability to afford bail is particularly concerning for young people who undoubtedly have little to no control over family finances and rarely have the ability to work at a job that would create personal resources to satisfy bail.

301 Mich. Ct. R. 6.909(A)(2) (stating "If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail: (a) to a juvenile charged with first-degree murder, second-degree murder, or (b) to a juvenile charged with first-degree criminal sexual conduct, or armed robbery, (i) who is likely to flee, or (ii) who clearly presents a danger to others.").

302 Mich. Ct. R. 6.909(A)(1).

303 Mich. Ct. R. 3.935 F(4).

304 Mich. Ct. R. 3.935 F(4)(a).

E. Minimum Age of Juvenile Court Jurisdiction

Michigan is among the nearly two-thirds of states with no statute to specify a minimum age under which a child cannot be prosecuted and adjudicated for delinquency acts.[305] Without a statutory minimum, even the youngest of children can be prosecuted, a practice that is contrary to commonsense knowledge about youth, development, and the importance of children learning from their mistakes outside the jurisdiction of the courts.[306]

The Michigan Committee on Juvenile Justice reports that in 2017, a total of 958 children between the ages of 10 and 12 were criminally charged, most with non-violent offenses.[307]

Juvenile defenders are faced with myriad challenges while defending younger clients, including obligations to raise competency issues, having clients under a disability due to age and/or immaturity, and understanding the developmental needs of pre-adolescent or early adolescent youth.

The intersection of delinquency and child welfare involvement may be stronger in many of these cases, as well. Additionally, one national organization that represents the interests of juvenile detention staff has said that particularly young children should not be detained, given that children under age 12 "have unique needs and when placed in secure juvenile detention facilities pose specific programmatic, safety, and security issues."[308]

Michigan should establish a minimum age that is developmentally more appropriate to ensure these youth are not exposed to delinquency courts, juvenile detention, or other system involvement, and that other needed interventions and resources in the community can be considered instead.

305 Nat'l Juvenile Defender Ctr., The Criminalization of Childhood (2019), https://njdc.info/wp-content/uploads/Criminalization-of-Childhood-WEB.pdf.

306 *Id.*

307 *See* Mich. Comm. Juvenile Justice, Michigan 2017 Profile, Violent & Property Crimes (2017), https://michigancommitteeonjuvenilejustice.com/site-files/files/2017%20Arrest%20Tables%20by%20County/Michigan%202017%20Profile,%20violent%20&%20property%20crimes.pdf.

308 Nat'l P'ship for Juvenile Servs., Position Statement on Placement and Treatment of Pre-Adolescents in a Detention Facility (2011), http://npjs.org/wp-content/uploads/2012/12/NPJS-Placement-and-Treatment.pdf.

PROMISING PRACTICES IN MICHIGAN:

Considerations in Building a Strong Juvenile Defense System

After years of advocacy and attention, Michigan has begun to transform both its system of indigent defense and its system of juvenile justice. The reforms underway and other strengths in the state are important markers that indicate the willingness and interest of Michigan's stakeholders, lawmakers, and leaders to advance the rights and interests of its citizens.

Full-Time Public Defender Offices

The Michigan Indigent Defense Commission recently noted that there are 16 new full-time public defender offices being created, in addition to the existing eight offices.[309] This trend in how defense services are delivered can lead the state to a more effective, more efficient way of providing high-quality defense services. The potential to incorporate juvenile defense services into these offices, as has been done in Muskegon and Washtenaw counties, could help to recruit, train, and cultivate full-time juvenile defenders with specialized training, skills, and experience.

State Appellate Office

Michigan's Office of the State Public Defender (SADO) provides high-quality appellate advocacy in adult felony cases and oversees the Criminal Defense Resource Center. SADO provides excellent opportunities for newer attorneys to be mentored, by connecting them with more experienced defense attorneys. SADO is also providing much of the training for attorneys to comply with the MIDC standards.

This model of state-managed and state-funded appellate representation, as well as training, mentoring, and technical assistance at the state level, can be replicated for juvenile representation.

Mandatory State Standards that Comport with Constitutional Requirements

Michigan took an important step in recognizing its constitutional obligation to ensure effective representation for those who cannot afford it and passed the Michigan Indigent Defense Commission Act recognizing the need for specific mandatory standards to provide effective representation for adults. Standards for the operation of juvenile defense programs should also be mandated by legislation or court rule with enforcement provisions.

Law School Involvement in Improving Juvenile Defense Practices

Expanding and strengthening the pool of new lawyers engaged in juvenile defense should necessarily include Michigan's law schools. Some are already engaged in operating juvenile trial practice clinics and/or appellate clinics. The University of Detroit Mercy College of Law has a Juvenile Appellate Clinic that handles some delinquency appeals. The University of Michigan has the Juvenile Justice Clinic that does delinquency trial work, appellate work, and juvenile life without parole cases. Thomas M. Cooley Law School, through Western Michigan University, operates a public defender clinic out of the Washtenaw County defender office, with some students handling juvenile court cases.

Law schools can play a vital role in training, policy work, and resources to support juvenile defense. Utilizing the experience of these educators and clinicians, who already have a proven interest in juvenile defense practices, can lend vital resources needed to build a strong community of juvenile defenders throughout Michigan.

309 *See* Mich. Indigent Def. Comm'n, Blog - Latest News (Nov. 25, 2019), https://michiganidc.gov/latest-news-from-the-midc-2/.

OPPORTUNITIES FOR CHANGE: A CALL TO ACTION

RECOMMENDATIONS FOR STATE ACTION

Create a system of state oversight and enforcement of juvenile defense delivery.

Michigan must meet its constitutional obligation to ensure access to effective representation for all children by establishing, by law or by court rule, a system for state oversight within an existing organization or agency or by creating an independent entity with authority for monitoring and enforcement of specialized juvenile defense standards. The state must raise the bar and provide supplemental funding and resources for juvenile defense.

Establish mandatory state standards for juvenile defense delivery systems at the trial level.

State standards for juvenile defense should be juvenile-specific and designed to ensure that delivery systems provide effective assistance of counsel and have sufficient independence from the judiciary. Whether by court rule or statute, these standards should work to ensure that defenders have clear guidance on responsibilities and duties, protect their clients' right to due process, emphasize developmental differences between youth and adults, and provide adequate compensation, training, and resources to provide effective assistance of counsel.

Expand the role of SADO to include appeals of juvenile delinquency and status offender cases, training, and other support to trial-level juvenile defenders.

Michigan has an excellent model for handling adult criminal appeals through a full-time office, combined with contract attorneys, through the State Appellate Defender Office (SADO). Juvenile appeals should be assigned to SADO. Robust juvenile appellate practice requires adequate training, expertise, resources, and oversight, which SADO could provide. It is also logical for SADO to provide support to juvenile defense attorneys and assist in training, coaching, and providing technical assistance on juvenile justice issues.

Ensure adequate funding to support juvenile defense services.

Ensuring a constitutionally sound, developmentally appropriate system of juvenile defense must be accompanied by a plan for sufficient funding. The state must ultimately be responsible for funding a system of juvenile defense services that provides effective assistance of counsel. Such systems should fully compensate attorneys at a reasonable rate for all relevant work done on a case.

Ensure that cash bail is not used as a restraint on young people's liberty.

Bail should be used only as a means to ensure attendance at a court hearing. Given that Michigan law already provides criteria for consideration in releasing youth pending further proceedings and the inconsistent use of bail provisions across jurisdictions, Michigan should examine how its state law pertaining to bail for children is put into practice, and how those practices impact youth and their families.

Eliminate fees and costs related to juvenile courts.

State requirements for fees, fines, and other costs, including reimbursement for attorneys' fees, should be eliminated. Youth and guardians should not be assessed for the cost of counsel, nor should poor families be responsible for funding the juvenile court system.

Identify and implement a system of performance metrics to assess the provision of juvenile defense services relative to national standards and benchmarks.

The state should create a system for collecting juvenile defense data, establish performance metrics, and develop a comprehensive research agenda. Data, assessment, evaluation, and research are important tools to advance juvenile defense practices and to assist jurisdictions in meeting the constitutional requirement that youth receive a vigorous defense from qualified attorneys.

Prohibit the indiscriminate use of shackles on detained youth.

Michigan should prohibit the indiscriminate use of shackles on youth appearing in court, whether by law or by court rule. Youth in juvenile court should only be subject to shackling in the rare instances where the youth poses an actual risk of flight or a safety risk, and these determinations should be made by judges on a case-by-case basis.

Encourage and fund additional research, training, and initiatives that support equitable treatment of all youth in the delinquency system, including youth of color, youth with mental illness or disabilities, and LGBTQ-GNC youth.

Juvenile defense counsel should receive specific training and resources to advance racial justice and to address disparities related to the various youth populations disproportionately drawn into the juvenile court system. Juvenile defenders must advocate effectively for equitable treatment through both case advocacy and policy reform.

Establish a statutory minimum age of prosecution in juvenile court and compel the removal of younger children from the juvenile legal system.

Michigan should remove children under the age of 14 from the delinquency system, to allow for more effective use of the state's limited resources, particularly now that age of minority will be extended though age 17.

RECOMMENDATIONS TO IMPROVE LOCAL JUVENILE DEFENSE DELIVERY SYSTEMS: ACCESS TO COUNSEL

Courts should automatically appoint counsel for all youth prior to their first appearance before a judge, unless they have retained counsel.

While automatic appointment is common practice in some jurisdictions, all courts should be required, by statute or by court rule, to ensure appointment prior to the initial hearing, whether a preliminary or other initial appearance, with sufficient time so that the attorney is not only present, but also prepared.

Courts should not consider allowing youth to waive counsel without the youth having first consulted with an attorney.

While many courts require that all youth be appointed counsel, when waiver occurs, courts should ensure the child has first had a meaningful consultation with a defense attorney about the disadvantages of self-representation. Financial constraints should never be a reason for youth to waive counsel.

Reimbursement fees for the cost of an attorney in juvenile court proceedings should be eliminated.

Youth should receive the benefit of appointed counsel regardless of the ability of their guardians to pay for that attorney. Families and youth should not be charged for the expense of the youth's counsel. The variation in the ways these expenses are imposed has a chilling effect on whether some youth receive counsel, the amount of time the attorney puts into the case, and whether representation terminates prematurely.

Counsel should provide post-dispositional representation until all orders of the court have been terminated.

While in most instances, attorneys continue representation of a delinquency case until the court terminates jurisdiction, this should be a standard practice in all jurisdictions. Financial constraints should not be a reason for termination of the attorney's services.

Courts and counsel should advise youth of the right to appeal and to appellate counsel and ensure there are no barriers to providing appellate representation.

Courts should explain the appellate process to youth at disposition, and a determination should be made as to the appointment of counsel, or an appropriate waiver of that right. Defense counsel has an independent duty to discuss the right to appeal and to explain the benefits or disadvantages of an appeal.

RECOMMENDATIONS TO IMPROVE LOCAL JUVENILE DEFENSE DELIVERY SYSTEMS: QUALITY OF REPRESENTATION

Strengthen defense advocacy at the preliminary hearing stage to minimize the use of pre-trial detention and the unnecessary imposition of bail.

Attorneys must have the tools needed to provide effective advocacy at a preliminary hearing, including access to police reports and other available discovery, appointment prior to the hearing, sufficient time to interview their client, adequate information to examine probable cause, and specific training to develop and advocate for alternative release options.

Create specialized units or designated attorneys with sufficient multi-disciplinary resources to represent youth subject to being tried as adults.

Michigan has taken recent legislative steps in recognition of the developmental differences between youth and adults by including most 17-year-olds under juvenile court jurisdiction. These same developmental differences require specialized skills and resources when youth are subject to being tried as adults in criminal court. Specialized units to handle these cases in larger jurisdictions, or designated attorneys with access to multi-disciplinary resources, can improve the outcomes in these cases.

Improve pre-trial defense advocacy by expanding the use of pre-trial motions, experts, and investigators when appropriate.

Adequate funding and resources for juvenile defense, coupled with a well-trained and experienced juvenile defender, can provide more robust pre-trial advocacy to further divert youth from the system, address substantive pre-trial issues, and utilize other expertise needed to move cases to a just and fair resolution. All juvenile defenders should have access to these resources.

Strengthen and expand post-disposition defense advocacy.

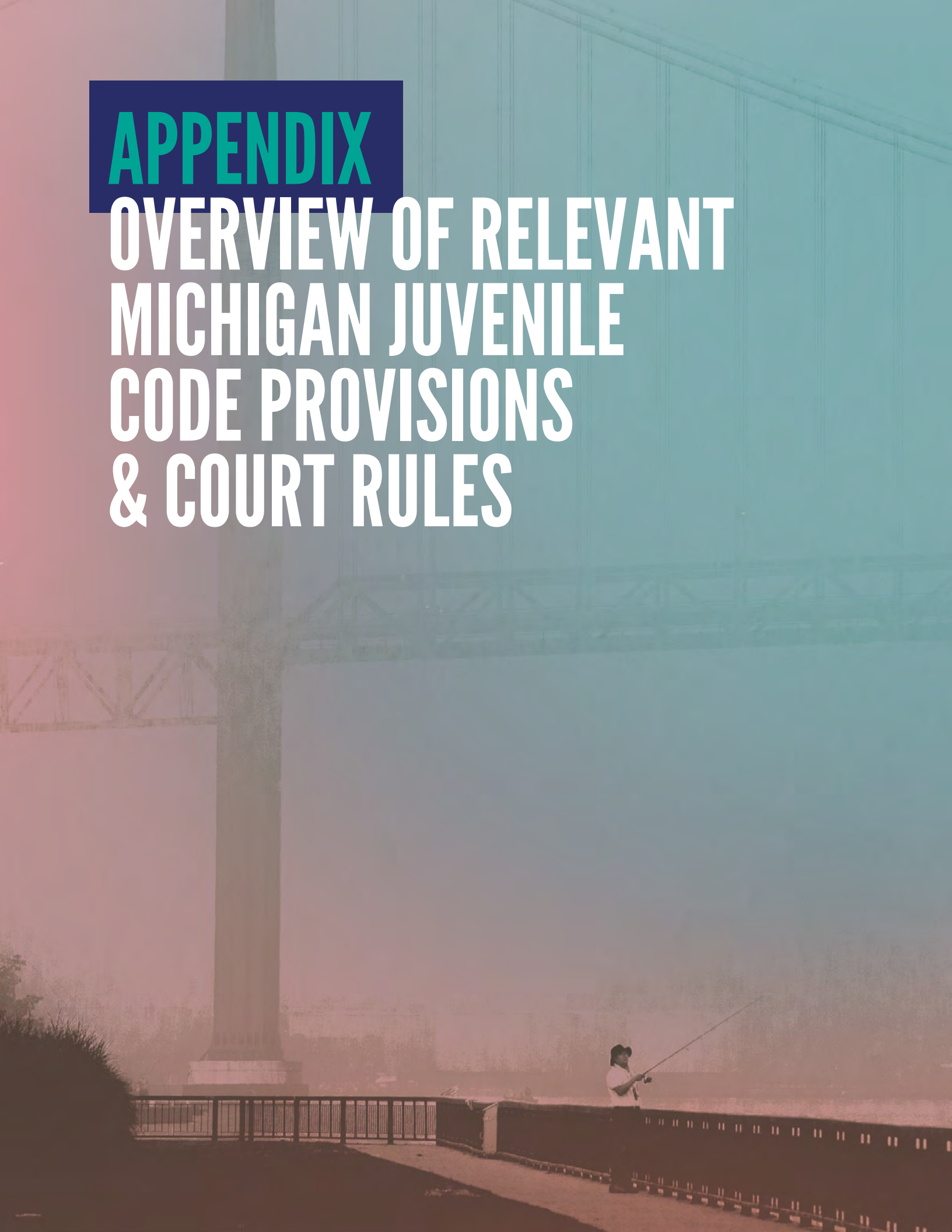
Juvenile defenders should be required to continue representation until all orders of the court are terminated and should advocate for their client's wishes during review hearings, revocations, and other matters. Trial lawyers should advise their clients of the right to appeal and establish a complete record of issues properly preserved for consideration on appeal.

Require ongoing mandatory training for juvenile defenders.

Specialized training in juvenile defense can lay a strong foundation for comprehensive advocacy and is key to ensuring that the right to due process is protected. Training should be specific to juvenile court, help defenders develop strong practice skills, and keep pace with research and legal precedent directly applicable to children in delinquency courts.

APPENDIX

OVERVIEW OF RELEVANT MICHIGAN JUVENILE CODE PROVISIONS & COURT RULES



Juvenile court proceedings in Michigan are governed by the Michigan Juvenile Code[310] and Michigan Court Rules regarding practice and procedures and caselaw.[311]

Purpose of Michigan's Juvenile Justice System

The purpose of Michigan's juvenile code is to ensure youth receive "the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state."[312] For youth removed from home, the code requires they be placed in care as similar as possible to the care that should be given by their parents.[313]

Jurisdiction

The Family Division of the Circuit Court has jurisdiction over delinquency cases.[314] In Michigan, the term "juvenile" generally refers to a person who is less than 17 years of age;[315] however, recent legislation raises the age of majority to 18, effective October 2021.[316] The term "juvenile" also includes "a person 18 years of age or older . . . over whom the [Family Division] has continuing jurisdiction[,]"[317] and status offenders.[318]

Youth in Adult Court

Until Raise the Age legislation takes effect on October 21, 2021, 17-year-olds in Michigan are considered adults and are tried in adult court.[319] Children 16 and younger can be tried in adult court through a variety of mechanisms.

One way a youth can be tried in adult criminal court is through a mechanism referred to as "automatic waiver" or "direct file." Under certain circumstances, the law vests jurisdiction in the criminal court.[320] This includes youth who are from 14 to 16 years old, accused of specific categories of violations ranging from first-degree murder to attempted possession of controlled substances.[321] In these instances, the juvenile court has jurisdiction "only if the prosecuting attorney files a [juvenile] petition instead of authorizing a complaint and warrant [in adult court]."[322]

310 Mich. Comp. Laws §§ 712A.1-712A.32 (2020).
311 Mich. Ct. R. 3.901-3.993.
312 Mich. Comp. Laws § 712A.1(3) (2020).
313 *Id.*
314 Mich. Comp. Laws §§ 712A.2, 600.1021(1)(e) (2020); *see also* §§ 600.601(4), 600.1001, 712A.1-32.
315 Mich. Comp. Laws §§ 712A.1(1)(i), 712A.2(a) (2020).
316 *Governor Whitmer Raise the Age*, *supra* note 138. The Raise the Age campaign in Michigan was successful in increasing the maximum age of juvenile court jurisdiction, ensuring funding to ensure 17-year-olds can access services in the juvenile courts, and prohibiting the placement of youth under 18 in adult jails and prisons. Legislation passed in 2019 in 18 separate bills raising the age from 17 to 18 effective October 21, 2021.
317 Mich. Comp. Laws § 712A.2a(9) (2020); Mich. Ct. R. 3.903(B)(2), 3.903(A)(16).
318 Mich. Comp. Laws §§ 712A.2(a)(2) (runaways), (a)(3) (incorrigibles), (a)(4) (truants) (2020).
319 *See* Mich. Comp. Laws § 780.933(a) (2020).
320 Mich. Comp. Laws § 600.606(1) (2020) presumptively "divests the juvenile court of jurisdiction over certain juvenile offenders and vests that jurisdiction in the circuit courts."; *Veling*, 504 N.W.2d at 458 (citing *Brooks*, 459 N.W.2d 313).
321 Mich. Comp. Laws §§ 600.606(1) (2020).
322 Mich. Comp. Laws § 712A.2(a)(1) (2020).

Youth may also be waived into adult court by the family court division if a youth is 14, 15, or 16 years of age and is accused of an act that, if committed by an adult, would be a felony.[323] This judicial waiver requires a hearing in front of a judge.[324]

Finally, youth of any age can be tried as an adult in juvenile court in a "designated" proceeding.[325] In these proceedings, a prosecutor can designate a youth charged with any offense to be tried as an adult.[326] If the court authorizes a petition to designate a youth for an offense outside of a statutory list of specified violations,[327] the judge must conduct a hearing to determine whether it is in the best interest of the youth and the public to try them as an adult.[328] If a youth is designated and found guilty, the judge may impose either a juvenile disposition or an adult sentence, based on the individual circumstances of the case and the child.[329]

The Michigan Indigent Defense Commission Act, which establishes a system for standards for defense counsel for indigent defendants, applies to attorneys for youth who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings.[330]

Confidentiality

Records of juvenile delinquency proceedings are kept by Michigan courts and are public records.[331] A typical delinquency proceeding on the formal docket will be a public record, which can be viewed by anyone at the courthouse, via online docket records, or both. Juvenile court hearings are open to the public.

There are exceptions to this general rule. Parts of a record that are considered "confidential files"[332] are accessible only by persons with a "legitimate interest." Additionally, the file will be closed and only available to select individuals in a number of discrete proceedings. For example, juvenile diversion records and a youth's social history are considered confidential files. If a youth successfully completes participation in drug treatment court or mental health court and the proceedings are discharged and dismissed, all records regarding the youth's participation are closed to public inspection and are exempt from disclosure.[333] Juvenile competency evaluations are required to be sealed following a determination.[334]

Petitions

A petition is filed and docketed on the formal calendar if the court determines that the "interests of the public or the juvenile require that further action be taken."[335] The prosecuting attorney has to approve submitting a petition to the court in order for the court to authorize it.[336] The youth must be advised of their right to counsel, right to trial by judge or jury, right to the presentation of proof beyond a reasonable doubt, and privilege against self-incrimination when the court is proceeding on the formal calendar.[337]

323 Mich. Comp. Laws § 712A.4(1) (2020).
324 Mich. Ct. R. 3.950(D).
325 Mich. Comp. Laws § 712A.2d(1) (2020).
326 Mich. Comp. Laws § 712A.2d (2020).
327 Mich. Comp. Laws § 712A.2d(9)(a)-(i) (2020).
328 Mich. Comp. Laws § 712A.2d(2) (2020).
329 Mich. Comp. Laws § 712A.18(1)(m) (2020); Mich. Ct. R. 3.955.
330 Mich. Comp. Laws § 780.983(a)(ii)(A)-(D) (2020).
331 Mich. Comp. Laws § 712A.28(2) (2020).
332 Mich. Ct. R. 3.903(A)(3) (defining "[c]onfidential file" as: "(a) that part of a file made confidential by statute or court rule, including, but not limited to, (i) the diversion record of a minor pursuant to the Juvenile Diversion Act; (ii) the separate statement about known victims of juvenile offenses, as required by the Crime Victim's Rights Act; (iii) the testimony taken during a closed proceeding . . .; (iv) the dispositional reports . . .; (v) fingerprinting material required to be maintained . . .; (vi) reports of sexually motivated crimes . . .; (vii) test results of those charged with certain sexual offenses or substance abuse offenses . . .; (b) the contents of a social file maintained by the court, including materials such as: (i) youth and family record fact sheet; (ii) social study; (iii) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports); (iv) Department of Human Services records; (v) correspondence; (vi) victim statements; (vii) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver.")
333 Mich. Comp. Laws § 600.1076(6) (2020).
334 Mich. Comp. Laws § 712A.185(5) (2020).
335 Mich. Comp. Laws § 712A.11(1) (2020).
336 Mich. Ct. R. 3.932(D); Mich. Comp. Laws § 712A.11(2) (2020).
337 Mich. Comp. Laws § 712A.17c(1) (2020); Mich. Ct. R. 3.915(A)(1), 3.935(B)(4)(a)-(c).

Diversion & Alternative Courts

Diversion is available in many juvenile court cases, as is placement on the "consent calendar."[338]After reading the allegations in the petition, the judge or referee may decide to dismiss the petition, refer the matter to alternative services under the Juvenile Diversion Act, proceed on the consent calendar, or continue with the preliminary hearing.[339] The decision to divert a youth is made by the court and is followed by a conference with the minor, the minor's parent or guardian, and a law enforcement officer or court intake personnel.[340] Youth accused of assaultive crimes—which is not defined to include simple assault—are not eligible for diversion.[341]

The prosecutor, the youth, the youth's parent, guardian, or legal custodian must agree to have a case placed on the consent calendar.[342] When a case is placed on the consent calendar, the child waives certain rights, including the assistance of an attorney, right to trial, presentation of proof beyond a reasonable doubt, and the privilege against self-incrimination.[343] After a case is placed on the consent calendar, a consent calendar conference is called and a case plan is developed. If a youth successfully completes the case plan, the court will close the case and destroy all records of the proceeding in accordance with the records management policies and procedures of the state court administrative office.[344] If the court decides the consent calendar is no longer the best option for a youth's case, the court can remove the case from the consent calendar and place it back on the formal calendar.

Custody

A police officer can take any youth into custody if the youth is found violating any law or ordinance or if there is reasonable cause to believe the youth is violating or has violated a personal protection order.[345] After apprehending the youth, the officer or agent must immediately attempt to notify the youth's parent, guardian, or custodian.[346] While awaiting arrival of the parent, guardian, or custodian, the youth must not be held in a detention facility unless the youth can be isolated so as to prevent any verbal, visual, or physical contact with any adult prisoner.[347]

Unless the prosecuting attorney has decided to proceed under the automatic waiver statute, a police officer who arrests a person under 17 years of age must immediately take them before the family division of the circuit court of the county where the offense was allegedly committed and file or cause to be filed a delinquency petition.[348] If the youth is not released, the youth and their parent, guardian, or custodian, if they can be located, must immediately be brought before the court for a preliminary hearing.[349] At the conclusion of the preliminary hearing, the court must either authorize a complaint to be filed or release the youth to their parent, guardian, or custodian.[350]

338 *See* Mich. Comp. Laws § 712A.2f (2020) (outlining the procedures for the consent calendar).
339 Mich. Ct. R. 3.935(B)(3).
340 Mich. Comp. Laws § 722.825(1) (2020).
341 Mich. Comp. Laws §§ 722.822(a), 722.823(3) (2020).
342 Mich. Comp. Laws § 712A.2f(2) (2020); Mich. Ct. R. 3.932(C)(2).
343 *See* Mich. Ct. R. 3.915(A), 3.935(B)(4)(a)-(c), 3.942(C).
344 Mich. Comp. Laws § 712A.2f(9) (2020).
345 Mich. Comp. Laws § 712A.14(1) (2020). These PPOs are issued under § 712A.2(h).
346 *Id.*
347 *Id.*; Mich. Ct. R. 3.933(D).
348 Mich. Comp. Laws § 764.27 (2020); § 600.606.
349 Mich. Comp. Laws § 712A.14(2) (2020).
350 *Id.*

Initial Hearings

a) Preliminary Inquiries & Preliminary Hearings

After a petition is filed and if no request is made to detain the youth, the family division may conduct a preliminary inquiry to determine the appropriate action on the petition.[351] At a preliminary inquiry, the court examines "the best interest of the juvenile and the public to determine whether further action is required" and "whether the case should be treated informally or formally."[352]

A preliminary hearing is a formal review of a petition set on the formal court calendar.[353] The court may assign a referee to conduct a preliminary hearing and to make recommended findings and conclusions. Functionally equivalent to an arraignment in an adult case, a preliminary hearing "must commence no later than 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays, or the juvenile must be released."[354]

b) Detention & Bail Provisions

Youth may be detained without bail when they are charged with first-degree murder, second degree murder, first degree criminal sexual conduct, or armed robbery.[355] When detaining a youth without bail, the court has to find that "the proof is evident or [] the presumption is great that" the youth committed the offense.[356] For charges of first-degree criminal sexual conduct and armed robbery, the court must go a step further and find that the youth is likely to flee or that they clearly present a danger to others.[357] Otherwise, the court must advise the youth of the right to bail as provided for adults who are accused.[358] The court may order a youth released to a parent or guardian on the basis of any lawful condition, including the posting of bail.[359]

The court must consider a number of factors to determine if a youth can be released, with or without conditions, or should be detained. Those factors include the youth's relationship with family, prior delinquency record, nature of the offense, history of failure to appear, and character and mental condition.[360] The court must explain its decision on the record or in a written memorandum.[361]

Youth can be detained or continue to be detained if there is probable cause to believe that the youth committed the offense, and that one of more other circumstances are present:

> (a) the offense alleged is so serious that release would endanger the public safety; (b) the juvenile is charged with an offense that would be a felony if committed by an adult and will likely commit another offense pending trial, if released, and (i) another petition is pending against the juvenile, (ii) the juvenile is on probation, or (iii) the juvenile has a prior adjudication, but is not under the court's jurisdiction at the time of apprehension; (c) there is a substantial likelihood that if the juvenile is released to the parent, guardian, or legal custodian, with or without conditions, the juvenile will fail to appear at the next court proceeding; (d) the home conditions of the juvenile make detention necessary; (e) the juvenile has run away from home; (f) the juvenile has failed to remain in a detention facility or non-secure facility or placement in violation of a valid court order; or (g) pretrial detention is otherwise specifically authorized by law. [362]

351 Mich. Ct. R. 3.932(A); *In re* Hatcher, 505 N.W.2d 834, 838 (Mich. 1993).
352 Mich. Ct. R. 3.932(A).
353 *Hatcher*, 505 N.W.2d at 838.
354 Mich. Ct. R. 3.935(A)(1).
355 Mich. Ct. R. 6.909(A)(2)(a)-(b).
356 Mich. Ct. R. 6.909(A)(2).
357 Mich. Ct. R. 6.909(A)(2)(b)(i)-(ii).
358 Mich. Ct. R. 6.909(A)(1).
359 Mich. Ct. R. 6.909(A)(1).
360 Mich. Ct. R. 3.935(C)(1).
361 Mich. Ct. R. 3.935(C)(2).
362 Mich. Ct. R. 3.935(D)(1).

Generally, youth must be placed "in the least restrictive environment that will meet the needs of the juvenile and the public," and otherwise meets the statutory requirements.[363]

Shackling

Michigan permits indiscriminate shackling of youth in juvenile court and has no statewide written limits on the use of shackling.

Discovery & Pretrial Motions

Michigan Court Rules enumerate the type of materials that are discoverable as of right and generally require that they be provided within 21 days of trial.[364] A party may motion the court to require discovery of other materials and evidence, including materials that are not requested within a timely basis.[365] Motion practice in delinquency cases is governed by Michigan Court Rules.[366]

Pleas

A guilty or no contest plea must be understanding, voluntary, and accurate.[367] Before accepting an admission or no contest plea, the court must address the youth and engage in a mandated colloquy relative to the youth's understanding of their rights, the voluntary nature of the admissions, and the factual basis of the plea.[368] An admission or plea of no contest must be on the record, [369] and an inquiry must be made of the parent or guardian as to whether there is any reason the plea should not be accepted.[370]

Youth may withdraw a plea of admission or of no contest as a matter of right before the Court accepts the plea, but once the plea is accepted, withdrawal is discretionary on the part of the court.[371]

Adjudication

For purposes of delinquency proceedings, a "trial" is "the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court."[372] The factfinder must determine that the youth has violated a criminal law or committed a civil infraction or status offense.[373] The verdict in a delinquency proceeding must be guilty or not guilty of the offense charged or a lesser-included offense.[374] If a youth is found not to be within the court's jurisdiction, that is, "not guilty" of the alleged offense, the court must dismiss the petition.[375] If a youth is found to be within the court's jurisdiction, the court must order that the youth be returned home unless doing so would constitute a "substantial risk of harm to the juvenile or society."[376] The court may also enter any order of disposition appropriate for the welfare of the youth and society in view of the facts of the case.[377]

Youth can have a jury trial in Michigan, although it is not a federal or state constitutional right.[378] A party may demand a jury trial by filing a written demand with the court.379 For youth proceedings, the right to a jury exists only at the trial.[380]

---

363 Mich. Ct. R. 3.935(D)(4).
364 Mich. Ct. R. 3.922(A)(1).
365 Mich. Ct. R. 3.922(A)(2).
366 Mich. Ct. R. 2.119, 3.922(C).
367 Mich. Ct. R. 3.941(A).
368 Mich. Ct. R. 3.941(C)(1)-(4).
369 Mich. Ct. R. 3.925(B).
370 Mich. Ct. R. 3.941(C)(4).
371 Mich. Ct. R. 3.941(D).
372 Mich. Ct. R. 3.903(A)(27).
373 Mich. Comp. Laws § 712A.2(a)(1)-(4) (2020).
374 Mich. Ct. R. 3.942(D).
375 Mich. Comp. Laws § 712A.18(1) (2020).
376 *Id.*
377 *Id.*
378 *In re* Whittaker, 607 N.W.2d 387, 389 (Mich. Ct. App. 1999).
379 Mich. Ct. R. 3.911(B).
380 Mich. Ct. R. 3.911(A).

Disposition

Dispositional hearings are conducted after a jury or the court has found that a youth has committed an offense, in order to determine what measures might be appropriate with respect to the youth, and in some cases, other persons.[381] A youth may be detained at the court's discretion between a plea of admission or trial and the disposition, but generally not for more than 35 days.[382] If there is no objection by the parties, and where the parties have had notice and an opportunity to present suggestions and/or objections, a dispositional hearing may occur immediately after an adjudication hearing.[383]

In order to establish a record, the proper procedure for the court to follow is to take sworn testimony on the record, allow defense counsel and the prosecuting attorney to argue for an appropriate disposition, and articulate reasons for the disposition imposed.[384]

The Michigan Rules of Evidence, apart from those that pertain to privilege, do not apply. The court has a number of options at disposition, including returning the youth to their parent or guardian, warning the youth and dismissing the petition, in-home probation, placement in foster care, placement in a private institution or agency, placement in a state institution, ordering health care, issuing an order directed at the parent or another adult, appointing a guardian, ordering community service, ordering a payment of civil fines, ordering the youth to boot camp, and/or ordering the payment of restitution.[385]

At any time while a youth is under the court's jurisdiction, the court may terminate jurisdiction or amend or supplement a disposition order.[386] The court is required to consider imposing graduated sanctions on a youth when making second and subsequent dispositions in delinquency cases.[387]

Reviews of Probation & Probation Revocation

When the court receives a sworn petition that a youth has violated their probation, the court can direct the youth to appear before the court for a hearing on the alleged violation or the court can order that the youth be apprehended and brought before the court for a detention hearing.[388] The procedural requirements at a detention hearing are similar to those required at a preliminary examination. [389]

A probation violation hearing is considered to be a dispositional hearing rather than an adjudicative hearing.[390] However, a youth has rights at a probation violation hearing, including the right to be present, the right to an attorney, the right to prove the probation violation by a preponderance of the evidence, the right to have the court order any witnesses to appear before it, the right to question witnesses against the youth, the right to remain silent, and the right to testify.[391] After conducting a hearing, if the court finds that a probation violation has occurred, the court may modify an existing probation order or order other dispositions allowed under law.[392]

381 Mich. Ct. R. 3.943(A).
382 Mich. Ct. R. 3.943(B).
383 *See In re* Hardin, 457 N.W.2d 347, 348 (Mich. Ct. App. 1990), abrogated on other grounds by *In re* Alton, 512 N.W.2d (Mich. Ct. App. 1994).
384 See *In re* Chapel, 350 N.W.2d 871, 874 (Mich. Ct. App. 1984).
385 Mich. Comp. Laws § 712A.18 (2020).
386 Mich. Comp. Laws § 712A.19 (2020).
387 Mich. Ct. R. 3.943(E)(2).
388 Mich. Ct. R. 3.944(A).
389 *See* Mich. Ct. R. 3.944(B).
390 *In re* Scruggs, 350 N.W.2d 916, 919 (Mich. Ct. App. 1984).
391 Mich. Ct. R. 3.944(C)(1).
392 Mich. Ct. R. 3.9344 (E)(1).

Review Hearings

The court is required to conduct periodic hearings to review dispositional orders in delinquency cases where the youth was placed outside their home. The court designates the intervals at which review hearings occur, although a party or probation officer may request a hearing. At a dispositional review hearing, the court may modify or amend the dispositional order or treatment plan. The Michigan Rules of Evidence, other than those with respect to privileges, do not apply.[393] If a youth is placed in out-of-home care, the court must hold dispositional review hearings no later than every 182 days.[394]

Courts must retain jurisdiction over youth if they are committed to a public institution or agency for a felony offense or in other enumerated circumstances.[395] When the court retains jurisdiction under either of these provisions, it must conduct an annual dispositional review to examine the services being provided and the youth's progress in that placement.[396]

If the court has exercised jurisdiction over a youth for committing an enumerated serious offense, jurisdiction may be extended until the youth reaches age 21.[397]

Appeals

An appeal may be taken only from a final order of disposition.[398] There is no requirement in the court rules governing delinquency and minor Personal Protection Order (PPO) proceedings that the court advise the young person of their right to appeal. If the court revokes probation and removes the youth from their home, the probation revocation order is appealable by right.[399]

Orders of disposition in delinquency cases are reviewed for an abuse of discretion.[400] A prosecuting attorney also retains the right to appeal any final order of the court. Although delinquency proceedings are not criminal in nature,[401] the constitutional protection against double jeopardy applies, and a youth may not be tried a second time for the same offense after an adjudication in juvenile court.[402] Jeopardy attaches in a delinquency proceeding when the youth is "'put to trial before the trier of the facts,' . . . that is, when the Juvenile Court, as the trier of the facts, beg[ins] to hear evidence."[403]

393 Mich. Ct. R. 3.945(A)(1).
394 Mich. Ct. R. 3.945(A)(2)(a).
395 Mich. Comp. Laws §§ 712A.2(a), 712A.18c(1)-(2) (2020).
396 Mich. Comp. Laws § 712.18c(3) (2020).
397 Mich. Comp. Laws § 712A.2a(5) (2020); *see also* § 712A.2(a)(1) (defining jurisdiction and listing "specified juvenile violations").
398 Mich. Ct. R. 3.993(A)(1); *In re* McCarrick, 861 N.W.2d 303, 317 (Mich. Ct. App. 2014).
399 *See* Mich. Ct. R. 3.993(A)(1) (stating that "any order removing a child from a parent's care and custody" is appealable by right).
400 *See In re* Ricks, 421 N.W.2d 667, 295 (Mich. Ct. App. 1988); *Scruggs*, 350 N.W.2d at 919.
401 Mich. Comp. Laws § 712A.1(2) (2020).
402 Breed v. Jones, 421 U.S. 519, 527-531 (1975).
403 *Id.* at 531 (citations omitted).

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

www.njdc.info

facebook.com/njdc.info
twitter.com/natjuvdefend

NJDC | NATIONAL JUVENILE DEFENDER CENTER