Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters (2003)

Recommendations Summary

Prepared for the October 2-3, 2008
Juvenile Indigent Defense Action Network Inaugural Meeting

I. TIMING AND APPOINTMENT OF COUNSEL

When a lawyer is appointed can have as much of an impact on a case as whether an attorney is appointed at all. For this reason, the *IJA/ABA Juvenile Justice Standards* emphasize prompt appointment of counsel, prescribing systemic methods for assigning counsel from the outset, as well as ensuring continuity of counsel through the various stages of the juvenile court process. Unfortunately, many jurisdictions do not meet this standard. In juvenile courts across the country, defense counsel is appointed after the initial hearing, and defense attorneys do not participate at all in the detention decision; or, as in, for example, Yakima, defenders are appointed at the initial hearing, but are prohibited from arguing probable cause, the threshold evidentiary requirement the government must meet in order to detain a child.

It is axiomatic that the detention decision is critical, not just to the outcome of the case, but to a child's development. The detention decision is integral to the client's ability to prepare for trial. A detained client cannot assist as well in preparing for trial, and does not make as good an impression on the court, as a client who has been released. In addition, detention halls are often crowded, dangerous, and unhygienic. Studies show that time spent in detention increases the likelihood that a child will recidivate, in part because the child is likely to make negative peer connections, and because positive, community-based relationships (in particular, with the child's family) are interrupted. In fact, detention, as a predictor of future criminality, is more reliable than gang affiliation, weapons possession, or family dysfunction. Indeed, detention is a demonstrable gateway into the system.

Aggressive defense advocacy at the detention hearing, in addition to affecting the outcome of the case and the development of the client, also serves the attorney-client relationship. In many detention hearings, the defender's relationship with the client is new. There is no better way to bring voice and meaning to the attorney/client relationship than by taking the time to understand and fight for the client's expressed legitimate interest.

Issue Statement	Proposed Solution
Certain counties do not ever provide counsel at First Appearance hearings, contrary to the *IJA/ABA Juvenile Justice Standards* and Washington law. In the written survey, defenders from only 11 counties responded that youth are always represented at First Appearance hearings. p. 27 In most counties, counsel is appointed at or before the arraignment hearing; however, it is common for attorneys to have no meaningful contact with clients prior to this hearing. A commissioner stated, "my perception is that the attorney client meetings happen only at court right before the hearing." It is usual for attorneys to meet their clients for the first time at court, immediately prior to the arraignment hearing, often in a courthouse hallway. The inadequacy of this contact was not lost on a court administrator who said, "the overwhelming majority of complaints [about defense counsel] concern lack of contact before court." pp. 29-30	Continuity of representation should continue to b e supported and enforced throughout the state by defenders, judges, prosecutors, and probation officers. Counsel should represent a child throughout a case, including probation violations and probable cause hearings. If the child has new offender matters, the same attorney should be assigned to represent the child. p. 58

Recommendations Summary

II. WAIVER OF COUNSEL

In some jurisdictions, more than half of youths in court appear without any representation. Assessments of the states' juvenile indigent defense delivery systems by the ABA and by NJDC provide the main sources of quantification of the incidence of waiver of counsel in juvenile delinquency court. These assessments reveal that across the country, children not yet old enough to drive, vote, drink, or, in many cases, sign a binding contract, waive their constitutional right to counsel and proceed in their delinquency matters unrepresented. For example, in 2005, the Florida Supreme Court reported that half of the youth in Florida's Sixth Circuit waive their right to a lawyer and 75% of youth in the Twelfth Circuit do so. In Indiana in 2004, it is estimated that almost 40% of youth went unrepresented, not including a very limited number who may have hired private counsel. For 2003, the percentage was even higher, with 49% of cases not receiving pauper counsel. According to a 2007 fact sheet by the ACLU, the Children's Law Center and the Office of the Ohio State Public Defender, in 73 of Ohio's 88 counties, 60% of juveniles or more lacked legal representation, or there was no claim for reimbursement by the attorney; in 24 of those counties, 90% or more went without counsel or there was no claim for reimbursement by the attorney. Pennsylvania, an anomaly, reported a rate of 11%.

The problem with juvenile waiver of counsel is clear: juveniles lack the knowledge and decision-making capabilities of adults. They simply do not have the legal knowledge to understand the long- and short-term immediate and collateral consequences of waiving their constitutional right to counsel. As a result of immaturity or anxiety, unrepresented youth may feel pressure to resolve their cases and may precipitously enter admissions without obtaining advice from counsel about possible defenses or mitigation. Youth without counsel may be influenced by prosecutors or judges, who are sometimes pressured to clear cases from their calendars. One study showed that nearly 80% of juveniles do not fully understand the concepts necessary to comprehending *Miranda* rights, which deal only with compelled self-incrimination, particularly the right to consult with an attorney. The rights to counsel, to receive a fair trial, and to appeal are far more complex.

However, states can take steps to protect children's right to counsel. Iowa does not allow youths of any age to waive counsel at any delinquency-related court proceeding. Illinois and Texas also do not allow juveniles to waive their right to counsel under any circumstance. Other states, including Louisiana, offer weaker protection of juveniles' right to counsel by creating specific requirements for waiver. Several states, like New Jersey, and, if the advocacy efforts of the Washington Bar Association's subcommittee on juvenile defense are successful, Washington, require that youths discuss the waiver decision with an attorney before they waive their right to counsel.

Issue Statement	Proposed Solutions
In some counties, young people go unrepresented in a wide variety of hearings. While this practice varies widely from county to county and does not appear to be frequent in the majority of counties, the data indicate that in some counties, children appear without counsel up to 30% of the time. p. 27 The data revealed a strong perception that some hearings are not as important as others and, therefore, the presence of a child's attorney is not perceived as important. p. 27 An alarming 38% of attorneys said that [children waive the right to counsel] before a child has had a chance to consult with an attorney. If the right to counsel is waived before a juvenile ever has the chance to consult with an attorney, then no one is present to assert the child's independent right to not be denied counsel because of the inability to pay. p. 28	Washington law should be changed to conform to national standards prohibiting children from waiving the right to counsel. Until the law is changed, the judicial colloquy with youth regarding their decisions to waive counsel should be thorough, comprehensive, and easily understood. p. 58 Judges should consistently follow guidelines for the advisement of all rights to juvenile offenders, including but not limited to appellate rights, wavier of speedy trial, and waiver of counsel. p. 60

Recommendations Summary

Contrary to IJA/ABA Standards, Washington law allows a juvenile to waive their right to counsel. This is despite the fact that Washington law requires representation at "all critical stages of the proceedings." In over 40% of the counties defenders reported that children waive the right to counsel. p. 28.	

III. PLEA BARGAINS

The vast majority of juvenile delinquency cases are resolved with plea agreements between the child and the government, often at the initial hearing. In some instances, a plea agreement can produce a just outcome for both the child and the government. In most instances, and especially in cases that are resolved at the initial hearing, pleas are made with little or no effort on the part of the defender to assess the facts of the case; children are simply presumed guilty, and pleas function as a caseload reduction tool.

The role of the defense attorney in negotiating a resolution via a guilty plea is critical to maintaining the integrity of the system. If prosecutors overcharge a case, either in the number of crimes or the seriousness of crimes, a defender can negotiate reductions. Through negotiation, a defender can raise issues that might not constitute a legal defense to the crime, but are relevant to the level of culpability. A good negotiation can also result in a recommendation for a sentence that addresses problems underlying the criminal behavior.

Unfortunately, while plea negotiation may be a key to the process, negotiations are often done at the last minute, severely limiting the amount of time left to discuss the process and the details of plea agreements with clients. In addition, juvenile defenders reported at the Washington Defender Association training that, particularly in sex offense cases, prosecutors in several counties condition plea offers on the defense attorney's agreement to forego crucial investigation, like interviewing the complaining witness.

The *IJA/ABA Juvenile Justice Standards* state that "ordinarily the lawyer should not make or agree to a specific dispositional recommendation without the client's consent." Particularly where plea deals are made at the last minute, it is likely that clients are not giving informed consent for binding agreements. The result is that in many cases, children are not fully advised and do not have a good understanding of what they are doing by pleading guilty. In particular, children plead without knowing that a juvenile adjudication can lead to expulsion from school and eviction from public housing, can render a juvenile ineligible for federal student loans, and can disqualify a juvenile from military service.

In addition, judicial plea colloquies are often inadequate, glossing over or skipping altogether key concepts such as the nature of the allegations, the rights to go to trial, to confront witnesses, to call witnesses, to testify, and to appeal, and the minimum and maximum penalties, including fees and restitution. Even when these concepts are covered, they are often discussed in age-inappropriate legalese that neither the children nor their parents understand.

Issue Statement	Proposed Solutions
In most counties, however, children often plead guilty before their defender has done a full investigation of the facts of the case. A commissioner noted that, "Before pleas there is virtually no independent investigation except for the most serious cases." p. 35 Further, negotiations in some counties routinely end in "binding" deals in which a defender agrees to agree with the other parties at sentencing[.] p. 36 One commissioner described, "It is common that a child cannot make a statement of fact to support the plea. 'I was there so I am guilty' is what I hear a lot." A detention staff member criticized this process, "the kids here don't understand much. It is hard to excuse the judges for accepting pleas from someone who couldn't tell you the first thing about what is going on." p. 36	Attorney caseload limits should be set by each county contracting for public defense services. Caseload limits should reflect the standards endorsed by the Washington State Bar Association. p. 59 Defense contracts and public defender office budges should include funds specifically allocated to investigation. p. 59 Judges should consistently follow guidelines for the advisement of all rights to juvenile offenders, including but not limited to appellate rights, wavier of speedy trial, and waiver of counsel. p. 60

IV. CASELOADS

Juvenile defender caseloads have grown so large as to be an almost unmanageable impediment to vigorous representation. In 2004 courts with juvenile jurisdiction disposed of more than 1.66 million delinquency cases. On any given day in 2004, juvenile courts handled 4,500 delinquency cases. In comparison, in 1960, approximately 1,100 delinquency cases were processed daily. The number of defense attorneys and support staff needed to handle these cases has not kept pace with the increase in the large volume of cases. In its national survey, *A Call to Justice*, the ABA found that excessive caseloads are "the single most important barrier to effective representation."

The *IJA/ABA Juvenile Justice Standards* state that "[i]t is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignment than its staff can adequately discharge." The American Council of Chief Defenders recommends that full-time public defender and assigned counsel caseloads not exceed 200 juvenile cases each year. National and state studies indicate that caseloads are, in reality, well above the number of cases that juvenile defenders can reasonably handle. In the 2003 assessment, Washington juvenile defenders reported annual delinquency caseloads ranging from 360 to 750 cases; at the 2008 Washington Defender Association training, juvenile defenders from several counties continued to report that they carry caseloads over 200, including defenders from one county who reported having 450 cases.

The problem of high caseloads impacts every facet of representation. The juvenile defender's job should include time spent on: pre-detention hearing interviews of the client and the client's parents, as well as other pre-detention hearing preparations, all subsequent court hearings including status and other discovery hearings, investigation of the allegations, negotiations with the prosecutor, motions practice, taking witness statements, client counseling, legal research, witness preparation, trial preparation, and investigation of disposition options. It would also have to include the handling of any collateral legal matters, like, for example, a school disciplinary hearing arising from the allegations. The sheer number of cases that juvenile defenders handle means they cannot meaningfully represent each client.

Caseload limits consistent with the recommendation of the *IJA/ABA Juvenile Justice Standards* should be established. There should be regular data collection and caseload monitoring, so that overburdened attorneys are allowed to refuse appointments.

Issue Statement	Proposed Solutions
Defenders interviewed cited caseloads ranging from 360 to 750 cases a year. Defenders working fulltime reported in the written survey an average of close to 400 cases annually, roughly 62% more cases than the advised standard of practice. The data indicate that those working part-time may have a proportionately higher number of cases. Not insignificant is the fact that 86% of defenders responding to our survey reported they either do not have a cap on the number of cases they could be assigned, or they did not know whether there was a cap. Juvenile justice professionals across the spectrum consistently perceive defense attorneys as "overwhelmed" by the number of cases in their caseloads. WA p. 41	Attorney caseload limits should be set by each county contracting for public defense services. Caseload limits should reflect the standards endorsed by the Washington State Bar Association. p. 59 The Legislature should enact a law setting caseload limits for defenders reflecting those endorsed by the Washington State Bar Association. p. 61

Recommendations Summary

V. INADEQUATE RESOURCES

Support services are essential to quality representation. Investigators are necessary because investigation can literally make or break a case; creative, thorough, and persistent investigation can mean the difference between a chance at an acquittal or acceptance of a guilty plea. Social workers help to devise individualized disposition plans that can provide an alternative to detention and set a child on a path to staying out of the juvenile delinquency system. Investigators and social workers should be available for every case, without exception. Expert witnesses, on the other hand, are needed only when specific issues arise. However, when they are required, the need is critical: expert witnesses can illuminate the factfinder on a range of important issues, from competency, to adolescent development, to the effect of police interrogation on children, to the reliability of cross-racial eyewitness testimony, to the understanding of the science and statistics behind DNA evidence that either implicates or exonerates the client.

Support services also include more basic needs, such as office space, telephone and internet access, and access to online or library research. For many contract juvenile defenders, the obligation to obtain and maintain these resources falls on the defender alone. Consequently, many contract juvenile defenders negotiate part-time contracts, so that they can have a private practice that subsidizes their juvenile court practice. This arrangement rarely inures to the benefit of the client, since with high caseloads, even a part-time practice involves a large volume of cases.

Issue Statement	Proposed Solutions
In almost all counties, independent investigation of cases is rare and only takes place in more serious cases. Increasingly limited state and local funding is affecting the availability of investigation funding for juvenile cases. p. 31 For an indigent offender, funding for case investigation comes from the county. The process for a defender to obtain funding differs from county to county, but often requires a written petition to the juvenile court judge or commissioner. It can be time-consuming to prepare a request and, especially in small communities, attorneys feel like they need to be cautious, so they do not lose credibility with judges by asking for investigative funding too often. p. 31	Effective representation of children requires support services, including investigation, access to independent experts, interpreters, evaluation and social work. p. 58 Defense contracts and public defender office budgets should include funds specifically allocated to investigation. p. 59, 61 Effective social work advocacy can help to develop dispositional alternatives that are cost effective in preventing recidivism and helping a child client become a productive member of society. To increase the likelihood of these positive outcomes, defense contracts and public defender office budgets should include funds specifically allocated for social work advocacy. p. 59, 61

VI. INADEQUATE TRAINING AND SUPERVISION

Juvenile indigent defense is a specialty. Training and mentoring are critical ingredients for increasing the knowledge and developing the skills of juvenile defense attorneys. Juvenile defenders must hone their courtroom advocacy, trial, and writing skills, exactly as criminal defense attorneys do. But, juvenile defenders also need training in non-legal areas that are central to working with high-risk youth: as a population, young people accused of crimes have high rates of mental illness, learning disabilities, addiction and other problems. Juvenile defenders need access to regular, low-cost trainings on the rapidly evolving fields of child and adolescent development, as well as competency, special education, alternatives to detention, and additional juvenile-specific areas of research.

Issue Statement	Proposed Solution
In the vast majority of places across the state, however, there is no comprehensive training available to juvenile defenders. As one defender described it, "my training consisted of one hour meeting with the . . . [former public defender]. Nothing else." Juvenile defenders are not receiving enough training on legal procedure and ethics, nor on topics specific to juvenile practice. This lack of training is evident in defenders' low rates of motions and greater likelihood to waive the right to dispute issues such as capacity. One defender noted that "not only are [defenders] completely untrained once they start, but even those who have been doing it for years get no direction or support from anyone. Several of them don't have the slightest clue about the most common procedures." p. 42 Most attorneys working with children in Washington have little training in adolescent development, disabilities, mental health problems, or even simple techniques for communication with young clients. p. 23 There is a large discrepancy in the provision of training across the state. The availability of training in Washington's most populous county is much higher than in other counties. Some juvenile justice professionals suggested that there should be a training component built in to the contracts for defenders – a requirement that new juvenile defense attorneys spend a certain amount of time in training before they would be considered for the contract. p. 43	Juvenile defenders should encourage development of expertise through initial and ongoing training on all of, but not limited to, the following topics: attorney/client relationship and the role of the defense attorney in Washington's juvenile justice system, the importance of investigation and how effectively to use an investigator, pre-trial motions practice, use of experts, capacity and competency hearings, legal standards, child development, mental health issues, learning disabilities, negotiations, time and case management, case planning, racial disproportionality, effective sentencing advocacy, child development, mental health problems, mental/emotional disabilities, and appropriate treatment options. p. 59 Judges should participate in training on competency, capacity, and child development issues. p. 60 The legislature should enact a law that requires all juvenile justice professionals to receive training on child development, mental health problems, and mental/emotional disabilities prevalent in children. p. 61

VII. INADEQUATE OVERSIGHT/MONITORING

The juvenile indigent defense system needs to have adequate oversight and monitoring for several reasons, the most obvious being quality control: there should be an ongoing mechanism in place to ensure adequate access to counsel and quality of representation. In addition, oversight has the benefit of normalizing practice across a state, so that a child's chance at a just outcome does not depend on where the child lives or whether the child can afford an attorney. Also, juvenile defenders should be able to evaluate how effective their services are, so that they can be responsive to their client population and protect not just individual clients, but also the client community (for example, if there is an inordinately large number of shoplifting cases involving youths coming from one particular department store, a defender might talk with that store's proprietor to determine other ways to address the issue without involving the juvenile court).

Issue Statement	Proposed Solutions
In Washington, the quality of counsel a child encounters depends significantly on where he or she lives. Although RCW 10.101.030 requires counties to adopt standards for the delivery of public defense, most counties have failed to do so, according to the preliminary findings of a Washington State ACLU survey. As a result, the quality of defense is inconsistent. One defender related a particularly devastating anecdote involving a juvenile defender who did not prepare cases or visit clients in detention; one juvenile client even complained that that attorney smelled of alcohol. However, the defender related, "There are no safeguards built in to ensure the level of quality stays high." p. 45	A state ombudsman office should be created and funded to address complaints concerning delivery of juvenile public defense services, p. 58, and the Governor should appoint an ombudsman to be available to children for complaints about their counsel. p. 60 Counties should ensure that standards that include caseload limits, attorney qualifications, supervision, training, and regular performance review are implemented. Counties should also develop a formalized system of case assignment in which experience of the attorney and type of case are taken into consideration. p. 61 Juvenile Court Administrators should support the creation of a statewide ombudsman. Until that time, they should ensure that children have access to adults who can inform the appropriate party to take action when a defender is not effectively performing his or her duties. p. 62

VIII. JUVENILE COURT CULTURE

There is a prevailing attitude in juvenile courts around the country that juvenile court is not serious – that it is "kiddie" court, the junior varsity to the adult criminal court's varsity league. This attitude stems from several sources. First, it may be attributed to the fact that *In re Gault*, the case that extended the right to counsel to children, did not bestow the full panoply of protections that are available to adult criminal defendants, in service to the ideal of the rehabilitative juvenile court offering individualized treatment without having to contend with the hurdles of certain constitutional protections. Second, the fact that children generally cannot be held longer than their 21st birthday, while adults can be held for the rest of their lives, makes juvenile court seem bush league. Unfortunately, this belief affects how states allocate already scarce indigent defense resources, with the lion's share going to adult criminal defense, and the scraps going to juvenile delinquency. This belief that juvenile court is not serious is often used by defenders as an excuse for serious lapses in advocacy.

In addition, inside the courtroom, defenders have to battle, in overt and subtle ways, against the "best interest" standard that allows the judge, the prosecutor, and the probation officer to substitute their judgment for that of the child. The juvenile defender alone represents the child's "expressed interest," often against the tide of the wishes of everyone else in the courtroom. Judges allow inadmissible evidence, deny suppression motions, refuse to dismiss cases, detain children who might not otherwise be detained, and give probation officers undue deference, all because they believe their actions are for the child's own good. Many defenders cave under the pressure, often because they work in a single courtroom with one prosecutor and one judge every day so that maintaining a friendly relationship is a priority, or because they are genuinely confused about their ethical mandate.

Issue Statement	Proposed Solutions
There is confusion and disagreement about the role of juvenile defenders in Washington and, as a result, important opportunities to effectively counsel and represent the interest of the child are lost. Attorneys in juvenile court often do not represent their clients' stated interest as required by the legal standard of practice and the lawyers' ethical responsibilities. Confusion or disagreement over the role of the defender stems from four sources: (1) the attorney/child-client relationship is more complex than the attorney/adult-client relationship; (2) attorneys feel they must balance seemingly disparate goals of the JJA; (3) defenders sometimes have ambivalent feelings about their role; and (4) attorneys do not clearly understand their ethical and legal obligations to their young clients. p. 22 The false dichotomy of due process versus rehabilitation can taint the attorney-client relationship. Attorneys feel their choice is either to act in the best interest of the child or aggressively pursue their client's due process rights. For many lawyers the ethical standard that requires them to treat their child client in the same way as an adult client is viewed in an over-simplified way: the right to due process becomes simply trying to "get a client off." p. 24 In some counties, defenders do not set trials, bring motions, or push for investigation funds because they fear "rocking the boat" and being ostracized by the juvenile court community. Evidence of this comes from a commissioner who ties a low trail rate in his county to the idea that everyone gets along well, "The trial rate is low in our county, and this is a testament as to how well everyone	Judges should intervene when necessary to ensure adequate representation by defense counsel. p. 60

here gets along." p. 31 One youth put the situation into painful context, "I have a Public Defender, but it isn't quite the same as having a lawyer. He works with the judge, not like a real lawyer. If he were real, then he would not follow along with the judge." p. 32 Fifty percent of defenders working in defender agencies reported that lawyers cannot remain indefinitely in the juvenile division of their office. p. 46	

IX. PAY PARITY

Research shows that compensation levels for attorneys who represent juveniles are inadequate in many jurisdictions and are generally not commensurate with compensation in other areas of legal practice. Many jurisdictions cap the number of hours a court-appointed attorney (i.e., not a public defender) can bill to a case or on overall spending per case.

In 2002, the average debt load nationwide for graduating lawyers was more than $80,000 (Chase and Gonnell, 2003; Equal Justice Works, National Association for Law Placement, and Partnership for Public Service, 2002). Given that debt load, It is understandable that new attorneys may be reluctant to enter public service, even if they have a strong interest in juvenile work. An ABA national survey found that 55% of juvenile defense attorneys remained in their positions less than 2 years, and state surveys found that low compensation contributed to high staff turnover.

Issue Statement	Proposed Solutions
The data indicate that private counsel who contract with counties for public defense cases often have private cases that compete for their time. A probation officer observed that "many defense attorneys have their own private practice, and I think that interferes [with the juvenile court practice]. They don't spend enough time with their clients, maybe they wouldn't financially survive, so they must have a private practice – not ideal." p. 45 One particular contract attorney had signed a contract with the understanding that it would be the equivalent of a half-time caseload. The pay was a flat rate each month for the part-time work. But instead of half of a caseload, the attorney was overwhelmed with cases and scheduled for hearings 5 days a week. Thus, while some attorneys have good intentions, unrealistic demands may be crippling their ability to represent their clients vigorously. p. 46	Public defense organizations and counties should allow juvenile defenders the opportunity to work for periods of time sufficient to develop expertise in the representation of children. Defense programs and defense contracts should be organized in such a way as to encourage experienced attorneys to spend part of their career in juvenile defense. p. 59

Recommendations Summary

X. LACK OF LEADERSHIP/CAPACITY BUILDING

No advances in juvenile defense can be realized without committed leadership and capacity building. Juvenile defenders need the support of leaders who will listen to and advocate for their concerns, and protect any gains. Juvenile defense is still a very young area of practice – only four decades old – and, as such, needs champions to advance it as a legal specialization.

Leadership is multifaceted and can take all forms: a blue-ribbon commission; a defender resource office; finding and allocating resources for defender offices as well as innovative practices; creation of regular trainings on a range of topics; or promulgation of practice standards, or juvenile court rules. These leadership initiatives are valuable as long as they are grounded in the needs and issues confronting frontline defenders who work with children.

Issue Statement	Proposed Solutions
Each county or city in Washington state must adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Most counties have failed to comply with the law. p. 44 Fifty percent of defenders working in defender agencies reported that lawyers cannot remain indefinitely in the juvenile division of their office. p. 46	The Governor, in partnership with the Washington Bar Association, should appoint a blue-ribbon commission to review county standards to determine whether they are adequate and effective implemented. p. 60, 62