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West Virginia

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

NJDC

Spring 2010

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

Written by
Patricia Puritz and Robin Walker Sterling
National Juvenile Defender Center

Spring 2010

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Acknowledgments

This assessment sets forth a comprehensive evaluation of West Virginia's juvenile indigent defense delivery system, providing policymakers, judges, attorneys and other advocates with a blueprint upon which to build best practices and remedy institutional deficiencies. This assessment is the culmination of several years of work and thoughtful collaboration. We are especially grateful to the juvenile defense attorneys across West Virginia who took time out of their busy schedules to meet with members of our assessment team and facilitate interviews and court observations. We would also like to thank the many judges, prosecutors, and probation officers who allowed us into courtrooms, took part in interviews, and offered candid remarks about their views of the juvenile indigent defense systems in their counties.

We extend our sincere thanks to the Supreme Court of West Virginia for its commitment to examining these important issues and to advisory board members John Hedges, Peter Levy, Jane Moran, Jack Rogers and Robert Wilkinson for their time, thoughtful guidance, and tremendous help in scheduling and conducting this assessment. Finally, we would like to thank our assessment team investigators who graciously donated their time and expertise, including:

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Executive Summary

When the United States Supreme Court extended the right to counsel to youth accused of crimes in 1967, each state implemented measures to protect youths' due process rights at the state, county or local level. This assessment of access to counsel and quality of representation for youth in West Virginia is part of a nationwide effort to uncover deficiencies and identify strengths in juvenile indigent defense practices. Our goal is to provide policymakers, judges, defender managers and others with the knowledge and information they need to improve the management and implementation of juvenile indigent defense services.

The information in this assessment was collected by a team of experts from across the country, with the support of a dedicated advisory board of West Virginia stakeholders, the West Virginia Supreme Court, and the West Virginia Public Defender Services. Investigators traveled to 12 of West Virginia's 31 judicial circuits to observe courtroom proceedings and to interview judges, prosecutors, probation staff, public defenders, other appointed counsel, detention personnel, youth, and other stakeholders. The interview protocols were prepared in accordance with comprehensive national standards developed by the American Bar Association and delinquency court guidelines promulgated by the National Council of Juvenile and Family Court Judges. West Virginia state laws, court rules, advisory and ethical opinions, and scholarly writings provided additional guidance about the role of defense counsel in juvenile delinquency proceedings.

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Significant Findings

In West Virginia, full-time public defenders work for the Public Defender Corporation, established by W.Va. Code 29-21-1, *et seq*. By statute, all indigent defense work is to be assigned to public defender offices except for conflicts and case overloads. However, public defender offices exist in only 23 of 55 counties (18 of 31 Judicial Circuits) because of local opposition to establishment of offices in those counties, caseloads too small to justify a full-time office, or other factors. In those counties without public defender offices, private attorneys, appointed on a case by case basis, undertake all representation. WV Public Defender Services is the sole source for all public defender and private counsel funding.

West Virginia's juvenile code is one of the most progressive in the country. For example, West Virginia juveniles are entitled to evidentiary preliminary hearings, instead of probable cause determinations based solely on the information in the four corners of the police affidavit. Also, West Virginia's code provides juveniles facing delinquency proceedings the additional due process protection of the right to a jury trial. A third example of West Virginia's strong recognition of the importance of due process rights is in the area of interrogations. West Virginia's youth code states that: a child younger than 13 years old cannot make an admission without the consent of the child's parent and the child's attorney; children between the ages of 14 -16 need the consent of either their attorney or their parent to make an admission; and youth 17 and older can consent on their own. In addition, because of both code provisions and practice, instances in which youths are transferred to adult criminal court are exceedingly rare. Finally, West Virginia's code leaves no room for interpretation on issues that plague the juvenile defense systems of many other states, like children's waiving counsel or an unwillingness to use diversion options, so that such issues do not exist in West Virginia's juvenile proceedings.

Unfortunately, investigators found that, in general, the promise of the code was often trumped by actual juvenile court practice, which is characterized by a general malaise. Investigators found that many lawyers emphasize serving the child's best interests over serving the child's stated legal interests, demonstrating a fundamental lack of understanding as to the role of defense counsel in delinquency court. Of course, site investigators observed examples of best practices and competent and diligent defense advocacy, but these practices were the exception and not the rule. Juvenile court professionals throughout the state agreed there is a great deal of room for improvement in West Virginia's juvenile indigent defense system. Pervasive problems, like a profound lack of resources, customary discouragement of diligent advocacy, excessive reliance on improvement periods and guilty pleas, and long periods of detention for relatively minor offenses, keep West Virginia's juvenile indigent defense system from being as effective as it could be in protecting the rights of children facing delinquency charges.

Lack of Resources

Deprived of adequate resources, training, and experience, many of West Virginia's overwhelmed juvenile defenders are unable to fulfill their responsibilities to clients. A handful of full-time public defenders doing juvenile work reported attending juvenile-specific training sponsored by non-prof-

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its and other organizations outside West Virginia; the rest of the juvenile defense attorneys interviewed, public defenders and private appointed counsel alike, said that they had few opportunities for even basic training and would like more juvenile-specific training opportunities. In addition, few defenders reported having access to the services of investigators or social workers. In particular, private counsel reported that, because they are reimbursed for investigators by the WVPDS, they have to pay the costs of the investigators upfront and wait to be reimbursed; compounding the issue, they report that vouchers for their own time, let alone time billed by investigators or social workers, go unpaid for months because of the dire financial straits of the WVPDS. Finally, juvenile justice professionals from every side agreed that there is a serious lack of resources for the rehabilitative programs that support juvenile court's goal of enabling system-involved youth to participate in society as law-abiding citizens.

Courthouse Culture

In each county visited, there was a clear emphasis on the importance of civility, inside and outside the courtroom, that in practice seemed to translate into less diligent legal advocacy by defense attorneys. In some of the counties that operate on a contract system, other courtroom actors have the power to appoint attorneys to cases; defense counsel in those counties expressed an unwritten rule that they should be careful not to cultivate a reputation as "too adversarial or too aggressive," and that often providing even minimal or basic legal assistance, such as filing motions or taking cases to trial, was considered adversarial or aggressive.

As a result, a pervasive lack of legal advocacy permeates the juvenile court. Defense attorneys generally don't file pre-trial motions, due in part to the active discouragement of system stakeholders and to overreliance on the prosecution's representations about the case details without any independent investigation. Few juvenile cases go to trial. Even fewer juvenile cases were appealed. Post-disposition advocacy is virtually nonexistent, so youth lacked representation to challenge conditions of confinement, obtain services promised in disposition orders, or defend themselves in hearings on alleged probation or parole violations. Detained youth reported that their attorneys did not visit or call them, and some defenders suggested that it was the client's duty to initiate contact if the client was in the community.

Excessive Use of Improvement Periods and Guilty Pleas

Investigators found, and participants estimated, that very few matters are contested, let alone taken to trial. Instead, the vast majority of cases were resolved with a formalized, pre-adjudication diversion program generally referred to as an "improvement period." An improvement period is pre-adjudication probation. If the terms and conditions of the improvement period are successfully completed, the case is dismissed. If the terms and conditions of the improvement period are not successfully completed and the child is terminated from the program, the case starts over and the child can then proceed formally with a preliminary hearing and a trial. The duration of the improvement period is either six months or one year. The same circuit judge who presides over the initial improvement period hearing will hear any violation of the improvement period conditions and decide whether the child should be terminated from or has successfully completed the improvement period.

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The defense attorney's role is very minimal in improvement period cases. If the parties elect to go forward with an improvement period, no legal issues are raised, and no affirmative defenses are presented. The Probation Department prepares a written report to the court recommending whether the child should be accepted into the improvement period and what the terms and conditions should be. It appears that the defense attorney's only role is to make the tactical decision about whether to request the improvement period; defense attorneys seemed to have minimal input into the terms and conditions. One problem with this role division is that many children may, knowingly or unknowingly, violate the terms and conditions of their improvement periods and be forced to start trial in a worse position than they were in at the beginning of the case: not only is the evidence six or more months stale, so that photographing the scene of the alleged crime, finding and interviewing witnesses, and other investigation is much harder, since the child has shown the court that the child cannot abide by probation conditions in the community, the child is much less likely to get a second chance at probation, and much more likely to receive a term of incarceration.

Long Periods of Detention for Minor Offenses

A large number of children who are arrested for minor offenses end up placed under court supervision until they become adults. Many children are initially caught up in the system through pre-petition diversion programs or improvement periods and end up deep in the system because of technical violations while under court supervision, either as part of an improvement period agreement, or probation. In both instances, the focus of the case becomes delivery of services that, once the child violates release conditions, lead to more structured settings and often ultimately secure detention. Besides children in pre-petition diversion programs, the other category of children placed under long-term supervision because of a minor offense were children who were charged with a felony and a much less serious offense, like truancy, or fleeing, or disorderly conduct, and pled to the less serious offense in exchange for the dismissal of the more serious charge.

Net-Widening

While diversion programs are useful to keep kids out of the system, the overreliance on these programs seemed to merely widen the net on the front end. As a result of net-widening, there is an increased chance that youth who should not be in the juvenile system at all, either because they are not guilty, because they have a legitimate defense for their behavior, or because there are additional compelling social factors that otherwise require dismissal of the case, are ensnared in the process at this point. In fact, stakeholders admitted many cases that might otherwise have been dismissed or produced acquittals were, instead, diverted. In addition, some diversion programs are used incorrectly, so that there is incentive to shuttle youths who might otherwise have been returned to their communities free of court supervision into such programs.

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Core Recommendations

The core recommendations set forth below are followed by a series of implementation strategies designed to engage all juvenile justice system stakeholders and policymakers in replicating best practices. Core recommendations include:

1. ***Timing and Appointment of Counsel:*** Although there is a very strong and unique commitment in West Virginia that no child appear in juvenile court without an attorney, it is nonetheless critical that all attorneys are appointed early in their cases and that they have access to the confidential space necessary to meaningfully consult with their clients.

2. ***Ethical and Role Confusion and Continuity of Representation:*** The role of defense counsel in juvenile court and counsel's ethical obligations should be clearly articulated and enforced and the continuity of representation should be ensured.

3. ***Lack of Resources:*** The state must commit consistent and adequate funding to the West Virginia Public Defender Service (WVPDS), so that WVPDS, in turn, can reliably pay its attorneys and reimburse vouchers submitted by conflict and court appointed counsel in a timely manner.

4. ***Inadequate Monitoring and Oversight:*** The juvenile indigent defense system needs ongoing, statewide oversight and monitoring. Data should be routinely collected and best practices and innovations should be promoted.

5. ***Inadequate Access to and Advisement of Collateral Consequences:*** Procedures to expunge juvenile records should be readily accessible and routinized. Youth should be informed of the serious short- and long-term collateral consequences that attach to a juvenile court adjudication at the earliest possible time, including before they agree to enter into an improvement period.

6. ***Magistrate Qualifications:*** Presently, under the West Virginia Constitution, magistrates are not required to possess more than a high school diploma, and the Judicial Reform Act of 1975 includes a provision that magistrates cannot be required to be licensed attorneys. However, if magistrates are going to be tasked with presiding over legal hearings, including juvenile detention hearings, they should be required to be licensed attorneys.

7. ***Inadequate Colloquies:*** Developmentally appropriate judicial colloquies and admonitions for waiver of preliminary hearings, improvement period agreements, pre-trial release conditions, disposition conditions, and pleas resolving cases short of adjudication should be developed and used. Colloquies should be thorough, comprehensive and easily understood. Judges should take time to test a youth's understanding of the information that is being presented.

8. ***Shackling:*** Children who come before the court should not be handcuffed or shackled unless there is a showing that they present a risk of flight or pose an imminent threat to themselves or others, and even in those extraordinary circumstances, children should be shackled for the shortest period of time necessary.

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9. ***Juvenile Defense as a Specialized Area of Practice:*** Juvenile defense needs to be understood and appreciated for the highly specialized practice that it is. Juvenile defenders need ongoing support and training. Attorneys should participate in comprehensive training before starting practice in juvenile court and should have the opportunity to participate in ongoing training specific to the representation of children. A statewide juvenile defender resource center should be established.

10. ***Implementation:*** A high level, statewide commission should be formed to implement these recommendations.

Implementation Strategies

The West Virginia State Legislature should:

- Require juvenile-specific training and fund juvenile-specific training opportunities for all public defenders and court-appointed private counsel to at least match, if not improve upon, the training already required for prosecutors, judges, prosecutors, and guardians *ad litem*.
- Increase the available resources to support the delinquency court process—including defender access to independent experts, social workers, Westlaw/Lexis, and investigators. Currently, both public defenders and private attorneys have the option of applying for funds for investigators, experts, and social workers in individual cases; in each of these cases, the request must be approved by the judge before it is approved and reimbursed by WVPDS. Beyond individual cases, requests for investigators, experts, and social workers depend on caseload numbers, and, in many counties, the juvenile caseload is considered too low to justify those additional resources. Accordingly, the provision of those resources should be untied from caseload numbers and judicial approval.
- Amend West Virginia's school discipline statute to provide greater authority to local education and juvenile justice officials to exercise broad discretion in deciding whether school-related offenses should be referred for prosecution in delinquency proceedings.

The West Virginia Judiciary should:

- Create a system for screening, training, and monitoring private attorneys who appear in juvenile delinquency matters, set minimum training requirements for appointment in juvenile cases and appoint to juvenile cases only attorneys trained as juvenile defenders.
- Coordinate the appointment of counsel processes so that defenders are alerted to appointed cases with enough time to allow them a meaningful opportunity to interview their clients before the detention hearing.
- Ensure, in conjunction with WVPDS, that private attorneys are promptly compensated for all reasonable work including—but not limited to—client meetings, pre-adjudication investigation, legal research, motion practice, dispositional planning and advocacy, and appeals, and other post-dispositional representation.

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- Ensure that the study of adolescent development and its application to juvenile cases is part of the circuit court judicial training each year.
- Ensure all youth fully understand their rights before pleading guilty, including but not limited to their right to appeal delinquency decisions, in accordance with applicable case law, rules of procedure, and statutes, and that they are informed of their rights during plea colloquies.
- Provide private facilities at the courthouse to defense attorneys for client consultation.
- Encourage continuity of representation where feasible or appropriate throughout the delinquency process.
- Encourage an increase in juvenile appellate advocacy.

The Public Defenders and Private Attorneys should:

- Create dedicated juvenile units, which include a corps of attorneys allowed to develop expertise in juvenile indigent defense, without pressure to rotate to a different unit, and with full pay parity.
- Create special units, such as a post-disposition unit, to regularly monitor youth who are sent to DJS facilities.
- Design and institute standardized training about programs and services that are available to youth, both pretrial and post-disposition.
- Add West Virginia juvenile defenders to the Mid-Atlantic Juvenile Defender Center listserv, and elect a local defender as a statewide resource.
- Share resources, including providing trainings, holding joint case rounds (even by telephone or Skype), holding statewide trainings that private attorneys are encouraged to attend, and creating and sharing a statewide bank of sample briefs and motions.
- Increase litigation and the number of trials, jury trials, and appeals.
- Understand the role and ethical obligations of juvenile defense counsel.
- As a practice, have regular post-hearing debriefings with their clients to ensure that clients understand what happened at the hearing.
- Ensure that effective representation happens at the earliest possible stage in juvenile court proceedings and remains zealous throughout the entire process, including at disposition and post-disposition proceedings.
- Develop expertise through ongoing training on juvenile justice related issues and delinquency practice, and seek out opportunities for training to evolve best practices.
- Ensure, in conjunction with the West Virginia judiciary, that private attorneys are promptly compensated for all reasonable work including—but not limited to—client meetings, preadjudication investigation, legal research, motion practice, dispositional planning and advocacy, and appeals, and other post-dispositional representation.

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Juvenile Prosecutors should:

- Work with juvenile justice stakeholders to devise creative ways to address the influx of juvenile justice system cases from school fights, disorderly conducts, and other minor school referrals.
- Encourage faster case processing by providing liberal discovery to defense attorneys, even before the preliminary hearing if appropriate.

Juvenile Probation Officers should:

- Work to lower the number of probation revocations based on status offense type violations.
- Work with other stakeholders to institute a graduated sanction program for technical violations of probation.

Detention Center Staff should:

- Attend juvenile-specific training on providing needs- and strengths-based guidance and supervision to detained juveniles.

West Virginia University Law School should:

- Provide increased opportunities for law students' involvement in juvenile defense through internships, externships, clinics, and paid fellowships.
- Offer an array of courses in juvenile delinquency law both to attract students to this practice area and to prepare students for careers in juvenile justice.
- Provide leadership on juvenile indigent defense issues and the treatment of youth in the juvenile justice system through clinical programs, research, and community involvement.
- Offer continuing legal education courses and other professional opportunities to improve the quality of representation in delinquency proceedings.

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Introduction

This assessment of access to counsel and quality of representation in delinquency proceedings is part of a national effort to understand juvenile indigent defense delivery systems throughout the country, and to evaluate whether juvenile defenders are able to fulfill their constitutional and ethical obligations when representing their young clients. The goals of this assessment are to: provide information about the role of defense counsel in the delinquency system; identify structural or systemic barriers to more effective representation of youth who stand accused of offenses; highlight best practices; and make recommendations for ways to improve the delivery of juvenile defender services in West Virginia.

The job of juvenile defense counsel is complex and challenging. Juvenile defense attorneys must have all the legal knowledge and courtroom skills of a criminal defense attorney representing adult defendants. In addition, juvenile defenders must be aware of the strengths and needs of their juvenile clients and of their clients' families, communities, and other social structures, both formal and informal; this requirement is particularly important in close-knit, rural communities, where many community members know each other, and where family names may have generations of history and long-established reputations that follow the child into court.

Similarly, juvenile defenders must have knowledge of and contacts at community-based programs to compose an individualized disposition plan. Juvenile defenders must be able to enlist the client's parent or guardian as an ally without compromising the attorney-client relationship. They need the requisite skills to spot mental health and special education issues and make appropriate referrals both pre- and post-disposition; and to navigate the network of mental health services and schools that may or may not be appropriate for the client. Most importantly, the juvenile defender must understand child and adolescent development in order to evaluate the client's level of maturity and competency and its relevancy to the delinquency case, and to be able to communicate effectively with their clients about the long- and short-term collateral consequences of a juvenile adjudication, including the possible impact on public housing, education, employment, eligibility for financial

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aid, and participation in the armed forces. For these reasons and more, it is critical that juvenile indigent defense systems be comprehensively assessed to ensure that resources are allocated wisely and that children are receiving the legal protections to which they are constitutionally entitled.

I. Due Process and the Juvenile Justice System

The first specialized juvenile court in the United States was created on July 1, 1899, as part of an Illinois legislative act establishing the juvenile court division of the circuit court for Cook County.[1] The 1899 Illinois legislation codified an enlightened way to treat wayward youth: instead of showing them the error of their ways by punishing them, the state would help youth correct their course and become productive, law-abiding citizens. Because the goal of the newly-created system was rehabilitation and not punishment, the state law required only cursory legal proceedings that placed judicial economy and youth rehabilitation before due process.[2] There were no defense attorneys. Social workers and behavioral scientists advised the court on the most appropriate disposition of the cases. For the first time, detained youths were separated from adult offenders and placed in training and industrial schools, as well as in private foster homes and institutions.[3] This type of specialized juvenile court was quickly duplicated in the larger cities of the East and Midwest, so that by 1925, some form of juvenile court existed in all but two states.[4]

Until the 1960s, constitutional challenges to juvenile court practices and procedures were consistently overruled. Children were denied the rights to counsel, public adjudications, and jury adjudications. They did not have any immunity against self-incrimination. They could be convicted on hearsay testimony.[5] They could also be convicted by only a preponderance of the evidence. Rulings found that juvenile proceedings were civil in nature and that their purpose was to rehabilitate rather than punish.[6] Research on the juvenile justice system had begun to show that juvenile court judges often lacked legal training;[7] that probation officers were undertrained and that their heavy caseloads often prohibited meaningful social intervention; that children were still regularly housed in adult facilities; that juvenile correctional institutions, far from serving as home-like settings in which children learned to become upstanding members of society, were often, in reality, little more than breeding grounds for further criminal activity.

In 1963, the United States Supreme Court held that the Sixth Amendment right to counsel requires that indigent adults charged with a felony offense be appointed an attorney at public expense. In that seminal case, *Gideon v. Wainwright*,[8] a unanimous court wrote that "any person …too poor to hire a lawyer cannot be assured a fair adjudication unless counsel is provided for him," explaining that "lawyers in criminal court are necessities, not luxuries."[9]

In the wake of *Gideon*, in a series of cases starting in 1966, the Supreme Court extended this and other bedrock elements of due process to youth facing delinquency proceedings. Arguably the most important of these cases, *In re Gault*,[10] held that juveniles facing delinquency proceedings have the right to counsel under the Due Process Clause of the United States Constitution, applied to the states through the Fourteenth Amendment. The Court observed that youth in juvenile court were getting "the worst of both worlds," explaining that youths received, "neither the protections

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accorded to adults nor the solicitous care and regenerative treatment postulated for children."[11] The Court continued: "[t]he probation officer cannot act as counsel for the child. His role . . . is as arresting officer and witness against the child. Nor can the judge represent the child."[12] The Court concluded that no matter how many court personnel were charged with looking after the accused child's best interests, any child facing "the awesome prospect of incarceration" needed "the guiding hand of counsel at every step in the proceedings against him" for the same reasons that adults facing criminal charges need counsel.[13]

"...juveniles accused of delinquent acts were to become participants, rather than spectators, in their court proceedings."

The introduction of advocates to the juvenile court system was meant to infuse the informal juvenile court process with more of the strictly observed constitutional protections of adult criminal court and their concomitant adversarial nature: the Court observed specifically that juvenile respondents needed defenders to enable them "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the client] has a defense and to prepare and submit it."[14] The Court specifically denounced the typical pre-*Gault* courtroom proceeding in which the child's due process rights were not protected by juvenile defense counsel, in acknowledgement of the unfortunate reality that the "absence of substantive standards ha[d] not necessarily meant that children receive[d] careful, compassionate, individualized treatment."[15]

Perhaps most importantly, beginning with this line of due process cases, juveniles accused of delinquent acts were to become participants, rather than spectators, in their court proceedings. By the early 1980s, there was professional consensus that defense attorneys owe their juvenile clients the same duty of loyalty as adult clients.[16] That coextensive duty of loyalty requires defenders to represent the legitimate "expressed interests" of their juvenile clients, and not the "best interests" as determined by the individual judge.[17]

In addition to the right to counsel, *Gault* also extended to youth the right to notice of the charges against them, the privilege against self-incrimination,[18] and the right to confront and cross-examine adverse witnesses.[19] In later cases, using fundamental fairness as its touchstone, the Court held that a youth cannot be adjudicated delinquent unless the state proves his guilt beyond a reasonable doubt,[20] that a delinquency proceeding constitutes being placed "in jeopardy" and bars future prosecution for the same allegations,[21] and that youth have the right to a formal hearing and an attorney before being transferred to adult court for criminal prosecution.[22] In each of these cases, the Court reaffirmed, that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile court[.]"[23] As the President's 1967 Commission on Law Enforcement and the Administration of Justice stated, "No single action holds more potential for achieving procedural justice for the child in juvenile court than the provision of counsel. The presence of an independent legal representative of the child, or his parent, is the keystone to the whole structure of guarantees that a minimum system of procedural justice requires."[24]

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With the Court's decisions in *Gault* and other cases, and the President's 1967 Commission on Law Enforcement and the Administration of Justice, the treatment of youth in the juvenile justice system moved into the national spotlight. Congress was the only federal branch left to respond. In 1974, with a goal of protecting the rights of children, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA).[25] The JJDPA also created the National Advisory Committee on Juvenile Justice and Delinquency Prevention, which was charged with developing national juvenile justice standards and guidelines. These included guidelines for protecting juvenile due process rights, as well as for decriminalization of status offenses, and for development of diversion programs that would provide alternatives to formal involvement in the juvenile justice system. The National Advisory Committee standards, published in 1980, require that children be represented by counsel in delinquency matters from the earliest stage of the process.[26]

At the same time, on the national scene, several non-governmental organizations also recognized the necessity of protections for youth in delinquency courts. Beginning in 1971, and continuing over a ten-year period, the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) promulgated 23 volumes of comprehensive juvenile justice standards, annotated with explicit policies and guidelines.[27] The IJA/ABA Joint Commission on Juvenile Standards relied upon the work of approximately 300 dedicated professionals across the country with expertise in the many disciplines relevant to juvenile justice, including the law, the judiciary, social work, mental health, corrections, law enforcement, and education. The Commission circulated draft standards to individuals and organizations throughout the country for comments. The final standards, which were adopted by the ABA in the early 1980's, were crafted to establish a model juvenile justice system, one that would not fluctuate in response to transitory headlines or controversies. These standards as well call for children to be represented by counsel throughout the delinquency court process.

In 1992, when Congress reauthorized the JJDPA, it reaffirmed the importance of the role of defense counsel in delinquency proceedings, specifically noting the deficiencies of prosecutorial and indigent defense delivery systems charged with providing individualized justice. Recognizing the need for more information about the functioning of delinquency courts across the country, Congress asked the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) to address the issue.

One year later, in 1993, OJJDP responded to Congress' request by funding the Due Process Advocacy Project led by the ABA Juvenile Justice Center, together with the Youth Law Center and Juvenile Law Center. The goal of the project was to evaluate and understand juvenile indigent defense systems and identify strategies that would strengthen those systems. One result of this undertaking was the 1995 release of *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national review of the legal representation of children in delinquency proceedings.[28] The first systemic national assessment of its kind, the report laid the foundation for a closer examination of access to counsel, the training and resource needs of juvenile defenders, and the quality of legal representation provided by each states' juvenile indigent defense system. The report pinpointed the gaps in the quality of legal representation for indigent children across the country. While many juvenile defenders represent their clients with inspiring skill and commitment, the report reached the unsettling conclusion that instances of

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model advocacy are few and far between, and that effective juvenile representation is impeded by longstanding systemic barriers. Over forty years after *Gault's* recognition of the importance of the right to counsel for youth, the promise of effective delinquency representation remains hollow for many poor children.

The findings of *A Call for Justice* prompted an outpouring of concern from judges and lawyers across the country, and highlighted the need for state-specific assessments to ground and inform decision-making and reform. In response, a methodology was developed to conduct comprehensive assessments of access to counsel and quality of representation in individual states. Since 1995, state-specific juvenile defense assessments have been conducted in: Florida, Georgia, Indiana, Illinois, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nebraska, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and Washington. Re-assessments have been conducted in Kentucky and Louisiana. County-based assessments were conducted in Cook County, Illinois, Marion County, Indiana and Caddo Parish, Louisiana. New assessments are currently under consideration in Alabama and Colorado.

II. Due Process in West Virginia

Before the enactment of the JJDPA, West Virginia had been typical of most states in its treatment of wayward youths.[29] For example, West Virginia defined a child as "delinquent" if he or she were truant, ran away "without just cause," associated with persons regarded as "immoral or vicious," or was deemed "incorrigible," "ungovernable," or "habitually disobedient."[30] Often these "delinquents" were taken into police custody and detained in secure adult facilities, before being sent off to what was referred to as an "industrial school."[31]

After the enactment of the JJDPA, West Virginia's Commissioner of Welfare, Director of Youth Services of the Department of Welfare and the Director of Family and Children's Services all encouraged the state legislature to create legislation allowing them to obtain federal funds to meet the new national policy guidelines.[32] Three years later, in 1977, West Virginia's legislature adopted Senate Bill 200, which required that juveniles be afforded the due process protections that *Gault* prescribed. It also decriminalized many status offenses, leaving "delinquency" to be defined as violations of criminal law, ungovernability, or truancy. It also encouraged diversion by requiring that the court strive to place the child in the "least restrictive" alternative to detention responsive to the child's circumstances and public safety at each stage once the juvenile had been taken into custody. It also provided for an "improvement period" prior to the disposition of a case, allowing the juvenile time to demonstrate positive behavior as a last effort to avert starting the machinery of formal court processing. SB 200 sparked a sea change in West Virginia's approach to juvenile justice.[33] In 1977, West Virginia relied heavily on detention to manage its youthful offender population.[34] By 1982, only Massachusetts (which had abolished its juvenile training schools) had a lower rate of juveniles held in "training schools," and only South Carolina had a lower rate of juvenile detention.[35]

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> **The primary goal of this assessment is to provide key stakeholders and policy makers with relevant and timely information related to access to counsel and quality of representation for youth in West Virginia's juvenile justice system.**

West Virginia's State Advisory Group for Juvenile Justice and Delinquency Prevention (WVSAG) was created in 1977. The WVSAG provided funding for a range of projects that aimed to protect the due process rights of juveniles facing delinquency proceedings and to develop alternatives to formal processing. With these goals in mind, WVSAG provided financial support to juvenile defense groups that focused their efforts on assisting juveniles and attorneys representing juveniles, and on reducing the number of juveniles held in detention. The WVSAG also provided funding for alternative schools, community education and training programs, and treatment-oriented foster homes. Later, WVSAG's funding patterns shifted toward emergency shelters, community-based youth crisis centers, long-term shelters, treatment aftercare and restitution programs.

During the same period, the West Virginia Supreme Court of Appeals issued a series of critical rulings that expanded the rights of West Virginia's juveniles. In 1977, in *State of West Virginia ex rel. Harris v. Calendine*, the West Virginia Supreme Court ruled that a status offender could no longer be held in a secure facility unless no alternative to secure custody would meet the needs of the offender and of the community.[36] In 1978, the court prohibited the use of corporal punishment in correctional facilities.[37] In that same year, the court mandated that the lower courts pursue all reasonable prospects for rehabilitation before transferring a juvenile case to criminal court.[38] In 1979, the court issued a series of important rulings. In *State of West Virginia ex rel. C.A.H. v. Strickler*,[39] the court held that courts must seek to apply the "least restrictive alternative" in delinquency dispositions, and that the lack of an appropriate facility does not justify placement in an inappropriate one; in *State of West Virginia v. Peterman*,[40] West Virginia's analog to *In re Winship*, the court charged the state with the burden of proving a charged juvenile's guilt beyond a reasonable doubt. Also in *State of West Virginia ex rel. R.C.F. v. Wilt*, the court held that a child held in detention facility must be released after 96 hours and must be separated from adults.[41] In 1980, in *State of West Virginia ex rel. D.D.H. v. Dostert* the court extended the rules of evidence regularly applied in adult criminal trials to juvenile delinquency proceedings.[42] Like the United States Supreme Court rulings preceding them, these rulings emphasized protection of due process rights and rehabilitation in the juvenile justice system.

The court continued its forward-looking expansion of juvenile due process rights in the 1980s. In 1982, in *State ex rel. R.S. v. Trent*, the court held that a child adjudged delinquent and committed to custody of the State has both a constitutional and a statutory right to treatment.[43] Most notably, in 1984, the court handed down *State of West Virginia ex rel. M. C. H.* and *S.A.H. v. Kinder*, and enunciated the factors the court must consider when determining whether a child should be de-

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tained.[44] The respondents in *Kinder* were a seven-year-old boy and a nine-year-old boy who were securely detained for breaking into an elementary school and stealing $12.00. The Supreme Court ruled that the trial court would have to consider specific factors, including the seriousness of the offense, the juveniles' prior record, the public's safety, and the availability of alternatives to secure detention, as part of its detention decision.[45] *Kinder* set the minimum age for secure detention for boys at ten years old and for girls at twelve years old.[46] It also reaffirmed a presumption against criminal culpability for children younger than 14.[47]

The 1980s saw the beginning of the rise of punitive "get tough" policies in juvenile justice. The emerging schism between West Virginia's commitment to due process protections in juvenile court and concern for community safety is exemplified in the passage of House Bill 1010. The Bill included some very forward-looking disposition options, including the use of fines, restitution, and the restriction of driving privileges as alternatives to youth incarceration.[48] In addition, the Commissioner of Welfare was directed to designate youth services coordinators in each judicial district, and to develop a plan for a unified state system of pre-adjudication detention that included home shelters and foster homes.[49] But, HB 1010 also lengthened the grasp of legal intervention into the lives of West Virginia's juveniles. For example, it lowered the age at which certain statements could be used against juveniles in court from 16 to 14.[50]

III. Assessment Methodology

In February 2008, with the support of Chief Justice Robin Davis of the West Virginia Supreme Court, the National Juvenile Defender Center (NJDC) was invited to conduct a comprehensive assessment of West Virginia's juvenile indigent defense system. The primary goal of this assessment is to provide key stakeholders and policy makers with relevant and timely information related to access to counsel and quality of representation for youth in West Virginia's juvenile justice system. Assessments provide accurate baseline data upon which to make informed decisions. This assessment addresses a broad range of issues, including meaningful and timely access to counsel in delinquency proceedings; systemic barriers to quality representation; best practices; and comprehensive recommendations.

NJDC relied upon its well-tested and highly structured methodology for assessment site investigation. An investigative team of 19 juvenile defense experts was assembled and trained to conduct the site work. Extensive site visits and court observations occurred in 12 representative counties across West Virginia during the summer of 2008, and those counties will remain anonymous. These counties were carefully selected based on a comprehensive analysis of state demographics, crime trends, and indigent defense delivery systems. The assessment team included private practitioners, academics, current and former public defenders, defender managers, and juvenile justice advocates; all the investigators were very familiar with the role of defenders in youth court. Investigators visited each site to conduct interviews, observe juvenile court proceedings, and gather documentary evidence. Using interview protocols developed by the American Bar Association and NJDC, the team conducted extensive interviews at each site with circuit court judges, referees, defenders, prosecutors, probation officers, counselors, parents, and court-involved youth. The teams

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also visited detention centers and interviewed detention center staff. NJDC also reviewed research and other reports relevant to West Virginia's juvenile justice system.

Chapter One of the assessment contains a discussion of the background for the legal representation of youth in West Virginia. Chapter Two includes a review of relevant provisions of the West Virginia Youth Code and articulates the role of counsel in delinquency proceedings. The data resulting from the research and site visits are summarized in Chapter Three, including findings related to meaningful access to counsel, ethical and role confusion, aspects of juvenile court culture, and barriers and obstacles that impede quality representation. Chapter Four is a description of best practices in West Virginia's juvenile justice system. Chapter Five discusses results of conversations with youth about their attorneys and the quality of representation they feel they received. Chapter Six concludes with comprehensive recommendations and suggested implementation strategies.

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Chapter One:
Background and Context for the Legal Representation of Youth

I. Poverty, Delinquency, and Juvenile System Statistics

More than anything else, West Virginia's delinquency system struggles with the effects of deep-seeded poverty. It should come as no surprise that, according to the Casey Foundation's 2009 *KIDS COUNT Data Book*, West Virginia ranks 42nd in percentage of children living in poverty. Inevitably, low rankings in other areas of child well-being follow the fact of West Virginia's poverty: West Virginia ranks 46th in the country for percentage of low-weight babies; 33rd in infant mortality rates;[51] and 37th for teen death rates.[52] Statistics from the Children's Defense Fund lead to similarly dispiriting results in which 23% of West Virginia's children live in poverty, and seven percent do not have health insurance; there are 1,438 juvenile arrests each year; there are 579 children and teens in juvenile residential facilities; and the ratio of cost per detention center resident to cost per public school pupil is 4 to 1.

West Virginia is farming country, but in a form different from large extensive cash-crop agriculture elsewhere in the USA. The model average farm size was 140 to 179 acres (567,000 to 724,000 m^2), and sold less than $2,500 of crops annually, according to the 2002 US Census of Agriculture for West Virginia. Family and single-owner operators worked 92.7% of the farms, and an astounding 96.9% were totally or partly owned by the operator. The rural poverty rate in West Virginia is 20.4%; this figure is five points higher than the state's urban poverty rate.

West Virginia is also coal mining country, and the relationship between the state's overall economic health and coal mining is at least 200 years old. The state has enormous reserves of energy rich bituminous coal, which occur in all but two of the state's fifty-five counties. West Virginia has a long history of and dedication to coal mining. Coal is reported to have been mined as early as 1810 when a mine was opened near Wheeling, in the northern panhandle. The growth of the salt industry led to the opening of mines to supply furnace fuel during the 1820s and 1830s. Other coal fields in the state began to develop in the following two decades. Most of the coal produced was

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for local business and domestic consumption,[53] but coal was also exported to distant markets along navigable riverways. In 1883, the major railroad lines were completed in the state's coal fields, and had a profound impact on the commercial coal industry: that year, production totaled nearly 3 million tons.

As the April 2010 Upper Big Branch Mine Disaster underscores, coal mining is an extremely dangerous enterprise. Despite the fact that it is lucrative, younger generations are less and less willing to take on the significant health risks that mining demands. The other large impediments to employment in the mines are mechanization and the recent dramatic increase in strip mining, including mountaintop removal, which requires far fewer people. Total employment has fallen from nearly 120,000 in the 1940s to approximately 20,000 today. A concomitant decline in steel and glass production across the state presents a similar and equally difficult problem; the number of chemical workers, steadily dwindled and continues to shrink.

As a result of decades of outmigration, West Virginia's population is aging.[54] In fact, West Virginia has the nation's oldest population, and it is getting older. The state's median age is the highest of all states at 38.9 years. Nearly one-third of West Virginia's population is over the age of 50 (32.7%). Those over age 50 are projected to increase to 38% of the population by 2030. While the state's total population is forecasted to decline by 4% by the year 2030, the number and percent of persons over age 75 is expected to increase dramatically, from 128,000 to 196,000, a 53% increase. The proportion of those over age 75 will increase from 7.1% to 11.3% of West Virginia's total population. Among all residents over age 65, 11.9% were classified as living below the poverty level, while 21.4% of African-American elderly were so classified. The U.S. poverty rate among all persons age 65 or over was 9.9%.[55]

As a result, there are far fewer resources channeled into juvenile services. The effect of the combination of poverty and the aging population is most visibly demonstrated by the dearth of services available to court-involved juveniles. Juvenile defenders report that it is difficult to get juvenile service providers to contract with the state because of its demographics. Accordingly, it is difficult to provide juveniles with local programs that address their individual needs and strengths. Most detained juveniles are housed in detention facilities far from their homes, so that their family, community, school, and other positive relationships are interrupted.

II. Structure of the West Virginia Indigent Defense System

West Virginia Public Defender Services (WVPDS) provides funding for all indigent defense services for the State of West Virginia.[56] West Virginia has a hybrid system of criminal defense, in which indigent defendants are represented by full-time salaried public defenders or by court appointed private attorneys who are appointed case-by-case and paid an hourly fee. Despite statutory language establishing a public defender office in each judicial circuit, in practice each of the state's 31 circuits chooses its own system of indigent defense delivery. As of August 2009, there were 17 local public defender corporations operating in 18 of the state's 31 judicial circuits; the public defender offices are appointed to the lion's share of that Circuit's cases, with private counsel be-

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ing appointed when the public defender office has a conflict. Eight of the remaining 13 circuits, which currently rely solely on private counsel, are sites of proposed public defender corporations. The last five judicial circuits do not need public defender corporations, because the population and crime rates of these circuits are so low.

The salaried defenders are employed by local Public Defender Corporations, established by the legislature in 1981.WVPDS is authorized to fund local public defender offices throughout the state but cannot initiate an office on its own. WVPDS can also provide funding to private attorneys on a case by case basis, or can contract with private attorneys. The local public defender offices are independent of WVPDS and the defender offices in other counties, with their own boards of directors made up of representatives of the local bar, and general public. No public defender offices have juvenile dedicated divisions; instead, a few attorneys carry a caseload of only delinquency cases.

In contrast, private counsel systems are controlled by the Circuit Court. Before 1981, indigent criminal defense in West Virginia was provided exclusively by private, court appointed attorneys who were paid an hourly fee of $20 per hour for out-of-court work, and $25 per hour in court, with a total per case limit of $1,000.[57] Circuit judges could force private attorneys to take cases at these very low rates.[58] In 1989, the West Virginia Supreme Court of Appeals held, in *Jewell v. Maynard* (181 W.Va. 571), that forcing a private attorney to devote more than ten percent of his or her work year in mandatory, court-appointed cases was unconstitutional.[59] The court also raised the hourly rates to $45 per hour for out-of-court work and $65 per hour for in-court work, and ordered the legislature to set the per-case limit at $3,000 or eliminate it altogether.[60] Judges are empowered to waive the $3,000 per case cap, which applies to delinquency and criminal cases alike, and, according to private counsel in several counties, many routinely do. Following approval by the circuit judge, WVPDS pays each private attorney and other service provider for each case. Judges also make the indigency determination, assign cases, and determine what the assigned counsel is owed for his or her work. Where public defender offices are present, the office makes an initial determination of indigency subject to subsequent court appointment.

III. Juvenile Court Rules

In April 2010, the Supreme Court of West Virginia approved the state's first Rules of Juvenile Procedure. The Court had earlier adopted Rules of Procedure for Child Abuse and Neglect Proceedings, and those rules have been instrumental in improving the quality of representation in those cases. Juvenile court rules do not set out to make substantive law; instead, they synthesize caselaw, the juvenile code, and best practices, to produce a uniform set of procedures to govern juvenile delinquency and status offense cases. The Supreme Court's Court Improvement Program Youth Services Committee was charged with devising a similar set of rules for delinquency and status offense cases.

The Court Improvement Program was created as part of the Omnibus Budget Reconciliation Act of 1993. The Board receives federal funding to assess foster care laws and judicial processes, and to

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effect system improvements. The Youth Services Committee of the Court Improvement Program has spent much of the last five years carefully researching, drafting and revising these new Rules of Juvenile Procedure. In particular, the new Rules create a presumption against detention in less serious cases in favor of community-based services and treatment; reaffirm due process rights already embedded in the West Virginia code, like the rights to counsel and to a jury trial; and aim to curb recidivism by focusing on preparing youth for reentry into the community. The Court Improvement Board's Youth Services Committee was an interdisciplinary collaboration of DHHR staff involved with youth services, defense and prosecuting attorneys, the Supreme Court Administrative Director of Probation Services, the Division of Juvenile Services Assistant Director, CIP Oversight Board legal counsel, and counsel from the National Juvenile Defender Center.

The Rules will become effective July 1, 2010, and are included in the appendix.

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Chapter Two:
The Youth Code and the Role of Defense Counsel in Juvenile Delinquency Proceedings

West Virginia's youth code and juvenile caselaw are relatively progressive, extending due process protections above the minimum protections provided by federal constitutional law and statutes. For example, unlike juveniles in many other states, West Virginia juveniles facing charges in delinquency proceedings are entitled to evidentiary preliminary hearings, instead of probable cause determinations based solely on the information in the four corners of the police affidavit. West Virginia's code also provides juveniles facing delinquency proceedings the additional due process protection of the right to a jury trial, instead of bench trials before a juvenile court judge who, unlike lay jurors, often knows the juvenile's social history, and always knows the potential sentence. A third example of West Virginia's strong recognition of the importance of due process rights is in the area of interrogations. West Virginia's youth code states that a child younger than 13 years old cannot make an admission without the consent of the child's parent and the child's attorney; children between the ages of 14-16 need the consent of either their attorney or their parent to make an admission; youth 17 and older can consent on their own. Unfortunately, as will be discussed in Chapter Three, the promise of the code is not necessarily matched by the reality of delinquency practice. Still, the fact that the code itself is so observant of children's due process rights leaves West Virginia poised to effect significant improvements in its juvenile defense delivery system.

I. Youth Court's Purpose

The purpose of the West Virginia youth code is faithful to the traditional rehabilitative animus of juvenile delinquency court, as evidenced by its specificity and family-centered approach. The code's purpose clause lists the goals of the state's juvenile justice system as: assuring to each child "care, safety and guidance;" safeguarding the child's mental and physical welfare; preserving and strengthening the child's family ties; favoring a family-focused approach, except where the best

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interests of the child or the safety of the community is at risk; including the child and his or her family or caregiver as active participants in the planning and delivery of programs and services; providing community-based services in the least restrictive settings that serve the needs and potentials of the child and his or her family; and providing a system for the rehabilitation of status offenders and juvenile delinquents. Notably, the goal of "protect[ing] the welfare of the general public" is listed last.[61]

The purpose clause also expressly charges West Virginia with providing a system for the secure detention of certain juveniles alleged or adjudicated delinquent, and for the secure incarceration of juveniles adjudicated delinquent and committed to the custody of the director of the division of juvenile services.[62] The state has designated the Division of Juvenile Services of the Department of Military Affairs and Public Safety as the agency in charge of operating, maintaining and improving juvenile correction facilities and detention centers.[63]

II. Jurisdiction and Venue

The circuit court has original jurisdiction over all juvenile proceedings.[64] The West Virginia code defines "juvenile" as any person younger than eighteen years old.[65] Unless the case is being prosecuted pursuant to West Virginia's transfer provision, as long as the defendant is younger than 19 years old and was under the age of 18 at the time of the alleged offense, the matter must be handled by the juvenile court.[66]

A juvenile case begins in court when a petition requesting that the juvenile be adjudicated as a status offender or as a juvenile delinquent is brought before the circuit court. Municipal courts and magistrate courts share jurisdiction with the circuit courts for a juvenile's violation of an ordinance such as a traffic regulation, curfew restriction, or underage possession or use of tobacco or alcohol products.[67]

If a juvenile commits an act that would be a crime if he or she were an adult, and the juvenile is adjudicated delinquent for the act, the juvenile court retains jurisdiction until the juvenile reaches the age of 21.[68] If a juvenile who has a case pending in delinquency court commits a crime after becoming an adult, the circuit court can handle that new case as an adult criminal matter.[69]

III. Transfer of Jurisdiction

West Virginia's juvenile code has discretionary and mandatory waiver provisions. The mandatory waiver provision requires that a juvenile's case be transferred for prosecution in adult criminal court if the juvenile is charged with certain very serious crimes, if the juvenile is a possible repeat violent offender, or if the juvenile asks to be transferred. Specifically, the mandatory waiver provision states that, upon the written motion of the prosecutor, the juvenile court must transfer juvenile proceedings to criminal court if it finds that there is probable cause to believe a child of at least 14

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has committed treason, murder, armed robbery, or first degree arson, or has committed a crime of violence after having previously been adjudicated delinquent for similar conduct. The court can transfer the juvenile to criminal court jurisdiction only if the juvenile is at least 14 and there is probable cause to believe that the juvenile: (1) has committed an action such as treason, murder, or robbery, (2) has committed an offense of violence to a person that would be considered a felony if the juvenile was an adult and he or she has been previously found delinquent for a similar act, or (3) has committed an offense that would be a felony if the juvenile was an adult and he or she has been twice previously adjudged delinquent for a similar act.

The prosecutor's motion for transfer must describe the grounds for transfer, and the prosecutor has the burden of establishing those grounds by clear and convincing evidence. The court must also transfer a juvenile proceeding to criminal jurisdiction if a juvenile who is at least 14 years old makes a demand on the record to be transferred to the criminal jurisdiction of the court. There is no provision allowing immediate appeal of a mandatory transfer.

The discretionary waiver provision casts a much wider net. The discretionary waiver provision allows that, upon the written motion of the prosecutor filed at least eight days before the adjudicatory hearing and with reasonable notice to the juvenile, his or her counsel, and his or her parents, guardians or custodians, the court must hold a hearing to determine if juvenile jurisdiction should be waived and the proceeding transferred to the criminal jurisdiction of the court. As in cases of mandatory transfer, the state's motion must state, with particularity, the grounds for the requested transfer, and the burden is upon the state to establish these grounds by clear and convincing evidence.

Instances in which the court might entertain a motion for discretionary waiver include: a juvenile who is younger than 14 years old who would otherwise be subject to mandatory transfer either because the juvenile is charged with a very serious offense or the juvenile is a repeat offender; a child of at least 14 who has committed a felony involving use or threat of force against a person, involving use of a deadly weapon, or who has previously been adjudicated for any felony; or a child of any age who has committed a specified drug felony or second-degree arson against a church or public building. The court must consider "the juvenile's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors," in making its decision in discretionary transfer cases.

An order granting a transfer is immediately appealable to the Supreme Court of Appeals, but the child may also reserve any appeal until after conviction. If a juvenile is tried and convicted following transfer to adult jurisdiction, the court can still impose a juvenile disposition instead of sentencing the juvenile as an adult. If the court does sentence the juvenile as an adult, the juvenile cannot be confined with incarcerated adults, and, when the juvenile turns 18 years old, the court must conduct a review and reconsideration of the imposed sentence before approving the juvenile's transfer to a penitentiary.

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IV. Right to Counsel

A juvenile has the right to be effectively represented by counsel at all stages of juvenile proceedings. The court has to appoint an attorney if the juvenile or his or her parents execute an affidavit showing that they are unable to afford one of their own. The court-appointed attorney must be paid by the state of West Virginia.[70]

V. The Nature of Juvenile Proceedings

Children should have a meaningful opportunity to be heard in juvenile proceedings. The West Virginia youth code accordingly allows that youth must have the opportunity in all proceedings to testify and to present and cross-examine witnesses.[71] The procedural rights of juveniles in delinquency court and the procedural rights extended to adults in criminal proceedings are coextensive, unless the code indicates otherwise.[72]

As a standard rule, the general public is typically not allowed into any delinquency proceedings. However, certain people may be admitted if the parties themselves request their presence or if the court determines that the individuals have a legitimate interest in the proceedings at hand.[73] Other members of the public may also be admitted at the discretion of the presiding judicial officer if the juvenile has been accused of committing a felony and these individuals are either alleged victims or representatives of victims. If the alleged victim is a youth, his or her parents may be admitted into the proceeding at the court's discretion.[74]

A. Diversion

The vast majority of youth court cases are disposed of through informal, pre-adjudication diversion. Prior to the formal filing of a petition with the court, the probation officer has the option of negotiating an informal agreement among the parties, in which the child agrees to a set of conditions for a set period, usually six months unless extended by the court,[75] and in return, the case is dismissed if the child has successfully met all the conditions at the end of that period. The agreements often include conditions like observing a curfew; avoiding rearrest; attending school regularly; and other similar requirements. This kind of diversion is available in cases in which it seems that (1) the admitted facts bring the case within the court's jurisdiction, (2) the probation officer's recommendation that proceeding without an adjudication would be both in the public's and the juvenile's best interests, and (3) the juvenile and his or her parents' consent to the agreement.[76]

B. Custody

Pre-Adjudication Custody and Detention

Once proceedings have formally begun by the filing of a juvenile petition and before adjudication occurs, a juvenile can be taken into custody based on a court order only if there is probable cause

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that at least one of a limited number of conditions exists. The petition must show that (1) an adult in identical circumstances would be arrested, (2) the health, safety and welfare of the juvenile requires that the juvenile be taken into custody, (3) the juvenile is a fugitive from custody or a juvenile court's commitment order, or (4) the juvenile is alleged to be a juvenile delinquent with a record of "willful failure to appear at juvenile proceedings and custody is necessary to assure his or her presence before the court."[77] A detention hearing must be held before a child meeting at least one of these conditions can be taken into custody.

Without the court order, there are still a limited number of circumstances in which a juvenile can be taken into custody. For a law-enforcement official to take a juvenile into custody without a court order, one of the following conditions must exist:

i. there are grounds to arrest an adult in a similar situation;
ii. there are emergency conditions that pose imminent danger to the health, safety and welfare of the child;
iii. there are reasonable grounds for the official to believe that the juvenile has run away and the juvenile's health, safety, and welfare are jeopardized as a result;
iv. the juvenile is a fugitive from lawful custody or a commitment order of a juvenile court;
v. reasonable grounds lead the official to believe that the juvenile has driven a motor vehicle with any amount of alcohol in his or her blood; or
vi. the juvenile is the named respondent in an emergency protective order, filed by the juvenile's parent.[78]

Once a juvenile has been taken into custody, the juvenile's parents must be notified immediately. The juvenile can then be released into their custody unless the juvenile faces an immediate threat of serious bodily harm, there is no responsible adult to be found who can take custody, or the act of alleged delinquency for which the juvenile is in custody permits secure detention regardless of these factors.[79] The juvenile must have a detention hearing "without unnecessary delay," and any delay that does occur cannot exceed one day after the juvenile is taken into custody. The sheriff or detention facility director shall immediately provide to every juvenile who is delivered into his or her custody a written statement that explains to the juvenile his or her right to a prompt detention hearing, right to counsel, and privilege against self-incrimination.[80]

> **"Children should have a meaningful opportunity to be heard in juvenile proceedings."**

Post-Adjudication Custody and Detention

If a juvenile has been adjudicated delinquent, the court may order the juvenile into custody and the juvenile may be transferred to a juvenile diagnostic center for no longer than 60 days.[81] At the center, the juvenile has to go through an examination, diagnosis, classification, and complete medical exam. During this period the director of the center must put together a multidisciplinary

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treatment (MDT) team for the juvenile. The MDT team is made up of the juvenile's probation officer, social worker, parents, defense attorney and guardian *ad litem* (GAL) if the child has a GAL, the prosecuting attorney and an appropriate school official or representative.[82] It may also include a court-appointed special advocate, a member of a child advocacy center and anyone else who can help provide insight and recommendations for the child and his or her family.

As long as a child remains in the legal or physical custody of the state, the MDT team will reconvene quarterly for review hearings in the court; the court must conduct regular judicial review of the case at least once every three months while the juvenile remains in custody. At these sessions, the court must look at the extent of progress in the case, the treatment and service needs, any plans for permanent placement for the juvenile, any uncontested issues and any other matters the court considers pertinent at the time.[83]

C. Detention Hearings

The sole purpose of a detention hearing is to determine whether the child should be detained pending further court proceedings. At the start of any detention hearing, the judge, juvenile referee or magistrate must inform the child that he or she has the right to remain silent, that any statement made can be used against him or her, and that he or she has a right to counsel.[84] If counsel has not yet been retained then the court must appoint counsel for the juvenile as soon as possible.

The court must balance the child's health, safety and welfare in its consideration of whether the child should be detained.[85] If it determines that these factors will not be endangered, the court must release the juvenile on his or her own recognizance to parents or to an appropriate agency. Bail may also be required. The court does not have to release the juvenile into a parent's custody if doing so would present an immediate threat of serious bodily harm to the juvenile, if a responsible adult can't be found, or if secure detention is in fact permissible for the act of delinquency that has been charged.[86] If the juvenile has been charged with a status offense, the Department of Health and Human Resources (DHHR) must be notified immediately and the court may order that the juvenile be detained in a non-secure or staff-secure facility.[87]

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Rights of Juveniles in Custody or Detention

Under the West Virginia code, juveniles in custody or detention have, at minimum, the following rights:[88]

1. A juvenile may not be punished by physical force, deprivation of nutritious meals, deprivation of family visits or forced solitary confinement.
2. A juvenile must be given the opportunity to participate in daily physical exercise.
3. A juvenile in a state facility may not be locked alone in a room, except for sleeping hours, unless unresponsive to reasonable direction and control.
4. A juvenile must be given access to daily showers.
5. A juvenile must be provided with his or her own clothing or individualized, clean clothing supplied by the facility.
6. A juvenile must be given constant access to writing materials and must be allowed to send mail without limitation, censorship or prior reading. The juvenile must also be able to receive mail without prior reading, although mail may be *opened* in the juvenile's presence to inspect it for contraband.
7. A juvenile may make and receive regular local phone calls without being charged. He or she can also make and receive long distance calls to his or her family without charge at least once a week.
8. A juvenile has the right to receive visitors daily and on a regular basis.
9. A juvenile shall be given immediate access to medical care as necessary.
10. If a juvenile is in a juvenile detention facility or juvenile corrections facility, he or she must be provided access to education, including teaching, educational materials and books.
11. If a juvenile requests access to an attorney, he or she must be afforded reasonable access.
12. A juvenile has a right to a grievance procedure, including some mechanism in place for appeal.

All juveniles must be given a copy of these and any other rights afforded to them upon admission to their respective facilities.

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D. Petitions

Filing a Petition

A petition alleging that a juvenile is a delinquent or a status offender is filed by a person who is knowledgeable of the alleged facts in a potential case.[89] The petition must contain specific allegations regarding conduct and facts, the approximate time and place of the alleged conduct, a statement on the juvenile's right to counsel, and a description of the specific relief sought.[90] If a petition is filed, not only must the juvenile be served with notice of the proceedings, but parents must also be served and be named in the petition as respondents.[91] If the juvenile is in custody at the time, the petition must be served there within four days of when custody began.[92] If no petition is served in that time period, the juvenile must be released from custody.

Once a petition has been filed, the court must set a time and place for a preliminary hearing and may appoint counsel for the juvenile.[93] The juvenile may be served with the petition and summons by first class mail or by personal service of process. If the juvenile fails to appear in response to a mailed copy, then there must be personal service. If the juvenile ever fails to respond to a summons delivered in person then an order for arrest may be issued.[94]

Alternatives to Filing a Petition

Rather than rely on a formal filing of a petition, the court may instead opt to refer the juvenile's matter to a state department worker or probation officer for preliminary inquiry.[95] The court or another official may also refer a juvenile alleged to be a delinquent or status offender to a counselor at a place like the state department or a community mental health center.[96] Both of these options are ways to avoid the formal process of filing a petition.

Another alternative is West Virginia's teen court program, which is available in some counties throughout the state. Volunteer students from grades seven through twelve are selected to serve as the defense attorney, prosecuting attorney, court clerk, bailiff, and jurors. The judge's role must be filled by an acting or retired circuit court judge or an active member of the state bar.[97] In counties that have teen court programs, some juveniles may be given the option of proceeding in this alternative program. In order to have this option, the juvenile must have been alleged to have committed either a status offense or an act of delinquency that would have only been a misdemeanor if committed by an adult.[98] To enter the program the juvenile needs parental consent and if he or she doesn't cooperate successfully in the program or does not complete it, he or she must be returned to the circuit court for further disposition.[99] Disposition in teen court consists of community service, the duration and type of which is determined by the teen court jury. The jury picks from a list of available community service programs and is limited to requiring between sixteen to forty hours of service.[100] Any juvenile who elects to use a teen court in lieu of having a petition filed is then required to serve in the future at least twice as a teen court juror.[101]

West Virginia's third option to the filing of a formal petition is the Animal Cruelty Early Intervention program. Established by a task force created by the Department of Juvenile Services, this program provides an alternative to juveniles alleged to have committed delinquent acts that involved harm to animals. If the court determines that the juvenile is a good candidate and parents consent

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to participation, this is a viable alternative for this specific subset of offenders. The program is designed to help juveniles who have a history of animal cruelty develop skills, resolve problems and increase family support. Services may include referral of juveniles and parents to psychological, welfare, medical, legal, educational or other social services.[102]

E. Preliminary Hearing

After a petition has been filed, the court or referee must hold a preliminary hearing. This hearing can be skipped if a preliminary hearing has already been held or if the juvenile waived this right on the advice of counsel.[103] If the juvenile is detained, the hearing must be held within ten days of when he or she was placed in detention. If the hearing is not held within ten days, the juvenile must be released on his or her own recognizance unless the hearing has been continued for good cause.[104]

At the hearing, the court must inform the juvenile of his or her right to counsel, and appoint counsel if counsel has not already been retained, appointed, or knowingly waived. The hearing is an evidentiary proceeding, at which the government and the defense can present and cross-examine witnesses, and introduce tangible evidence. The rules of evidence are relaxed, and hearsay is admissible. Preliminary hearings are held on the record. After the hearing, it is the court's job to determine whether or not there is probable cause to believe that the juvenile is a delinquent or a status offender. If the court finds there is no probable cause, the juvenile must be released and the proceedings dismissed.[105] If the court finds probable cause, the case proceeds to adjudication. At this point, if the juvenile is detained, the detention may not last longer than thirty days before the adjudicatory hearing begins. A juvenile alleged to be a status offender cannot be placed in a secure detention facility.

One other option the juvenile has at the preliminary hearing is to move to be allowed to enter into an improvement period. If the court agrees that an improvement period is in the juvenile's best interest then the adjudicatory hearing can be delayed, depending on the juvenile's rehabilitative needs, for a maximum of one year.[106]

F. Adjudication

As the first step of an adjudicatory hearing, the court must ask the juvenile whether he or she admits or denies the allegations put forth in the petition.[107] A refusal to respond is taken as a general denial of all the allegations. If the juvenile denies the allegations then the court or jury will hear the evidence; if the allegations are admitted or sustained by proof beyond a reasonable doubt then the court can schedule disposition.[108] If the juvenile is adjudicated delinquent, then the court can order the juvenile into custody for a maximum of 60 days. In custody, the juvenile must be examined, diagnosed, classified, and given a complete medical exam.[109] At times it may also be required that the juvenile be separated from the general inmate population.

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Jury Trials

In juvenile proceedings, the juvenile, the juvenile's parents, or the juvenile's counsel has the right to demand a jury trial on any question of fact that would expose an adult in a similar situation to incarceration.[110] The judge can also order a jury trial even if the juvenile has not requested one. The jury consists of 12 members.[111] If a juvenile has a jury trial and loses, jury costs at the rate of $40 per day for each juror are assessed against the juvenile. If proceedings deal with a youth who has been charged with a status offense however, where incarceration is not a possibility, trial by jury is not an option.[112]

Evidence, Testimony, and Out of Court Admissions

At all juvenile adjudicatory hearings, the rules of evidence that are used in adult criminal cases apply, including the rule against written reports based upon hearsay.[113] Additionally, except for admissible spontaneous declarations, extrajudicial statements made by a juvenile under 14 to law-enforcement officials or while in custody are not admissible unless they're made while the juvenile's counsel is present.[114] Children between the ages of 14 and 16 face a slightly different situation. Their extrajudicial statements are also not admissible unless made in the presence of counsel but can be admitted if made in the presence of, and with the consent of, the juvenile's parents. To satisfy this requirement, the parents must have been fully informed of the juvenile's right to counsel and the privilege against self-incrimination.[115]

G. Disposition

Pre-Hearing Preparation

The court can gather information that would be helpful to it in making the disposition decision. The court can order the juvenile's probation officer to investigate the juvenile's environment and seek out any potential alternative dispositions that may be available. The court can also order that probation arrange for a psychological or other mental health examination of the juvenile. If the court requests this kind of pre-disposition hearing investigation, copies of any reports have to be provided to defense counsel no later than 72 hours before the hearing.

The Supreme Court of Appeals appoints probation officers and determines their fixed salaries.[116] Probation officers are not considered law enforcement officials. There must be at least one probation officer in every circuit in West Virginia. All expenses and costs that the officers encounter are covered by the court of appeals, according to its rules. Any time a juvenile is brought before the court or a judge, the court clerk must notify the chief probation officer of the county.[117] Once notified, the probation officer or an assistant has to investigate the case and furnish any information and assistance to the court or judge that may be required.[118]

Disposition Options

After adjudication, the court must hold dispositional proceedings that give all parties the chance to be heard. In determining the best outcome, the court will balance the best interests of the juvenile and the welfare of the public.[119] One option the court has is to dismiss the petition and refer the juvenile and his or her parents to a community agency for assistance. And, even if the petition is

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dismissed, the court may place the juvenile under a probation officer's supervision or prescribe a treatment program that may include some form of therapy or community service.[120]

If the court elects to release the juvenile to his or her parents but finds either that they are unwilling or unable to take the child or the juvenile simply does not want to stay in their custody, the court can instead place the juvenile in temporary foster care or a child welfare agency.[121] In that same circumstance, if the court determines that the welfare of the public or the best interests of the juvenile require it, the juvenile can be placed in a juvenile services facility. Any such commitments "shall not exceed the maximum term for which an adult could have been sentenced for the same offense."[122]

In cases in which the court finds that the juvenile consumed alcohol, it can order the child to perform community service or to pay limited fines. In some cases it can also suspend the juvenile's driver's license.[123] In addition to the court's other methods of disposition, it may also opt generally to impose a small fine on the juvenile, require either the child or parents to pay restitution or reparation to the aggrieved party, require the juvenile to participate in a public service project, or suspend or revoke a child's driving privileges.[124] Following disposition, it is the court's duty to inquire whether the juvenile wishes to appeal.[125] Even if the child responds negatively, this cannot be considered a waiver of the right.

If a juvenile has been transferred to and convicted in the adult jurisdiction, the court can still choose to sentence the juvenile as a juvenile and not as an adult.[126] If a court convicts a juvenile under the adult jurisdiction, the child cannot be held in custody in a state penitentiary, though he or she can be transferred there after turning 18.[127] West Virginia does not allow any juvenile, regardless of jurisdiction, to be detained or confined in an institution in which he or she has any sort of contact with incarcerated adults.[128]

Modifications of Dispositional Order and Appeals

A dispositional order may be modified by the court upon a motion of a department official, the probation officer, the director of the division of juvenile services or the prosecuting attorney.[129] It may also be modified upon the successful request of either the child or the child's parents if they allege that there has been a significant change of circumstances. Once such a motion or request has been made, the court must conduct a review proceeding. If, however, the last dispositional order was within the past six months, this is unnecessary. At the review proceeding, it's the court's responsibility, as it was the first time, to consider the best interests of the child and the welfare of the public in making its decision.[130]

Comprehensive Plan and Aftercare

It is the job of the division of juvenile services to develop a comprehensive plan for the treatment of juveniles who are either detained or incarcerated. The purpose of the plan is to establish a unified state system for social and rehabilitative programming and treatment of the children.[131] Parts of the plan will vary across the state according to the respective needs of detention services in the different counties and regions.

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Before a juvenile may be discharged from any institution or facility, there has to be a meeting of the child's multidisciplinary treatment team to come up with an after-care plan for the juvenile.[132] This plan must be in the juvenile's best interests. It has to include a detailed description of the education, counseling and treatment the juvenile received while at the institution.[133] It must also propose a plan for development in these areas upon discharge. The plan must address the problems the juvenile is facing and propose the best solutions possible. It is then up to the juvenile's probation officer or community mental health center professional to contact all persons, organizations and agencies that will be involved in executing the plan to determine whether they are all capable and willing to implement the plan.[134]

Once created, a copy of the after-care plan must be forwarded to the court, the juvenile's parents, the juvenile's lawyer, the juvenile's probation officer or community mental health center professional, the prosecuting attorney, and the juvenile's school principal.[135] The court will also appoint the juvenile's probation officer or a community mental health center professional to act as supervisor of the plan.[136] The plan supervisor must regularly report the juvenile's progress to the court. If there are any obstacles to implementation, the court will hold a hearing to reconsider the plan and make possible modifications.[137] Any person or agency that has a role in executing the plan may be required to attend this hearing.

H. Confidentiality of Records

Juvenile records are not public records and therefore cannot be disclosed save for a few exceptions.[138]

Disclosure to School Officials

If a child has been charged with an offense that involves violence against another person, possession of a dangerous or deadly weapon, or possession or delivery of a controlled substance, a copy of the child's records must automatically be disclosed to certain school officials.[139] For this disclosure to happen, the case must also have either proceeded to a point where there is probable cause to believe that the offense was committed or some disposition has been made other than a dismissal.[140]

If the juvenile attends public school, all records of the juvenile's case have to be automatically disclosed to the juvenile's county superintendent and school principal. If the juvenile attends a private school, the court must first determine the identity of the highest-ranking person at that school and then automatically disclose all records of the case to that individual.[141] If the child's school is located in a state other than West Virginia, the court must first determine the laws in that state and then the judge must use his or her discretion to determine if the records should be disclosed.[142]

The records that must be disclosed are copies of the arrest report, investigations, psychological test results, evaluation reports, and any other relevant materials that would help alert the school to potential danger. The goal is to make the school aware of any threats the child might pose, to himself or to others. If HIPAA[143] restricts disclosure of any record, the court, if the Act permits it, must provide the superintendent and principal with notice of the existence of the record and information

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on how to obtain the record, if this is even possible.[144] In addition to disclosure of the records, the court must send a cover letter and a copy of the applicable sections of the state code.[145]

> **"Juvenile records are not public records and therefore cannot be disclosed save for a few exceptions."[139]**

School officials who become privy to records must keep them absolutely confidential and nothing contained in the records can be noted on the juvenile's permanent educational record.[146] There are, however, some exceptions to this restriction. The county superintendent is required to designate the school psychologist to receive the juvenile's psychological test results and any mental health records then available. The psychologist must then use his or her professional judgment to decide whether or not the principal must be notified of any details.[147] If a principal has access to the records, he or she must disclose the contents of the records to any of the juvenile's teachers and regular school bus drivers. Any school official with access to the records may also disclose information to any adults within the school system they deem necessary.[148] However, under no circumstances can one school transmit records to another school, be it another primary or secondary school, a college, or any other sort of post-secondary school – the court must facilitate these sorts of transactions.[149]

If someone who has access to records accidentally or negligently attributes them to the wrong person or attributes false information to the juvenile in question, he or she won't suffer any penalty, civil or criminal, but will be under a duty to promptly correct the mistake. If, on the other hand, the disclosure or false attribution is purposeful, the individual can face criminal and civil penalties.[150]

Disclosure to Court Personnel

The court can also permit disclosure of juvenile records, upon a written petition and pursuant to a written order, to (1) a court which has the juvenile before it in a juvenile proceeding, (2) a court exercising criminal jurisdiction over the juvenile which intends to use the records for a presentence report or disposition proceeding, (3) the juvenile, the juvenile's parents or the juvenile's counsel, or (4) the officials of a public institution to which the juvenile is committed so long as the records are a necessity for them for actions such as transfer or parole.[151] A person who is conducting research may also gain access to the records but only if any information that could identify the juvenile or the juvenile's family is not disclosed.[152]

In accordance with state code restrictions, juvenile records must be disclosed, or copies must be made available to probation officers upon their written request and upon approval of the supervising judge.[153] Records can also be disclosed to them upon subpoena from a federal court or federal agency.[154]

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Juvenile Records Open to Public Inspection

In some cases, juvenile records may be open to public inspection. Once a juvenile case is transferred to the criminal jurisdiction of the court, for example, it becomes public record. If a juvenile is younger than 14 and the case has not been transferred to criminal jurisdiction but a court has determined that there is probable cause to believe that the juvenile committed murder or sexual assault in the first degree, the records may be open to public inspection pending trial. However, this can only happen if the juvenile is released on bond and no longer detained or if the juvenile has been adjudicated delinquent of the offense.[155]

Sealed Records

Once a juvenile's records have been sealed, the legal effect is such that it is as though the offense never occurred. Records shall be sealed either after the juvenile turns 19 or, if later in time, one year after jurisdiction over the juvenile has ended.[156] Records shall also be sealed if, after being transferred to a criminal jurisdiction, the juvenile was either acquitted or his or her proceedings were dismissed.[157] Once a juvenile's records have been expunged, no individual or entity can discriminate against that person due to those proceedings.[158]

I. Status Offenders

In status offender proceedings, if the allegations in a petition alleging that the juvenile in question is a status offender are admitted or sustained by clear and convincing proof, the court must refer the juvenile to DHHR.[159] Here, the juvenile can get services designed to develop skills and supports within families and to resolve conflicts with families or with the juvenile individually.[160] Such services may include referrals of juveniles and their family members to services for psychological, welfare, medical, legal, educational or other social services, as appropriate.[161] If necessary, the department may petition for a court order to place the juvenile out of home.[162] Since this is a big step, if the court approves the petition it must make every effort possible to place the juvenile in community-based facilities as these are the least restrictive alternatives available.[163]

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Chapter Three:
Assessment Findings

I. Access to Counsel

A. Waiver of Counsel

As recent, high-profile lawsuits in Ohio and in Luzerne County, Pennsylvania[164] have revealed, waiver of counsel in juvenile delinquency proceedings results in unfair outcomes for youths in jurisdictions across the country.

West Virginia's juvenile system, however, did not seem to suffer from this widespread problem. West Virginia's juvenile code affords juveniles accused of crimes the right to effective representation at all stages of juvenile proceedings.[165] Across the state, circuit courts did an excellent job of realizing this statutory language. Except for a single circuit court judge who reported that he has seen a small number of status offenders proceed without counsel, in county after county, stakeholders reported and investigators observed firsthand that children facing juvenile delinquency proceedings do not waive counsel. One assessment team investigator reported, "Everyone we spoke to confirmed that no child proceeds in the system without an attorney." More than one attorney attributed this commitment to providing indigent defense representation to the fact that judges simply "do not allow waiver of counsel." Consistent with this observation, the judges interviewed expressed a unified sensibility on this issue: they simply do not allow juveniles to waive counsel. One judge went so far as to comment that, "Although I often see juveniles in my court without parents or guardians, I never see one without an attorney."

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B. Appointment of Counsel

Indigence Determinations and Fees

By West Virginia statute, eligibility guidelines for indigent defense have been set by the West Virginia Public Defender Services at 150% of the federal poverty level for the applicable family size. If a child is unable to pay for counsel – and, in most counties, the court simply presumes that the child cannot afford an attorney – the court is required to order the child's parent or guardian to complete a financial affidavit. If the financial affidavit indicates that the parent or guardian is also unable to pay for counsel, the court must appoint counsel for the child. The court may order a parent or guardian with sufficient assets to pay for legal representation for the child in the proceedings. W. Va. Code § 29-21-16. If there is a conflict of interest between the parent or guardian and the child that would interfere with the child's right to effective representation of counsel – for example, in a domestic violence case in which the child is accused of striking the parent – or if requiring the child's parent or guardian to provide legal representation for the child would otherwise jeopardize the best interests of the child, the court may disregard the assets of the parent or guardian, and appoint counsel for the child.

Across the state, counties generally followed this procedure, with some minor variations: in one county, interviewees reported that there was a presumption of indigence, likely because eligibility is based upon the child's income; in another, the probation officer reported that the parents fill out the indigence form in the probation office; in another, interviewees reported that the referee's secretary has parents fill out the indigence form; in a third, the prosecutor sends the juvenile and his or her family a packet that includes the affidavit for appointment of counsel once charges are filed; in another, the public defender makes the indigence determination. Overall, even though some interviewees noted that the financial guidelines for appointment of counsel have not been updated in 13 years, there was no indication that the process of indigence determinations or assessment of fees present a barrier to access to counsel for West Virginia's children. As one juvenile defender stated, "No one looks at the financial statements – they are mainly perfunctory. No child is ever turned down for a lawyer because of the financial situation of the child's family."

Methods of Appointment of Counsel

There was no uniform method of appointment. Jurisdictions with public defender offices give priority in case assignments to the public defender's office, determine whether there is a conflict of interest that requires appointment of a private attorney, and, if there is, appoint from the conflict panel.[166] For example, in one county, when a new case is filed in the clerk's office, the clerk prepares a petition and summons and sends it to the court administrator. The court administrator's office prepares an appointment order for the chief judge of the circuit court to sign appointing an attorney to the case. In that county, the court administrator assigns all juvenile cases to the public defender's office unless there is a conflict of interest as determined by the court administrator, who is an attorney. When there is a conflict, the administrator appoints a private attorney. The court administrator also sends notices of appointment to all the relevant parties. In another county with a public defender office, the referee's secretary assigns counsel, giving priority to the public defender, and, sending cases in which the public defender's office has a conflict of interest to conflict counsel. The referee's secretary, a non-lawyer, determines whether there is a conflict. In a third

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county, the public defender's office interviews the child and the child's family and determines whether there is a conflict. If there is a conflict, then the office sends an order to the circuit court, and the circuit court judge chooses from a panel of private conflict attorneys and makes an appointment. Counties without public defender offices also have their individual methods of appointing counsel. However, in each of these, the court assigns counsel from a panel of attorneys who sign up to take juvenile appointments.

"There is an incentive, in the name of system economy, to avoid appointment of defense attorneys who might slow the progress of the docket, but who, in the juvenile client's opinion, are abiding by their ethical duty to provide competent and diligent advocacy."

The common factor among counties – that, whether the county has a public defender office or not, the other stakeholders, including judges and prosecutors, have a hand in appointing counsel – can arise as a problem. There is an incentive, in the name of system economy, to avoid appointment of defense attorneys who might slow the progress of the docket, but who, in the juvenile client's opinion, are abiding by their ethical duty to provide competent and diligent advocacy. For example, one appointed counsel reported a story from a jurisdiction in which the circuit court judge was charged with appointing counsel in the cases on the judge's own docket. A court appointed attorney took two juvenile cases to trial before this judge; now, that attorney does not get receive more appointments. In another jurisdiction, in which prosecutors have a hand in choosing which private counsel is appointed at detention hearings when there is a conflict with the public defender's office, the prosecutors freely admitted that they are more likely to choose defense attorneys that do not have a reputation for fighting for their clients. Particularly in small, rural jurisdictions, such tactics discourage best defense practices. If diligent defense advocates are passed over for appointments, this omission has a powerful chilling effect, discouraging other lawyers who observe the example.

Timing of Appointment of Counsel

When juvenile defense counsel is appointed can have as much of an impact on a case as whether counsel is appointed at all. For this reason, the IJA/ABA *Juvenile Justice Standards* recommend prompt appointment of counsel, prescribing specific and systemic methods for assigning counsel from the outset, as well as ensuring continuity of counsel through the various stages of the juvenile court process. The *Juvenile Delinquency Guidelines* of the National Council of Juvenile and Family Court Judges agrees with the recommendation in the IJA/ABA *Juvenile Justice Standards*, explaining that "[i]n a juvenile delinquency court of excellence, counsel is appointed prior to the detention or initial hearing, and has time to prepare for the hearing."[167] If counsel is appointed on the day of a detention hearing, the appointment should be accompanied by time and space for

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counsel and counsel's new client to consult privately before stepping foot in the courtroom. Early appointment of counsel benefits all participants because "[d]elays in the appointment of counsel create less effective juvenile delinquency court systems."

Across the state, reports concerning the timing of appointment of counsel were inconsistent. One juvenile defender stated that he is appointed to cases very early, sometimes even at the point when the child is being interrogated at the police station; this defender also reported that the police in his county do not interview juveniles without counsel present. Similarly, a juvenile defender in another county related that the defender is generally able to speak with clients a few days in advance of court hearings, sending a letter as soon as the defender is notified by the court administrator of the new appointment. If the client has been released, the defender finds out about his appointment about a week in advance of the hearing. If the client has been detained, the defender usually meets the child at the detention facility. In a third county, a juvenile defender reported that the public defenders or appointed counsel are "always" called and able to meet with their juvenile clients before the child's first court appearance. In contrast, a judge in a different county reported that, while no child has ever appeared before him without an attorney, sometimes the appointment is not timely, and it is clear that the attorney has not had adequate time to prepare.

II. Quality of Representation

A. Preparation and Client Contact

Consultation to Prepare for Court

According to the IJA/ABA *Juvenile Justice Standards*, a defense attorney "has a duty to keep the client informed of the developments in the case, and of the lawyer's efforts and progress with respect to all phases of representation." In action, this ethical obligation means that juvenile defense attorneys must, from the moment the defender is appointed, "establish a relationship of trust and confidence with the client," and preserve a young client's confidences and secrets, even from parents. The pull on juvenile defense attorneys to avoid these ethical duties in juvenile delinquency court, because of the system's ostensibly benevolent goal of rehabilitation, because of the court's commitment to moving the docket, or because of pressure from other stakeholders, is ineluctable.

One problem observed throughout the majority of counties was the failure of juvenile defenders to engage in meaningful consultation with their clients before a hearing or adjudication. At times, this problem seemed to stem from unwitting systemic barriers embedded in the overall operation of the court. For example, a judge in one county reported that juvenile defenders in his courtroom seemed "overwhelmed" by their caseloads, and, as a consequence, very little time is allotted for preparation; despite his understanding of the defenders' staggering obligations, this judge reported "throwing" public defenders out of his courtroom for appearing before him unprepared. A juvenile defender reported that she does not have a lot of time to meet with her clients prior to their initial court appearance, so she typically locates them in the hallway and finds a corner if the hallways are crowded or a room if they are lucky, to meet before court. She rarely has as much as 30 minutes, not nearly enough time to do what she considers a complete initial interview, which she strongly

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> **One problem observed throughout the majority of counties was the failure of juvenile defenders to engage in meaningful consultation with their clients before a hearing or adjudication.**

believes includes discussion of the juvenile's constitutional rights, as well as what happened and how the child ended up in court. Another juvenile defender reported that when the assigned public defender steps into the courtroom for a detention hearing in a newly-assigned case in his county, the defender has no information besides the child's name. If the defender has an opportunity to interview the child before the hearing, the interview is nothing more than the sum total of information the defender has about the charged allegations; the defender does not receive a police report, a report of the child's prior involvement in the dependency or delinquency systems, or any other documentary information.

At other times, the failure seemed to be attributable to individual attorneys. For example, in one jurisdiction, assessment team investigators observed that there was no attorney/client contact before a case was called and the court began proceeding. Instead, the case began with the child and the child's mother sitting at counsel table; the defender joined them after the case had been called. Not until the client offered an inculpatory explanation for her behavior in response to direct questioning from the court did the defender ask for a pass to confer with his client. Once the defender asked for the pass, the court was more than willing to grant it. In another jurisdiction, a youth who was charged with burglary and robbery and was being transferred to adult criminal court, complained that his attorney "did not speak with him about his charges or get any information" prior to the youth's detention hearing; the youth spoke with his attorney on the day of the detention hearing, and again on the day of the preliminary hearing. In another jurisdiction, one judge noted that, from his observations, a child's "first contact with counsel almost always is at the first court date," and remarked that, as a result, "the juveniles rarely seemed prepared for court." He went on to explain that "[the juveniles] generally are not dressed appropriately, and rarely have the ability to speak for themselves," because counsel has not taken the time to advise the client about appropriate court dress and etiquette.

In counties in which the system of appointment facilitates early appointment of counsel, stakeholders indicated that the juvenile defenders regularly meet with the youth before the hearing. In one county, the public defenders assume they will be appointed so they can speak with the client before the official appointment. Juvenile public defenders in another jurisdiction also reported that they generally speak with clients a few days in advance of court hearings. In this jurisdiction, when juveniles are released, the juvenile defenders usually find out about the appointment about a week in advance of the hearing; when juveniles are detained, the defenders generally meet those clients at the detention facility. These defenders also made it a policy of letting their clients know that they have an open door policy at their offices, which are just a few steps from the courthouse. These defenders also reported that, if the case is particularly serious, they are particularly dogged in their efforts to make sure they speak with the client before the hearing.

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Assessment team investigators also observed juvenile defenders taking steps to prepare their cases in advance by working with the prosecutor and with the probation officer. In one excellent example of a pre-negotiated disposition hearing, the defender did not have to advocate very much in court because it was clear that the negotiations were done before the hearing. The prosecutor recommended placement at a DHHR staff secure facility. The defender had been aware of the prosecutor's recommendation before the hearing. The defender and the child thought that the judge would go along with that recommendation, but wanted the judge to send the child back home pending availability of bed space in the DHHR facility, and negotiated this with the prosecutor before the hearing. In the hearing, the prosecutor did not object to the child's return home, and the judge allowed the child to remain at home pending placement.

Lack of Confidential Facilities at the Courthouse

Confidentiality is the heart of the attorney-client relationship. Accordingly, courthouse spaces should accommodate the fact that juvenile defense attorneys need to be able to confer with their young clients about their cases privately. Unfortunately, assessment team investigators observed that often there were no facilities that allowed attorneys and their clients to have private conversations. Some courthouses did not have rooms dedicated to client interviews. Attorneys and clients had to have confidential conversations concerning case allegations, the clients' home, medical, and school situation, and other potentially embarrassing topics, in the courthouse hallways, or within earshot of opposing counsel, co-respondent's counsel, or the probation officer. Still, resourceful juvenile defenders found ways to work around this deficiency and have confidential conversations with their clients. In one courthouse, assessment team investigators saw that juvenile defenders took their clients to a quiet and private alcove down the hall from the courtroom to hold confidential conversations both before and after hearings. It seemed that this was the practice in the courthouse, as every attorney appearing in juvenile court that day took this tack. Promisingly, some courthouses did have dedicated client counseling space, or judges willing to let defense attorneys use their jury rooms. In one jurisdiction, a juvenile defender took his client to a side room near the courtroom in which her hearing was held to counsel her about her plea options.

> **"Confidentiality is the heart of the attorney-client relationship."**

Like criminal defense attorneys, juvenile defense attorneys are ethically bound to keep their clients' confidences inviolate, even from their clients' parents, unless they have specific permission from their clients to divulge the information. Still, whether because of the custom in the jurisdiction or the physical space of the courthouse, several assessment team investigators observed juvenile defenders including parents in confidential discussions with their clients. In one instance, in what appeared to be the first conversation between the juvenile defender and his client, the juvenile defender interviewed the client about the allegations and the relationship between the client and the complainant, and advised the client about the client's options at that point in the case, all in front

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of the client's mother. In fact, not only was the client's mother present during this entire interview, but she was an active participant in the discussion. There was no private conversation between the attorney and the client. In another jurisdiction, assessment team investigators observed that the juvenile public defenders speak with their clients outside of the presence of the parents, while the lone appointed counsel spoke with his client in front of the client's mother.

Consultation Following Court Appearances

An attorney's ethical duty to keep the client informed about the case includes speaking with their clients, using age-appropriate language, after court appearances to ensure that the client understands what has happened, the prognosis for the case, and the court's expectations of the client. Interviews with youth in detention centers after they had been to court revealed that juveniles often leave court and return to the detention center without an accurate understanding of the current status or the likely developments of their cases. One youth, who was involved with several other youths in a school incident, reported that he did not realize he had agreed to being held in this facility for three months as part of his plea. He said his attorney never discussed the allegations with him, and that he did not realize his plea included time at a residential facility; he thought the program his attorney described to him was in the community. Another youth, a 15 year-old girl, summed up her court experience as "I showed up when I was told to, met my lawyer for a few minutes, and then they told me I was going away."

Assessment team investigators observed that some attorneys incorporated talking with clients after their hearings into their regular practice, while other attorneys did not. Attorneys who were not observed talking with their clients after hearings often had several hearings back-to-back, and so were unable to follow their clients out of the courtroom and talk with them. Attorneys who were observed talking with their clients after their court appearances adopted some promising practices. In one county, the two juvenile defenders who had hearings that day arranged with the courtroom clerk to alternate their hearings, so that neither of the defenders had hearings back-to-back. In another county, the defenders asked the court for, and were consistently granted, an opportunity to confer with their clients post-hearing; the judge simply sat on the bench and handled paperwork and other administrative matters until the defender returned.

Defense Attorney Contact with Detained Youth

In theory, youth in detention have access to their attorneys through phone calls and in-person visits. In several juvenile detention facilities across the state, assessment team investigators noted that rules concerning how a juvenile can contact his or her attorney were included in orientation materials given to youths when they enter the facility and posted in common areas. Many of the facilities also kept a list of the attorney's phone numbers in the facility, in case a child remembered his attorney's name but not the attorney's contact information. In addition, when assessment team investigators randomly asked detained youths in each facility about legal phone calls, they were all able to give the same, facility-appropriate answer without hesitation. In at least one facility, not only are detained youth allowed to make calls every other day, but the counselor proactively asks each child every Tuesday and Wednesday if the child needs to make a legal call. In another facility, the case manager keeps a log of how often the children call their attorneys, and whether those attorneys call back. Because the facilities can never deny a child's request for a legal call, all the

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facilities had processes in place to allow a detained youth to make a legal call even on days when the child is not scheduled for calls.

Just as important, most of the facilities visited contained either dedicated space for confidential attorney/client visits, or conference rooms or other areas with a closed door that were able to be used for visits. Most have sound-proof areas that are observable from the guard's booth. One detention center allowed only non-contact visits. However, most allowed attorneys to sit and consult with their clients in contact visits. Generally the child is required to sit across the table from the attorney; however, if the child has a disability, then the counselors will let the child have a bit more freedom in the attorney-client interview. Assessment team investigators observed a visit in one county in which a child with Attention Deficit Hyperactivity Disorder (ADHD) who would not sit in his chair was given a lot of freedom to roam around while he met with his attorney.

Unfortunately, according to both detention center staff and detained youth, the prevailing practice is that juvenile defenders do not visit their clients in detention. There are certainly exceptions to this general practice. For example, detention center staff confirmed that the juvenile public defenders in one county visit often; one even visited on holidays. But, by and large, children were frustrated at their attorneys' non-responsiveness, and detention center staff reported that they see children making phone calls to their attorneys that go unreturned. According to one detention center staff member, "the kids get frustrated wondering if their attorneys care." A detention center staff member at a different facility echoed this sentiment: "Kids get frustrated at times, and with some attorneys in particular, when the attorneys do not call them back or come see them." Exacerbating this situation, children who are housed in detention facilities far from their home county almost never see or hear from their attorneys.

B. Detention Hearings

Detention Hearing Process

West Virginia's juvenile code dictates that a child who is detained after arrest is entitled to a detention hearing within 24 hours. At the time of this assessment, if the child was arrested during the week, detention hearings were presided over by juvenile referees; if the child was arrested on the weekend, the cases were handled by a magistrate. Referees were not, and magistrates are not, required to be attorneys. If a magistrate detains a child during the weekend, the case can be set for review before the circuit court judge on Monday morning. The prosecutor and a juvenile defender are "on call" on the weekends for detention hearings. It should be noted that at least two counties were out of compliance with the 24-hour requirement when youth were arrested on Fridays. If the child is detained after the detention hearing, he or she is entitled to a preliminary hearing with evidence and testimony within 10 days. By statute, probable cause is determined after the preliminary hearing.

In *Gerstein v. Pugh*, the U.S. Supreme Court mandated prompt judicial determination of probable cause as a prerequisite to an extended pre-trial detention following a warrantless arrest. The meaning of "prompt," however, was open to interpretation until the Supreme Court clearly defined a time limit for judicial determination in *County of Riverside v. McLaughlin*. *McLaughlin* held that

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judicial determinations of probable cause within 48 hours of arrest will usually meet the promptness requirement of *Gerstein*.

Gerstein and *McLaughlin* are cases about adults, so arguably, the meaning of "prompt" in a juvenile case may not be the same as *McLaughlin*'s strict 48-hour rule. In *Schall v. Martin*, in which the U.S. Supreme Court dealt with New York's juvenile pre-trial detention statute, the Court emphasized, years before *McLaughlin* was handed down, that a probable cause determination is just one aspect of deciding whether to keep a juvenile in detention. Accordingly, the statutory length of time between placement in detention and judicial review in juvenile cases varies from state to state. But the vast majority of statutes require the probable cause determination to be made within 72 hours, or three days, of arrest; West Virginia's requires the determination be made within 240 hours, or 10 days. There is no reason that a longer period of detention would be appropriate for children. And, there is no question that the Fourth Amendment protections enunciated in *Gerstein* apply to juveniles, and a prompt judicial determination of probable cause is required if a youth is detained on a warrantless arrest. Accordingly, West Virginia's statute should be revised to require the judicial officer presiding over the detention hearing to make the probable cause determination as well.

Magistrates

Often, magistrates preside over juvenile detention hearings. There are 158 magistrates statewide, with at least two in every county and 10 in West Virginia's largest county. Magistrates also issue arrest and search warrants, hear misdemeanor cases, conduct preliminary examinations in felony cases, hear civil cases with $5,000 or less in dispute, and issue emergency protective orders in cases involving domestic violence. The circuit courts handle appeals of magistrate court cases. Magistrates run for four-year terms in partisan elections.[168] As provided by the West Virginia Constitution, magistrates do not have to be, and often are not, lawyers. In one county, the magistrate was a former sheriff. They are given a bench book, and they attend a four-day training given by West Virginia Supreme Court Administrative Office. Despite the fact that they are not attorneys, they are empowered to make the initial determination of whether a child should be detained. As one attorney explained, "West Virginia is culturally suspicious of authority and education, so people like the fact that regular people serve as magistrates. Half of the magistrates are the former secretaries of a magistrate." The attorney articulated the problem with this arrangement: "These are substantive proceedings that have real consequences. We have one magistrate that is a lawyer, which makes a difference because she is able to apply law and understand the burdens." The attorney concluded that system actors know that the current situation is substandard, "but there are financial consequences of changing the system." Another attorney was more blunt, saying the magistrates are often "politically connected hacks," and adding that two magistrates were recently suspended by the state supreme court for incompetence. Finally, another attorney stated that appearing before magistrates is a "train wreck when you have a legal issue." The potential harm of entrusting so crucial a decision to magistrates likely outweighs the judicial and fiscal expediency of having non-lawyers make legal determinations.

It should be noted that the existing potential remedy to this problem, the fact that West Virginia's juvenile code allows a minor to ask a judge to review a magistrate's detention decision, is not ef-

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> **Despite the fact that they are not attorneys, [magistrates] are empowered to make the initial determination of whether a child should be detained.**

fective. The use of this code provision is uneven. In one county, weekend detention decisions made by magistrates were automatically set for review before the referee the following Monday. But in another county, juvenile defenders reported that magistrates' weekend detention decisions are rarely reviewed, in part because the judge who would review the determinations stated on the record that juveniles have no such right; in that same county, the chief public defender was unsure whether the United States Constitution applied to juvenile detention hearings.

Another possible remedy to this problem, requiring magistrates to be attorneys, has a long and heated history. Currently, the West Virginia Constitution does not require magistrates to be attorneys. In February, the House of Delegates voted 61-37 to approve HB 4292, which requires magistrates to have a college degree. If the measure becomes law, it would not take effect until 2014, and wouldn't affect current magistrates who do not have college degrees. Also, two years of magistrate experience could substitute for a degree.

Research shows that detention, even for a short period of time, can have serious and far-reaching consequences. A detained client cannot assist as well in preparing for adjudication as a released client – and particularly not in the early days of a case, when investigation is most likely to lead to witnesses and other crucial information concerning the merit of the allegations. With respect to the child's development, simply put, detention can change a child. Studies show that time spent in detention increases the likelihood that the child will recidivate, in part because the client is likely to make negative peer connections, and because positive, community-based relationships (in particular, with the child's family) are interrupted. In fact, as a predictor of future criminality, detention is more reliable than gang affiliation, weapons possession, or family dysfunction. To the children whose liberty is at stake, the role of defense counsel at detention hearings is crucial. Accordingly, the detention determination is critically important, and should be handled by a practitioner with the requisite training and expertise.

Lax Application of Evidentiary Rules

Detention hearings were marked by lax application of evidentiary rules. For example, in one detention hearing, the child was accused of stealing sneakers at a high school. The parties freely questioned the child about his involvement, all without objection from defense counsel. First, the referee began the hearing by asking the child direct questions about the child's involvement with no objection from defense counsel. The child denied the charges, stating that someone gave him the sneakers. He said he knew the owner of the shoes and was often beaten up by her. The prosecu-

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tor then questioned the child, and elicited that the stolen shoes were in fact girls' shoes, and that the child had a grudge against the owner of the shoes because of all the times she beat him up. The prosecutor asked "Did you buy the shoes?' The child responded "No, they were just given to me." At this point, the child was fidgeting, and glassy-eyed, and his speech pattern was very fast and unresponsive. The prosecutor asked the child "Are you high?" Still, there was no objection from defense counsel. The child's mother responded that he wasn't high, and that his ADHD medications were making him act this way. Although hearsay is permissible in detention hearings, the child's Fifth Amendment right against compelled self-incrimination still applies, and should be actively observed and protected, unless the child waives this right on the record.

Detention Advocacy and the Role of Probation

The zealousness of advocacy at the detention hearing seemed to be firmly grounded in the culture of each individual county. In one county, the defense attorneys offered a tactical reason for not calling witnesses at the detention hearing: they worry about showing their cards so early in the case, especially since so few youths are detained pre-trial, and so they do not put on witnesses. In several other counties, stakeholders freely admitted that advocating at a detention hearing was an exercise in futility largely because there was a tacit understanding that the court would always simply follow probation's recommendation. In one county, the prosecutor reported "detention hearings are often not contested, because the courts always follow the probation officer's recommendation." A judge in another county all but relinquished the ultimate responsibility to the probation officer, saying that the detention decision is "really up to Probation." Another judge called probation "the most reliable source of information about child and family." In another county, the juvenile defenders took the position that advocating for release from detention at any point in the case was pointless because of the dearth of resources available in the community. This overreliance on the probation officer's recommendation discourages zealous advocacy, and allows detention hearings to resemble the pre-*Gault* hearings that the Supreme Court so firmly rejected.

In other counties, diligent detention advocacy was the norm. In one instance, in a case set for trial of a child charged with uttering and petty larceny, the public defender moved for an improvement period, and requested that the child be allowed to go to Arizona to stay with his mother until a space opened at the Mountaineer Challenge Program. The public defender made an excellent argument for the improvement period, pointing out, among other things, that because the father was the victim, the child was not a menace to the larger society. The judge granted the defender's motion. In another case, in which a child was charged with possession with intent to distribute and was already placed at Davis Stuart for another charge, the defender moved for an improvement period until the end of this semester. Again, the defender made a solid argument to support her motion. The defender continued to argue zealously even when the prosecutor raised some concerns about reports of continued negative behavior at Davis Stuart, and about the prosecutor's belief that the child was currently testing positive for illegal drugs. The child's father spoke up from the audience and argued that the child was not using drugs any more. The judge set the case down for a 90-day review. The defender told us later that if the child was still abiding by all his release conditions in 90 days she would ask for the child to return home.

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C. Preliminary Hearings

West Virginia's juvenile code allows that arrested youth get preliminary hearings in every case, even if the child will not be detained pending trial. A child's case will not be "bound over" to circuit court without a finding of probable cause at a preliminary hearing. If the child is detained, he is entitled to a preliminary hearing within ten days. A child and his defender may waive a preliminary hearing in some cases (e.g., a truancy case in which the government provides certified documentation of the truancy record). Preliminary hearings are tremendously useful for the child and the defender. A preliminary hearing clears up factual confusion, and because the hearings are taped, the transcripts may be used to impeach government witnesses if the cases go to trial. A preliminary hearing also gives the defenders a better opportunity to assess the value of a plea. In one county, the government calls the actual complaining witnesses and eye witnesses to testify. In addition, the defenders in that county can order a CD of the hearing and can ask one of their "transcriptionists" to transcribe the hearing. One juvenile defender reports that he likes to check over the transcript before he allows the transcriptionist to certify it as accurate.

The advantages to this provision are considerable. Assuming that the child's expressed interest is to be released, defense attorneys have an ethical obligation to mount an argument against probable cause unless there is a compelling tactical reason to concede. West Virginia's code puts in place a systemic facilitator, instead of a systemic barrier, that allows juvenile defenders to test the government's evidence, and question the complaining witness. Equally important, arguing probable cause builds the relationship between the defender and the client. Especially since most cases are resolved with admissions, the probable cause hearing may be the child's only opportunity to see the defense attorney fight for the child's interests, and feel that someone in the courtroom is on the child's side. A probable cause determination by the judge on the papers, without an evidentiary hearing, forces the defender to forfeit this crucial rapport-building opportunity.

Despite the myriad benefits of a preliminary hearing, many juvenile defenders waive them. In one county, assessment team investigators observed a preliminary hearing in which court appointed counsel waived the preliminary hearing, went on to state that his client "didn't deny the charges," and said almost nothing when he argued for the client's release. After the hearing, other stakeholders, including the prosecutors and the judge, expressed that they knew that this defense attorney was not very good, and that he routinely did not advocate zealously for his clients. Compounding the drawbacks of waiving the preliminary hearing is the fact that, at best, waiver is accompanied by an abbreviated colloquy in which the child often is not advised of the rights the child is relinquishing. When asked by assessment team investigators about the lack of a colloquy after a preliminary hearing, one defense attorney reported, "this is standard – no colloquy." The defense attorney went on to report the defense attorneys are expected to make sure that they have explained the rights to the child before the hearing but assessment team investigators saw virtually no evidence of this, even in conferences that they sat in on with the attorney and child.

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D. Investigation and Discovery

No Defense Right to Discovery

Prompt and diligent investigation and assiduous pursuit of discovery materials in the custody of the government are crucial to any case, whether the case is resolved by a trial or by a plea agreement. If the case goes to trial, the advantage of speaking to the state's witnesses, preparing defense witnesses, and subpoenaing relevant documents is obvious. Less obvious but just as important is the client's full and meaningful engagement in understanding of the strengths and weaknesses of his case; this kind of active participation, which *Gault* contemplated, is integral to the client's making an informed decision about whether to admit. Also, investigation provides an important opportunity to allow the child to take charge of his case, as the attorney consults the child about witnesses and investigation tactics. Indeed, conducting prompt and thorough investigation is one of the ways a defense attorney can take control of a delinquency case.

Open File Policy

West Virginia's juvenile code does not provide the defense any right to discovery in delinquency proceedings.[169] However, assessment team investigators uniformly found that, in most jurisdictions, the prosecutors have an open file policy, and discovery is handled very informally. Admirably, prosecutors in several counties expressed the sentiment that "the defense is entitled to everything the prosecutor has." A judge in one county noted as a point of pride that few discovery issues are litigated in his courtroom, as the prosecutor has an open file policy. The juvenile defenders in one county confirmed that discovery motions are formulaic and there are virtually no discovery issues because they trust that their juvenile prosecutor will turn over whatever should be turned over, and will not bring a case that is not supported by admissible evidence. In another county, both the juvenile public defender and the juvenile prosecutor confirmed that the prosecutor has an open discovery policy, and that discovery is not an issue. This open file policy can be attributed to stakeholders' commitment to the rehabilitative philosophy of juvenile court, and to the importance that juvenile court stakeholders place on civility in juvenile proceedings. In high stakes cases, like those involving very serious charges, or certification to adult court, the parties create a paper trail and formalize discovery. A much more informal attitude about discovery accompanies less serious cases. For example, in one county, a victim witness coordinator who sometimes helps the prosecutor with discovery stated, "there's not a whole lot by way of discovery."

In the rare instance where there is a discovery issue, the juvenile prosecutors stated that it can usually be traced to the actions of the police. One juvenile prosecutor summed up juvenile discovery, stating that the prosecutor's office has an open discovery policy, but sometimes the police hold evidence back or for some reason fail to give the prosecutor information; she went on to explain that some of the police are forthcoming, and understand the juvenile system, while others don't and "can't be bothered with it." She indicated that the police were not well-trained with respect to juvenile matters. Another prosecutor pointed to police actions to explain potential delays in evidence testing and turning over results of forensic examinations.

Even in jurisdictions with open file policies, there is a danger that the discovery policy does not comport with due process: defense attorneys might not receive discovery materials in time to make

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meaningful use of them. Perhaps the defense does not receive the petition until the day of adjudication, or worse yet, does not receive police reports, statements, and other discoverable material necessary to formulate a viable theory of defense until a few days before the adjudicatory hearing, leaving little to no time to search for and prepare defense witnesses or subpoena and develop defense evidence. There were only a few reports of these pitfalls, however; stakeholders in most counties were satisfied with the discovery procedures, though juvenile defense attorneys acknowledged and were uneasy with the fact that they were at the mercy of the prosecutor's generosity.

E. Motions Practice

Motions for discovery, to suppress inadmissible evidence, and to request continuances are often critical components of an adequate defense. Unfortunately, motions practice is very limited across West Virginia. Most defenders reported that they do not routinely file any sort of motions, whether oral or written. Pre-trial motions practice, when it is undertaken, largely takes the form of oral motions, usually motions for bond reduction, release from detention, or, in a rare instance, competency, and are most often made in open court on the day of the adjudicatory hearing. Written motions are even more infrequent.

Defenders across the state offered different reasons for the uniformly non-existent motions practice. The most commonly offered reason was that the juvenile prosecutor and the juvenile defender resolve issues in ways that do not require the filing of a written motion. For example, with respect to Fourth and Fifth Amendment violations, juvenile prosecutors in three different counties indicated that suppression motions are rare because if search and seizure or unreliable confession issues are brought to their attention, they often drop the case without a formal motion by the defense. Likewise, juvenile defenders indicated that they felt confident that, if they alerted juvenile prosecutors to Fourth and Fifth Amendment deficiencies in their cases, their disclosure would lead to a favorable disposition of the case. Similarly, on discovery issues, many interviewees reported that discovery motions were rare because juvenile prosecutors have an open file policy. In fact, stakeholders took the limited motions practice as a sign that things in West Virginia's juvenile system are working. As one circuit court judge pointed out, there are not so many motions because the juvenile public defender and the prosecutor work it out, and "we dispose of cases as quickly as we can."

F. Adjudication

West Virginia's juvenile court code requires that juveniles enjoy "a meaningful opportunity to be heard. This means that they must have the opportunity in all proceedings to testify and to present and cross-examine witnesses."[170] In all adjudicatory hearings held for juveniles, all of the same procedural rights that are given to adults in criminal proceedings must be given to them too unless there is a provision specifically stating otherwise.[171] In a rare and particularly progressive move, West Virginia's statute also entitles juveniles to jury trials. In juvenile proceedings, the juvenile, the juvenile's parents, or the juvenile's counsel has the right to demand a jury trial on any question of fact which would expose an adult in a similar situation to incarceration.[172] The judge can also order a jury trial even if the juvenile has not requested one. If proceedings deal with a youth who

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has been charged with a status offense where incarceration is not a possibility, trial by jury is not an option.[173]

> **"One circuit court judge reported that less than 10% of juvenile cases are tried, and very few of those cases are jury trials."**

Despite these liberal rules regarding juvenile trials, the vast majority of cases are disposed of with pleas; juvenile justice professionals across the state reported that juvenile trials happen very rarely in delinquency court. Two defenders reported that in four years of practice, neither of them had ever conducted a trial in juvenile court. One circuit court judge reported that less than 10% of juvenile cases are tried, and very few of those cases are jury trials. In another county, the juvenile prosecutors estimated that only about 4% of all juvenile cases go to trial, or one bench trial every two weeks. The prosecutors in this county actually want more trials and believed that if their caseloads were not so high there would be more trials. Judges reported even more infrequent trials. A circuit court judge in one county reported that he has not heard one juvenile jury trial since he started hearing juvenile matters one and a half years ago. A circuit court judge in a different county said, "I haven't presided over a juvenile trial in thirteen years. My role in juvenile court is to be the arbiter of conflicting interests between the public defender and district attorney. I'm never the trier of fact." Not surprisingly, even when cases go to trial, they are perfunctory. One prosecutor reported that bench trials usually last only 20 minutes. The prosecutors believe that the judges are fair and do not convict every child.

As with the lack of pre-trial motions practice, stakeholders attributed the low number of trials to the parties' being, in the words of one very well-respected juvenile prosecutor, "reasonable" and "able to work things out without contested hearings." And, as with the lack of pre-trial motions practice, defenders similarly did not often avail themselves of the jury trial right. One juvenile defender reported that in seven years he has only seen one jury trial. He added that the more serious cases get certified to adult criminal court, where the jury trial rate is much higher. Finally, in line with the pride that West Virginia juvenile court stakeholders take in their ability to work together, one juvenile defender who had a great deal of confidence in his county judge reported that he thinks having a juvenile jury trial would be a "nightmare" and that he generally would get better results from the judge. Not surprisingly, he has not done any jury trials with juvenile clients.

Another juvenile defender offered a different reason for the small number of jury trials that highlights the incredible advantage of jury trials in juvenile court: he said that he has had only one jury trial in his half-year tenure as a juvenile defender because the plea offers he has received since he had that jury trial have been so good that he has not seen a need to have another one; he says most cases that go to trial only go to trial when the government gives no reason to plead, and the jury trial is a strong negotiating tool with the prosecutors. By threatening to take a case to jury, he was able to convince the prosecutors to give good plea offers. Attorneys in other counties echoed the sentiment that the jury trial right significantly levels a playing field that would otherwise be heavily slanted in the state's favor. The looming and implicit threat of jury trials allows the defenders to

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negotiate, for example, (1) felonies down to misdemeanors, (2) misdemeanors down to improvement periods with no adjudication, and (3) commitments to the age of 21 down to a commitment with a cap of 1 year. Other juvenile defenders in a different county said a similar thing: that they had not taken a case all the way to a jury trial because, in the eleventh hour just before the jury trial is set to commence, they receive very reasonable plea offers and the case is resolved.

If a juvenile has a jury trial and loses, jury costs at the rate of $40 per day for each juror are assessed against the juvenile.

G. Pleas

Although West Virginia's juvenile code is silent on the subject of plea agreements, pleading is an integral part of West Virginia juvenile delinquency practice. The vast majority of cases are disposed of by plea agreements. Perhaps because so many cases are disposed of by plea agreements, the colloquies that assessment team investigators observed were very scant. Whether written or oral, plea colloquies were not conducted using age-appropriate language. In one jurisdiction, the plea form had several terms and concepts that were fairly advanced, including "unanimous verdict," "proof beyond a reasonable doubt," "suppress illegally obtained evidence," and "right to remain silent."And, whether written or oral, in most jurisdictions, the judges expressed a clear expectation that they relied on defense attorneys to explain the significance of the plea, the rights the child was giving up, and the possible penalties for non-compliance.

Certainly, there were some exceptions to this rule. In one county, the juvenile defenders reported that most judges in that county do a 20-minute oral plea colloquy, while one judge relies solely on a written plea colloquy. That lone judge expects that the written waiver of rights form will be presented and explained to the child by the defense attorney. The proceeding before that judge was as follows: the judge asked the juvenile defense attorney if the attorney had gone over the rights with the child and the defense attorney answered yes. The judge asked the child if he was pleading to truancy and if the child knew what truancy was. The child defined truancy correctly. The judge was satisfied. The prosecutor stated on the record that the child was guilty of "being a status offender" and provided the judge with signed paper work, including the written waiver of rights form that the defender had had his client sign. The form included a list of the rights the child would give up by pleading guilty, but there was no mention of these rights in open court. According to stakeholders, this judge has already been reversed on appeal for his sparse plea colloquies in adult court, but seems to take pride in continuing the practice, especially in juvenile cases. In a matter in a different county, in which an eighth grade boy was entering into an improvement period agreement, there was a similarly abbreviated colloquy. The charge was not mentioned at all. Instead, the judge asked, "Your lawyer explained all this to you?" and repeatedly directed the child to respond to his questions with, "Yes, sir" or "No, sir." Although the child's mother was present in the courtroom, it was unclear that this young man understood the import of the proceedings swirling around him.

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H. Disposition

West Virginia stakeholders regarded disposition as perhaps the most important stage of the delinquency court process, the "heart of the juvenile justice system." All dispositions occur in circuit court. In a disposition hearing, a court is likely to consider a host of factors, including the child's family and home environment, as well as the child's educational, medical, and social history, to devise an individualized dispositional plan. It cannot be stated too often that public safety suffers when lawyers are not equipped to ensure their clients receive appropriate sanctions, in which discipline and accountability are tempered with educational, vocational, and mental health programs designed to help youth become responsible and productive adults. The right sanction can help a youth turn away from a life of involvement in the juvenile and criminal justice systems; but the wrong placement can actually increase the chance that a youth will reoffend.

Fortunately, assessment team investigators found dispositional advocacy in West Virginia to routinely include defense attempts to advocate for the client. In one county, the juvenile defender reported that it is not uncommon to have a disposition hearing where the defense lawyer calls witnesses and has a hearing. The defense attorneys frequently have their clients sign release forms for probation to get their records prior to adjudication in cases they know won't be tried. The judge in that county agreed that the juvenile defenders do a good job of advocating for their clients at disposition. Still, there is room for improvement. For example, the defender in one county, when asked whether the defenders file written disposition letters, stated that it is not the practice of defense attorneys (juvenile or adult) to file sentencing letters or disposition letters to aid the court in disposition; instead, the defenders advocate orally at disposition hearings. The attorney added that the probation officers are good and prepare good reports so there is no need to write letters.

There is a great deal of reliance on and deference to probation officers in disposition hearings. At the hearing, a defense attorney may challenge the accuracy of information in the probation officer's report and argue for what the child wants, usually release. Similarly, though the probation officers often order psychological evaluations for youths, this action usually goes unchallenged by defense counsel, even though, in one defense attorney's opinion, the reports too often label the child as having a conduct disorder; nor do defense counsel request independent evaluations. The evaluations are virtually always credited by the court and generally include information about mental health diagnosis and medicines the child will take. The chief public defender in another county said simply, "We allow the probation department to do the investigative work and make recommendations." It is no surprise then that, in the absence of contrary representations, most judges defer to the recommendations of the probation officer.

Improvement Periods

Although it is a pre-trial option, most cases are disposed of through improvement periods, a formalized juvenile diversion program. Essentially, an improvement period is pre-adjudication probation. If the terms and conditions of the improvement period are successfully completed, the case is dismissed. If the terms and conditions of the improvement period are not successfully completed and the child is terminated from supervision, the case starts all over from square one, pre-adjudication. The child would then proceed formally with a preliminary hearing and the right to trial including a jury trial. Most cases appear to be resolved by the child opting to take the improvement

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period. Because it is a pre-trial measure, it is usually initially requested in front of the magistrate and then a probation report is prepared and provided to the circuit judge. A hearing in front of the circuit judge follows, where the child, parents and attorney are present and the judge makes a determination to grant the request to be accepted into the improvement period agreement, and what its duration, terms and conditions will be. The duration is either six months or one year. If the child demonstrates exceptional behavior, he can have the supervision terminated early. Most improvement periods are six months to a year; the shortest time period defenders reported was three to four months. Importantly, the circuit judge will also be the judge who will hear any violation of the improvement period rules and conditions. The circuit judge will also be the one to decide whether the child should be terminated from or allowed to successfully complete the improvement period.

While it is admirable that West Virginia offers this option to its juveniles – indeed, many jurisdictions around the country offer their juveniles a similar diversion option – improvement periods do have some potential drawbacks. First, there is the problem of defense disenfranchisement from the process: in improvement period cases, no legal issues are raised, no investigation is performed, usually there is no meaningful exchange of discovery, and no affirmative defenses are presented. It appears that the defense attorney's role is limited, by custom, to making the strategic decision about whether to request the improvement period; for the most part, juvenile defenders have minimal input into the terms and conditions. The problem is in cases where the juvenile violates the conditions of the improvement period and re-starts the case back at square one. These juveniles are in an infinitely worse position and plead since, for a host of reasons, there are so few trials. Also, in this situation, the probation officer wields a great deal of influence. Probation prepares a written report and recommendation to the Court not only as to whether the child should be accepted into the improvement period, but also what the terms and conditions would be. The probation officer in one county reported that if a juvenile did not successfully complete diversion, all the information about the child's failed adjustment to the community would be sent to the judge once the case was dropped out of diversion and petitioned. This leaves the child in the disadvantageous position of having the same circuit judge who has now heard six months to a year's worth of social information about the child hearing all pre-trial motions and presiding over the adjudication.

The overreliance on improvement periods resulted in another problem. While diversion programs are good if they keep kids out of the system, these programs seemed to merely widen the net of kids brought into the system, and cases that might otherwise get "no papered" were put in diversion. In one county, defense attorneys admitted that they know the prosecutor will get youths who are not guilty to be placed on an improvement period. In addition, because many of the diversion programs are grant funded, to keep the grant, stakeholders need to show the program is being used and the incentive is to put kids in the program. Particularly in light of the recent scandal in Luzerne County, Pennsylvania, it is important to zealously guard against potentially improper motivations for placement.

I. Post-Disposition

A court-involved juvenile's problems do not end once the gavel is banged at the close of the disposition hearing. Juveniles often need the assistance of counsel after disposition for direct appeals of issues arising during the pre-trial process or adjudication hearings, periodic reviews of dispo-

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sitions, collateral reviews of adjudications, obtaining particular services such as drug or mental health treatment, or challenging dangerous or unlawful conditions of confinement. West Virginia's juvenile code provides an opportunity to modify or appeal a disposition order. Unfortunately, for West Virginia's juvenile defenders, delinquency representation ends, for all and intents and purposes, when the child is either put on probation or when the child is sent to the Department of Juvenile Services: while youth who are placed in a group home by DHHR are entitled to a review hearing every 90 days, youth who are placed in DJS facilities are not statutorily entitled to any regularly scheduled disposition review hearings. Because there are no scheduled reviews for DJS wards, only the ones who are persistent with their defenders get back into court for review hearings or motions for release. There is no formal process or unit of attorneys responsible for checking in with youth in DJS facilities to see how they are doing. Notwithstanding the absence of any statutory mandates or timelines, some judges do schedule periodic reviews for youth in detention. Juveniles released by DJS from a DJS facility are often put back on probation; aftercare monitoring is not an official function of DJS. However, public defenders do handle probation revocations, motions to reconsider commitment, and a motion to commute sentence.

Appeals

West Virginia has no intermediate appellate court. The West Virginia Supreme Court may grant *certiorari*, but their docket is usually consumed by worker's compensation cases, which they must hear. Although every West Virginia litigant has the absolute right to file an appeal from a final decision of the circuit courts, in practice, because the court's docket is crowded with other, seemingly more important cases, juvenile defenders perceive that that there is no point in appealing juvenile cases, as the right to file does not mean a meaningful review of the case. Further complicating matters, hearings before magistrates are not recorded unless there is a contested hearing or the allegations are particularly serious. Appeals are most often done by the trial lawyer, usually pertaining to a disposition decision. There is little available in the area of juvenile related case law as a result. One juvenile defender reported that, because of all these factors, he feels juvenile defenders are more successful with post-disposition vehicles like probation revocations, motions to reconsider commitment, and a motion to commute sentence than with appeals. Indeed, stakeholders across the state agreed that instances of appellate advocacy in juvenile court are uncommon. This lack of post-dispositional representation not only deprives West Virginia's court-involved youth of their right to appeal, it also inhibits West Virginia's higher courts from interpreting and applying West Virginia's juvenile code.

Attorneys should treat appellate practice as an important part of juvenile defense. Felony adjudications have long-term consequences, especially for such crimes as sex offenses, and may have important implications for plea negotiations or sentencing if the youth gets in trouble in the future, either in juvenile court or adult criminal court. In addition, as states move to longer terms of commitment, there is more time to perfect appeals, and there are also more compelling reasons to challenge adjudications and dispositions. The IJA/ABA *Standards* provide that counsel should file appropriate notices of appeal and represent clients, or arrange for representation on appeals. Attorneys must explain potential appellate issues to juvenile clients, as well as the factors the client should consider in deciding whether to appeal and should file legally sound appeals whenever their clients want them to do so.

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III. Systemic Barriers to Effective Representation

A. Ethical and Role Confusion

Although the primary goal of a juvenile court case is the successful rehabilitation of an adjudicated child into a law abiding member of society, the method to reach the goal is an adversarial process that relies on the prosecution's proving its case beyond a reasonable doubt and the defense's zealous protection of a child's due process rights. Many West Virginia defenders recognized the tension between their view of a youth's best interests and the course that the youth wants to take. Others discussed the overwhelming pressure to yield to the wishes of probation, the prosecution, and the court, in the name of civility, or in service to the best interest inertia that seems to animate juvenile court culture around the state. Several offered views similar to those of one attorney who explained that he understands that his role is to advise the client to do what he believes is best, but to follow the client's wishes in the end.

Expressed Interests v. Best Interests

All officers and employees of the state charged with implementing provisions of juvenile law are required to act in the best interests of the child and the public in establishing an individualized program of treatment which is directed toward needs of the child and likely to result in the development of the child into a productive member of society.[174]

Assessment team investigators uniformly observed that the rehabilitative axis of juvenile court gave many juvenile defense attorneys a muddled understanding of their ethical responsibility to represent their clients' expressed interests. One juvenile defense attorney explained that her understanding of her role depended on the circumstances of the child's home life: she stated she allows juveniles facing delinquency charges to decide what they want. If there's an interested parent she "steps back into attorney role." But if there is no parent, she will consider best interest of the child, and work more closely with the probation officer. A juvenile prosecutor, when asked about the role of defense counsel, noted that the defenders are supposed to be the ultimate advocate for the child. At the same time, she felt that most defenders learn to balance the best interest of the child with the expressed interest of the child. As a result, in this prosecutor's opinion, the defense attorneys are easy to work with. She accepted the role of defender as ultimate advocate but did not think defenders should be so tunnel-visioned that they believe that every client is innocent in every single case. Some attorneys were very clear that they understood their role in the system as advocating for their client, as opposed to the GAL's approach, which is to advocate for the "best interest."

Oftentimes, the pressure from other courtroom actors to yield and serve a child's best interests is irresistible. For example, one longtime probation officer reported that he understands that the role of defender is to advocate for what the child wants and for the least restrictive option, but then, in the next breath, said, "But [the defense attorneys] definitely don't care about these kids the way they should," because they advocate for the child's expressed interest, and just "try to get the kid off." In another county, the judge described the defenders' role as team players who worked with others in the system to advance the best interests of their clients. The prosecutor in that county said, flat out, "Juvenile proceedings are adversary in name only." And of course, there are instances

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in which it seems that juvenile defenders do cave in to the pressure. One detention center staff member remarked that "if a child wants to go home and home would be bad (for the child's best interest), the attorneys agree not to send the child home, even if that's what the child wants. They all work together. They're all professional people – there's not much stepping on each other's toes. They work on and look at the best interest of the child."

B. Juvenile Court Culture

Informality of the Proceedings

The informality of delinquency proceedings encourages lax observance of juveniles' due process rights. Especially since the dangers of juvenile detention are so real and so far-ranging, it is critical to observe all the accoutrements that make court processes impress the importance of the proceedings upon litigants and stakeholders. As the National Council of Juvenile and Family Court Judges has advised, delinquency judges should "explain and maintain strict courtroom decorum and behavioral expectations for all participants … [and] ensure that the juvenile delinquency court is a place where all … participants are treated with respect, dignity, and courtesy." The pall of informality also creeps into the tone of delinquency proceedings. In county after county, defenders and prosecutors talked favorably about how juvenile court is not adversarial.

Juvenile defenders in one county related a very disturbing incident concerning the discouragement of zealous advocacy. In one county, a youth was put on an improvement period because she shot someone with a BB gun. One of the conditions of probation was that she maintain a 'C' average. The probation officer filed a petition to revoke because she was failing school. The public defender was appointed to represent the youth. When she and her mother met with the public defender, the mother explained that the child had been in special education classes all her life and she was illiterate. At the revocation hearing, the defense attorney called teachers to testify that she could not function as a high school student, but was at a second grade level; the teachers brought in comparative samples. The defender also called in people who administered tests at school, the high school guidance counselor, and her mother. The State did not present evidence. The court revoked probation, even though the child only had one month left, and extended it. The public defender noted, "Even though the judge did not throw the kid in jail, it represented a further deprivation of liberty. It is advantageous to keep an eye on school – arguably so is there a motivation – you risk detention if you do not do homework and this gives mom an extra tool in her arsenal. But it is not consistent with the law." When asked if he appealed, the defender responded there was "no point," because the Supreme Court would not overturn a juvenile case where a child was not detained.

What was particularly interesting was that several of the interviewees in this county brought up this case in conversation, but from very different perspectives. The judge who presided over this case used this as an example of the lawyer being too adversarial. The supervising public defender, who had originally appointed the juvenile defender to handle all juvenile cases, removed him from appearing in cases in this court because the judge, prosecutor and probation thought him too contentious.

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> **The informality of delinquency proceedings encourages lax observance of juveniles' due process rights.**

Assessment team investigators in another county heard a similar incident in a different county. In that county, where assessment team members spoke to three different appointed attorneys, two of them described the third with disapproval, calling her too adversarial and relating a story in which that attorney had tried a truancy case to support the characterization. The significant difference between this case and the case described above is the judge's reaction. The judge in the above county was able to get the "adversarial" attorney removed from his courtroom. But in this county, when assessment team members interviewed the juvenile court judge, the judge also described this particular attorney as adversarial, mentioned the same truancy trial, and followed that description with, "bar none, the best juvenile attorney in the county," because of how she consistently tested the government's case against her clients.

Commitment to Rehabilitative Philosophy

There is no question that West Virginia's juvenile delinquency court stakeholders care about West Virginia's children. Assessment team investigators observed many instances of caring communication during court hearings. In one example, the court was presiding over the hearing of mentally impaired child. During the hearing, it was revealed that the child was undergoing counseling and being medicated for autism and mental retardation. This respondent came to court with his grandmother; his mother had died in an alcohol-related car accident. The referee stated the case shouldn't be in court at all. He cited his 28 years on the bench and in the system, and decided to hold the case open for the summer. The referee was very polite and respectful, vigorously thanking the child's grandmother for her patience and support of the boy. The referee told the boy that he would tear up the complaint if the boy stayed out of trouble.

During the course of the hearing the referee asked the child if he was taking his medications. The child stammered "yes" and the grandmother related that his dosages, time and frequency of medication were more than the boy could handle by himself. In response, the referee then produced a pill bottle from his desk. The referee told the child that he had been on medication since he was the child's age, expressed the importance of consulting with a doctor, following the doctor's advice, and held up the pill bottle to the child, saying "I have to do it and so do you. It's important." In another example, an assessment team investigator was impressed with a drug court judge's sincere pride in seeing girls advance through the program.

But this commitment to the rehabilitative philosophy of juvenile court can lead to lax observance of children's due process rights. For example, one judge defined his role without mentioning protection of the juvenile's due process rights, "A judge's role is to act as the final arbiter between the

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state and the juvenile's family. A judge should try to keep the juvenile with his family if possible, and to provide appropriate support and structure to the juvenile if not."

C. Hybrid System of Representation

Tension between Private Attorneys and Public Defenders

There are some circuits in which WVPDS would like to create additional offices. In January 2009, the Indigent Defense Commission recommended opening four new public defender offices beginning July 2009.[175] Proponents of these expansions averred that public defender offices would make public defense services less expensive and more efficient. Opponents argued that there was no need, based on numbers of cases, to establish public defender offices in counties in which private attorneys easily and effectively managed the demand for indigent defense services. Private attorneys also argued that the fact that they must compete with each other for business means that they have more of an incentive to provide high-quality representation than salaried defenders, who make the same amount of money regardless of how much work they put into their cases. Private attorneys perceive the push to expand the number of public defender offices as a threat to their livelihood; proponents of opening more public defender offices take the position that public defenders provide higher-quality representation at a lower cost to the state.

The recent exponential increase in the number of indigent cases has stressed West Virginia's indigent defense delivery system. The number of cases has increased due to several factors, including the addition of *Jeffrey R.L.* guardians for abused and neglected children; an increase in gun-related cases, because of West Virginia's reputation as a Second Amendment haven; and an increase in drug-related cases, particularly involving drug traffic between New York and Florida. The result of this influx of cases has been dramatic. For example, one public defender office tripled its caseload in a single year because of these additional responsibilities.

Another source of tension between public defender office proponents and private attorneys stems from the fact that WVPDS pays private attorneys from funds left after setting aside money for public defender offices. The private appointed counsel system, which operates in all 55 of West Virginia's counties, includes approximately 800 private attorneys and other service providers (expert witnesses, investigators, and court reporters). Private attorneys are appointed by the circuit judge after the judge determines clients' eligibility. Private attorneys then submit their vouchers to the circuit judge, who issues a court order directing WVPDS to pay. The reimbursement rate for fees is $45 per hour out of court and $65 per hour in court. Claims are reviewed by WVPDS for eligibility and accuracy before submission to the State Auditor.

Exacerbating matters, in 2008 the legislature greatly shortened the time attorneys had to bill for service from four years to 90 days. A grace period of six months was allowed in which to submit all billings for work prior to July 1, 2008. WVPDS was overwhelmed with older bills, receiving in some months three times the normal flow of vouchers. To address the critical funding and timing of payment issues, WVPDS has taken on more staff, and received supplemental appropriations so that as of February 2010, WVPDS was paying bills within 90 days of receipt. However, as a result

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of the billing time limitation, the normal monthly billings by private attorneys have increased by 54% compared to billing levels before the time limitation.

The importance of the fact that the Governor and the legislature have consistently prioritized the provision of indigent defense services, allocating an increasing amount to WVPDS each year cannot be understated; despite the legislature's well-placed priorities, funding simply has not been able to keep pace with caseload demands.

D. Resources

Inadequate Facilities and Meeting Space

The availability of adequate meeting space for defenders to speak with clients at the courthouse varied. While some assessment team investigators reported that courthouses had facilities that allowed private consultation between defense attorneys and their young clients, most did not. At one courthouse, assessment team investigators did not observe any interview room for defenders to speak with their clients, though they did observe every attorney take their clients to a quiet and private space at the end of the hall to hold private conversations both before and after hearings. In that same courthouse, the drawback of the lack of private meeting space was abundantly clear: in one incident, in which the public defender was talking to a probation officer about a child after the end of the child's hearing, the probation officer was telling the defender some additional negative facts about the client that the probation officer had chosen not to bring to the judge's attention. After a few minutes, the prosecutor came up and joined them. The defender and the probation officer continued to talk about the case and the prosecutor started asking questions. Unfortunately, the prosecutor also learned the negative facts about the child. In another courthouse, the only space available for client consultations was the courthouse library, which had only one section partitioned for privacy, and in which any library patrons could clearly overhear even a hushed conversation.

Non-legal Support Staff and Research

Most juvenile defenders, whether public defenders or private attorneys, had difficulties funding ancillary experts and support staff. There are no full time social workers assigned to public defender offices.

The public defender office in one county had no full time investigators; a larger public defender office had "plenty" of secretaries and four investigators, but the investigators did not discriminate between juvenile and adult investigative assignments. A public defender in that same county reported that WVPDS pays also for experts if the defenders need one, and juvenile attorneys also can use this resource. One conflict attorney reported that she has access to investigators and experts only if there is a mental health issue in her case, because DHHR steps in and helps defray the costs of investigating the child's mental health issues.

With respect to resources for research, all public defender offices have had Westlaw since 2001, with Lexis replacing that service in 2009, through WVPDS. WVPDS also reimburses private attorneys for case-related research. Still, when asked about research tools and services, several defenders referred to relying chiefly on a database compilation of West Virginia cases that members

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of the West Virginia bar can access. Several defenders stated that they believe this database is adequate because the judges only pay attention to West Virginia law. In most public defender offices, attorneys share tools, including the jury instructions and the youth code book. West Virginia juvenile defenders did identify the most recent ABA's Hertz/Guggenheim juvenile delinquency trial manual as a potentially useful resource. A juvenile public defender in one office said that the public defenders shared a few sets of the jury instructions, and he believed this was adequate.

Lack of Placement Options

The lack of placement options for court-involved youth was the single topic that every stakeholder pointed to as a severe deficiency in West Virginia's juvenile system. In interviews and in court observations, the lack of placement options was a profound and ever-present limitation.

Still, a desperate need for services persists. For some children, involvement in the juvenile justice system is the only way the family can access services. For example, assessment team investigators observed an initial hearing for a 16-year-old African-American boy who was not present for the hearing, although his grandparents, who appeared to be the child's guardians, were. The child suffered from, among other things, a severe seizure disorder and had serious behavioral issues that threatened the safety of his grandparents. The child was not present for the hearing because he was not responsive when the staff at the detention center tried to wake him for court, and he was later admitted to the hospital. According to the prosecutor's, defense attorney's, and grandparents' comments at the hearing, the child has been in the system for years. All parties agreed that the child was in the system because the delinquency system was the only way they all knew to get the child the mental health and hospitalization services he needed. The judge commented during the hearing that: "West Virginia suffers from such a lack of resources for kids, we have to have this fiction of delinquency." In a later interview, the public defender stated that the parties had tried to get the child committed pursuant to a mental hygiene hearing a few years ago, but no probable cause was found.

Wait time for the small number of bed spaces can stretch across months. For example, the child whose erratic behavior threatened his grandparents had been on the waiting list for a local hospital that was considered the most appropriate placement for over six months. Because of recent out-of-control behaviors at home, the child was being detained at the detention center until a bed space became available or, according to the public defender, until the child stabilized enough so that the judge thought he should not be held any longer and was able to return home. At the close of the hearing the parties scheduled a review of the matter and a preliminary hearing in 30 days. Adding insult to injury, the effects of overwhelming poverty permeate the system. In particular, the lack of public transportation is a real weakness, because families cannot travel to services.

E. Training

Defender Training

Most juvenile defenders had had significant experience before they started practicing in juvenile court, but the experience was not juvenile-specific, or even necessarily criminal. For example, in one county, one juvenile defender started doing juvenile defense work after he had been in civil

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practice for 25 years. In another county, the policy in the public defender's office is clear that juvenile court should not be used as a training ground for new defenders. The juvenile attorneys generally do not start in the juvenile court, but instead spend time in misdemeanor court or some other division. For example, both of the juvenile attorneys in that office had prior experience; one had completed a stint in mental health proceedings and in felonies before shifting to juvenile court practice, and the other had spent several months trying misdemeanors before moving to juvenile court. Unfortunately, this policy is not statewide: the chief public defender in another county told assessment team investigators that all of his attorneys start in a juvenile rotation.

Although many juvenile defenders had previous legal experience before they started juvenile practice, they still wished for more juvenile-specific training opportunities, both at the beginning of their practice as juvenile defenders, and during their career as juvenile defenders, to keep their skills sharp. One defense attorney learned about juvenile court by reading the juvenile code and all the major juvenile cases, and shadowing the attorney then assigned to juvenile court. The attorney reported that the transition was a little challenging because the previous juvenile attorney was also moving into his next rotation and needed to shadow attorneys in that rotation. This attorney, and several others in other counties, expressed a desire for a more formalized training that would have given her an opportunity to meet with all of the key players in the various programs where her clients might be placed. The state public defender office does provide an annual statewide training, but that training focuses on general trial skills, and the juvenile training sessions are limited. Several defense attorneys talked about attending the annual Juvenile Defender Leadership Summit. The problem, simply stated, is that there is very little juvenile-specific training available for West Virginia's juvenile defenders.

Other Stakeholders' Experience/Training

Like juvenile defense attorneys, West Virginia's other stakeholders have to seek out opportunities for juvenile-specific training. Judges reported that they receive little training on juvenile issues, and some referenced some "national programs for judges" where they can get this type of training, but none mentioned attending such training. The West Virginia Supreme Court holds two judicial trainings a year, but not much of the training is dedicated to juvenile issues. With the exception of one juvenile prosecutor who had received a certification in juvenile prosecution from a national association of prosecutors, the prosecutors also did not have a lot of juvenile-specific training; several mentioned that they would like to have more training for themselves, particularly in the area of child and adolescent brain development. Probation officers, who are hired and paid by the court, were the best trained: they are able to receive training in juvenile justice-related areas, including substance abuse counseling and social work, as a perquisite.

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Chapter Four:
Promising Approaches

The job of juvenile defense counsel is complex and demanding. Juvenile defense attorneys must master more than the legal knowledge and courtroom skills of a criminal defense attorney representing adult defendants. Juvenile defense attorneys must be aware of the strengths and needs of their juvenile clients and of their clients' families, communities, and other social structures. Juvenile defense attorneys must be able to: understand child and adolescent development to communicate effectively with their clients; evaluate the client's level of maturity and competency and its relevancy to the delinquency case; have knowledge of and contacts at community- based programs to compose an individualized disposition plan; enlist the client's parent or guardian as an ally without compromising the attorney-client relationship; know the intricacies of mental health and special education law, as well as the network of schools that may or may not be appropriate placements for the client; and communicate the long- and short-term collateral consequences of a juvenile adjudication, including the possible impact on public housing, school and job applications, eligibility for financial aid, and participation in the armed forces. Binding all these various facets together is the abiding ethical obligation to serve the client's expressed interests, to protect the client's due process rights, and to ensure, in accordance with the client's wishes, a just and balanced outcome. Especially in light of the resource problems that are leading to the elimination of rehabilitative programs in jurisdictions across the country, it is all the more important that children receive the front-end legal protections they are constitutionally guaranteed.

Paucity of resources aside, West Virginia's juvenile defense attorneys have several particularly forward-thinking practices and tools that help them zealously guard their clients' due process rights. The first is the community's unanimous and bright line commitment to not allowing children to waive counsel. West Virginia's code allows that "[a] juvenile has the right to be effectively represented by counsel at all stages of juvenile proceedings," but the practice of the judges who simply do not allow children to waive counsel, and the system stakeholders who expect children to be represented, and who do not subtly pressure them to waive counsel, breathes life into the provision. Liberal indigence requirements support this practice. According to the code, the court has to ap-

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point an attorney paid by the state if the juvenile or his or her parents execute an affidavit showing that they are unable to afford one of their own.[176] Finally, a system that allows defense attorneys to be on call 24 hours a day for detention hearings also supports this practice. Defense attorneys who reported being called in the middle of the night for the occasional off-hour detention hearing considered their involvement in the hearing as a necessity, instead of a burden.

And, as was discussed in chapters two and three, West Virginia's juvenile code is very progressive, extending due process protections above the minimum protections provided by federal constitutional law and statutes. The code includes several provisions that protect children's due process rights: evidentiary preliminary hearings, instead of probable cause determinations based solely on the information in the four corners of the police affidavit; the right to a jury trial, instead of bench trials before a juvenile court judge who, unlike lay jurors, often knows the juvenile's social history, and always knows the potential sentence; interrogation code provisions that state a child younger than 13 years old cannot make an admission without the consent of the child's parent and the child's attorney, that children between the ages of 14-16 need the consent of either their attorney or their parent to make an admission, and that youth 17 and older can consent on their own.

Although the system's collective emphasis on civility has its drawbacks, it has the advantage of facilitating intra-system cooperation that can lead to creative solutions to systemic problems. For example, one county operates a very successful drug court. In preparation for drug court hearings, all the key stakeholders – the defense, the prosecutor, and the probation officer – met with the judge and went over the files of four girls scheduled to appear before court that day. The atmosphere in the meeting was non-contentious and pleasant. All four girls were being recommended to progress to the second step of the program with the following privileges: less frequent meetings, the ability to choose between group and individual therapy, and rewarding of achievement points. When enough points are awarded, the child can choose from prizes like a pet goldfish, tickets, dinner, and gift cards. The prizes were started through the district attorney's donation of drug forfeiture monies. Each case was discussed, and then everyone proceeded as a group into the hearing. In another county, the prosecutor has brokered a compromise with local school officials, so that the school refers far fewer school cases. This compromise was negotiated with the help of the juvenile defenders and probation as well. As a result, school referrals in this county have significantly decreased.

Finally, particularly in light of the juvenile life without parole cases presently pending before the United States Supreme Court, the importance of the fact that the practice of transferring juveniles to adult criminal court is extremely rare in West Virginia cannot be overemphasized. The fact that transfer is used so sporadically is emblematic of the fact that the entire system is well and truly committed to rehabilitation over punishment as a guiding principle.

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Chapter Five:
Youth Interviews

In several counties, assessment team investigators had the opportunity to talk with system-involved juveniles – for example, in the hallways and waiting rooms at court, or in detention centers. Investigators took these opportunities to talk with youth about their impressions of West Virginia's juvenile justice system, and their experiences with their defense attorneys. Three important patterns emerged from these discussions.

First, youth reported that they did not have regular contact with their attorneys and that, when they did talk with their attorneys, their conversations were rushed and uninformative. One 18-year-old told site investigators that he had court appointed counsel who was not responsive to his requests. He said, "I tried to tell him I wanted to appeal. It's like trying to talk to Jesus. He doesn't talk back!" Another youth echoed that sentiment, saying of his attorney, "It's like they put you in here and forget about you." Another youth reported that he was able to talk with his attorney, but he had to repeatedly reassure and console his friend, whose attorney never called. Another youth reported persistent efforts to contact his counsel. He said that he: tried to call his attorney and got no response; left several messages; and wrote a letter to the judge telling the judge he called his attorney, but didn't get a call back. Ultimately, he chose not to ask for a new attorney because one of the detention center staff members told him that asking for a new attorney would make his case take longer. Another child, who had been in the system for three years, was waiting in detention for placement after his probation was revoked because of positive drug tests. He has been represented by a single attorney for those three years and reports that, in that time, he has spent no more than 90 minutes total with his attorney.

Second, although youth did not have a lot of opportunity to talk with their attorneys, they formed strong impressions about what did – or did not happen – in their cases and at court appearances. The 18-year-old who said that trying to talk with his lawyer was like trying to talk to Jesus added that the judge did a better job of defending him during his hearing than his own lawyer did. He said, in his case that concerned allegations that he was downloading child pornography, "There

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were names, photos, and videos on the computer and the judge was questioning their reliability and my lawyer wasn't." He went on to describe his time in court as a "horror story. My lawyer didn't argue and didn't make much effort." Another youth from a different county reported that his attorney told him in a 15 minute conversation just before the scheduled court hearing that he could go to trial in six days or plead guilty that day. His brothers were witnesses in the case and he thought that the attorney had not talked to the witnesses. A third young man asked for a new attorney because according to him, at his hearing, it seemed the only words the attorney knew were "yes, no and maybe." In the same vein, another young man knew enough to know that he had a good attorney: his attorney responded to his phone calls, argued for him in court, and got him what he wanted in terms of placement. Another youth reported that, at his court hearings, if the prosecutor said something, his attorney "would shut down, like there was no need to keep fighting." Finally, another youth reported that one of the first things his attorney said to him was, "you are guilty, you know you are guilty, so don't even say anything." He said he didn't know he could "get the people to help me and stuff like that." He said if he could change one thing about his representations: "[he] would have a different lawyer."

Third, a large number of children seem to be in the system for minor offenses and placed under court supervision until they become adults. Many children are initially caught up in the system through pre-petition diversion programs or improvement periods and end up deep in the system because of technical violations while under court supervision. When the adjudication is delayed, the focus of the case becomes about the delivery of front-end services and a standard battery of release conditions that are often violated; as a result, hearings on technical violations, like school attendance, or missed curfews, result in increasingly structured settings and ultimately, detention.

Last, children were often placed very far from home. For example, although the detention facility in one county was filled, only one of the children detained there was from that county and had an attorney in that county. The rest of the children at that facility were from many different counties, some as far as five hours away. Site team investigators spoke to a child who was detained but who lived in Colorado. Another child was from Ohio. Placements far from home mean that children's family relationships are severely interrupted; that the child is that much more adrift and disconnected from potential services when the child does return home; and that access to counsel is dramatically curtailed.

Despite this, West Virginia youths had abiding hope in the juvenile justice system. Their feelings are best summed up in the comments of one youth, who reported that he had "no doubt the truth will come out" even though he could not even get in touch with his lawyer about an appeal.

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Chapter Six:
Core Recommendations and Implementation Strategies

As is true in so many juvenile courts across the nation, West Virginia has a dedicated, professional group of juvenile defense attorneys and others who work in the juvenile court system across the state. Their commitment to the children and families they serve is admirable. But despite the good work of many, there is much to be done in the area of juvenile indigent defense. To bring West Virginia in line with state and constitutional due process protections afforded indigent youth, will require the collaborative action of many professionals across all branches of government. Together, there needs to be a continued examination of the systemic barriers and obstacles that limit the fair representation of youth in juvenile court.

West Virginia's great strength is its commitments to rehabilitation and collaboration. The juvenile defense system will be improved only with the purposeful and concerted actions of all the system's stakeholders. The fact that the participants in West Virginia's juvenile system already place a premium on working together is an immeasurably important asset.

Core Recommendations

The core recommendations set forth below are followed by a series of implementation strategies designed to engage all juvenile justice system stakeholders and policymakers in replicating best practices. Core recommendations include:

1. ***Timing and Appointment of Counsel:*** Although there is a very strong and unique commitment in West Virginia that no child appear in juvenile court without an attorney, it is nonetheless critical that all attorneys are appointed early in their cases and that they have access to the confidential space necessary to meaningfully consult with their clients.

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2. ***Ethical and Role Confusion and Continuity of Representation:*** The role of defense counsel in juvenile court and counsel's ethical obligations should be clearly articulated and enforced and the continuity of representation should be ensured.

3. ***Lack of Resources:*** The state must commit consistent and adequate funding to the West Virginia Public Defender Service (WVPDS), so that WVPDS, in turn, can reliably pay its attorneys and reimburse vouchers submitted by conflict and court appointed counsel in a timely manner.

4. ***Inadequate Monitoring and Oversight:*** The juvenile indigent defense system needs ongoing, statewide oversight and monitoring. Data should be routinely collected and best practices and innovations should be promoted.

5. ***Inadequate Access to and Advisement of Collateral Consequences:*** Procedures to expunge juvenile records should be readily accessible and routinized. Youth should be informed of the serious short- and long-term collateral consequences that attach to a juvenile court adjudication at the earliest possible time, including before they agree to enter into an improvement period.

6. ***Magistrate Qualifications:*** Presently, under the West Virginia Constitution, magistrates are not required to possess more than a high school diploma, and the Judicial Reform Act of 1975 includes a provision that magistrates cannot be required to be licensed attorneys. However, if magistrates are going to be tasked with presiding over legal hearings, including juvenile detention hearings, they should be required to be licensed attorneys.

7. ***Inadequate Colloquies:*** Developmentally appropriate judicial colloquies and admonitions for waiver of preliminary hearings, improvement period agreements, pre-trial release conditions, disposition conditions, and pleas resolving cases short of adjudication should be developed and used. Colloquies should be thorough, comprehensive and easily understood. Judges should take time to test a youth's understanding of the information that is being presented.

8. ***Shackling:*** Children who come before the court should not be handcuffed or shackled unless there is a showing that they present a risk of flight or pose an imminent threat to themselves or others, and even in those extraordinary circumstances, children should be shackled for the shortest period of time necessary.

9. ***Juvenile Defense as a Specialized Area of Practice:*** Juvenile defense needs to be understood and appreciated for the highly specialized practice that it is. Juvenile defenders need ongoing support and training. Attorneys should participate in comprehensive training before starting practice in juvenile court and should have the opportunity to participate in ongoing training specific to the representation of children. A statewide juvenile defender resource center should be established.

10. ***Implementation:*** A high level, statewide commission should be formed to implement these recommendations.

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Implementation Strategies

The West Virginia State Legislature should:

- Require juvenile-specific training and fund juvenile-specific training opportunities for all public defenders and court-appointed private counsel to at least match, if not improve upon, the training already required for prosecutors, judges, prosecutors, and guardians *ad litem*.
- Increase the available resources to support the delinquency court process—including defender access to independent experts, social workers, Westlaw/Lexis, and investigators. Currently, both public defenders and private attorneys have the option of applying for funds for investigators, experts, and social workers in individual cases; in each of these cases, the request must be approved by the judge before it is approved and reimbursed by WVPDS. Beyond individual cases, requests for investigators, experts, and social workers depend on caseload numbers, and, in many counties, the juvenile caseload is considered too low to justify those additional resources. Accordingly, the provision of those resources should be untied from caseload numbers and judicial approval.
- Amend West Virginia's school discipline statute to provide greater authority to local education and juvenile justice officials to exercise broad discretion in deciding whether school-related offenses should be referred for prosecution in delinquency proceedings.

The West Virginia Judiciary should:

- Create a system for screening, training, and monitoring private attorneys who appear in juvenile delinquency matters, set minimum training requirements for appointment in juvenile cases and appoint to juvenile cases only attorneys trained as juvenile defenders.
- Coordinate the appointment of counsel processes so that defenders are alerted to appointed cases with enough time to allow them a meaningful opportunity to interview their clients before the detention hearing.
- Ensure, in conjunction with WVPDS, that private attorneys are promptly compensated for all reasonable work including—but not limited to—client meetings, pre-adjudication investigation, legal research, motion practice, dispositional planning and advocacy, and appeals, and other post-dispositional representation.
- Ensure that the study of adolescent development and its application to juvenile cases is part of the circuit court judicial training each year.
- Ensure all youth fully understand their rights before pleading guilty, including but not limited to their right to appeal delinquency decisions, in accordance with applicable case law, rules of procedure, and statutes, and that they are informed of their rights during plea colloquies.
- Provide private facilities at the courthouse to defense attorneys for client consultation.
- Encourage continuity of representation where feasible or appropriate throughout the delinquency process.
- Encourage an increase in juvenile appellate advocacy.

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The Public Defenders and Private Attorneys should:

- Create dedicated juvenile units, which include a corps of attorneys allowed to develop expertise in juvenile indigent defense, without pressure to rotate to a different unit, and with full pay parity.
- Create special units, such as a post-disposition unit, to regularly monitor youth who are sent to DJS facilities.
- Design and institute standardized training about programs and services that are available to youth, both pretrial and post-disposition.
- Add West Virginia juvenile defenders to the Mid-Atlantic Juvenile Defender Center listserv, and elect a local defender as a statewide resource.
- Share resources, including providing trainings, holding joint case rounds (even by telephone or Skype), holding statewide trainings that private attorneys are encouraged to attend, and creating and sharing a statewide bank of sample briefs and motions.
- Increase litigation and the number of trials, jury trials, and appeals.
- Understand the role and ethical obligations of juvenile defense counsel.
- As a practice, have regular post-hearing debriefings with their clients to ensure that clients understand what happened at the hearing.
- Ensure that effective representation happens at the earliest possible stage in juvenile court proceedings and remains zealous throughout the entire process, including at disposition and post-disposition proceedings.
- Develop expertise through ongoing training on juvenile justice related issues and delinquency practice, and seek out opportunities for training to evolve best practices.
- Ensure, in conjunction with the West Virginia judiciary, that private attorneys are promptly compensated for all reasonable work including—but not limited to—client meetings, pre-adjudication investigation, legal research, motion practice, dispositional planning and advocacy, and appeals, and other post-dispositional representation.

Juvenile Prosecutors should:

- Work with juvenile justice stakeholders to devise creative ways to address the influx of juvenile justice system cases from school fights, disorderly conducts, and other minor school referrals.
- Encourage faster case processing by providing liberal discovery to defense attorneys, even before the preliminary hearing if appropriate.

Juvenile Probation Officers should:

- Work to lower the number of probation revocations based on status offense type violations.
- Work with other stakeholders to institute a graduated sanction program for technical violations of probation.

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Detention Center Staff should:

- Attend juvenile-specific training on providing needs- and strengths-based guidance and supervision to detained juveniles.

West Virginia University Law School should:

- Provide increased opportunities for law students' involvement in juvenile defense through internships, externships, clinics, and paid fellowships.
- Offer an array of courses in juvenile delinquency law both to attract students to this practice area and to prepare students for careers in juvenile justice.
- Provide leadership on juvenile indigent defense issues and the treatment of youth in the juvenile justice system through clinical programs, research, and community involvement.
- Offer continuing legal education courses and other professional opportunities to improve the quality of representation in delinquency proceedings.

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Appendix

Please visit http://www.njdc.info/assessments.php and click on West Virginia to download the following Appendices.

- Letter of Support from Chief Justice Robin Davis
- NJDC's Role of Defense Counsel in Delinquency Court
- NJDC's Ten Core Principles For Providing Quality Delinquency Representation Through Public Defense Delivery Systems
- IJA/ABA Juvenile Justice Standards Relating to Counsel for Private Parties
- Illinois shackling court rule
- FL SC decision on shackling
- West Virginia Rules of Juvenile Procedure

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2 U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 2006 National Report*, 95-96 (2006).
3 *Id*. at 95.
4 *Id*. at 94.
5 *Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 Harv. L.Rev. 775, 794-95 (1966), cited in *In re Gault*, 387 U.S. 1, 11 (1967).
6 *In re Gault*, 387 U.S. 1, 17 (1967).
7 *Id*. at 15 fn. 14.
8 372 U.S. 335 (1963).
9 *Gideon*, 372 U.S. at 344.
10 387 U.S. 1 (1967).
11 *Gault*, 387 U.S. at 19 fn.23 (internal quotations and citation omitted).
12 *Gault*, 387 U.S. at 36.
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15 *Gault*, 387 U.S. at 18.
16 Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 255-56 (2005).
17 *Id*.
18 *Gault*, 387 U.S. at 55.
19 *Gault*, 387 U.S. at 56-7.
20 *In re Winship*, 397 U.S. 358 (1970).
21 *Breed v. Jones*, 421 U.S. 519 (1975).
22 *Kent v. United States*, 383 U.S. 541 (1966).
23 *Winship*, 397 U.S. at 365-66 (1970).
24 The President's Commission of Law Enforcement and the Administration of Justice: "The Challenge of Crime on a Free Society," p. 86-87 (1967), cited in *Gault,* 387 U.S at 41 fn. 65.
25 Pub. L. 93-415 (1974).
26 National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* §3.132 Representation by Counsel – For the Juvenile (1980).
27 For a description of the project, *see IJA/ABA Juvenile Justice Standards Annotated: A Balanced Approach* xvi-xviii (Robert E. Shepherd, ed., 1996).
28 ABA Juvenile Justice Center, Juvenile Law Center & Youth Law Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995), available at http://www.njdc.info/pdf/cfjfull/pdf.

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29 Richard A. Ball, Juvenile *Justice in West Virginia*, available at file:///S:/Projects/Assessments/States/West%20Virginia/Research%20and%20Sources/Juvenile%20Justice%20in$20West%20Virginia.html.
30 *Id*.
31 *Id*.
32 *Id*. West Virginia members of the National Council of Jewish Women, the Appalachian Research and Defense Fund, and the West Virginia League of Women Voters were particularly active in mobilizing support to change the direction of the state's juvenile justice system to align more closely with the new federal mandates.
33 *Id*.
34 *Id*.
35 *Id*.
36 233 S.E.2d 318 (1977).
37 *See State of West Virginia ex rel. K. W. v. Werner*, 242 S.E.2d 907 (1978).
38 *State of West Virginia ex rel. E. D. v. Aldredge*, 245 S.E.2d 849 (1978).
39 251 S.E.2d 222 (1979).
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43 289 S.E.2d 166 (1982).
44 317 S.E.2d 150 (1984).
45 *Id*. at 157.
46 *Id*.
47 *Id*.
48 Richard A. Ball, *Juvenile Justice in West Virginia*, available at file:///S:/Projects/Assessments/States/West%20Virginia/Research%20and%20Sources/Juvenile%20Justice%20in%20West%20Virginia.html.
49 *Id*.
50 *Id*.
51 Annie E. Casey Foundation, KIDS COUNT Data Book, 113 (2009), available at http://datacenter.kidscount.org/Databook/2009/OnlineBooks/StateProfiles/AEC189%20profile_West_Virginia.pdf. Notably, West Virginia dramatically improved its ranking for percentage of child death rates, rising to 20th in 2009 from 42nd in 2008.
52 *Id*.
53 The state has an extensive network of railroads, and much of the coal is transported by rail, and the railways were once one of the largest customers for coal to drive the steam locomotives. These have now been replaced by diesel locomotives. Coal is rarely used now for home heating. Most coal today is used by power plants to produce electricity, both in West Virginia, and in other eastern states.
54 Mike Harman, West Virginia Aging Health Status Report, January 2004, p. 4, available at http://www.wvdhhr.org/bph/oehp/hp/aging/Aging%20Report.pdf (last checked July 9, 2009).
55 *Id*.

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56 In addition to criminal charges, West Virginia Public Defender Services pays for representation in abuse and neglect, mental commitment, juvenile proceedings and other related matters. For more information, consult PDS's website at http://www.wvpds.org/.
57 John C. Kilwein, Vol. 20/No. 1, The West Virginia Public Affairs Reporter, "Indigent Access to Justice in West Virginia," Winter/Spring 2003, p. 7. This fee cap did not apply to life imprisonment cases.
58 *Id*.
59 *Id*.
60 *Id*. In 2009, the Indigent Defense Commission, which was established in 2008, recommended that the hourly rate for appointed counsel be raised to $75 out-of-court and $105 in-court. This raise was intended to compensate for the cumulative effect of inflation since 1 July 1990, when the rate was set at $45/65. Governor Manchin worked with state legislators to introduce a bill, S.B. 260/H.B. 2405, in the 2009 Regular Session to implement the Commission's recommendation, but the Legislature did not enact the legislation. Jack Rogers, Vol. 10 Issue 2, *The Defender*, May 2009.
61 W. Va. Code §49-1-1(a).
62 *Id*.
63 W. Va. Code §49-1-1(d).
64 W. Va. Code §49-5-2.
65 W. Va. Code §49-1-2.
66 W. Va. Code §49-5-2(b).
67 W. Va. Code §49-5-2(d).
68 W. Va. Code §49-5-2(f).
69 *Id*.
70 W. Va. Code §49-5-2(h).
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72 W. Va. Code §49-5-2(j).
73 W. Va. Code §49-5-2(i).
74 *Id*.
75 *Id*.
76 W. Va. Code §49-5-3a.
77 W. Va. Code §49-5-8(a).
78 W. Va. Code §49-5-8(b).
79 W. Va. Code §49-5-8(c).
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85 *Id*.
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88 W. Va. Code §49-5-16a.
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90 *Id*.

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92 W. Va. Code §49-5-7(d).
93 W. Va. Code §49-5-7(a)(2).
94 *Id*.
95 W. Va. Code §49-5-2a.
96 W. Va. Code §49-5-3.
97 W. Va. Code §49-5-13d(b).
98 W. Va. Code §49-5-13d(a).
99 *Id*.
100 W. Va. Code §49-5-13d(b).
101 *Id*.
102 *Id*.
103 W. Va. Code §49-5-9(a).
104 *Id*.
105 *Id*.
106 W. Va. Code §49-5-9(b).
107 W. Va. Code §49-5-11.
108 W. Va. Code §49-5-11(b).
109 W. Va. Code §49-5-13a(a).
110 W. Va. Code §49-5-6(a).
111 W. Va. Code §49-5-6(d).
112 W. Va. Code §49-5-6(b).
113 W. Va. Code §49-5-2(k).
114 W. Va. Code §49-5-2(l).
115 *Id*.
116 W. Va. Code §49-5-15(a).
117 W. Va. Code §49-5-15(b).
118 *Id*.
119 W. Va. Code §49-5-13(b)(2).
120 W. Va. Code §49-5-13(b)(3).
121 W. Va. Code §49-5-13(b)(4).
122 W. Va. Code §49-5-13(b)(5).
123 W. Va. Code §49-5-13c.
124 W. Va. Code §49-5-13b.
125 W. Va. Code §49-5-13(d).
126 W. Va. Code §49-5-13b(c).
127 W. Va. Code §49-5-16(b).
128 W. Va. Code §49-5-16(a).
129 *Id*.
130 W. Va. Code §49-5-14(b).
131 W. Va. Code §49-5-13e(a).
132 W. Va. Code §49-5-20(a).
133 W. Va. Code §49-5-20(b).
134 W. Va. Code §49-5-20(d).
135 W. Va. Code §49-5-20(a).

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136 W. Va. Code §49-5-20(h).
137 W. Va. Code §49-5-20(e).
138 W. Va. Code §49-5-17(a).
139 W. Va. Code §49-5-17(b).
140 *Id*.
141 *Id*.
142 *Id*.
143 Health Insurance Portability and Accountability Act of 1996.
144 W. Va. Code §49-5-17(b)(3).
145 *Id*.
146 W. Va. Code §49-5-17(b)(8).
147 W. Va. Code §49-5-17(b)(14).
148 W. Va. Code §49-5-17(b)(8).
149 W. Va. Code §49-5-17(b)(10).
150 W. Va. Code §49-5-17(b)(12).
151 W. Va. Code §49-5-17(c)(5).
152 *Id*.
153 W. Va. Code §49-5-17(c)(6).
154 W. Va. Code §49-5-17(c)(7).
155 W. Va. Code §49-5-17(c).
156 W. Va. Code §49-5-18(a).
157 W. Va. Code §49-5-18(b).
158 W. Va. Code §49-5-19.
159 W. Va. Code §49-5-11(d).
160 W. Va. Code §49-5-11a(a).
161 *Id*.
162 W. Va. Code §49-5-11a(b).
163 W. Va. Code §49-5-11a(c).
164 A recent lawsuit in Luzerne County, Pennsylvania, reveals the appalling outcomes that result when accused youth go unrepresented. In 2008, the Juvenile Law Center filed a lawsuit to challenge the very high numbers of youth appearing without counsel in Luzerne County juvenile court. Over the course of the next year, criminal allegations surfaced that two Luzerne County judges, including the juvenile court Judge Mark A. Ciavarella, Jr. and his colleague Judge Michael T. Conahan, were taking kickbacks to send youth to privately-run detention centers. This "kids for cash" scheme, which involved thousands of children over a 5-year period, is one of the most egregious civil rights violations in the country's history. *See* Ian Urbina, "Pennsylvania Overturns Many Youths' Convictions," *New York Times* Oct. 29, 2009, *available at* http://www.nytimes.com/2009/10/30/us/30judges.html?_r=2&scp=5&sq=luzerne&st=cse.
165 W.Va. Code 49-5-2(h).
166 In a very small number of cases, counsel is retained.
167 The National Council of Juvenile and Family Court Judges *Juvenile Delinquency Guidelines* are available on the web at http://www.ncjfcj.org/content/view/411/411/.
168 For more information about magistrates, consult the West Virginia Judicial System website at http://www.state.wv.us/wvsca/wvsystem.htm.

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169 Although there is presently no right to discovery, a committee through the Supreme Court's Court Improvement Board is examining this omission, along with several other aspects of the juvenile code. The Committee is working to establish uniformity among rules and procedures. This Committee includes juvenile prosecutors, juvenile defenders, representatives of the Department of Juvenile Services, the Department of Health and Human Resources, and probation.

170 W. Va. Code §49-5-2(i).

171 W. Va. Code §49-5-2(j).

172 W. Va. Code §49-5-6(a).

173 W. Va. Code §49-5-6(b).

174 WV Code §49-1-1(a). *See also State ex rel. R.S. v. Trent*, 289 S.E.2d 166, 169 W.Va.493 (1982).

175 Jack Rogers, *The Defender.*

176 W. Va. Code §49-5-2(h).

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