

LIMITED JUSTICE



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

NAT. JUVENILE DEFENDER CTR., LIMITED JUSTICE: AN
ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE
DEFENSE COUNSEL IN KANSAS (2020).

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A report of the National Juvenile Defender Center

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EXECUTIVE SUMMARY

More than 50 years ago, the United States Supreme Court affirmed children’s constitutional right to due process in delinquency court, including the assistance of counsel. In its decision in *In re Gault*, the Court found that children need “the guiding hand of counsel at every step in the proceedings against [them]”¹ and outlined the vital role of counsel for children: “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 child] has a defense and to prepare and submit it.”²

But, to this day, although every state has some basic structure to provide attorneys for children, few fully satisfy *Gault*’s mandate of access to counsel for young people.³

Public defense delivery systems must recognize that the representation of children is different than that of adults and must support counsel who are trained to understand and incorporate adolescent development and the other unique aspects of defending youth. These are not merely aspirational goals. Public defense systems must implement policies and structures to ensure the due process protections mandated by *Gault* can be realized by every young person across the state.

This assessment of access to counsel and quality of representation for Kansas youth is part of a nationwide effort to systematically review and provide information about the provision of defense counsel in delinquency proceedings. The purpose of a state assessment is to provide policymakers, legislators, defense leadership, and other stakeholders with a thorough understanding of children’s access to counsel in the state, identify structural and systemic barriers that impede effective representation of children, analyze how fee and cost structures inhibit young people’s access to justice, highlight best practices where found, and make recommendations that will serve as a guide for improving juvenile defender services for children in the state.

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

2 *Id.* at 36.

3 NAT’L JUVENILE DEFENDER CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES’ FAILURE TO PROTECT CHILDREN’S RIGHT TO COUNSEL 4 (2017) [hereinafter *ACCESS DENIED*], https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf.

Some of the key findings of the assessment include:

- While Kansas has succeeded in ensuring that nearly every youth who faces charges in delinquency court is represented by counsel at most stages of the proceedings, the quality of defense young people receive far too often does not fulfill constitutional obligations, meet national standards, or satisfy professional responsibility requirements.
- Kansas juvenile defenders do not have the structure, training, support, or compensation needed to develop an expertise in juvenile defense and provide Kansas youth with the representation to which they are entitled and the Constitution demands.
- Recent changes to state law have increased diversion and decreased youth incarceration by limiting the availability of detention and commitment. However, the state provides a less-than-complete continuum of alternative options, and defender advocacy in detention, disposition, and post-disposition hearings is lacking, with defenders who too often fail to offer or become familiar with alternative options for their clients.
- Far too often, juvenile defense attorneys engage in the plea process with little to no true investigation or advocacy to challenge the allegations. In some areas, the defense contracting system may even incentivize expediting pleas and a lack of strong defense advocacy.
- The innumerable fines, fees, and costs levied on young people and families by the juvenile court system interfere with youths' right to counsel and access to diversion, and burden youth and families with insurmountable debt that follows them long after the young person's involvement in the juvenile legal system has ended.
- Despite the recognized harm and trauma caused by shackling and the nationwide movement toward limiting or eliminating the shackling of youth, Kansas juvenile courts continue to indiscriminately shackle young people, and defenders largely fail to recognize the harm or advocate to unshackle their young clients.
- Although racial disparities in Kansas' juvenile legal system exceed national rates, juvenile defenders do little to challenge the biases driving these disparities and rarely raise racial justice arguments in their defense of youth.

Among other recommendations, this report encourages Kansas to:

- Implement a strong, specialized system of juvenile defense.
- Institute statewide standards and oversight of juvenile defenders and of county-level juvenile defense delivery systems.
- Establish a juvenile defense system that allows defenders to become specialists in juvenile delinquency defense.
- Ensure youth have access to counsel at all stages of the juvenile court process, including for post-disposition and appeals.
- Eliminate fines, fees, and costs associated with juvenile court involvement.
- Eliminate the indiscriminate shackling of youth in juvenile court.
- Eliminate racial disparities in the juvenile court system.

Kansas has both a constitutional obligation to provide every youth with a defense attorney who is sufficiently qualified and resourced to properly defend their client and a moral imperative to ensure its young people are provided every opportunity for success. The state must meet its obligation to ensure that all youth have access to well-trained, effective lawyers in delinquency proceedings to achieve better outcomes for its young people, their families and communities, and the entire State of Kansas.

INTRODUCTION

The Role of Counsel in Delinquency Proceedings

“[C]hildren, like adults, are denied their right to counsel not only when an attorney is entirely absent, but also when an attorney is made available in name only.”⁴

On the heels of the United States Supreme Court’s affirmation in 1963 that indigent adults charged with a criminal offense had a right to a publicly funded defense attorney,⁵ the Court decided a series of cases affirming a child’s right to certain due process protections when facing delinquency proceedings.⁶ Seminal among these cases, *In re Gault*, decided in 1967, affirmed that children have a due process right to counsel in delinquency proceedings under the Fourteenth Amendment to the United States Constitution.⁷ Justice Abe Fortas, writing for the majority, reasoned:

Under our Constitution, the condition of being a boy does not justify a kangaroo court There is no material difference in this respect between adult and juvenile proceedings of the sort here involved The [child] needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the child] has a defense and to prepare and submit it.⁸

The Court explicitly rejected the claim that others would be capable of protecting the child’s interests and heralded the unique role of counsel: “The probation officer cannot act as counsel for the child Nor can the judge represent the child.”⁹ While the judge, the probation officer, and other court personnel are charged with looking out for an accused child’s best interests, children facing “the awesome prospect of incarceration” require counsel to advocate for their stated interests and guide them in proceedings implicating potential loss of liberty.¹⁰

The right to effective counsel throughout the entirety of a youth’s system involvement is critical.¹¹ “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”¹² It is the juvenile defender who must insist upon fairness of the proceedings, ensure the child’s voice is heard at every stage of the process, and safeguard the due process and equal protection rights of the child.¹³

4 Statement of Interest of the United States, N.P. et al. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. 2015) [hereinafter Dep’t of Justice Statement of Interest in N.P.] at 7.

5 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6 *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966); *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

7 *Gault*, 387 U.S. at 30-31.

8 *Id.* at 28, 36 (internal citations omitted).

9 *Id.* at 36.

10 *Id.*

11 *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970) (stating that “the right to counsel is the right to the *effective* assistance of counsel” (emphasis added)).

12 *United States v. Cronin*, 466 U.S. 648, 654 (1984).

13 The juvenile defense attorney has a duty to advocate for a client’s expressed interests, regardless of whether the expressed interests coincide with what the lawyer personally believes to be in the best interests of the client. See *Gault*, 387 U.S. at 37. See generally MODEL RULES OF PROF’L CONDUCT r. 1.2, 1.3, 1.4, 1.8, 1.14 (AM. BAR ASS’N 1983). “Expressed-interest” (also called stated-interest) representation requires that counsel assert the client’s voice in juvenile proceedings.



The juvenile defender is the only justice system stakeholder who is ethically and constitutionally mandated to zealously advocate for the protection of the youth’s rights in a manner that is consistent with the youth’s expressed interests.¹⁴ This role is distinct from other juvenile court stakeholders such as the judge, probation officer, guardian *ad litem*, or prosecutor, who consider the perceived “best interests” of the child.¹⁵ If the defense attorney acts in a role akin to an *amicus curiae* (or friend of the court), rather than as a true advocate for the client, the constitutional right to counsel is denied.¹⁶

Effective juvenile defense not only requires specialized practice—wherein the attorney must meet all the obligations due to an adult client—but also necessitates expertise in juvenile-specific law and policy, the science of adolescent development and how it impacts a young person’s case, skills and techniques for effectively communicating with youth, collateral consequences specific to juvenile court, and various child-specific systems affecting delinquency cases, such as schools and adolescent health services.¹⁷

Youth are still developing their cognitive and socio-emotional capacities, which requires defenders to learn about and understand developmental principles.¹⁸ The juvenile defender must apply this expertise in representing youth at all stages of the court system, including pretrial detention hearings, advisory hearings, suppression hearings, the adjudicatory phase, disposition hearings, transfer hearings, any competence proceedings, and all points of post-disposition while a youth remains under the jurisdiction of the juvenile court.

14 See KAN. R. PROF. CONDUCT 1.2, 1.3, 1.4, 1.6, 2.1 (2020); NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012) [hereinafter NATIONAL JUVENILE DEFENSE STANDARDS] at Standards 1.1, 1.2. See also *Gault*, 387 U.S. at 1.

15 “Expressed-interest” (also called stated-interest) representation requires that counsel assert the client’s voice in juvenile proceedings. The juvenile defense attorney has a duty to advocate for a client’s “expressed interests,” regardless of whether the “expressed interests” coincide with what the lawyer personally believes to be in the “best interests” of the client. See NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standards 1.1, 1.2

16 *Anders v. California*, 386 U.S. 738 (1967).

17 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 1.3.

18 NAT’L JUVENILE DEFENDER CTR. & NAT’L LEGAL AID & DEFENDER ASS’N, TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS (2d ed. 2008) [hereinafter TEN CORE PRINCIPLES], <http://njdc.info/wp-content/uploads/2013/11/10-Core-Principles.pdf>.

Juvenile defenders must also ensure a client-centered model of advocacy and empower and advise their young clients using developmentally appropriate communication.¹⁹ These elements of juvenile defense advocacy are critical to equipping youth to understand and make informed decisions about their case, including accepting or rejecting a plea offer or going to trial, testifying or remaining silent, developing components of a defense-driven disposition plan, and considering alternatives to juvenile court involvement and treatment.²⁰

Juvenile defense delivery systems have a responsibility to provide juvenile defenders with the necessary training, support, and oversight to ensure attorneys have the time needed to build rapport with clients, obtain discovery and conduct investigations, engage in motions practice and appropriately prepare for hearings, monitor the post-disposition needs of clients under the court's jurisdiction, and consult with the client to ensure expressed-interest representation at all stages of court involvement.²¹

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

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NJDC's Assessments of Juvenile Defense Systems

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

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

NJDC has conducted statewide assessments of juvenile defense systems in 28 states.²² These assessments not only gather information and data about the structure and funding of defense systems, but also examine whether youth receive counsel at all critical stages, the timing of appointments, waiver of counsel, juvenile defense resource allocation, supervision and training, and access to investigators, experts, social workers, and support staff. Reports note promising practices within a state and offer recommendations for improvements.

19 KAN. R. PROF. CONDUCT 1.2, 1.3, 1.4, 2.1 (2020).

20 See NAT'L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 9 (2009) [hereinafter ROLE OF JUVENILE DEFENSE COUNSEL], <https://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf>; See also TEN CORE PRINCIPLES.

21 See Dep't of Justice Statement of Interest in N.P., *supra* note 4, at 14.

22 *State Assessments*, NAT'L JUVENILE DEFENDER CTR., <https://njdc.info/our-work/juvenile-indigent-defense-assessments/> (last visited Aug. 3, 2020).

Several consistent themes have emerged across state assessments, including an array of systemic barriers that prohibit youth from receiving timely access to qualified juvenile defense counsel, juvenile defense not being recognized or acknowledged as a specialized legal practice, and juvenile defense being significantly under-resourced. Since the *Gault* decision, juvenile defense systems have faltered and failed in many jurisdictions, leaving far too many children defenseless in courts of law across the country.²³

Since the Gault decision, juvenile defense systems have faltered and failed in many jurisdictions, leaving far too many children defenseless in courts of law across the country.

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

Methodology

NJDC began its assessment process in Kansas through conversations with local- and state-level juvenile court stakeholders, including judges, defense leaders, and the Kansas Department of Corrections, who were interested in understanding the system of juvenile defense in the state. The Kansas Office of Judicial Administration issued a letter notifying local courts that NJDC assessment teams would be visiting selected sites around the state to collect insight into how juvenile defense in Kansas worked in practice. NJDC staff and consultants conducted a series of meetings with multiple stakeholder groups from private and public entities to gather information about Kansas' juvenile defense delivery system.

Simultaneously, NJDC and its consultants began a thorough review of the juvenile code, caselaw, and statutes related to juvenile defense. After evaluating a wide range of factors, NJDC identified 11 counties for site visits considered to be representative of the heterogeneity found in counties across the state along criteria such as population size, geographic location, presence or absence of a detention facility, ethnic/racial diversity, urban/suburban/rural setting, type of juvenile defense delivery system, and number of delinquency petitions filed annually.

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

²³ See generally ACCESS DENIED, *supra* note 3.

Two assessment team members went to each of the 11 selected jurisdictions, where they conducted interviews, court observations, and tours of courthouses and juvenile detention centers. Using interview questionnaires developed by NJDC and specifically adapted for use in Kansas, the assessment teams interviewed defense lawyers, prosecutors, judges, court administrators, probation officers and supervisors, and detention facility staff. Interviews included questions about the role and performance of defense counsel, access to counsel at all critical stages, and systemic impediments to effective representation. Jurisdictions are not identified in the report in order to maintain the confidentiality ensured to interview participants and so the report is focused on statewide trends in juvenile defense and not individual county issues.

Jointly, the assessment team completed 116 confidential interviews and observed approximately 120 court proceedings across the 11 counties. They also collected documentation regarding local appointed counsel application processes and contracts, plea forms, standard probation supervision rules, risk assessment instruments, court dockets, detention facility populations, and information concerning the imposition, collection, and enforcement of fees, fines, and other costs in juvenile court. Completed questionnaires, court and facility observation forms, and other documentation were submitted to NJDC for incorporation into this assessment report. The interview questionnaires and court and facility observation forms were coded and analyzed using NVivo, qualitative data analysis software, to identify trends and outlying practices and policies.

This report and its recommendations are the result of a yearlong assessment of Kansas' system of providing counsel to youth in delinquency proceedings. It assesses Kansas' juvenile defense system in the context of what is constitutionally required and uses national standards, research, and best practices as a foundation for review. The report can provide a roadmap to support both positive practices and reforms that can further the integrity of the juvenile legal system by ensuring adequate due process and equal protection of the law through well-trained, effective lawyers for all youth.

Kansas' Juvenile Court & Defense Systems

In early 2015, spurred by reports about high costs and unsatisfactory outcomes of the Kansas juvenile court system, Kansas' governor, legislative leaders, and chief justice came together to create the bipartisan Kansas Juvenile Justice Workgroup to investigate the state of juvenile justice in Kansas and whether outcomes and costs were in line with evidence-based practices.

In November 2015, the Workgroup released its final report. Based on data analysis, roundtable discussions with stakeholders, and review of current research, the Workgroup's findings included: as crime fell, the juvenile justice system did not keep pace, lower-level offenders made up most of the juvenile justice system, bed costs were high, evidence-based services in the community were scarce, lack of standardization led to disparate outcomes, and data collection was insufficient and inconsistent.²⁴

The Workgroup issued 40 consensus policy recommendations that its members believed would meet the three goals the group was charged with advancing: promoting public safety and holding youth accountable, controlling taxpayer costs, and improving outcomes for youth, families, and communities in Kansas.²⁵ The policy recommendations were grouped into three categories: preventing deeper juvenile justice system involvement, protecting public safety by focusing system resources, and sustaining effective practices through oversight and reinvestment.²⁶

²⁴ KAN. JUVENILE JUSTICE WORKGROUP, FINAL REPORT 1-2 (2015), <https://www.doc.ks.gov/juvenile-services/Workgroup/report/Final>.

²⁵ *Id.* at 1.

²⁶ *Id.* at 10-19.



Included in the third category of policy recommendations was: “Improve the quality of juvenile defense.”²⁷ The Workgroup recommended that Kansas “[i]mprove the quality of the juvenile defense bar by creating a system that encourages specialization in juvenile justice matters and provides oversight and juvenile-specific training statewide.”²⁸ To do so, the Workgroup recommended three reforms: “create or designate a state-level entity to oversee juvenile defenders,” “improve the structure of the juvenile defender system,” and “create a payment structure that encourages specialization.”²⁹ The Workgroup also recommended that judges, county or district attorneys, and defenders complete a model training protocol to work in juvenile court.³⁰

In 2016, the Kansas legislature passed omnibus juvenile justice reform legislation, Senate Bill 367 (SB 367), which addressed many of the findings and implemented many of the recommendations of the Workgroup.³¹

SB 367 also created the Kansas Juvenile Justice Oversight Committee, charged with overseeing and issuing annual reports on the implementation of the new law.³² In November 2019, the Committee released its 2019 Kansas Juvenile Justice Oversight Committee Annual Report, which found that SB 367 was having its intended effect on Kansas’ juvenile justice system.³³ Since the enactment of SB 367, the number of youth committed to Kansas’ state facility dropped by 24 percent; more than half of youth committed were high risk; nearly 91 percent of youth placed on community corrections probation supervision were moderate or high risk, which is the intended population for this form of supervision; the average length of probation is decreasing; and 88.5 percent of youth diverted from juvenile court were successful in the state’s new Immediate Intervention Programs.³⁴

Notably, SB 367 did not address the Workgroup’s three recommendations for improving the quality of the juvenile defense bar. It did require the Office of Judicial Administration to develop a training protocol for judges, county and district attorneys, and defense attorneys who work in juvenile court.³⁵ The protocol ultimately adopted by the Office of Judicial Administration, however, simply “recommends” that judges, prosecutors, and defenders attend continuing legal or judicial education about topics related to adolescence and juvenile justice.³⁶ As of August 31, 2019, two years after the effective date of SB 367 and the adoption of this protocol, only 38 people across the state had self-reported to the Office of Judicial Administration that they had participated in training as recommended by the protocol.³⁷

27 *Id.* at 17.

28 *Id.*

29 *Id.*

30 *Id.*

31 S.B. 367, 2016 Reg. Sess., (Kan. 2016).

32 *Id.* at 3.

33 KAN. JUVENILE JUSTICE OVERSIGHT COMM., 2019 KANSAS JUVENILE JUSTICE OVERSIGHT COMMITTEE ANNUAL REPORT (2019), <https://www.doc.ks.gov/juvenile-services/committee/2019-annual-report/view>.

34 *Id.* at 2-3.

35 KAN. STAT. ANN. §20-318a(a) (2016).

36 OFFICE OF JUDICIAL ADMIN., TRAINING PROTOCOL (2017), <https://www.kscourts.org/KSCourts/media/KsCourts/Trial%20court%20programs/Juvenile-Justice-Education-Protocol-final.pdf>.

37 KAN. JUVENILE JUSTICE OVERSIGHT COMM., *supra* note 33, at 21-22.

Despite significantly reforming its juvenile justice system, the State of Kansas continues to play virtually no role in ensuring that young people who face prosecution are represented by qualified defense counsel, as required by the U.S. Constitution. Delivery of juvenile defense services is left entirely to Kansas' 105 counties, which appoint private defense counsel to individual cases or contract with private defense attorneys or groups of defenders. The state provides no oversight of juvenile defense systems or defender quality, has no standards for defense representation, and requires no training either prior to accepting juvenile court cases or throughout a juvenile defense attorney's career. The state also provides no guidance or rules regarding payment for defense attorneys. Kansas is one of only four states with no salaried public defense system representing youth anywhere in the state.³⁸

The State of Kansas continues to play virtually no role in ensuring that young people who face prosecution are represented by qualified defense counsel.

By comparison, a state agency, the Kansas State Board of Indigents' Defense Services, is responsible for providing defense services to adults charged with a felony, defendants in extradition proceedings, and in *habeas corpus* proceedings.³⁹ Courts may appoint private defense attorneys in these cases only if those attorneys are members of the State Board's Indigent Defense panel,⁴⁰ and Kansas law sets a payment rate of \$80 per hour for attorneys appointed to these proceedings.⁴¹ No part of this state structure supporting defense services applies to the system of providing defense to young people in delinquency courts.

Kansas has already proven its commitment to improving its juvenile court system and to establishing state oversight of its adult criminal defense services. It can take the next step in ensuring justice for children by carefully considering the findings, recommendations, and discussion of best practices related to its system of juvenile defense that follow.

38 NAT'L JUVENILE DEFENDER CTR., *BROKEN CONTRACTS: REIMAGINING HIGH-QUALITY REPRESENTATION OF YOUTH IN CONTRACT AND APPOINTED COUNSEL SYSTEMS* (2019), https://njdc.info/wp-content/uploads/NJDC_Broken_Contracts-Report-WEB.pdf (every state except Kansas, Maine, Michigan, and Mississippi has some formal public defender system for youth in delinquency court, at least in some larger population centers, if not statewide).

39 KAN. STAT. ANN. §22-4503(a) (1996).

40 KAN. STAT. ANN. §22-4503(c) (1996).

41 KAN. STAT. ANN. §22-4503(c)(1) (1996).

KEY FINDINGS

I. STAGES OF JUVENILE COURT PROCEEDINGS



I. STAGES OF JUVENILE COURT PROCEEDINGS

Youth need “the guiding hand of counsel at every step in the proceedings against [them]” in juvenile court.⁴² Children need the assistance of counsel, and no one—not a probation officer, judge, or family member—can substitute as counsel for a young person.⁴³ “The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.”⁴⁴

Counsel for children in the delinquency system must be recognized as an essential component of a developmentally appropriate juvenile justice system.⁴⁵ “The essence of access to justice for children is access to counsel.”⁴⁶

“The essence of access to justice for children is access to counsel.”

A. Timing of Appointment of Counsel

Counsel’s immediate action early in a case is vital to ensuring the child’s interests and due process rights are protected in juvenile offender proceedings.⁴⁷ Early and frequent contacts are also important opportunities for the defender and child to build rapport, trust, and confidence in each other.⁴⁸ When counsel is appointed is arguably as important as *whether* counsel is appointed at all.⁴⁹

1. Access to Counsel at Interrogation

The first time a youth has an explicit right to counsel is during police interrogation. In 1966, the United States Supreme Court ruled that people subject to police interrogation must, at a minimum, be advised of their right to consult a lawyer, to protect their Fifth Amendment right to silence.⁵⁰ The following year, the Court explicitly acknowledged in *Gault* that this protection extends to youth under the Fourteenth Amendment’s Due Process Clause.⁵¹

42 *In re Gault*, 387 U.S. 1, 36 (1967).

43 *Id.*

44 INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, STANDARDS ON JUVENILE JUSTICE, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Standard 1.1 (1979).

45 *Id.*

46 *Id.*

47 The term “juvenile offender” is codified in KAN. STAT. ANN. §38-2302(s) (2016). This is not a term that NJDC would otherwise use to describe the proceedings in which young people face charges in juvenile courts. This report will also use the term “delinquency” to refer to Kansas’ juvenile offender or “JO” proceedings.

48 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 2.1 cmt.; NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 2.4; *see also* INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, *supra* note 44, at 36.

49 *Id.* at Standards 2.1, 3.1; INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, *supra* note 44, at 73, 75.

50 *Miranda v. Arizona*, 384 U.S. 436 (1966).

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

Police questioning is an especially fraught experience for youth; they face an inherent imbalance of power, which necessitates special care be taken to afford their rights.⁵² Youth are particularly susceptible to manipulative strategies commonly used in interrogations, and they often waive their rights or offer confessions in response to unrealistic or short-term incentives.⁵³ Interrogation should be recognized as a critical stage of the proceedings at which young people should be represented by publicly funded defense counsel.⁵⁴

While all youth have a right against self-incrimination and a right to counsel during interrogation, only two states currently mandate a procedure for providing counsel to certain youth during interrogation.⁵⁵ While Kansas is not one of these states, Kansas law does offer important protections to youth under 14 who are questioned by police:

[N]o admission or confession resulting from interrogation while in custody or under arrest may be admitted into evidence unless the confession or admission was made following a consultation between the juvenile's parent or attorney as to whether the juvenile will waive the right to an attorney and the right against self-incrimination.⁵⁶

If the youth's parent is the alleged victim or codefendant, "no admission or confession may be admitted into evidence" unless it "was made following a consultation between the juvenile and an attorney, or a parent who is not involved in the investigation of the crime."⁵⁷

These key statutory protections recognize what the U.S. Supreme Court acknowledged more than 70 years ago:

[W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.⁵⁸

It appears that, at least in the jurisdictions visited for this assessment, this important protection for younger children is not being realized. Almost all stakeholders who responded to a question about youth access to counsel during interrogations did not know there was a law pertaining to it. Several stakeholders reported that they had never known of a youth having a publicly funded lawyer present during interrogation (although a few noted that youth with retained counsel did have that protection).

52 *Haley v. Ohio*, 332 U.S. 596, 599 (1948) ("[W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.").

53 See, e.g., *Dassey v. Dittmann*, 201 F.Supp. 3d 963, 993-1007 (E.D. Wis. 2016) (finding Brendan Dassey's confession involuntary because of the investigators' use of false promises); *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004). See generally, INT'L ASS'N OF CHIEFS OF POLICE, REDUCING RISKS: AN EXECUTIVE'S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION 4 (2012), <https://www.theiacp.org/sites/default/files/all/p-r/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf>.

54 ACCESS DENIED, *supra* note 3, at 16.

55 705 ILL. COMP. STAT. ANN. 405 / 5-170(a) (2017); CAL. WELF. & INST. §625.6 (2018).

56 KAN. STAT. ANN. §38-2333(a) (2006).

57 KAN. STAT. ANN. §38-2333(b) (2006).

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

One prosecutor specified that in their jurisdiction, there is not a system in place to provide counsel to youth who request it during interrogation. “We should have a system in place. This is one of our weakest points.” Another prosecutor opined that confessions from youth under 14 should never be allowed, regardless of the presence of a parent or attorney.

Kansas is to be commended for providing important statutory protections to young children who are questioned by law enforcement. All system stakeholders must become familiar with the existing protections offered to youth under 14 and ensure they are enforced. The state should consider further strengthening these protections by extending them to all youth, regardless of age, and by mandating the presence of counsel—not parents, since few have sufficient legal training to protect their children’s rights—at all youth interrogations.

2. Access to Counsel at Pre-File Diversion

Diversion programs, known as Immediate Intervention Programs (IIP), provide opportunities for youth to avoid prosecution.⁵⁹ IIPs can be implemented either prior to the formal filing of a petition or after, depending on the individual youth and the allegations.⁶⁰ Whether a young person has a right to counsel in a case sent to diversion may depend upon whether a formal petition has been filed with the court and whether the youth must answer the petition.

A lack of counsel at the IIP phase may have significant implications if the youth does not successfully complete the program. As one prosecutor explained, to enter the IIP program in their county, a youth must sign an agreement stipulating to the offense; if they fail in the diversion program, their adjudication for the offense is essentially automatic. In these instances, young people may be adjudicated without ever realizing they waived their constitutional right to counsel and other due process protections when they signed the diversion agreement.

Several probation officers reported that when young people go through the IIP process without having consulted with or being represented by an attorney, the probation officers find themselves fielding questions better left to defenders. Probation officers in several counties reported that youth will ask for advice about diversion, plea offers, and possible consequences of violations of diversion, and that the officers find themselves having to explain the court process, the youth’s rights, and the role a defense attorney would play. “The family and child do not know the ramifications and often say, ‘I thought you were our lawyer.’” A probation officer in one county explained that if a young person wants to speak to an attorney, the probation officers sometimes “send the case back to court, with a letter to the judge explaining that the child and family have questions and should seek legal counsel.”

“The family and child do not know the ramifications”

Consultation with defense counsel can help ensure a young person understands the charges against them, their rights and options prior to entering diversion, the conditions that will be placed upon them by the diversion program, and the possible consequences of successful or unsuccessful completion of the program. Providing counsel can improve court efficiency and the experience youth and families have while in diversion, and ultimately lead to better success and long-term public safety.

⁵⁹ KAN. STAT. ANN. §38-2346 (2017).

⁶⁰ *Id.*

IIPs have been leading to less youth involvement in the formal juvenile court system and greater youth success: the Kansas Juvenile Justice Oversight Committee found that youth successfully completed 89.5 percent of pre-file and 87 percent of post-file diversion programs.⁶¹ Despite these promising statistics, greater access to counsel, particularly in pre-file IIPs, is needed.

3. First Appearance Hearings

The National Council of Juvenile and Family Court Judges (NCJFCJ) encourages juvenile courts to ensure that defense counsel is appointed far enough in advance of an initial hearing to allow youth to meet with counsel “to fully explore the options and make advised and considered decisions about the best course of action.”⁶² When a summons is served, it should “provide information regarding options for obtaining counsel for the youth prior to the initial hearing, so that counsel has time to prepare, hearings do not need to be unnecessarily continued, and the process proceeds in as timely a fashion as possible.”⁶³

Delayed appointment of counsel “creates unnecessary and inefficient delays” and prevents the juvenile defender “from being able to prepare for the initial hearing prior to the court date.”⁶⁴ NCJFCJ notes that: “Families who can afford private counsel do not have these barriers and rarely appear at a detention or initial juvenile justice court hearing without prior consultation with counsel.”⁶⁵

National standards for juvenile defender advocacy at the initial hearing point out that “counsel’s first obligation is to preserve the client’s rights.”⁶⁶ Accordingly, “[c]ounsel should enter a plea of not guilty, assert constitutional rights, preserve the right to file motions, demand discovery, and set the next court date” and “preserve all of the client’s options until adequate investigation, discovery, and legal research can be completed.”⁶⁷

In Kansas, the first appearance is the hearing at which a youth must answer the complaint. For youth who are not detained following their arrest, this initial hearing must occur within 30 days.⁶⁸ If a youth appears without a lawyer at this hearing, the court must advise the youth of the nature of the charges, their right to hire an attorney, and their right to counsel at public expense if they do not hire an attorney.⁶⁹ If the family cannot afford to hire an attorney, “the court shall promptly appoint an attorney” for the youth.⁷⁰

For youth who are detained prior to the initial hearing, the complaint must be presented and addressed at the detention hearing,⁷¹ at which counsel must be present. If the youth is not represented by retained counsel at the detention hearing, “the court shall appoint an attorney,” but can delay the hearing for an additional 24 hours, “excluding Saturdays, Sundays, and legal holidays, to obtain attendance of the attorney appointed.”⁷² A youth and their attorney may waive the detention hearing in writing, with the approval of the court.⁷³

61 KAN. JUVENILE JUSTICE OVERSIGHT COMM., *supra* note 33, at 5.

62 NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ENHANCED JUVENILE JUSTICE GUIDELINES, CH. III, 25 (2018) [hereinafter NCJFCJ JUVENILE JUSTICE GUIDELINES], https://www.ncjfcj.org/wp-content/uploads/2019/01/NCJFCJ_Enhanced_Juvenile_Justice_Guidelines_Final.pdf.

63 *Id.* at Ch. III, 21.

64 *Id.* at Ch. III, 25.

65 *Id.*

66 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 3.6.

67 *Id.*

68 KAN. STAT. ANN. §38-2336(a) (2006).

69 KAN. STAT. ANN. §38-2344(a) (2017).

70 *Id.*

71 KAN. STAT. ANN. §38-2336(b) (2006).

72 KAN. STAT. ANN. §38-2343(e) (2018).

73 KAN. STAT. ANN. §38-2343(c) (2018).

For youth in the community or being held in detention, the court must allow the youth an opportunity to consult with counsel before entering a plea.⁷⁴ If a youth is represented by counsel at a first appearance hearing, the youth must enter a plea of guilty or not guilty to the complaint.⁷⁵

Assessment teams found that in some counties, youth who are not detained are generally not represented by counsel the first time they appear in court. In about half of the counties visited, stakeholders consistently reported that defense counsel is appointed at, not before, the initial court hearing. In these counties, the first time a youth appears in court triggers the appointment-of-counsel process. A subsequent hearing, also labeled on court dockets as a first appearance, is the first hearing at which the youth appears before the court represented by counsel.

In some counties, youth who are not detained are generally not represented by counsel the first time they appear in court.

A judge in one of these counties explained that they appoint counsel while the young person is in the courtroom. If the youth wants counsel, the judge “asks the clerk who is next [on the appointment list]. The clerk says who is next and if they are in court, I introduce them. If not, I give [the youth] the attorney’s contact information.” A defender in another county explained that “attorneys are not at the initial hearing. We find out about it a day or two later when we get the notification that there is a new case number. Thirty days later is the first court appearance with our client.”

In one county, assessment team members observed first appearance hearings where young people had not yet been appointed lawyers. Assessment team members observed that no one in the courtroom explained to the children the allegations against them, their right to counsel, or the role of counsel. One unrepresented youth expressed that they did not understand why they were in court, and the judge mentioned in open court the possible need for a competency hearing, yet the child had no access to a lawyer.

In another first appearance hearing without defense counsel, the child’s mother became visibly upset because she had not known that charges had been filed against her child. The mother asked to see video related to her child’s case, and the judge advised her to stop talking so that she wouldn’t “get her son in trouble.” The observers noted, “it would be helpful to have an attorney there to have a private conversation with the child and mother about why they were in court and what the allegations were.”

In other counties visited, reports from stakeholders about the precise timing of the appointment of counsel varied. Stakeholders from some of these counties reported that counsel is appointed “at” the first appearance. Stakeholders in other counties reported that youth are informed of who their appointed counsel is when they receive a summons to appear in court.

A defense attorney in one of these counties explained: “Lawyers are appointed at arraignments, and this doesn’t give us much time to talk to our clients. The plea offer is extended at the same time.” A defender in another county explained that they sometimes receive notification of appointment the day before the first hearing, but sometimes just hours before.

Stakeholders across the counties visited reported that Kansas juvenile courts generally adhere to Kansas law by not accepting pleas from uncounseled youth at first appearances. Instead, courts usually appoint counsel and schedule a future hearing to accept the young person’s plea. Although uncommon, a few stakeholders reported that some courts will accept a plea at a first appearance hearing in certain misdemeanor cases even if the youth is not represented by counsel, despite the prohibition against it.

74 KAN. STAT. ANN. §38-2344(a) (2017).

75 KAN. STAT. ANN. §38-2344(b) (2017).

The timing of the appointment of counsel in some Kansas counties creates inefficiencies in these court systems by essentially requiring two “first” appearance hearings: one that serves only to set in motion the process of appointing counsel and a second where the first appearance hearing is actually conducted. In addition to using court time and resources, this practice increases the number of times a young person and their family must appear in court, adding stress and confusion to an already challenging process. Appearing in court without counsel also gives youth an opportunity to unwittingly say or do something detrimental to their case. As one defender said, the biggest drawback to the current appointment system is not being able “to inform the child and parent about what they do NOT have to do.”

All stakeholders agreed that, following recent reforms, youth were rarely detained prior to initial hearings. When youth were detained, however, how far in advance attorneys were notified of their appointment varied from a day to a few hours. This timing drastically affected whether the attorney had the ability to meet with their client prior to the hearing. Given that the attorney will need to advocate for the child’s liberty interests and any potential release conditions, meeting a client as the hearing starts does not allow the attorney to obtain the information necessary for effective detention hearing advocacy.

Kansas can better protect youth rights and increase court efficiency by making changes to its system of appointing defense counsel in juvenile courts. Courts should presume young people cannot afford to hire counsel, automatically assign court-appointed counsel to every youth, and notify the young person and their assigned attorney of the appointment at the time the court sends a summons for the youth to first appear in court. Doing so would allow the youth and attorney time to consult prior to the first appearance, allow the attorney time to review the allegations and evidence, and allow courts to hold substantive first appearance hearings. Jurisdictions should also consider how they can establish procedures to best effectuate youth access to counsel at interrogation under Kansas’ law that provides greater protections for youth who are questioned by police.

B. Waiver of Counsel

National best practices call for courts to safeguard the right to counsel by guarding against youth waiver of counsel. The National Council of Juvenile and Family Court Judges states that it is “vitaly important that youth are represented by counsel,” and considers waiver of counsel “a detrimental practice,” as youth “who are not represented by counsel are not likely to effectively exercise their other due process rights.”⁷⁶ The U.S. Department of Justice has asserted that children cannot knowingly and intelligently waive their right to counsel without first having a meaningful opportunity to consult with a lawyer.⁷⁷

In Kansas, youth have the right to an attorney at every stage of juvenile court proceedings.⁷⁸ If a young person appears before the court without an attorney, the court must inform the child and the child’s parent of “the right to employ an attorney.”⁷⁹ If the child or the child’s parent “fail[] to retain an attorney,” the court must appoint an attorney to represent the child.⁸⁰ “After an attorney has been appointed for the juvenile in the case, the parent may not waive the juvenile’s rights.”⁸¹

76 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 62, at Ch. III, 24.

77 Dep’t of Justice Statement of Interest in N.P., *supra* note 4, at 1. See also Press Release, U.S. Dep’t of Justice, Department of Justice Statement of Interest Supports Meaningful Right to Counsel in Juvenile Prosecutions (Mar. 13, 2015) (<https://www.justice.gov/opa/pr/department-justice-statement-interest-supports-meaningful-right-counsel-juvenile-prosecutions>).

78 KAN. STAT. ANN. §38-2306(a) (2006).

79 *Id.*

80 *Id.*

81 KAN. STAT. ANN. §38-2333(c) (2006).

Almost without exception, assessment team members found that Kansas juvenile courts interpret Kansas law to require the appointment of counsel in all delinquency cases, once official proceedings have been initiated. Stakeholders consistently reported that the law does not allow waiver, that they have never seen a child waive counsel, and that judges will not hold a hearing if a defense attorney is not present. “It’s just a given that you always have an attorney when you’re in court.”

Stakeholders also made clear they understood that the right to counsel belongs to the child, not the parent, and reported that Kansas courts will not allow a parent to waive their child’s right to counsel.

Young people in Kansas very rarely waive their right to counsel.

Court observations conducted by assessment team members aligned with stakeholder accounts that young people in Kansas very rarely waive their right to counsel. Assessment team members observed approximately 120 court hearings in the counties visited for this assessment. Only three youth were not represented by counsel; those three hearings were all first appearances, a topic covered in greater detail in the previous section. Once delinquency cases move beyond the initial first appearance hearing, however, youth were almost universally represented by counsel through the disposition of their case.

The assessment team found that young people in Kansas almost never waive their constitutional right to counsel when they appear in juvenile court for a delinquency proceeding. In this respect, Kansas lives up to national best practices by making youth waiver of counsel rare or non-existent and ensuring access to a defense lawyer. Given this strength, Kansas should focus its efforts on ensuring that the quality of representation youth receive reflects what any Kansan would want for their own child.

C. Detention Hearings & Probable Cause Determinations

When a person is arrested by police and detained, courts must make a “prompt” determination of probable cause to justify continued detention of that person.⁸² The U.S. Supreme Court clarified the meaning of “prompt” by establishing a 48-hour rule for probable cause determinations.⁸³ Importantly, the Court did not exclude juvenile proceedings from its holding.⁸⁴

National judicial guidelines say that juvenile courts should “hold detention hearings on Saturday mornings for youth admitted to detention Friday afternoon or evening”⁸⁵ and that the “youth, parent, and counsel for the youth [should] meet prior to the detention or initial hearing to determine the position they will take at the hearing.”⁸⁶

Defense lawyers must prepare as best as possible for detention hearings, often with limited time, and must make probable cause arguments relative to a lack of evidence regarding a charged offense or an insufficient nexus between the client and the offense.⁸⁷ Defense counsel have a duty “to explore promptly the least restrictive form of release, the alternatives to detention, and the opportunities for detention review, at every stage of the proceedings where such an inquiry would be relevant.”⁸⁸

82 Gerstein v. Pugh, 420 U.S. 103, 112 (1975).

83 Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

84 *Id.* at 58 (reasoning, “Everyone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail.”). *But see*, Schall v. Martin, 467 U.S. 253 (1984) (finding that a slightly longer delay may be acceptable for youth, if other adequate procedural safeguards are in place).

85 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 62, at Ch. III, 22.

86 *Id.* at 23.

87 TEN CORE PRINCIPLES, *supra* note 18, at 3.

88 *Id.* at 1.

The Supreme Court of Kansas has found that, while the statutory right to a preliminary hearing under the state’s adult criminal code does not apply to youth in juvenile court proceedings, youth do have a Fourth Amendment right to a judicial determination of probable cause as a prerequisite to their pretrial detention.⁸⁹ “The right not to be jailed for any substantial period of time without a neutral decision that there is probable cause is basic to a free society. Children should enjoy this right no less than adults.”⁹⁰

Kansas law provides that a child who is initially detained by law enforcement cannot “remain in detention for more than 48 hours, excluding Saturdays, Sundays, legal holidays, and days on which the office of the clerk of the court is not accessible,” without a court determination “that further detention is warranted.”⁹¹ At an initial detention hearing, if “no prior judicial determination of probable cause has been made, the court shall determine whether there is probable cause to believe that the juvenile has committed the alleged offense.”⁹² If the youth contests probable cause at the initial detention hearing, “the court shall allow the opportunity to present contrary evidence or information upon request.”⁹³

The juvenile court “shall appoint an attorney” for a youth who is not represented by retained counsel at a detention hearing, and may delay the hearing for 24 hours, “excluding Saturdays, Sundays, and legal holidays, to obtain attendance of the attorney appointed.”⁹⁴ A youth may waive their detention hearing, with the approval of the court.⁹⁵

Kansas law outlines the criteria courts must consider when making decisions to detain youth.⁹⁶ Courts “shall not” order the removal of a child from a parent’s custody unless the youth is found “detention-eligible” by a detention risk assessment tool *and* the court finds probable cause that alternatives to detention are insufficient to ensure the youth returns to court⁹⁷ or to protect people or property from “serious threat.”⁹⁸ The law specifies that a child may not be detained solely due to a lack of placement options, “a parent avoiding legal responsibility,” or “a risk of self-harm.”⁹⁹ If the court detains the child beyond the initial detention by law enforcement, the court “shall hold a detention review hearing at least every 14 days . . . to determine if the juvenile should continue to be held in detention.”¹⁰⁰

Based on stakeholder interviews and court observations conducted for this assessment, it appears that youth are represented by defense counsel at detention hearings in Kansas. However, defenders are unlikely to challenge, and courts do not regularly make on-the-record determinations of, probable cause to detain youth. While defense counsel regularly argue against detention for their young clients, their detention advocacy does not often include providing the court with alternatives to detention if the youth cannot return home. And the presence of young people at their detention hearings appears to have been devalued to the point that, in one county visited, youth were entirely absent from the hearings, likely in violation of their constitutional rights.

89 *In re D.E.R.*, 225 P.3d 1187, 1189 (Kan. 2010).

90 *Id.* at 1193 (citing *R.W.T. v. Dalton*, 712 F.2d 1225, 1230 (8th Cir. 1983)).

91 KAN. STAT. ANN. §38-2343(a) (2018).

92 KAN. STAT. ANN. §38-2343(b)(1) (2018).

93 KAN. STAT. ANN. §38-2343(f)(2) (2018).

94 KAN. STAT. ANN. §38-2343(e) (2018).

95 KAN. STAT. ANN. §38-2343(c) (2018).

96 KAN. STAT. ANN. §38-2331(a) (2017).

97 KAN. STAT. ANN. §38-2331(a)(1)(A) (2017) (finding of probable cause that an alternative to detention is insufficient to ensure the youth’s return to court, that decision must be based on evidence of a “demonstrable record of *recent* failures to appear at juvenile court proceedings and an exhaustion of detention alternatives.”)(emphasis added). It is important to note that this statutory analysis of whether there is probable cause to find alternatives to detention are insufficient is separate from the constitutional requirement that the court find probable cause of an offense prior to detaining a child.

98 KAN. STAT. ANN. §38-2331(a)(1)(B) (2017).

99 KAN. STAT. ANN. §38-2331(c) (2017).

100 KAN. STAT. ANN. §38-2343(i) (2018).

1. Probable Cause

Stakeholders interviewed across sites consistently stated that Kansas juvenile courts rarely make in-court findings of probable cause during detention hearings and that defenders rarely, if ever, challenge probable cause. Many stakeholders did not distinguish the probable cause required of law enforcement to take youth into custody from the judicial determination of probable cause that an offense was committed and that the youth in front of the judge was the one who likely committed it, which is the distinct judicial finding required for continued detention.

Assessment teams observed 20 detention hearings in the sites visited; youth were represented by counsel in every detention hearing observed. Assessment team members observed four initial detention hearings. In those, only once did the judge make an on-the-record finding of probable cause, and then, only after the prosecutor informed the court that it needed to do so. The judge made the determination simply by reading the warrant affidavit; the defense attorney made no argument against a finding of probable cause. No mention of probable cause was made in the other three initial detention hearings observed.

Assessment team members did observe one defense attorneys providing zealous advocacy around probable cause. Team members observed a hearing in a sex offense case in which the defense attorney had challenged probable cause at an earlier detention hearing, because no police report had been presented. At the hearing the assessment team observed, the defense attorney argued against both the facts presented and whether the police affidavit met statutory requirements.

During stakeholder interviews, one judge described how they “make probable cause determinations based on the police affidavit.” A judge in another county explained that “the county attorney proceeds by way of a proffer. Defense attorneys permit this to happen without objection. They never ask for an evidentiary hearing or make arguments that there’s not probable cause on the papers.” A prosecutor reported that the judge in their county determines probable cause by reviewing the motion for detention, “usually before the detention hearing.” One assessment team member noted, “there appeared to be no procedure or discussion of probable cause other than a declaration from the bench that it existed.”

Defense attorneys interviewed confirmed that courts often do not make probable cause findings at detention hearings. “Yes, they make a probable cause finding, meaning they write down that they’ve found PC. But I don’t know what their basis is. Even at detention hearings.” One defender acknowledged that “a detention hearing is supposed to include a PC hearing, but we probably don’t do that very effectively.”

One prosecutor recognized that defenders should challenge probable cause: “It can’t be that I am just lucky and every kid charged is guilty.”

Several defense attorneys interviewed for the assessment were unfamiliar with the probable cause process or the importance of challenging it, and more than one was content to rely upon law enforcement’s determination of probable cause to take a child into custody. Asked to describe their experience challenging probable cause, one defender answered simply, “None.” Another defender explained that, “If police make an arrest, they file an affidavit for probable cause. They’ve sworn to it, so there’s not much you can do.”

As one assessment team member noted, “there seems to be a presumption, by some judges and even some defense attorneys, that if a police officer claims something happened a particular way, that’s infallible.”



Effective defense advocacy includes holding the state to its burden to establish probable cause in each case where detention is considered. Defenders must ensure there is a judicial finding of probable cause *before* the court begins its analysis of the statutory criteria to detain a young person. A young person’s right to liberty is jeopardized when defenders do not hold the system accountable at this stage.

2. Detention Advocacy

Stakeholders across counties consistently reported that if a youth is able to be released to their home, defenders will make that argument, and the court will often follow that recommendation. However, when a youth cannot be easily released to home, defender advocacy for alternative options falls short. One judge estimated that defenders argue for their clients’ release about 95 percent of the time, but “offer a reasonable plan along with their argument” only about 50 percent of the time.

Numerous stakeholders in the counties visited conveyed a lack of available community-based options as a significant obstacle to effective detention advocacy. This is likely true in many parts of a state as vast as Kansas. However, many stakeholders reported that defenders are unfamiliar with alternatives that do exist in their area and resort to relying on recommendations made by probation officers. A number of stakeholders stated that defenders do engage their clients in the effort to find alternatives to detention, but the effort stops there. A judge reported that defender advocacy for alternatives to detention “usually amounts to asking the client whether there is anywhere they can go.” Although client-directed advocacy is essential, defenders have an obligation to also counsel their clients based on their investigation of all available options.

Stakeholder interviews with judges, probation officers, and prosecutors characterized defender advocacy regarding detention as “very basic,” with defenders “making arguments without knowing the kids” and “not citing the statute.” Stakeholders across counties noted that defenders do not present the court with information about the negative impacts of detention or the risks youth face when detained, which are well-documented in studies and national reports.¹⁰¹

101 NAT’L JUVENILE DEFENDER CTR., THE HARMS OF JUVENILE DETENTION (2016), <https://njdc.info/wp-content/uploads/2016/10/The-Harms-of-Juvenile-Detention.pdf>.

Counter to their professional obligation to advocate for the expressed interest of their clients, a few defense attorneys expressed that they wished the law still allowed youth to be detained “for their own good,” or “when they really need it, such as a runaways,” and shared that their detention advocacy was related to their personal opinions of detention as “not necessarily a bad thing.”

Assessment team members who observed detention and detention review hearings described limited detention advocacy. A prominent theme among court observers was that while defenders did generally ask the court to release their detained clients, they failed to provide legal reasoning or alternative options other than the child’s home, and many appeared to know very little about their clients. In one hearing, observers noted that “the best idea to come out of the hearing came from the distraught child rather than the lawyers, the judge, or the probation officers.”

In a detention review hearing, the observer noted that “nothing was put on the record regarding why the child should remain in detention, except the charges against them.” In this case, the defense attorney agreed with the prosecutor that their client should remain in detention, and the court continued the youth’s detention. Several court observers noted that defense counsel “seemed to know little about the child’s particular circumstances.” More than one observer characterized the detention review hearings they observed as “very much like a formality . . . everyone knew the child was going to continue to be detained no matter what.”

Kansas has successfully ensured that youth are represented by counsel at all detention and detention review hearings, and recent statutory changes that revamped the detention process have greatly reduced the number of youth detained. But young people are not receiving the quality of representation necessary to fully realize their constitutional right to counsel at this critical stage of juvenile court proceedings.

Kansas juvenile courts should hold detention hearings on Saturdays, to ensure no young person is held in detention for more than 48 hours without judicial review, and ensure they are making an on-the-record probable cause determination at the outset of every initial detention hearing. Defense counsel must be fully informed about alternatives to detention for youth who are unable to be released to their home and must be knowledgeable about, and present to the court, the risks youth face when detained.

3. Youth Presence at Detention Hearings

Every person accused of a crime has a constitutional right to be present at their hearings.¹⁰² The use of video or other remote technology, particularly in detention hearings involving youth, can be fraught with challenges that affect youth behavior and comprehension and the attorney-client relationship.¹⁰³ A “great deal of information is exchanged by not only the spoken word, but also by personal contact and observations inherent in the personal interaction generated by a personal appearance, qualities missing when an event is perceived only through the limitations of the lens of a camera or television monitor.”¹⁰⁴

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

103 See AMEND. TO FLA. R. JUV. PROC. 8.100(A), 796 So. 2d 470, 473 (Fla. 2001) (limiting the use of videoconferencing during juvenile detention hearings).

104 *Id.*

Kansas law allows detention hearings to be conducted electronically “in lieu of personal presence of the juvenile or the juvenile’s attorney in the courtroom from any location within Kansas.”¹⁰⁵ When hearings are conducted electronically, the youth’s attorney may be with the youth in person or “may be personally present in court as long as a means of confidential communication between the juvenile and the juvenile’s attorney is available.”¹⁰⁶ The statute grants the judge discretion to do away with the youth’s right to be present, rather than recognizing it as a due process right that must be knowingly and voluntarily waived by the youth.¹⁰⁷

In at least two counties visited for this assessment, detention hearings were routinely held via videoconference, even though a detention facility was located in the same county and in close proximity to the courthouse. Stakeholder interviews in these counties reinforced the perception that videoconferencing is sometimes used not to overcome the vast distance between a juvenile court and the nearest detention facility or to meet the expressed interests of a youth, but for the convenience of juvenile court stakeholders.

While assessment team members were unable to observe video detention hearings during their visits, some defenders who were interviewed about the practice saw video hearings as a barrier to the effectiveness of their advocacy. One defender explained that if a detention hearing “is on TV, you know the judge isn’t going to let them out.” A defender in another county commented that they “hate” videoconferencing and feel that “people need to be in court to make sure there’s a fair shake in the process.” A judge in a third county admitted that the choice to use video for detention hearings was based on the prosecutor’s pre-hearing assessment of whether “the case is serious or release is unlikely” and that the decision was made when the case was docketed, potentially even before a defender was appointed.

In one county visited for this assessment, a young person’s constitutional right to be present at their hearing seemed to be entirely ignored or forgotten. In this county, the assessment team observed ten detention review hearings. Of those ten hearings, the child was present in the courtroom for only one. In the other nine, the youth was not present, either physically or via electronic means, and court observers reported that no one—not even the defense attorneys—made mention of the fact that the youth was not present. No waiver of the youth’s right to be present, either in person or virtually, was noted. This courthouse and the detention facility were in the same county, so time and distance were not likely to be factors in transporting youth to the courtroom. Regardless of the reason, decisions about youth liberty, at least in this county, appeared to be made without the youth at all.

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Kansas should reconsider its statute allowing for detention hearings to be held remotely via video, given the concerns it raises for the fairness of such proceedings. While this assessment found areas of defender advocacy lacking in live detention hearings, the chances of reduced advocacy are only amplified when hearings are remote. Kansas juvenile courts must ensure that young people are present at all detention hearings and use videoconference only when necessary, not simply convenient, and only with the consent of the youth.¹⁰⁸

105 KAN. STAT. ANN. §38-2343(h) (2018).

106 *Id.*

107 *Id.* (“All hearings conducted pursuant to this section may be conducted by two-way electronic audio-video communication between the juvenile and the judge in lieu of personal presence of the juvenile or the juvenile’s attorney in the courtroom from any location within Kansas in the *discretion of the court.*”) (emphasis added).

108 Assessment site visits were conducted prior to the COVID-19 pandemic and, although video hearing use has increased across the nation for health and safety reasons, video hearings remain less than optimal environments for ensuring youth rights are afforded during delinquency court proceedings.



D. Client Contact & Communication

The attorney-client relationship is fundamental to effective representation. Early and frequent contacts are important to enable the attorney to build rapport, confidence, and trust with the youth.¹⁰⁹ Early communication between youth and their attorney is also essential to obtaining key information for locating witnesses; preserving evidence; obtaining information necessary for potential motions; ascertaining the client's mental and physical health, including competence to stand trial or mental state at the time of the alleged offense; obtaining records and delinquency history; and gathering information regarding how the child was treated by investigating agencies, arresting officers, or facility staff.

Counsel for children must be aware of the unique characteristics of each client and take the time needed not only to learn about the child's strengths and vulnerabilities, but also to integrate those into the case strategy at every step in the representation.¹¹⁰ Regular contact with child clients is crucial to ensuring youth have information about and an understanding of the proceedings against them.¹¹¹ Counsel should use age-appropriate language with youth clients to ensure they are fully informed and proactive participants in their representation.¹¹²

Defense attorneys should thoroughly prepare youth for what to expect in advance of any hearing and review what happened during the hearing with clients afterward, providing them with ample time to ask questions and raise any concerns.¹¹³ Communication outside of the courtroom is essential to keeping youth informed about how their case is proceeding.¹¹⁴ Youth should have a safe and confidential environment and sufficient time in which to speak with their lawyer and digest the information discussed.¹¹⁵

Kansas has not adopted standards of representation specific to attorneys who represent youth in juvenile delinquency cases, but Kansas Supreme Court Rules define the ethical duty for lawyers' communications with clients. Lawyers must "provide[] a client with an informed understanding of the client's legal rights and obligations and explain[] their practical implications."¹¹⁶ "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information,"¹¹⁷ and "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."¹¹⁸ Lawyers must be timely in their communication with clients, as "unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."¹¹⁹ All of these obligations apply equally whether the attorney is retained by a paying client or court-appointed.¹²⁰

109 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 2.1.

110 *Id.* at Standard 2.1 cmt. See also INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, *supra* note 44, at Standards 1, 15.

111 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 2.4.

112 ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 20, at 23.

113 *Id.*

114 *Id.*

115 *Id.*

116 KAN. R. PROF. CONDUCT Preamble (2020).

117 KAN. R. PROF. CONDUCT 1.4(a) (2020).

118 *Id.* at 1.4(b) (2020).

119 *Id.* at 1.3 cmt. (2020).

120 *Id.* at 6.2 cmt. (2020) ("An appointed lawyer has the same obligations to the client as retained counsel...").

Stakeholder interviews conducted across the counties for this assessment revealed that many attorneys appointed to represent youth in delinquency proceedings are generally not meeting their professional responsibilities to communicate with their young clients, either early in the proceedings or throughout their court involvement. During court observations, assessment team members noted that defense attorneys appeared to meet with their clients briefly outside the courtroom just moments before hearings began.

With few exceptions, all types of stakeholders, including defenders, prosecutors, judges, and probation officers, reported that defense attorneys “do most of their work in the hallways of the courthouse.” Judges, court administrators, and probation officers reported receiving complaints from youth and families about this lack of communication and the practice of meeting with the defense attorneys just before going into a court hearing.

Defense attorneys “do most of their work in the hallways of the courthouse.”

Most defense attorneys explained that when they receive a notice of appointment from the court, they simply send a letter introducing themselves to the client and asking the client to contact them. Defenders reported that they rarely heard from youth prior to the next scheduled court hearing. One defender estimated that they heard from one in 15 youth; another reported that “95 percent don’t call and I wind up talking to them right before court.”

Defenders generally reported meeting with clients between five and 15 minutes prior to the first court hearing. One reported that in about one-third of their cases, they meet the day before a hearing. A probation officer reported that some defenders do not even meet with their clients outside the courtroom, but “just whisper to them at the podium in court.”

One defender noted that in their retained cases, they meet with clients “well before the first court appearance,” but in appointed cases, they have no meetings with the client “until at or after the first court appearance.” Defenders in several counties explained that they make no effort to contact appointed clients outside of sending an introductory letter, with one stating, “I’m not going to call and beg them to come in. If they don’t show up, I can use that time for a paying client.”

Judges, prosecutors, and probation officers reported that defenders’ abilities to communicate well with youth clients varies greatly. Some reported that the court-appointed attorneys they work with “invest a lot of time explaining the process to the kids.” But the vast majority reported significant deficiencies with how well-informed youth are about their cases, the court proceedings, and the consequences they face.

One judge reported that they sometimes stop court proceedings and say to the defender, “I don’t think your client knows what is happening.” Unfortunately, that same judge believed the “best we can hope for some is that they have seen enough TV to know what courts are.” Young people’s lack of understanding of the court process means, as one probation officer noted, “kids never feel like they’re a stakeholder here.”

While observing court hearings, assessment team members noted numerous youth who appeared to become confused by the court process and upset by results. At one hearing, the observer reported:

The child seemed to have no idea what was happening or how it was going to affect her. She looked lost the entire time. When she was asked simple questions by the judge, she just had a blank stare and looked confused. I don’t think she understood anything that was being discussed or what the ruling was.

Another youth was detained after a hearing on a probation violation, and the observer noted, “He’s taken away in cuffs clearly still confused about what happened.”

Probation officers, who often have the most contact with youth throughout their involvement in the juvenile court process in Kansas, consistently reported that youth attend probation meetings without understanding what happened in court. A probation officer in one county reported being particularly concerned about defender-client communication when two youth had appeared in court without knowing they were going to be sent to a facility that day, despite the fact that their attorneys knew in advance. A probation officer in a different county described youth reporting to probation without understanding they had pled to a sex offense that required them to register.

One probation officer recognized the need for defenders to communicate with their clients in youth-specific language: “Those big beautiful words you use with adults, you can’t use with kids.”

Defenders consistently reported that they were able to communicate with clients who were detained, and that detention facility staff understood the need for communication between young people and their lawyers and facilitated phone calls and in-person meetings. Whether defenders actually maintained good communication with detained youth, however, appeared to vary.

Detention facility staff interviewed for this assessment reported mixed experiences: some reported that defenders regularly called and/or visited their detained clients, while others said they “don’t see attorneys around here very often.” Defenders did identify two obstacles that may be hampering their communication with detained clients: detention facilities’ practice of recording phone calls and the time it takes to travel to some detention facilities.

While defenders reported some continuing challenges to maintaining ongoing communication with non-detained clients, such as the young person’s inability to secure transportation to meet at the attorney’s office, attempts at communication were reportedly more successful after the defender and youth met in person at the courthouse. Defenders reported communicating with youth using the youth’s or parent’s cell phone number, either by call or text, or via email.

Reforming the process of appointing counsel in relation to a youth’s first appearance hearing, as discussed in the Timing of Appointment of Counsel section above, could alleviate some of these communication shortcomings. If Kansas courts were to ensure that appointed counsel were available prior to a youth’s actual first appearance hearing, the attorney and youth would have an opportunity to meet in person at the beginning of the juvenile court process. Until appointment processes are reformed, courts should collect additional contact information, such as cell phone numbers and email addresses, from youth and parents and provide them to defense attorneys with their appointment paperwork.

Detention facilities, the state, and counties must act immediately to ensure the availability of a confidential line of communication between youth and their attorneys.

Representing young people requires specialized skills and training on effective youth communication. Cognitively, youth do not process information or make decisions in the same ways as adults, some youth may have learning or communication differences, and interviewing techniques for youth are often quite different than for adults. It is incumbent upon defense attorneys to learn how issues of development or disabilities affect the ways in which they communicate with clients and to take the time necessary to do so. The fact that a client is a young person does not relieve defenders of their ethical mandates to help clients understand the process and make informed decisions. Defenders have a responsibility to develop effective strategies for communicating with their young clients long before they first meet them outside the courtroom door.

Juvenile court systems have a responsibility throughout Kansas to provide defenders with opportunities for training on issues of development and on techniques to communicate effectively with youth. Effective and ongoing attorney-client communication is necessary to ensure youth are able to meaningfully participate in their defense.

E. Case Preparation

Recognizing that a delinquency proceeding for a child can be “comparable in seriousness to a felony prosecution,” the U.S. Supreme Court explained: “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”¹²¹

In all delinquency cases, information about evidence, witnesses, and defenses is necessary to aid the client in the decision whether to plead guilty or go to trial. It is the lawyer’s duty to conduct prompt investigation and to “[e]xplore all avenues leading to facts concerning responsibility for the acts or conditions alleged. . . .”¹²² “The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities,” and the “duty to investigate exists regardless of client’s admissions. . . .”¹²³

Thorough investigation is invaluable. In addition to aiding in the client’s decision to enter an admission, accept a plea deal, or go to trial, information discovered through investigation can persuade the government to drop the case altogether or dismiss certain charges. Without investigating the case or pursuing all available discovery from the government, defenders are unable to effectively advise clients about plea offers or taking the case to trial.

“A case should not go to trial . . . without a prosecutor and counsel for the youth who are qualified and who have exercised due diligence in preparing for the proceeding.”¹²⁴ Prior to trial, counsel must have “investigated all circumstances of the allegations,” “sought discovery,” “requested appointment of an investigator or expert witness . . . [as] necessary to protect the youth’s rights,” and “informed the youth of the nature of the proceedings, the youth’s rights, and the consequences if the youth is adjudicated.”¹²⁵ “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”¹²⁶

Stakeholder interviews conducted for this assessment revealed that, while open discovery practices ease the flow of case information between county attorneys and defense counsel, defenders rarely engage in meaningful case preparation activities, conduct outside investigation, or seek to hire experts who could assist in their young clients’ cases.

121 *In re Gault*, 387 U.S. 1, 36 (1967).

122 INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, *supra* note 44, at Standard 3.1(b).

123 *Id.*

124 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 62, at Ch. VI, 4.

125 *Id.*

126 KAN. R. PROF. CONDUCT 1.1 cmt. (2020).

1. Discovery

Although the juvenile code does not include a statute governing discovery, Kansas caselaw suggests that in juvenile offender proceedings, “[d]iscovery should be the norm, and an arbitrary refusal to require the prosecution to disclose material information, without reason, is an abuse of discretion.”¹²⁷ Any motion available under civil and criminal procedure may be made in juvenile delinquency cases, orally or in writing,¹²⁸ including motions to compel discovery if a party feels they have been unjustly denied access to discoverable material.

The prosecutor’s obligations of disclosure, particularly with respect to exculpatory evidence, are not limited to what is in an individual prosecutor’s files. Disclosure obligations are imputed to the state, including law enforcement who investigate the matter, and prosecutors have an obligation to seek out and turn over evidence that must be disclosed.¹²⁹

In the counties visited for this assessment, stakeholders consistently reported that the county prosecutors or district attorneys practiced open-file discovery; easily, readily, and timely providing all relevant information in their possession to defense counsel, either automatically or upon request.

One shortcoming of the discovery process noted in stakeholder interviews across several counties was a lack of timely access to records in the possession of law enforcement. One defender explained that law enforcement photographs were not included in the county’s electronic discovery system. A defender in another county reported that only some law enforcement agencies used the county’s new electronic system, while others did not. And a defender in a third county reported significant delays in receiving transcripts of law enforcement interviews.

Defenders must litigate their clients’ rights to discoverable materials when they encounter undue delays or other obstacles.

While such issues were reported by defenders, there was little mention of litigating these delays or missing evidence. Rather than defenders using the legal process to push for their clients’ rights to timely discoverable information, there was a sense of acceptance that nothing could be done to fix these issues.

The discovery process in the Kansas juvenile court system seemed to move smoothly. To address the remaining obstacles to efficient discovery practices, the state should look to improve the methods by which law enforcement shares discoverable materials with county attorney offices and defense counsel. And defenders must litigate their clients’ rights to discoverable materials when they encounter undue delays or other obstacles.

127 *In re J.T.M & M.N.M*, 922 P.2d 1103, 1108 (Kan. 1996) (citing previous Kansas precedent, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972)).

128 KAN. STAT. ANN. §38-2328(b) (2006).

129 *Kyles v. Whitely*, 514 U.S. 419, 437 (1995) (finding “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”).

2. Investigation

While the rules of discovery govern what the state must disclose to the defense, there is much more to understanding the full picture of a case beyond what the police or prosecution may be required to provide. Defense attorneys have an independent obligation to conduct their own investigation into every case.¹³⁰

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.¹³¹

Early and thorough investigation is necessary to carefully test the charges brought against the child client and to provide sound advice.¹³² At least one state supreme court has found that failure to conduct investigation in a juvenile case can constitute ineffective assistance of counsel, even when the case is headed to a plea, rather than a trial.¹³³

During interviews, the vast majority of defenders reported that they had “never” used investigators in the past year. Several judges recognized the negative impact this has on delinquency cases, noting there is “always a failure to conduct investigation” and often “a failure to get the right witness when there is a trial set.”

Defenders may not be requesting investigators because they do not recognize the significant impact juvenile court involvement can have on a young person's life and future. One defender opined, “JO [juvenile offender] cases are so inconsequential lately.”

In several interviews, defenders explained how they thoroughly review “the evidence” with their clients before making plea decisions but described that they did not conduct independent investigation. Rather, they based plea negotiations and advice to their clients only on police reports and, occasionally, other discovery. One defender characterized reviewing discovery materials with their client as their “independent investigation” of the case rather than as the starting point of their investigation.

Some defenders may be responding to political pressure to not ask for additional money. One prosecutor explained: “Jury trials and investigation cost money for the county, and the county notices defenders who start to spend lots of money or raise a stink with regard to investigating cases. Their names go off of the appointment list if they spend too much money or cause problems.”

Juvenile defenders must receive adequate compensation, support, and training to thoroughly prepare juvenile delinquency cases and strengthen their case-preparation practices. All juvenile court stakeholders, including county officials, must ensure youth do not face additional consequences and defense counsel do not risk their livelihoods when seeking to fully exercise their clients' rights.

130 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standards 4.1-4.4

131 ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standards 4-4.1 (American Bar Association, 3d ed.1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE].

132 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 4.1, cmt. (citing ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 131, at Standards 4-4.1; ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 20, at 14-15).

133 State v. A.N.J., 225 P.3d 956 (Wash. 2010).

3. Motions Practice

A crucial part of case preparation is filing appropriate motions. This can include a vast range of motions, such as challenges to pretrial detention or conditions of pretrial release, challenges to the sufficiency of the petition, discovery motions, motions to suppress evidence, competency challenges, and numerous others.¹³⁴ Motions are integral to zealous advocacy and protecting a client's rights.

During interviews, a significant majority of defenders responded that they only sometimes filed pre-trial motions, and a handful reported that they never filed pre-trial motions. Judges and prosecutors across the sites made clear that regular motions practice was uncommon in juvenile delinquency proceedings.

Even though the frequency of filing motions was limited, most defenders reported that there were no obstacles that prevented them from filing motions. However, some defenders could be responding to pressure to not file pre-trial motions. One defender interviewed reported that “the judge expects you to work it out,” and another that “once a pre-trial motion is filed, the plea deal goes away.”

Prosecutors and judges both noted that they see the same defense attorneys file pre-trial motions in adult criminal cases, but “they just don’t do it for the kids.” One judge noted that “retained counsel is more likely to file a pre-trial motion,” once again raising concerns about the ethical responsibility defense attorneys have to treat retained and appointed clients equally.

“Once a pre-trial motion is filed, the plea deal goes away.”

A robust motions practice is a key indicator of an effective juvenile defense practice. Motions provide defenders with an opportunity to ensure that due process is afforded to all youth facing delinquency allegations, and Kansas defenders must be provided sufficient compensation, training, and support to meet their obligations and file written pretrial motions as appropriate in every case.

4. Experts

Zealous and effective juvenile defense advocacy requires that attorneys consider, and where appropriate seek out, experts and other professionals necessary for trial preparation, evaluation of clients, and testing of physical evidence.¹³⁵ Defending young people requires insight into a host of specialized areas of expertise, such as the science of child and adolescent development, special education, language and contextual comprehension, adolescent mental health and emotional status, and youth-related competency, to name just a few. Experts in these areas can be useful in motions practice, in litigating facts or issues at trial, and as mitigation at disposition or to help with developing targeted and appropriate disposition plans.

During interviews across assessment counties, the vast majority of defenders reported they rarely, if ever, used an expert. In several of the counties visited, no stakeholder was able to explain the process for requesting and paying for an expert. In fact, judges from several jurisdictions stated that they had never seen a defender call an expert as long as they had sat on the juvenile court bench. One judge noted that hearing from a defense expert “would be helpful for dispositions.” A prosecutor offered a similar take, wishing more defenders would offer expert information about their young clients to allow the court to better determine appropriate dispositions.

134 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 4.7 (citing Standard 4.8 cmt.).

135 *Id.* at Standard 4.7.

Defenders consistently expressed a belief, counter to their duty to investigate all available defenses, that experts are not necessary except in the most serious cases: “I am not gearing up for trial, so I don’t need experts.” “The only cases where you need an expert are serious cases like rape or murder.” One defender reported they had never “seen the need” to call an expert, and another that they believed experts were only necessary in cases where a young person may be transferred to adult court.

Cases involving youth are often more complex than the individual charge may suggest. Given how developmental science, disability, and competency can affect everything—from detention, to *mens rea*, to mitigation, to identifying the most effective disposition plan—experts are vital to help both defense attorneys and the courts understand the full context of a young person within the case. The entire juvenile court system in Kansas would be improved through greater access to and use of experts.

Defenders’ insufficient case preparation was apparent in court hearings observed for this assessment. Court observers regularly noted that defense attorneys appeared unprepared and provided little in-court advocacy. In one court hearing, the observer noted that the “judge asked if [the defender] looked through discovery, defense shook [their] head no.” An observer in another county noted: “Defender did not present an argument with any legal substance.” In multiple hearings across counties, assessment team members reported that defenders said nothing of substance or, in more than one hearing, literally nothing at all. “Nothing from the defense.” “There was no argument from defense counsel.”

In Kansas, the rules of evidence in juvenile court are governed by the civil rules of procedure.¹³⁶ The quasi-civil, quasi-criminal nature of juvenile delinquency cases, however, is not sufficiently captured by civil rules alone. Juvenile delinquency rules of procedure could provide needed clarity around procedures for pre-trial motions and requesting, using, and paying for experts and investigators. The Kansas Supreme Court should consider adopting rules of procedure specific to juvenile delinquency cases, because without full and thorough case preparation, young people in Kansas are being denied their constitutional right to due process of the law.

F. Adjudication & Plea Hearings

A juvenile defender must zealously advocate for the expressed interests of their client.¹³⁷ While other actors in the juvenile court system have a responsibility to pursue the “best interests” of the child, the juvenile defense attorney is the sole actor whose job is to advocate for the child’s perspective. If a child’s attorney does not abide by their obligation to provide expressed-interest advocacy, the youth is deprived of their fundamental right to counsel.¹³⁸ This role of the juvenile defender as an expressed-interest advocate is in line with the constitutional mandate for a child’s right to an attorney as set forth in *In re Gault*,¹³⁹ as well as national best practices.¹⁴⁰

136 KAN. STAT. ANN. §38-2354 (2012).

137 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 1.2.

138 See Dep’t of Justice Statement of Interest in N.P., *supra* note 4. See also Press Release, U.S. Dep’t of Justice, Department of Justice Statement of Interest Supports Meaningful Right to Counsel in Juvenile Prosecutions (Mar. 13, 2015) (<https://www.justice.gov/opa/pr/department-justice-statement-interest-supports-meaningful-right-counsel-juvenile-prosecutions>); *Anders v. California*, 386 U.S. 738 (1967).

139 *In re Gault*, 387 U.S. 1, 36 (1967).

140 See generally ABA MODEL RULES OF PROF. CONDUCT, *supra* note 13, at r. 1.2, 1.3, 1.4, 1.8, 1.14. “Expressed-interest” (also called “stated interest”) representation requires that counsel assert the client’s voice in juvenile proceedings.



Defense counsel must work with their clients to understand their goals and expectations prior to engaging in plea discussions and must convey any offers made by the prosecution, just as in an adult case.¹⁴¹ Although an attorney’s job is to advise and counsel, the ultimate decision must be the client’s as to whether to accept a plea offer or proceed to trial, and that choice must be respected.¹⁴²

Unless a youth has been approved to enter into an immediate intervention program, Kansas law requires the youth to enter a plea of guilty, *nolo contendere*, or not guilty at the first appearance hearing, if the young person has had “an opportunity to confer with the [youth’s] attorney.”¹⁴³ Kansas law expressly allows youth to enter pleas of *nolo contendere*, or no-contest pleas, in which the youth does not contest the charge against them but also does not acknowledge guilt.¹⁴⁴

Juvenile court hearings in Kansas are open to the public, unless a judge determines that an open hearing “is not in the best interests of the victim or of any juvenile who at the time of the alleged offense was less than 16 years of age.”¹⁴⁵ The rules of evidence within the code of civil procedure apply in all juvenile court hearings,¹⁴⁶ and the state must prove the acts charged beyond a reasonable doubt.¹⁴⁷

In stakeholder interviews and court observations, assessment team members found few instances of constitutionally sound, zealous, expressed-interest juvenile defense advocacy. Defenders were found to be more likely to engage in proactive representation in cases they considered higher stakes, such as when a young person faced transfer to the adult system.

141 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 4.9; KAN. R. PROF. CONDUCT 1.2 (2020).

142 *Id.*

143 KAN. STAT. ANN. §38-2344(a) (2017); KAN. STAT. ANN. §38-2344(b) (2017).

144 KAN. STAT. ANN. §38-2345 (2006).

145 KAN. STAT. ANN. §38-2353(a) (2006).

146 KAN. STAT. ANN. §38-2354 (2012).

147 KAN. STAT. ANN. §38-2355 (2011).

1. Pleas

Advising young clients on the merits of going to trial versus accepting a plea offer can be one of the most challenging aspects of juvenile practice. In keeping with expressed-interest representation, defense attorneys must counsel clients with an objective assessment of the case and without exercising undue influence on the client's decision.¹⁴⁸

As in juvenile and criminal court systems across the country, the vast majority of juvenile delinquency cases in Kansas are resolved via plea deal, rather than trial. Stakeholders interviewed across counties for this assessment estimated that between 95 and 100 percent of delinquency cases end with a plea. Statistics from the Kansas Supreme Court confirm these perceptions. In the most recent year for which statistics are available, out of the 6,708 delinquency cases filed, 2,864 were resolved via plea or stipulation, while only 46 were adjudicated by trial.¹⁴⁹

Thirty-four of the approximately 120 court hearings assessment team members observed were adjudicatory hearings in which the youth entered into a plea deal. With only a few exceptions, observers found defender advocacy to be constitutionally deficient.

In several plea hearings, it appeared to court observers that there had been little or no communication between the defender and their client before the hearing. One assessment team member noted, "The attorney relayed the plea offer to their client at counsel table in court. Their discussion was loud enough for everyone to hear." Another remarked, "The defense attorney did not seem well prepared. They seemed to have gathered all of the information about the client when the client entered the courtroom."

Twice, assessment teams observed hearings at which defense counsel told the court prior to the hearing that they did not know whether their client would appear at the hearing because they had had no contact with them. Both times, the youth did appear and both times, the defender did not request time to consult with their client. Assessment team members "observed zero interaction between the client and attorney during the hearing. The kid came in the court and the parties just started talking about the case and the plea. The youth just stood there while they talked."

Several defenders appeared to be unprepared for hearings. One observer noted: "Defender seemed quite frazzled and fumbled through reciting the plea agreement."

Court observations also revealed significant shortcomings in courts' plea colloquies, explanations of rights, and findings that youth were knowingly, intelligently, and voluntarily waiving their trial rights prior to accepting pleas. In several hearings across counties, judges were observed reading aloud plea colloquies without attempting to simplify the language or ensuring the young person understood.

In several courtrooms, judges were observed simply accepting signed forms waiving trial rights without any formal due process. "There were no factual findings of any kind, from any person, as to whether this kid understood anything. No one asked the youth questions to determine whether they understood anything that was going on in that room. The judge relied upon the attorney handing in a signed form."

148 *Id.*

149 ANNUAL REPORT OF THE COURTS OF KANSAS: *Fiscal Year 2019* (2019), <https://www.kscourts.org/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/19-T-OF-C-for-web.pdf>; SUMMARY OF JUVENILE CARE OF CHILDREN AND JUVENILE OFFENDER CASELOAD FOR THE STATE (2019), <https://www.kscourts.org/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-JuvenCarOffender.pdf>.

An observer of another hearing noted:

Waiver of rights was terrible. The defense attorney handed in the waiver form. The judge asked if the attorney went over it with his client and then had the kid raise his right hand and swear that he had gone over it with his attorney. That was it. There was no going through the rights the youth was waiving by not having a trial. It was definitely not clear whether the youth understood what was going on.

More than one assessment team member characterized the adjudicatory hearings they observed as “case processing systems.” Several team members noted rampant *ex parte* communication and defenders willing to go along with a court’s perceived best-interest analysis of the youth, rather than advocating for the young person’s expressed interests.

Stakeholder interviews across sites were consistent with court observations, describing a defense bar that does not see the importance of juvenile defense, enters into plea negotiations after reviewing only the discovery provided, and exerts minimal effort to learn or advocate for their clients’ interests, to ensure their clients understand the process and consequences, and to allow their clients to be active participants in their own cases. A number of stakeholders noted that perhaps the most consistent form of client-centered “advocacy” was defenders’ recognition that youth should enter no-contest pleas rather than guilty pleas whenever possible.

One defender interviewed explained that before they would allow a youth to plea, they and their client “would have talked about the case, considered any need for additional investigation, discussed inconsistencies in evidence, ramifications of life after conviction, and possible sentencing,” but then acknowledged that really, they would only discuss “as much as you can in five minutes” because this all generally happens at arraignment, with negotiations happening “on the fly.” The defender went on to say that after these brief discussions, they go into court with their client, the court conducts a formal arraignment, they often proceed to a plea, and then nearly always proceed directly to disposition.

Many of the juvenile defenders interviewed discounted or were unaware of the impacts a delinquency adjudication can have on a youth’s life. One defender explained that the juvenile court system in Kansas “isn’t set up” for trials or adversarial proceedings “because your record stays clean anyway, no long-term consequences.” This defender, and many others, seemed to be unfamiliar with the numerous ways juvenile court involvement can harm young people’s education, family, housing, and employment options. In Kansas, nearly all juvenile court and arrest records are open to the public,¹⁵⁰ and many juvenile adjudications are considered in adult criminal sentencing¹⁵¹ and can adversely affect a young person’s right to carry a gun when they come of age¹⁵² or their ability to get or maintain a driver’s license.¹⁵³

Many defenders seemed to be unfamiliar with the numerous ways juvenile court involvement can harm young people’s education, family, housing, and employment options.

150 KAN. STAT. ANN. §38-2309 (2015); KAN. STAT. ANN. §38-2310 (2016).

151 KAN. STAT. ANN. §21-6810 (2017).

152 KAN. STAT. ANN. §21-6304(a) (2014); KAN. STAT. ANN. §21-6304(b) (2014).

153 KAN. STAT. ANN. §38-2361(c)(1) (2017).

According to one probation officer, some youth were advised by their attorneys to plead guilty to registerable sex offenses but were not informed about registration requirements or other collateral consequences of their plea. This same probation officer noted that the young people they work with are never advised about how pleas in juvenile court can affect their cases if they are ever arrested as adults.

One prosecutor noted that they believe no child “understands the collateral consequences” attached to delinquency adjudications. A prosecutor in a different county, however, shared that juvenile defenders in their county negotiated pleas with an eye toward collateral consequences: “Many attorneys won’t let youth plea to something that will hurt them long-term, with school and financial aid.”

Assessment team members did encounter a few attorneys who described following best practices and national standards in plea advocacy. One defender reported that it was common for clients to say they wanted to plead guilty at the initial hearing, but explained that they would counsel clients on the importance of investigation and that youth would usually agree to schedule the hearing for a later date. This enabled the defender to conduct independent investigation, review the evidence, and have a much fuller conversation with the client about the charges, penalties, and collateral consequences of their juvenile court involvement.

Judges and prosecutors interviewed in several sites expressed concerns about the quality of plea colloquies and how much youth understand what happens in court. One prosecutor said the plea form “is never tailored toward the child.” In that county, the judge does not conduct a plea colloquy with youth: “The judge asks if the kid has read the form and then accepts the plea. The judge is not meticulous with the plea form. There is no factual basis on the record.”

Probation officers interviewed across counties for this assessment reported nearly universally that when they first meet young people after adjudication, youth have very little understanding of what happened in court, what they pled to, or what their responsibilities are. One probation officer explained, “Kids are made to feel like they have no option and they just take a plea because they don’t think it matters.” Another commented that it seemed like defense attorneys “just make a plea agreement and tell the kid to take it.” A third probation officer explained that defense attorneys in their court “very rarely meet with clients, even call them, or discuss the case with them or anything. Attorneys here will negotiate with the county attorney and tell the kid, ‘this is a great deal, go ahead and sign it.’”

With the large number of juvenile cases that end in an admission or guilty plea, it is essential for defenders to have the time, resources, and training to assist youth in understanding the charges against them, what they are admitting to, the results of an admission, and the lasting harm of a juvenile adjudication. The defender advocacy and counseling around pleas observed and described during this assessment were often truncated or nonexistent. Very few non-defender stakeholders interviewed for this assessment expressed a belief that youth were being afforded the constitutional guarantees of due process in plea proceedings.

2. Trials

If a client chooses to proceed to trial, the attorney must engage in the full range of trial practice, including filing appropriate motions,¹⁵⁴ preparing witness testimony,¹⁵⁵ making appropriate motions and objections during the course of the trial,¹⁵⁶ cross-examining government witnesses, and presenting defense witnesses and other evidence necessary for an adequate defense.¹⁵⁷

154 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 4.7.

155 *Id.* at Standard 5.2.

156 *Id.* at Standards 5.3, 5.6, 5.8.

157 *Id.* at Standards 5.5, 5.6, 5.8, 5.9.

Kansas law provides youth with a right to a jury trial in juvenile court.¹⁵⁸ The request for jury trial must be made in writing to the court within 30 days of the youth's entry of a not-guilty plea.¹⁵⁹ Juries for felony cases consist of 12 members; juries for misdemeanor cases consist of six.¹⁶⁰ If a youth does not request a jury trial, trials of delinquency cases are heard by a judge.¹⁶¹ In both jury and bench trials, adjudications on lesser-included charges are allowed.¹⁶²

Both judges and prosecutors interviewed for this assessment commented on how few juvenile delinquency cases go to trial and expressed beliefs that youth would see better outcomes if more cases were taken to trial. One prosecutor said, "I am surprised that defenders don't ask for more jury trials. Jury trials in juvenile matters are very hard for the state to win." A judge said they had "presided over six trials and reached six not guilty verdicts" during their two years on the bench.

A court administrator expressed concern that the structure of the county's contract with defense attorneys offered financial incentive to resolve cases quickly, not conduct independent investigation, and not take cases to trial. In that county and at least one other, the contract provides defenders a flat rate, paid in monthly allotments, to provide defense services, regardless of how much time they spend on each case. Because of this, according to the court administrator, "The attorneys see it as a loser from a business standpoint and encourage their clients not to pursue [their right to a trial]."

In some counties, juvenile court appeared to be used as a training ground for defense attorneys who want to work in adult criminal court. One judge felt that defenders in their courtroom have "good trial strategy, but poor mechanics," having "significant trouble getting in evidence that should be easily admissible." A prosecutor noted that "some attorneys lack experience and they get it here in juvenile court."

In stakeholder interviews, a few judges and prosecutors in various counties were complimentary of some individual defender advocacy, calling some defenders "good trial lawyers" and "very proficient." One prosecutor offered that they "see attorneys who are listening to their clients and doing what the client wants."

Unfortunately, these opinions of strong juvenile defense practice were not evident in the majority of sites across the state. Stakeholder interviews and court observations of adjudicatory hearings predominantly revealed a troubling lack of advocacy from juvenile defenders and provided further evidence that defenders are rarely investigating cases beyond the information provided in discovery, negotiating based only on the state's evidence, and offering plea deals to clients, often during a minutes-long time span in the first appearance or arraignment stage of the proceeding. In court observations, youth did not often appear to be active participants in their own cases, often did not seem to understand what was happening in the courtroom, and were adjudicated delinquent by courts that did not sufficiently ensure they understood their rights or the consequences of their plea or adjudication.

Defenders are rarely investigating cases beyond the information provided in discovery, negotiating based only on the state's evidence, and offering plea deals to clients, often during a minutes-long time span in the first appearance or arraignment stage of the proceeding.

158 KAN. STAT. ANN. § 38-2357(a) (2011).

159 *Id.*

160 KAN. STAT. ANN. §38-2357(a)(1)(A) (2011), KAN. STAT. ANN. §38-2357 (B) (2011).

161 KAN. STAT. ANN. §38-2357(a) (2011).

162 KAN. STAT. ANN. §38-2357(d)(1)(B) (2011); KAN. STAT. ANN. §38-2356(b) (2014).

One assessment team member, who has decades of experience as a juvenile defender, summarized their observations of hearings in one Kansas juvenile court:

Insufficient, unconstitutional, ineffective assistance of counsel. Cannot describe this as a court of record which comports with any notion of due process. This is a case-processing system replete with stakeholders that are all doing what they think is in the best interest of children with no regard for the child's interests or rights.

Kansas youth have a right to participate in their defense and to experience juvenile courts that comport with due process. Plea colloquies and youth waiver of rights must be conducted in open court, on the record, and with findings that the youth understands their rights and the consequences of their plea.

Kansas juvenile defenders must receive training on a wide range of critical issues, including the long-term impacts a delinquency adjudication can have on youth, the importance of conducting an independent investigation of each client's case, communicating with youth, and trial strategy and practices.

In far too many hearings observed for this assessment, juvenile defenders in Kansas were observed providing representation to their youth clients that fell short of ethical standards and national measures of quality. Kansas must adequately compensate juvenile defenders and provide them with the training and resources they need to become competent, effective, zealous advocates, and defenders must dedicate themselves to providing the level of advocacy youth deserve and the Constitution requires.

G. Disposition

Dispositional advocacy must be based on thorough and effective planning with youth clients and, as much as possible within the contours of the attorney-client relationship, with the client's family. Although client goals may be quite different from other stakeholder recommendations, the "role of counsel at disposition is essentially the same as at earlier stages of the proceedings: to advocate, within the bounds of the law, the best outcome available under the circumstances according to the client's view of the matter."¹⁶³

Disposition planning should begin at the first meeting between defender and client. Good disposition planning can result in client-driven outcomes, stronger advocacy, and better-informed plea negotiations. The attorney should also be aware of all of the possible disposition options and identify the least restrictive options to discuss with the child.¹⁶⁴ To do this satisfactorily, the attorney must be familiar with the client's history, current goals and options, available programs, alternatives to placement, and the collateral consequences of adjudication.¹⁶⁵ Counsel should discuss and explain disposition procedures, as well as any probation or commitment plans proposed by the prosecutor or probation officer to the child.¹⁶⁶

At the time of disposition, the attorney must advocate for the client's wishes, challenging any recommendations submitted to the court that are adverse to the client's stated interests.¹⁶⁷ After the hearing, the attorney must also explain the disposition order to the client, clarifying and emphasizing the court's instructions under that order, and informing the client of the potential consequences of not following the order.¹⁶⁸ The attorney must also advise the youth of the right to appeal a disposition.¹⁶⁹

¹⁶³ INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, *supra* note 44, at Standard 9.3(a) cmt.

¹⁶⁴ NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standards 6.2–6.5.

¹⁶⁵ *Id.* at Standard 6.2.

¹⁶⁶ *Id.* at Standard 6.3.

¹⁶⁷ *Id.* at Standards 6.5, 6.7.

¹⁶⁸ *Id.* at Standard 6.8.; KAN. R. PROF. CONDUCT 2.1 (2020).

¹⁶⁹ NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 7.2.

In Kansas, a court may order one or more evaluations, reports, and assessments of youth after the youth has been adjudicated and before they are sentenced.¹⁷⁰ In addition, the Office of Judicial Administration and the Department of Corrections have adopted a uniform risk and needs assessment to be used in all judicial districts “to inform supervision levels.”¹⁷¹ The court must make any of these reports available to the defense and prosecution and allow “a reasonable time to review the report before . . . sentencing.”¹⁷² If requested by one of the parties, the court “shall hear additional evidence as to proposals for reasonable and appropriate sentencing of the case.”¹⁷³

Kansas law provides juvenile judges with a wide range of sentencing options, from probation and community-based programming to residential facilities and incarceration at a state facility.¹⁷⁴ Some sentencing options are limited by the youth’s score on the state’s uniform risk and needs assessment, the Youth Level of Service/Case Management Inventory 2.0, often referred to as the YLS.¹⁷⁵ A court may commit a youth to a state juvenile correctional facility only if the court finds that the youth “poses a significant risk of harm to another or damage to property” or that “a firearm was used in the commission of an offense.”¹⁷⁶

The vast majority of stakeholders interviewed across the counties said that defenders do not regularly challenge the dispositional plan recommended by probation or the county attorney. Only a handful of stakeholders in a few of the counties said they see defenders regularly offering client-driven disposition plans. Several stakeholders interviewed pointed to a lack of alternatives as a factor that ties the hands of defenders who may want to argue for alternative placements for their clients.

Some defenders noted that they do not receive the YLS findings in advance of the disposition hearing, as required by law. Several defenders and judges explained that they only receive a cursory summary and a final YLS score, making it all but impossible to determine whether the tool was administered or evaluated correctly. However, none of the defenders interviewed for this assessment discussed challenging these shortcomings with the YLS process and no other stakeholders provided examples of such advocacy.

Numerous defenders and other stakeholders expressed a belief that the YLS tool and statutory sentencing matrix left no room for defenders to argue for dispositional alternatives. Assessment team members in at least one jurisdiction noted, through both court observations and interviews, that the court always ordered the maximum timeframe for probation available under the statute. Defenders in that jurisdiction said that they were disinclined to argue for or offer specific reasons why a given client should be subject to less time on probation, although they understood the court technically has the discretion to order less time, because they said their court would not consider ordering less time.

One assessment team member noted: “There was a perception that the statute created a formula that locked everyone in and prevented them from making independent judgments about the disposition options within those statutory limits.” While the statutory guidelines for disposition timeframes and commitment thresholds place structural limits on what can be ordered, there is wide discretion available to the court within those limits.

170 KAN. STAT. ANN. §38-2360(a) (2018).

171 KAN. STAT. ANN. §38-2360(b) (2018).

172 KAN. STAT. ANN. §38-2360(d) (2018).

173 KAN. STAT. ANN. §38-2360(e) (2018).

174 KAN. STAT. ANN. §38-2360(a) (2018).

175 It is important to note that the YLS is considered a comprehensive risk-assessment tool and is different from the brief risk assessment used for pre-adjudication detention considerations.

176 KAN. STAT. ANN. §38-2361(a)(12) (2017); KAN. STAT. ANN. §38-2361(a)(13) (2017).

Assessment team members observed ten scheduled disposition hearings and several other hearings captioned as first appearances, plea hearings, or other types of hearings that ultimately ended in the court issuing a disposition order. With only one exception, observers found defender advocacy to be minimal, at best.

In several hearings across multiple counties, defense counsel was observed speaking up only to concur with or confirm their lack of objection to the YLS score, or to tell the court they needed time to review the YLS with their client. Court observers noted that during these hearings, the defenders were not seen advocating for what their client wanted or offering the court any dispositional alternatives. And when youth were placed on probation, no defender was observed challenging any conditions of probation or offering client-driven alternatives that could address the court's concerns in less restrictive ways.

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In a disposition hearing where a youth was facing sentencing to state custody, the defender asked the court for a minimum term of commitment, stating simply that the youth "has been dealt a bad hand from the beginning." In contrast, the prosecutor asked for an alternative disposition and offered the court details about the youth's life, including that the 15-year-old's mother had relinquished custody, the youth had been through 14 placements, and they had recently been diagnosed with serious mental health issues.

In only one of the disposition hearings observed by assessment team members did it appear the defense attorney had prepared their client for the hearing and discussed the recommendations and disposition plan with their client. This defender was able to update the court on the youth's progress in treatment, the attorney and youth appeared to have a comfortable working relationship, and the youth made reference to talking with their attorney prior to the dispositional hearing.

The sentencing law's reliance upon a youth's risk score does not relieve defenders of their responsibility to provide the court with mitigating evidence, alternative disposition options, and the youth's expressed interests during a disposition hearing. As one assessment team member noted, "Everyone seems to think that because the law places restrictions on disposition outcomes, there aren't arguments to be made. This is a deep misunderstanding of the role of counsel."

Defenders should be trained on general dispositional advocacy, including challenging conditions of probation that are not youth- or case-specific, and on developing and presenting mitigating evidence for the court to consider in sentencing. Defenders also must receive training on the YLS risk assessment instrument and when and how it should be used in their advocacy. Kansas juvenile courts must ensure defenders receive YLS reports with sufficient time to allow them to review the report and prepare for the hearing.

Improving defender advocacy and ensuring young people's voices are heard at disposition hearings will increase the effectiveness of dispositions ordered by the juvenile court, as youth "who experience respectful and fair legal decision-making procedures are more likely to believe in the legitimacy of the law."¹⁷⁷

177 Erika K. Penner et al., *Procedural justice versus risk factors for offending: predicting recidivism in youth*, 38 LAW & HUM. BEHAV. 225, 225-237 (2014).

H. Post-Disposition

The post-disposition phase is often the longest period of court contact in the lives of youth and families. It is critical that youth retain access to counsel while on probation and especially while they are removed from their homes and sent to facilities away from their family and community. To ensure youth receive adequate due process protections, national standards require that counsel continue representation after a youth is adjudicated and placed on probation or committed to the jurisdiction of the court or a state agency.¹⁷⁸

Comprehensive post-disposition advocacy by juvenile defense attorneys encompasses a wide range of in- and out-of-court advocacy, including probation/parole review or revocation hearings; motions to terminate probation early or modify conditions of probation; relief from fees and fines stemming from court involvement; conditions of confinement, such as solitary confinement, physical or sexual abuse, administrative grievances, and access to family; institutional disciplinary hearings; ensuring probation and parole officers provide opportunities that promote youth success; access to educational, medical, or psychological services while in confinement or on probation; limiting access to and distribution of juvenile records by moving to seal, expunge, or purge records; deregistration from offender registries; and eliminating legal and other barriers to community reentry plans.¹⁷⁹

Under Kansas law, the attorney appointed to represent a youth in a delinquency case “shall continue to represent the [youth] at all subsequent court hearings in the proceeding . . . including appellate proceedings, unless relieved by the court. . . .”¹⁸⁰ Kansas law provides for several opportunities for post-dispositional advocacy, including modification of sentences;¹⁸¹ allegations of violations of probation, conditional release, and sentencing conditions;¹⁸² and reviews of reintegration plans for youth placed outside their home.¹⁸³

Stakeholders across jurisdictions reported that, other than probation violation hearings, most defenders have little engagement with clients once disposition has occurred. A few defenders believed that representation officially ended at disposition, despite state law that clearly states representation “shall continue” at “all subsequent court hearings.” Defenders in several jurisdictions reported that they rarely or never meet with clients post-disposition, with one stating flatly that “it’s not part of the expected contract.” Another offered, “I can meet with them, but it’s not very helpful.”

A handful of defenders in a couple of the counties the assessment teams visited did report more extensive post-disposition practice—including motions to withdraw pleas, motions for reconsideration, and efforts to move clients from the public to the private sex offender registry—but this was far from universal. One rural defender reported that, while she kept an eye on how her clients were doing post-disposition, it was informal. The community was small and she knew many of her clients personally, but she was not compensated for her time.

178 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standards 1.4, 7.1, 7.5; INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, *supra* note 44, at Standard 3.3(b) cmt.

179 See ACCESS DENIED, *supra* note 3, at 32 (citing NAT’L JUVENILE DEFENDER CTR., DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES (2016) [hereinafter DEFEND CHILDREN], <https://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf>).

180 KAN. STAT. ANN. §38-2306(b) (2006).

181 KAN. STAT. ANN. §38-2367 (2016).

182 KAN. STAT. ANN. §38-2392 (2017).

183 KAN. STAT. ANN. §38-2396 (2017).

The majority of stakeholders interviewed reported that post-disposition work is largely left to probation officers. Even in probation violation hearings, where defenders do appear on behalf of their clients, stakeholders reported that defenders generally offer little advocacy and instead “go with the flow” and more often than not, stipulate to the violation.

Post-disposition work is largely left to probation officers.

Court observations also seemed to bear this out, finding that most defenders agreed with the recommendations put forth by the state or probation department or remained silent throughout the hearing. One defender observed in a post-disposition hearing advocated for what their client’s parents wanted but did not include advocacy on behalf of their client. Another defender observed in a violation of probation hearing allowed their client to plea to the violation, resulting in detention, even though the defender made it clear they had no information about the alleged violation, had had no contact with the youth since the youth’s adjudication, and had neither received nor reviewed a copy of the affidavit alleging the violation.

In Kansas, almost all juvenile court and law enforcement records are open to the public,¹⁸⁴ creating barriers to opportunities for employment, housing, and higher education.¹⁸⁵ Expungement, where possible, is critical in helping young people avoid long-term life consequences related to their juvenile court involvement. In Kansas, an expunged case is treated as though it never occurred for most purposes, the young person can properly reply that they have no record, and few people can access the records.¹⁸⁶

To request expungement, youth must file a petition and pay a \$176 filing fee.¹⁸⁷ Judges have discretion to determine whether “the circumstances and behavior of the petitioner warrant expungement.”¹⁸⁸ A knowledgeable attorney could help young people navigate the process, understand expungement eligibility requirements and exceptions, and present arguments to persuade the court to grant the petition. However, because Kansas’ expungement laws do not allow youth, in most cases, to file for relief until at least two years after they complete the terms of their disposition,¹⁸⁹ there is not a mechanism for defense attorneys to be paid to assist former clients in this complicated process. Various stakeholders reported being able to remember few, if any, requests for record expungement ever filed by a youth during the stakeholders’ entire time with the juvenile court system.

Post-disposition advocacy for Kansas youth is rare. Done correctly, advocacy during this stage of juvenile court involvement can ensure youth are not harmed while under the supervision of the court, have access to ordered programming, and successfully engage in their homes, schools, and communities.

Defenders in Kansas must be compensated for the time required to provide post-disposition advocacy so they can take seriously their obligation to continue representation of young clients after disposition. Defenders should be trained on effective post-disposition advocacy, including opportunities to shorten dispositions or relieve youth of sentencing conditions. The court system and counties must ensure that contracts for defense counsel allow for defenders to continue providing effective representation after a youth receives their disposition.

184 KAN. STAT. ANN. §38-2309 (2015); KAN. STAT. ANN. § 38-2310 (2016).

185 See generally Joy Radice, *The Juvenile Record Myth*, 106 GEO. L. REV. 365 (2018).

186 KAN. STAT. ANN. §38-2312(f) (2019).

187 KAN. STAT. ANN. §38-2312(d) (2019).

188 KAN. STAT. ANN. §38-2312(e)(1)(C) (2019).

189 KAN. STAT. ANN. §38-2312(e)(1)(A)(i) (2019).



I. Appeals

Appellate practice is an important part of juvenile defense: “A robust and expeditious juvenile appellate practice is a fundamental component of a fair and effective juvenile delinquency system.”¹⁹⁰ The discussion with a child about their right to appeal should occur early in the representation and throughout the case. Attorneys must explain not only potential appellate issues to their clients as the case progresses, but also the factors the client should consider in deciding whether to appeal.¹⁹¹ And, for a child who wishes to appeal, juvenile defenders must file appropriate notices of appeal and either represent the client or arrange for other representation on appeal.¹⁹²

In Kansas, an attorney’s representation of a youth at the initial case level extends to appellate review.¹⁹³ Youth may appeal orders authorizing prosecution as an adult or extended jurisdiction juvenile prosecution and orders of adjudication and sentencing.¹⁹⁴ However, the appellate court cannot review “any sentence that is within the presumptive sentence for the crime,” “any sentence resulting from an agreement between the state and the juvenile which the sentencing court approves on the record,”¹⁹⁵ or juvenile court probation revocations.¹⁹⁶ The prosecution has limited, enumerated opportunities to appeal in juvenile delinquency cases.¹⁹⁷

Stakeholder interviews revealed that defenders engage in virtually no appellate practice. With only one exception, defenders, prosecutors, and judges in every site visited reported zero to, at most, two appeals in recent memory.

190 NAT’L JUVENILE DEFENDER CTR., *APPEALS: A CRITICAL CHECK ON THE JUVENILE DELINQUENCY SYSTEM 2* (2014), <http://njdc.info/wp-content/uploads/2014/10/Appeals-HR-10.4.14.pdf>.

191 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 7.3.

192 INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, *supra* note 44, at Standard 10.3.

193 KAN. STAT. ANN. §38-2306(b) (2006).

194 KAN. STAT. ANN. §38-2380 (2006).

195 KAN. STAT. ANN. §38-2380(b)(2) (2006). Juvenile court probation revocations are also not subject to appeal.

196 *In re J.S.P.*, 439 P.3d 344 (Kan. 2019) (acknowledging that under the criminal code, adults have broader statutory rights to appeal over any final order).

197 KAN. STAT. ANN. §38-2381 (2010).

A search of a legal research database for appeals filed in Kansas juvenile delinquency cases confirmed that appeals are very rarely filed. In 2019, ten juvenile delinquency appeals were filed, compared to more than 6,000 delinquency cases disposed of across the state.¹⁹⁸ Between 2014 and 2018, just 16 appeals of delinquency cases were filed across the entire state. During that same time period, nearly 40,000 delinquency cases were closed.¹⁹⁹

Without robust appellate practice, young people do not receive the benefit of error correction or the ability to clarify law. Regular review of lower-court decisions not only addresses poor practice or misunderstandings in law or procedure to prevent them from continuing unabated, but also ensures the courts are functioning as intended.

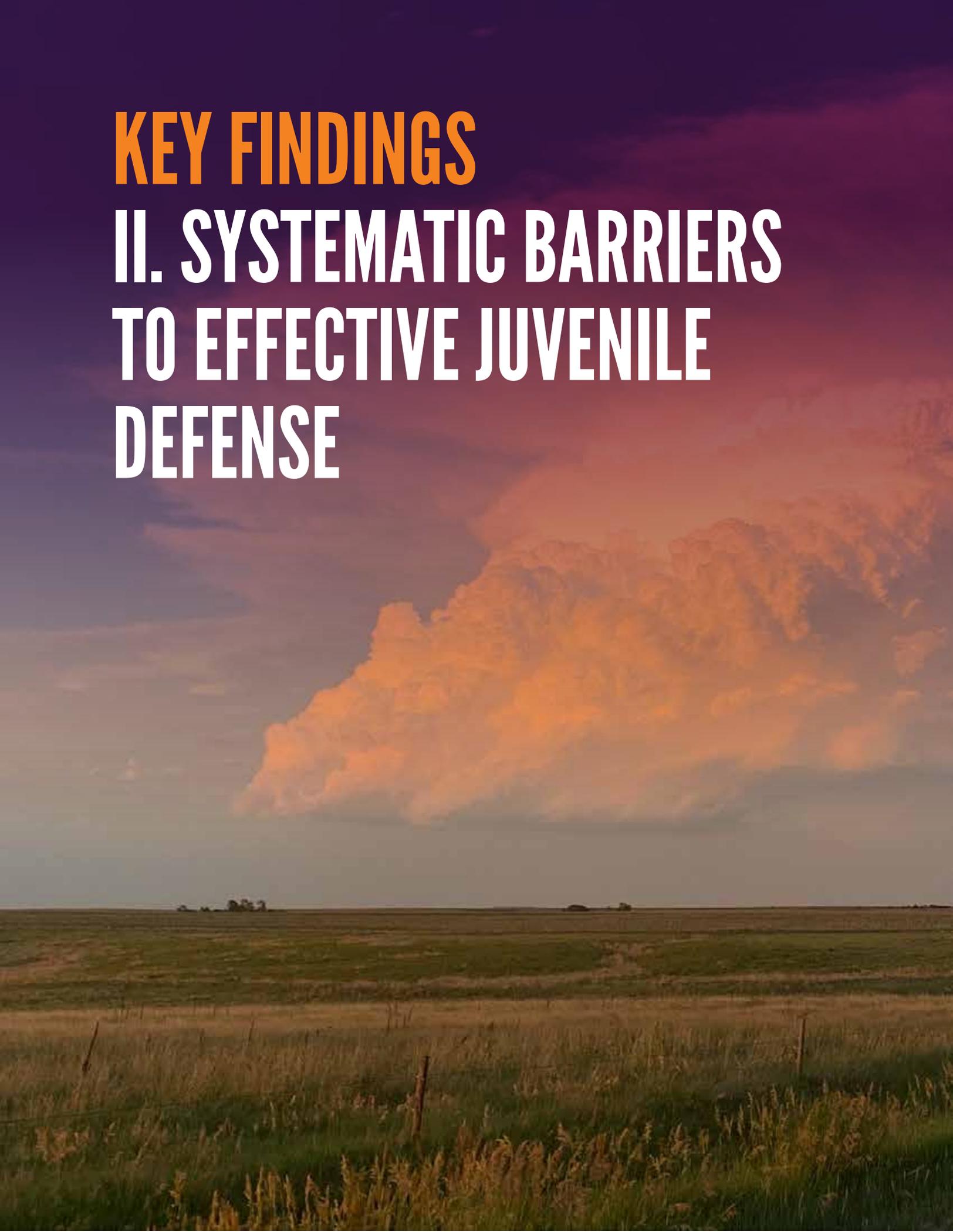
Given that the vast majority of juvenile delinquency cases are resolved via plea, the Kansas law that prohibits appellate review of pleas means the actions of stakeholders in those proceedings are exempted from review. Kansas should amend this law to allow appellate review of juvenile cases that result from pleas, allowing for greater oversight of juvenile court practice and procedure across the state. Defenders in Kansas should be trained on effective juvenile appellate advocacy and must ensure their youth clients' right to appeal is upheld.

198 SUMMARY OF JUVENILE CARE OF CHILDREN CASELOAD FOR THE STATE YEAR ENDING JUNE 30, 2019 (2019), <https://www.kscourts.org/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-JuvenCarOffender.pdf>.

199 See *Annual case statistics from Kansas courts (annual reports from 2014-18)*, KAN. JUDICIAL BRANCH, <https://www.kscourts.org/Cases-Opinions/Case-Statistics> (last visited Aug. 6, 2020) (Delinquency cases disposed of/appeals filed: 8,688/3 (2014), 8,165/4 (2015), 8,081/2 (2016), 7,501/3 (2017), 6,728/4 (2018)). The Supreme Court's annual reports cover state fiscal years, from July 1–June 30. The legal database search for the number of appeals filed is broken down by calendar year).

KEY FINDINGS

II. SYSTEMATIC BARRIERS TO EFFECTIVE JUVENILE DEFENSE



II. SYSTEMIC BARRIERS TO EFFECTIVE JUVENILE DEFENSE

Systemic and structural issues significantly impact juvenile defenders' ability to provide quality defense for their clients. Both the juvenile court system and the system for the provision of public defense services must value and uphold high standards of practice in juvenile courts. The assessment team found several areas in which systemic improvements would have a noticeable effect on juvenile defense and procedural justice for youth in Kansas.

A. Statewide Standards & Oversight

*"[C]hildren, like adults, are denied their right to counsel not only when an attorney is entirely absent, but also when an attorney is made available in name only."*²⁰⁰

Systems that provide defense representation to young people in delinquency proceedings must "recognize that children and adolescents are different from adults," "emphasize that juvenile defense counsel has an obligation to maximize each client's participation in his or her own case in order to ensure that the client understands the court process and to facilitate informed decision making by the client," and "pay special attention to providing high quality representation for the most vulnerable and over-represented groups of children in the delinquency system."²⁰¹

To meet the constitutional mandates of *Gault*, juvenile defense delivery systems must uphold young people's constitutional rights by providing competent and diligent representation, recognize juvenile defense as a specialized area of law, provide personnel and resource parity, provide attorney oversight and monitor caseloads, systematically review attorneys according to performance guidelines and standards, and require comprehensive, ongoing training for all attorneys and staff.²⁰²

Nationally, judges have recognized that assigning a lawyer to a child is only the first step: "Frequently, even though counsel is assigned to represent youth, crushing caseloads, lack of time to investigate charges or gather critical information, and inadequate training and experience result in ineffective representation."²⁰³ At least 21 states have standards or guidelines specific to juvenile defense practice.²⁰⁴

Assigning a lawyer to a child is only the first step.

In Kansas, the State Board of Indigents' Defense Services (BIDS) is responsible for ensuring the defense of anyone charged under the criminal code with a felony.²⁰⁵ While this is done at the adult criminal court level through both public defender offices²⁰⁶ and individual appointments from a pre-approved attorney list, legal representation through BIDS "shall not be provided . . . on behalf of juvenile offenders, unless the juvenile is charged with commission of a felony offense as an adult. . . ."²⁰⁷

200 Dep't of Justice Statement of Interest in N.P., *supra* note 4, at 7.

201 TEN CORE PRINCIPLES, *supra* note 18.

202 *Id.*

203 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 62, at Ch. III, 24.

204 *Juvenile Defense Standards*, NAT'L JUVENILE DEFENDER CTR., <https://njdc.info/our-work/juvenile-defense-standards/> (last visited Aug. 6, 2020).

205 KAN. STAT. ANN. §22-4503(a) (1996) (also requiring BIDS to ensure counsel in extradition, habeas corpus, and civil commitment proceedings). See also KAN. ADMIN. REGS. §105-1-1 (1984).

206 See *Contact Information*, STATE BD. OF INDIGENTS' DEF. SERVS., <http://www.sbids.org/contact.html> (last visited Aug. 6, 2020).

207 KAN. ADMIN. REGS. §105-1-1 (1999).

Instead, cities and counties must provide, at their own expense, defense services for “misdemeanors or other defense services required to be provided at public expense,” and may contract with BIDS for those services.²⁰⁸ Public defenders “may elect to accept misdemeanor or juvenile appointments,” or “may, at any time, refuse to accept misdemeanor or juvenile appointments.”²⁰⁹ In practice across the state, public defender offices in Kansas do not represent youth in juvenile court; instead, representation is provided by contract or appointed counsel. As noted previously, Kansas is one of only four states with no salaried public defense system for youth anywhere in the state.²¹⁰

Kansas law requires each district court to maintain a list of attorneys who are eligible to be appointed to represent defendants in adult felony cases, known as the panel for indigents’ defense services.²¹¹ BIDS regulates how these adult felony panels are created and revised,²¹² attorney eligibility for inclusion on a panel and appointment to certain types of cases,²¹³ how appointments are made from the panel list,²¹⁴ and how attorneys may be removed from the panel.²¹⁵ BIDS administrative regulations also govern the appointment of counsel prior to a court appearance,²¹⁶ the duties of counsel after sentencing,²¹⁷ attorney compensation,²¹⁸ funding for investigators, experts, and other defense services,²¹⁹ and contracting for defender services.²²⁰

Kansas has no comparable regulations governing defense counsel appointed to represent young people in juvenile court. This lack of statewide standards and oversight has left counties and courts without the guidance needed to create effective juvenile defense delivery systems that employ qualified attorneys who defend their young clients in a manner that meets ethical and constitutional requirements. It also likely accounts for why numerous stakeholders noted that attorneys who represented both youth and adults in their county sometimes provided much more zealous representation in adult cases.

Although Kansas has admirably ensured that young people nearly always have a defense attorney by their side during juvenile court proceedings, stakeholder interviews and court observations conducted for this assessment revealed that all too often, those defenders are present in name only. As one assessment team member noted after completing court observations, defenders’ practices were often “Meet client, plead client, meet next client,” with very little true advocacy occurring.

Stakeholders interviewed for this assessment across counties, including judges, defenders, prosecutors, and probation officers, widely recognized a need for creating a system with standards, professionalization, accountability, and increased pay and access to resources for juvenile defenders. Many of those same stakeholders noted that there are standards and training requirements for children in need of care (CINC) cases and for guardians *ad litem*, but not for juvenile delinquency cases.

208 KAN. STAT. ANN. §22-4523(f) (1982).

209 KAN. ADMIN. REGS. §105-21-4 (1984).

210 NAT’L JUVENILE DEFENDER CTR., BROKEN CONTRACTS: REIMAGINING HIGH-QUALITY REPRESENTATION OF YOUTH IN CONTRACT AND APPOINTED COUNSEL SYSTEMS (2019), https://njdc.info/wp-content/uploads/NJDC_Broken_Contracts-Report-WEB.pdf (every state, except Kansas, Maine, Michigan, and Mississippi, have some formal public defender system for youth in delinquency court, at least in some larger population centers, if not statewide).

211 KAN. STAT. ANN. §22-4501(a) (1982).

212 KAN. ADMIN. REGS. §105-3-1 (1999).

213 KAN. ADMIN. REGS. §105-3-2 (2012).

214 KAN. ADMIN. REGS. §105-3-3 (1984).

215 KAN. ADMIN. REGS. §105-3-5 (1999).

216 KAN. ADMIN. REGS. §105-3-7 (1984).

217 KAN. ADMIN. REGS. §105-3-9 (1999).

218 KAN. ADMIN. REGS. §105-5-1 (1984)- §105-5-9 (1999).

219 KAN. ADMIN. REGS. §105-7-1 (2012)- §105-7-9 (1999).

220 KAN. ADMIN. REGS. §105-31-1 (1984)-§105-31-6 (1984).

One defender echoed a sentiment also voiced by judges, prosecutors, and probation officers, that “if it’s left to the discretion of the county, these kids won’t get the representation they need. There needs to be centralized defense and standards.” Some stakeholders, including judges and defenders, advocated for public defender offices to provide representation to youth in juvenile court.

Others suggested a separate statewide system of juvenile defense, outside of the BIDS system, that would allow for a focus on and specialization in the issues specific to juvenile representation. As one defense attorney cautioned:

Including a juvenile public defender under BIDS would be a mistake; the expertise necessary and priorities for quality juvenile defense are different than for adults. Imposing juvenile defense on BIDS, which is already struggling to manage its current adult caseload, would be setting a new juvenile defender system up to fail. A new statewide juvenile-specific defender, separate from BIDS, is necessary to deliver quality representation to Kansas youth.

Comments made by several stakeholders in various jurisdictions, including a court administrator, judges, and probation officers, indicated that defenders may feel restricted in their advocacy by existing contracting and appointment systems, noting that defenders are “at the county’s mercy,” “fear getting cut from the [appointment] list,” and risk “judges not assigning them to cases” because they lack any true independence to be zealous advocates. One stakeholder expressed their belief that having a statewide juvenile defense body that could provide “structure and a definition of their role, policies, and standardization” would give defenders “a cloak of safety” to do their jobs without fear of professional reprisal.

Stakeholders in every assessment site pointed to low pay and a lack of other resources as serious impediments to youth receiving quality defense representation. Asked if they could change one thing about the juvenile defense system, stakeholders of all professions listed resources defenders need but do not have: investigators, social workers, experts, administrative staff, paralegals, clerks, interpreters outside the courtroom, and training. One judge explained that, “There is no support. Every attorney has to fend for themselves in each case. There are way more resources on the adult side.”

“There is no support. Every attorney has to fend for themselves in each case. There are way more resources on the adult side.”

Defenders and other stakeholders noted low pay as a barrier to quality representation. “If they want more capable and hardworking attorneys, they should pay more.” “Idealism only gets you so far, and it’s not going to keep your doors open.” “We have limited funding and unlimited cases.” A prosecutor compared juvenile defenders to their adult counterparts: “The juvenile defense attorneys are overworked and underpaid. The adult contract attorneys are paid hourly and have access to investigators, but not juvenile defenders.”

Judges, prosecutors, and probation officers all noted that low pay forces defenders to take on multiple contracts across counties and disciplines: “A lot of defense attorneys rely on multiple contracts like traffic, misdemeanors, criminal cases, etc. They are spreading themselves too thin.” A judge also noted that, “There are excellent lawyers who don’t want to get into this type of law because of the pay.”

Low pay and a lack of access to supporting resources undoubtedly lowers the quality of representation young people receive in Kansas juvenile courts. One court administrator characterized the quality of representation youth receive as: “They aren’t getting poor representation, but I wouldn’t call it adequate.” Another said that “It’s less than what I would want if I were the defendant.” And a defender admitted that, “my indigent juvenile cases are not necessarily treated the same as my retained cases.” As one probation officer explained, “A system built on limited resources is going to get limited justice.”



The lack of a strong, cohesive juvenile defense system across Kansas may also be contributing to problematic practices going unchecked. In one county, defense attorneys described how the prosecutor had stepped in to ensure youth were appointed counsel in delinquency cases because the juvenile court judge had failed to do so. The defenders explained that this same judge presided over juvenile court cases in an outlying county and, although they did not practice there, they had been told that appointment of counsel in the outlying county was inconsistent.

In another county, assessment team members learned that the court was disregarding a state law that requires at least three documented attempts²²¹ at “graduated responses”²²² to “technical violations”²²³ of probation. Stakeholders in this jurisdiction explained that the judge had instructed the probation department to instead file for revocations on technical violations without giving youth opportunities for graduated responses. A strong system of defense with specialized juvenile defenders could challenge these practices and ensure that youth rights are upheld at each point in the juvenile court process.

221 KAN. STAT. ANN. §38-2392(b) (2017) (“A technical violation shall only be considered by the court for revocation if: (1) It is a third or subsequent technical violation; (2) prior failed responses are documented in the juvenile’s case plan; and (3) the community supervision officer has determined and documented that graduated responses to the violation will not suffice.”).

222 Defined by KAN. STAT. ANN. §38-2302(i) (2016) as “a system of community-based sanctions and incentives ... used to address violations of immediate interventions, terms and conditions of probation and conditional release and to incentivize positive behavior.”.

223 Defined by KAN. STAT. ANN. §38-2302(bb) (2016) as “an act that violates the terms or conditions imposed as part of a probation disposition ... and that does not constitute a new juvenile offense or a new child in need of care violation.”.

Assessment teams also witnessed attorney conduct that raised ethics alarms and showed a lack of adherence to their role as a client-centered advocate. An assessment team member reported that during one of the court hearings they observed, the defender's behavior appeared to be openly adversarial to the client and their interests. The youth was late to court, and the defender told the court that the youth had probably run away. The youth did appear, but had no interaction with the defender. When the court explained the recommended disposition and the youth expressed that they did not understand what was happening, the defender did not respond. The only time the defense attorney spoke was to lecture his client: "I'm telling you on the record. You still have to follow the rules. When you're an adult, you'll be in adult prison." The county attorney asked the court to order grief counseling for the youth. The observer summarized: "The county attorney showed the youth warmth and caring during the hearing. The youth's own lawyer did not."

Stakeholders in multiple counties also raised concerns about defenders whose other legal work presents the appearance of, or actual, conflicts of interest that can impair their effectiveness as juvenile defenders. In some judicial districts in Kansas, an attorney who has a contract to provide juvenile defense services in one county serves as a prosecutor or county attorney in another county. Several stakeholders expressed concerns about these arrangements, with one probation officer noting that "those defense attorneys see it too much through the prism of a prosecutor and are less apt to be zealous. What kid would have confidence in that defense attorney?"²²⁴

While the stakeholder interviews and court observations conducted for this assessment provide an incomplete window into practice across the state, these concerns over effective counsel and conflicts of interest highlight the consequences of Kansas' lack of standards and oversight for juvenile defense and counties' juvenile defense delivery systems.

Far too many children in Kansas are being denied their constitutional right to counsel because they have an attorney in name only.

Kansas has in place basic standards and oversight for the provision of defense services to adult defendants facing felony charges, but provides no such guidance for the delivery of juvenile delinquency defense services and has not afforded the necessary state funding to ensure that youth in delinquency proceedings receive quality representation. As a result, far too many children in Kansas are being denied their constitutional right to counsel because they have an attorney in name only.

Kansas has ensured that almost all youth have a lawyer; instituting statewide standards and oversight of juvenile defenders and of county-level juvenile defense delivery systems would ensure youth have an effective lawyer. Attorneys should be permitted to provide defense services to young people only if they meet minimum qualifications and must be adequately compensated for the time needed to properly defend a young person in a delinquency proceeding. Defenders must have access to the support services necessary to adequately defend youth, including investigators, experts, and social workers. Kansas leaders can build on the progress they have already made to improve juvenile court by prioritizing high-quality defense for all youth facing the legal system.

224 Stakeholder interviews revealed other outside employment arrangements that present concerns about the appearance of a conflict of interest for system stakeholders, including a defense attorney whose law firm advocates for the imprisonment of people unable to pay medical debt, a police officer who owns a GPS monitoring business, and a probation officer who owns a company that provides diversion and pre-trial supervision services via contract with the county in which the probation officer works.

B. Specialization & Access to Juvenile-Specific Training

Juvenile defense specialization is essential to providing adequate delinquency defense to youth.²²⁵ Delinquency cases involve a unique body of law, and outcomes have significant, lifelong implications for youth and their families. In rural communities, where caseloads are not large enough to allow for a dedicated practice in juvenile defense, it is nonetheless critical that anyone who takes on representation of youth develop an expertise in the practice.

Delinquency defense is a specialized practice,²²⁶ and public defense delivery systems must provide specialized training²²⁷ to ensure attorneys who defend young people are knowledgeable about not only the law, but also youth development, cultural differences, disabilities, mental health, trauma, communicating with and effectively interviewing youth, and alternative disposition resources.²²⁸

Attorneys who practice juvenile defense in Kansas have neither the opportunity to develop expertise in this complex area of law nor access to the training they need to be effective practitioners. With few exceptions, stakeholders across all professions interviewed for this assessment recognized the need for defenders to develop an expertise in juvenile defense and for all attorneys who represent youth to have more training, both before they begin providing delinquency defense and ongoing throughout their careers.

Some stakeholders in Kansas still view juvenile court as “kiddie court,” as though the ramifications of juvenile court involvement do not severely disrupt the lives of young people and their families and leave them with long-term, sometimes lifelong, consequences. One prosecutor noted that defenders “have no concept of the ramifications of a child’s adjudication on their future,” and therefore “deem these cases less important.” Defenders, in fact, were the stakeholders who most often voiced opinions that juvenile court is “how you cut your teeth,” and that “it’s not hard to represent kids.” But, as one assessment team member remarked, “If you think juvenile defense is easy and doesn’t take much work, you’re doing it wrong.”

Other stakeholders recognized the inherent devaluing of juvenile court work and voiced support for defenders becoming specialists. One judge offered that, “Juvenile law is a specialty, and we need to make it a specialty and make it respected in the legal community. Right now, it is one of the least-respected areas of law in the state.” A probation officer noted, “There is no incentive to become a juvenile defense specialist.” Another felt that youth “get the short straw all across the state.”

One prosecutor viewed specialization as an important way to encourage defenders to spend the time and resources necessary to provide effective representation to youth: “I don’t know how else to promulgate the idea that a kid’s case is just as important if not more important.” Another prosecutor voiced enthusiasm for juvenile defenders becoming specialists: “It would be awesome to have a public defense system and a group of dedicated juvenile defenders statewide.”

225 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at 8-9.

226 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standards 1.3, 9.2.

227 TEN CORE PRINCIPLES, *supra* note 18, at 1.

228 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 62, at Ch. III, 23-24; NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 1.3.



More than one defender expressed an opinion that delinquency cases are the same as CINC cases or guardian *ad litem* work, “representing best interests as much as representing them individually.” This is a fundamental misunderstanding of a juvenile defense attorney’s role. A juvenile defense attorney is ethically bound to represent the expressed interests of their client, whereas a guardian *ad litem* is responsible for providing the court with the lawyer’s opinion of what should happen to the child. Any conflating of those roles is an inherent conflict of interest²²⁹ that may violate a young person’s due process rights in delinquency proceedings.²³⁰

Kansas has in place minimal guidance regarding juvenile court training. Pursuant to state law, the Office of Judicial Administration (OJA) “shall designate or develop a training protocol for judges, county and district attorneys and defense attorneys who work in juvenile court.”²³¹ OJA’s current training protocol “recommends” that judges, prosecutors, and defense attorneys working in juvenile court attend continuing legal education on a range of topics specific to juvenile justice—but do not suggest or require defense-specific training for defenders—and provides a mechanism for them to report if they participate in such trainings.²³² There is no mandate for either attending or reporting. Between July 12, 2017 and August 31, 2019, only 38 stakeholders statewide reported attending trainings related to juvenile court.²³³ It is unclear how many, if any, were defense attorneys.

Nearly all defenders interviewed for this assessment admitted that they had received little or no juvenile-specific training prior to accepting appointments or since they began practicing in delinquency court. As one defender noted, “I don’t know that a lot of attorneys do any juvenile defense training.”

In fact, Kansas law codifies inequity in training between prosecutors and defense attorneys. District court clerks deposit one dollar from every docketing fee collected in juvenile court into the Prosecuting Attorneys’ Training Fund.²³⁴ “Expenditures from the prosecuting attorneys’ training fund . . . shall be used exclusively for the training of personnel in such attorney’s office and costs related thereto.”²³⁵ In essence, Kansas requires youth and families to contribute to the cost of training the lawyers who prosecute them, but neither provides nor requires training for their defense attorneys.

The limited juvenile-specific training that exists in Kansas and is available to defense attorneys is generally designed to be available to all stakeholders. While there can be value in multi-stakeholder training on areas of general concern, training that is specific to defense attorneys is critical. Defenders need training on the development of legal defense strategies, defender ethics, the building and promotion of strong attorney-client interactions, defense investigation, and approaches to negotiating with other stakeholders, provided in training programs that allow for role-specific strategizing and support.

In at least two jurisdictions, stakeholders reported that local judges had adopted their own training requirements for juvenile defense attorneys in their courtrooms, but the lack of viable training opportunities remained a problem. While trainings for juvenile defense attorneys in Kansas were offered by bar associations and nonprofits in 2019, these remained sporadic and limited.

229 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 14, at Standard 1.6. KAN. R. PROF. CONDUCT 1.7 (2020) (defining a concurrent conflict of interest as when “there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”) (emphasis added).

230 See, e.g., *People v. Austin M.*, 975 N.E.2d 22 (Ill. 2012).

231 KAN. STAT. ANN. §20-318a (2016).

232 *Juvenile Court Training and Reporting*, KAN. JUDICIAL BRANCH, <https://www.kscourts.org/About-the-Courts/Programs/Juvenile-Court-Training> (last visited Aug. 6, 2020).

233 KAN. JUVENILE JUSTICE OVERSIGHT COMM., *supra* note 33, at 21-22.

234 KAN. STAT. ANN. §20-362(c) (2018); KAN. STAT. ANN. §28-170a (2007).

235 KAN. STAT. ANN. §28-170a(b) (2007).

Assessment teams did encounter some juvenile defenders who were dedicated to providing their clients with effective client-driven representation, who felt that “it would be great if more quality juvenile training was offered.” However, far too many defender interviews did not reveal a culture of zealous defense rooted in concerns about upholding young people’s constitutional rights or a need to seek greater opportunities to learn. In such an environment, statewide protocols that simply recommend training—rather than mandate it—are unlikely to motivate those who believe they are doing fine.

Non-defender stakeholders were nearly unanimous in their support of defenders being required to receive more delinquency-specific training, both prior to accepting delinquency cases and throughout their careers. At least one judge, prosecutor, and defender each described defenders as being “behind” prosecutors in their knowledge and skills. One judge said they “would like to significantly beef up the training standards, which should narrow the list of attorneys who receive court appointments.”

Among the issues stakeholders mentioned that defenders need training on were: adolescent development, motions practice, the differences between representing adults and children, communicating with youth, juvenile law and caselaw, mental and behavioral health issues, youth-focused interviewing techniques, forensic sciences, assessment tools, implicit bias, graduated responses, alternative placement options, the collateral consequences of juvenile court involvement, and ethics.

Defenders’ lack of specialization and training prompted one probation officer to note: “Doing your job and being effective at your job are two different things.”

Kansas should establish a juvenile defense system that allows defenders to become specialists in juvenile delinquency defense. At a minimum, the state must require defenders to be regularly trained in the areas of law and science critical to providing effective juvenile defense. Kansas should adopt minimum training requirements that defenders must meet prior to representing youth in delinquency court and ongoing training requirements they must meet to continue accepting appointments. The state must ensure there are enough delinquency-specific training opportunities for this to occur.

C. Costs & Fees

Across the country, juvenile courts routinely impose financial obligations on youth and families in delinquency matters, “including appointment of counsel fees, bail, diversion and treatment program fees, community supervision and placement fees, court costs, and restitution, frequently without consideration for each individual youth’s ability to pay.”²³⁶ The imposition of these financial obligations, especially on youth and families unable to pay, “can result in serious and long-term consequences . . . including further penetration into the juvenile justice system, increased recidivism, difficulty engaging in education and employment opportunities, [and] civil judgements.”²³⁷ “Families burdened by these obligations may face a difficult choice, either paying juvenile justice debts or paying for food, clothing, shelter, or other necessities.”²³⁸

236 NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOLUTION ADDRESSING FINES, FEES, AND COSTS IN JUVENILE COURTS 1 (2018), <https://www.ncjfcj.org/wp-content/uploads/2019/08/resolution-addressing-fines-fees-and-costs-in-juvenile-courts.pdf>.

237 *Id.*

238 U.S. DEP’T OF JUSTICE, ADVISORY FOR RECIPIENTS OF FINANCIAL ASSISTANCE FROM THE U.S. DEPARTMENT OF JUSTICE ON LEVYING FINES AND FEES ON JUVENILES 1 (2017), <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/advisoryjuvfinesfees.pdf>.

Fees imposed by the juvenile court system can also result in the “exacerbation of existing racial and ethnic disparities and increased financial burdens for impoverished families.”²³⁹ And, when fees are ordered and collected with the goal of raising revenue, “they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents.”²⁴⁰ All this, “for reasons unrelated to public safety and counterproductive to the rehabilitative aims of the juvenile court.”²⁴¹

The National Council of Juvenile and Family Court Judges (NCJFCJ) encourages juvenile courts “to work towards reducing and eliminating fines, fees, and costs by considering a youth and their family’s ability to pay prior to imposing such financial obligations” and to “presume youth indigent when making decisions regarding the imposition of fines, fees, and costs if the youth was previously determined indigent for the purpose of securing attorney representation.”²⁴² NCJFCJ “believes that the core functions necessary for our nation’s juvenile courts to meet their rehabilitative goals should be fully funded by governmental revenue and not by revenue generated by fines, fees, and costs.”²⁴³

Nationally, juvenile courts that track the income levels of youths’ families have found that 60 percent had incomes of less than \$20,000.²⁴⁴ This, combined with juvenile courts’ “emphasis on families’ needs when adjudicating delinquency,”²⁴⁵ means that court and service systems that charge youth and families are levying financial punishments on those deemed to be most in need of services, but who are least able to pay.

Kansas levies numerous fines, fees, and costs on young people and their families who are involved in juvenile court. The costs cover virtually every interaction with, and service ordered by, the juvenile court.

1. Fees for Accessing the Courts & Defense Counsel

Court-imposed fees and costs begin to accrue as soon as a case is filed. A docket fee of \$34 per case can be assessed to the youth or their parent or waived by the local court,²⁴⁶ and the supreme court may add an additional charge of up to \$22 to fund non-judicial personnel.²⁴⁷ Additionally, each county is authorized to charge a fee, which ranges from 50 cents to seven dollars, to support the county law library.²⁴⁸ While the statute provides that this amount is to be deducted from the docketing fee, except in Johnson and Sedgwick counties, the assessment teams received copies of bills from at least two other jurisdictions

Court-imposed fees and costs begin to accrue as soon as a case is filed.

indicating that library fees were being assessed both in excess of the allowable amounts and in addition to the docketing fees. Docketing fees extend to post-dispositional matters, as well. If a youth petitions the court to expunge their record, they must pay a docket fee of \$176, to which the supreme court may add a surcharge of \$19.²⁴⁹

239 NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 236, at 1.

240 U.S. DEP’T OF JUSTICE, DEAR COLLEAGUE LETTER: LAW ENFORCEMENT FEES AND FINES (2016), <https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf>.

241 NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 236, at 1.

242 *Id.* at 2.

243 *Id.*

244 Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J. L. & POL’Y 53, 58-59 (2012).

245 *Id.* at 54.

246 KAN. STAT. ANN. §38-2314(a) (2019); KAN. STAT. ANN. §38-2314(c) (2019).

247 KAN. STAT. ANN. §38-2314(a) (2019).

248 KAN. STAT. ANN. §20-3129 (2007) (Allowing for a law library fee of up to \$7 in any case that was neither a criminal felony nor matter brought under the civil code. For criminal matters, the allowable maximum fee is \$10, except in Johnson and Sedgwick Counties, where it may be up to \$14.).

249 KAN. STAT. ANN. §38-2312(d) (2019).

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

One year at the
University of Kansas = **\$54,162**



See <http://affordability.ku.edu/costs> (estimating the cost of two semesters of in-state tuition, room & board, books, and fees for 2020-21)

This artwork has been designed using resources from Freepik.com

Average Annual Cost of youth incarceration
in Kansas = **\$112,128** (\$307.20 per day)



Justice Policy Institute, *Sticker Shock 2020: The Cost of Youth Incarceration*, p. 3 July 2020

Young people and their parents can also be charged if the youth chooses to exercise their constitutional right to counsel. An attorney appointed to represent a young person in a delinquency case is entitled to “a reasonable fee for services,”²⁵⁰ the cost of which may be assessed against the youth or their parent.²⁵¹ The assessment team was unable to locate guidance regarding what a “reasonable fee” would entail, but examples from six of the counties visited suggested counsel reimbursement fees, ranging from \$50–\$250, were being assessed to youth and families.

In another county, defense attorneys billed an hourly rate for the time they spent working on a case, and the entire amount of the attorney’s bill was assessed to youth and families, unless the family filed a financial affidavit proving they were unable to pay. In that county, one official estimated that the county spends nearly \$400,000 annually on juvenile defense services and collects approximately \$175,000 yearly from youth and families in attorney reimbursement fees.

If a youth files an appeal of their delinquency case, attorney fees and the costs of transcripts and records “shall be taxed as expenses on appeal,” though the court may order the fees assessed against the county general funds.²⁵² One defender recounted a situation where they believed the juvenile court judge used costs to dissuade a youth from appealing their case: “[Client] filed an appeal and the judge immediately ordered the kid to pay for the cost of the transcripts and costs of the appeal.”

Charging youth and families administrative fees for docketing a case is, in essence, a “user fee” levied against people who have not voluntarily chosen to participate in the court process and who are constitutionally presumed to be innocent. By charging youth and parents the costs of court-appointed counsel, Kansas has shifted its constitutional obligation to provide counsel to those who, by definition, cannot afford it. And counsel reimbursement fees—particularly where there is little to no guidance on what a reasonable fee would be over the life of a case—have the potential to coerce young people to plead cases prematurely in an attempt to limit costs.

250 KAN. STAT. ANN. §38-2306(c) (2006).

251 KAN. STAT. ANN. §38-2314(c)(2) (2019).

252 KAN. STAT. ANN. §38-2384 (2006); *but see* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that when a state affords a right to appeal and procedures required that a lower court transcript be produced as part of the appeal, it is a due process violation to deny indigent defendants access to such transcripts simply because they are unable to pay).

2. Costs Related to Immediate Intervention Programs

Youth eligible to avoid prosecution via diversion are often charged fees to access an immediate intervention program (IIP). The Kansas Department of Corrections, Division of Juvenile Services suggests a fee of up to \$50 for IIPs involving misdemeanors and up to \$100 for IIPs involving felonies.²⁵³ Stakeholder interviews revealed that fees to access diversion programs may be a barrier to some youth being able to avoid formal juvenile court involvement, despite Kansas law specifying that a youth “who is eligible for an immediate intervention shall not be denied participation in such a program or terminated unsuccessfully due to an inability to pay fees or other associated costs.”²⁵⁴

A few probation officers interviewed for this assessment suggested that some youth do not accept an offer for an IIP because they have to pay a fee upfront and the fee is not waived. Court administrators similarly reported that in their counties, fees to access diversion “must be paid in full before a diversion agreement is filed with the court” and that “user fees are often a barrier.”

Kansas law specifies that fees collected from diversion programs “shall be retained by the program and shall not be used for any purpose, except development and operation of the program.”²⁵⁵ One probation officer reported, however, that: “This \$50 fee is supposed to be a growing pot, which is supposed to provide for services. There is no money.” And a court administrator reported that they “don’t collect a lot,” and that “the money collected is rolled into the county budget.”

The imposition and collection of fees to access diversion programs are inconsistent across Kansas and may be preventing some youth who should otherwise avoid court involvement from accessing diversion options. This drives youth who are least able to pay deeper into the juvenile legal system, where the costs assessed to them mount.

3. Fees for Law Enforcement Processing, Testing, & Court-Ordered Custody & Services

Kansas law allows for a fingerprinting fee of up to \$45.²⁵⁶ When the alleged offense authorizes police to collect a DNA sample, a youth is charged \$200.²⁵⁷ The statute outlining how a delinquency complaint must be filed against a youth specifies that the complaint “shall contain a request that parents be ordered to pay child support in the event the juvenile is removed from the home.”²⁵⁸

Kansas law provides that a court may order costs of “\$400 for every individual offense if forensic science or laboratory services” are to be performed by the Kansas Bureau of Investigation or county-based forensic laboratories.²⁵⁹ Several stakeholders reported that youth and families are charged \$400 for each urinalysis or other drug screening. With both DNA collection and forensic testing, the court may only reduce or waive the fee if it finds that the child is indigent and provides a written order to that effect.²⁶⁰

253 KAN. DEP’T OF CORR.-DIV. OF JUVENILE SERVS., Standard IIP-04-107 (2017), <https://www.doc.ks.gov/juvenile-services/supervision-standards/iip-immediate-intervention-program-operations-chapter>.

254 KAN. STAT. ANN. §38-2346(f) (2017).

255 *Id.*

256 KAN. STAT. ANN. §12-16,119 (2011).

257 KAN. STAT. ANN. §75-724(a) (2010).

258 KAN. STAT. ANN. §38-2328(a)(3) (2006).

259 KAN. STAT. ANN. §28-176(a) (2014).

260 KAN. STAT. ANN. §75-724(c) (2010); KAN. STAT. ANN. §28-176(c) (2014).

The supreme court may establish fees to be charged to youth or their parents for supervision, including probation, community corrections, community placement, conditional release, or any other program.²⁶¹ District court clerks are responsible for charging and collecting these fees, and money collected is to be used to fund community juvenile justice programs.²⁶²

Courts may assess a youth's parent for the "expenses for the care and custody" of a youth subject to a delinquency court proceeding, provided the family is not eligible to receive federal temporary assistance for needy families (TANF) benefits.²⁶³ This includes any costs related to ordering a child into detention, commitment, or out-of-home placement. The court "shall order child support unless good cause is shown," and this order is subject to enforcement by the Kansas Department for Children and Families.²⁶⁴

The imposition of costs for detention appears to happen consistently across the state, with detention facilities and counties, through the courts, charging families for each night a youth is held in pre-trial detention. Stakeholders reported that the per-night charges range from \$160 to more than \$200, depending on the jurisdiction. One defender reported seeing detention bills in excess of \$10,000, opining, "They stick it to the parents."

One defender reported seeing detention bills in excess of \$10,000.

If a court orders services for a youth, including "probation, conditional release, aftercare supervision, case management and community corrections," the youth's parents "shall be liable to repay . . . any assistance expended on the juvenile's behalf."²⁶⁵ Costs for "counseling or mediation sessions or a program of education, including placement in an alternative educational program" may be assessed to the youth or their parents.²⁶⁶ If a court orders a youth to submit to a drug and alcohol evaluation, the youth or their parent may have to pay "not less than \$150" for the evaluation.²⁶⁷ If a youth is adjudicated for an offense that "involved the transmission of body fluids . . . [or] a sexual act," the court must order the youth to pay the Department of Health and Environment for the costs of "any counseling and testing provided."²⁶⁸

In addition to saddling families with bills that easily accrue to the tens of thousands of dollars and beyond, fees that are paid to support entities such as law enforcement, detention facilities, or service providers risk creating an impression that increasing police-youth interactions, detention or commitment orders, or court-ordered treatment are ways of increasing revenue for those departments and agencies.

261 KAN. STAT. ANN. §20-167(a) (2016).

262 KAN. STAT. ANN. §20-167(b) (2016); KAN. STAT. ANN. §20-167(c) (2016).

263 KAN. STAT. ANN. §38-2315(a) (2006); KAN. STAT. ANN. §38-2315(b) (2006).

264 KAN. STAT. ANN. §38-2319 (2014).

265 KAN. STAT. ANN. §38-2324(a) (2006).

266 KAN. STAT. ANN. §38-2361(b)(1) (2017).

267 KAN. STAT. ANN. §38-2361(b)(2) (2017); KAN. STAT. ANN. §8-1008(e) (2018).

268 KAN. STAT. ANN. §38-2317(d) (2013); KAN. STAT. ANN. §38-2317(f) (2013).

4. Fines & Restitution

When a youth is adjudicated, the court may impose a fine of up to \$1,000 for each offense.²⁶⁹ While the imposition of a fine is discretionary, no ability-to-pay determination is required.

Courts must also order youth “to make reparation or restitution . . . for the damage or loss caused by the . . . offense unless [the court] finds compelling circumstances that would render a plan on reparation or restitution unworkable.”²⁷⁰ Monetary restitution is entered as a judgment against the youth “that may be collected by the court by garnishment or other execution as on judgments in civil cases,” and that “shall not be affected by the termination of the court’s jurisdiction” over the youth.²⁷¹ While the amount of restitution is based on the damage or loss “caused by” the offense, due process entitles youth to have a contested hearing on the issue of restitution and the amount imposed.²⁷²

Some stakeholders reported restitution payments ranging from thousands of dollars to tens of thousands of dollars, even though courts have discretion to order the youth “to perform charitable or social services” in lieu of payment if the financial burden is unworkable.²⁷³ One facility staff person told the assessment team that if parents put money in the child’s account for use on items in the facility, they will draw restitution payments from those funds.

Restitution obligations remain even after the youth’s case is terminated by the court. One court administrator shared that there are two people in their county who have outstanding juvenile restitution dating back to 2001.

The justification for restitution amounts, a youth’s ability to pay, and whether alternatives to financial obligations will satisfy the debt are all areas of restitution advocacy in which defense attorneys can and should be actively involved.

5. Imposition of Costs & Defender Advocacy

Stakeholders interviewed across the counties visited had different experiences with the imposition of, collection of, and advocacy regarding court-imposed fines, fees, and costs. Stakeholders in several counties reported that their courts rarely assessed fees and costs if the judge had discretion to waive or reduce them. In at least a few counties, however, stakeholders said their courts were more likely to assess even discretionary fees.

One judge explained that, “I impose fees on juveniles to encourage them to be responsible.” Another understood that “most kids and families don’t have resources, so fines and fees are going to make their circumstances even worse,” but also appeared willing to use financial assessments as punishment: “that attitude changes every time I see that kid in on a new charge.”

When asked whether courts consider a youth’s or their family’s ability to pay when levying fines, fees, and costs, stakeholders were nearly evenly split in their responses. It appeared to assessment team members that youth in some courts in Kansas were given consideration for their ability to pay, while youth in other courts were not.

269 KAN. STAT. ANN. §38-2361(a)(8) (2017), KAN. STAT. ANN. §38-2361(e) (2017).

270 KAN. STAT. ANN. §38-2361(d)(1) (2017).

271 KAN. STAT. ANN. §38-2361(d)(2) (2017).

272 *In re C.A.D.*, 711 P.2d 1336, 1342 (1985).

273 KAN. STAT. ANN. §38-2361(d)(2) (2017).

Despite inconsistent practices related to ability-to-pay determinations, the majority of stakeholders across sites reported that defenders regularly argued for the reduction or complete waiver of discretionary fees and costs, recognizing the burden it placed on families. However, stakeholders in a few of the counties visited reported that defenders rarely, if ever, advocate for their young clients on the issue of fees. Stakeholders in several jurisdictions reported that judges would at times reduce or waive fees even without defender advocacy.

Consistent, diligent, and zealous defense advocacy is critical to limiting the immense burden court costs can impose on youth and families.

6. Collection of Fees & Non-Payment

In 2016, Kansas repealed a law that had deemed youth ineligible for early release from supervision if their supervision fees were not paid.²⁷⁴ While non-payment can no longer prevent a young person's probation or commitment from ending, the debt incurred can follow youth and their families for years or decades and create significant financial barriers to their success.

Courts may waive supervision fees “upon a showing that such fee will result in an undue hardship” for the youth or their family.²⁷⁵ But unpaid costs that are not expressly waived are not forgiven upon termination of youth's supervision. Numerous stakeholders reported that courts contract with private agencies to collect outstanding financial assessments from juvenile court involvement and related services. Stakeholders consistently reported that collections agencies add approximately 30 percent to the amount due; this surcharge is kept by the collections agency as its fee for service to the courts and/or county.²⁷⁶

It is the state's obligation to provide counsel to youth, and young people should never be charged to access this vital constitutional right.

The imposition of fees, fines, and costs by juvenile courts and related agencies in Kansas unnecessarily burdens youth involved in the juvenile court system and their families. It is the state's obligation to provide counsel to youth, and young people should never be charged to access this vital constitutional right. Costs that directly impact access to defense counsel also compound youth and families' financial burdens, as defender advocacy surrounding fees and costs could go a long way toward eliminating or limiting many of the financial assessments youth and families face.

Where existing law allows for discretion, judges should waive all financial assessments and defenders should advocate for courts to waive fines, fees, and costs for all youth. Kansas should pass legislation to abolish all fines, fees, and costs associated with juvenile court involvement.

274 KAN. STAT. ANN. §20-167 (2016); S.B. 367, 2016 Reg. Sess., (Kan. 2016) (removing language that had previously read: “The juvenile offender shall not be eligible for early release from supervision unless the supervision fee has been paid.”).

275 KAN. STAT. ANN. §20-167(e) (2016).

276 KAN. STAT. ANN. §20-169(c)(5) (2017) authorizes the attorney general to contract with private agencies and provides “Each contract entered pursuant to this section shall provide for a fee to be paid to or retained by the contracting agent for collection services. Such fee shall be designated as the cost of collection hereunder, and shall not exceed 33% of the amount collected. The cost of collection shall be paid from the amount collected, but shall not be deducted from the debts owed to courts or restitution.” KAN. STAT. ANN. §20-169(d)-(h) (2017) authorizes the courts to utilize these contracts for the collection of justice system debts.



Potential Costs & Fees in Kansas Juvenile Courts

Court-imposed fees and costs begin to accrue as soon as case is filed. Throughout a young person's involvement in the juvenile court system, the youth and their families may be charged for:



Docketing fees



Fee to support county law library



Immediate Intervention Program fees



Fingerprinting fee



Costs to access publicly funded counsel



DNA sample fee



Costs of detention



Laboratory services fees



Probation supervision fees



Expenses for the care & custody of youth



Child support



Costs of counseling



Costs of transcripts & records



Drug & alcohol evaluation costs



Fines for adjudications

D. Equitable Treatment of Youth

Racial inequities permeate juvenile legal systems across the United States, and recent data shows the rates of disparity in Kansas are higher than national averages. “Racial disparity in Kansas begins as early as a youth’s first contact with the school system and continues through each step of the juvenile justice system.”²⁷⁷

Disparate racial treatment begins as early as preschool in Kansas. During the 2013–2014 school year, Black students represented 5.9 percent of preschool enrollment but 29.4 percent of students who received out-of-school suspensions, a disparity ratio 44 percent higher than the United States as a whole.²⁷⁸ That disparate treatment continues throughout Kansas students’ school careers. In K-12 schools, 2.8 percent of white students received out-of-school suspensions, compared to 14 percent of Black students.²⁷⁹ Black students account for seven percent of students in Kansas, but more than 20 percent of school-related arrests.²⁸⁰

Even as the number of arrests of youth is dropping considerably in Kansas, racial disparities are increasing. Between 2008 and 2013, arrests of youth in Kansas’ eight largest counties decreased by 56 percent.²⁸¹ During a similar time period, between 2006 and 2013, the disparity rate for Black youth arrests dropped 21 percent nationally but increased 51 percent in Kansas.²⁸²

Disparate racial treatment continues throughout every stage of the juvenile court process in Kansas. Indigenous youth are 98 percent more likely to be referred to court than white youth.²⁸³ Black and Latinx Kansas youth are about 75 percent more likely to be detained than white youth, compared to a national disparity rate of approximately 30 percent.²⁸⁴ Nationally, Black youth are found delinquent at a similar rate to white youth, but in Kansas, Black and Latinx youth are 20 percent more likely to be adjudicated delinquent than white youth.²⁸⁵

When charged, one in five white youth, one in four Latinx youth, and one in three Black youth in Kansas are held in secure detention.²⁸⁶ Once adjudicated, Black and Latinx youth are twice as likely to be incarcerated as white youth.²⁸⁷ Indigenous youth are held in secure confinement more than twice as long as white youth.²⁸⁸

Despite these very clear racial disparities, many at rates notably worse than national numbers, stakeholders interviewed for this assessment largely reported that juvenile defenders are doing little, if anything, to challenge the biases driving these disparities. A majority of defenders interviewed reported no concerns about disparate treatment of youth in the juvenile legal system, and the vast majority of other stakeholders interviewed reported that defenders rarely, if ever, raised racial justice arguments in their defense of youth.

277 KANSAS UNITED FOR YOUTH JUSTICE, RACIAL DISPARITIES IN THE KANSAS JUVENILE JUSTICE SYSTEM 1 (2019), https://www.kuyj.org/uploads/2/1/9/2/21929892/racial_disparities_in_the_kansas_juvenile_justice_system_2019.pdf.

278 *Id.* at 2.

279 *Id.*

280 *Id.*

281 *Id.* at 3.

282 *Id.*

283 *Id.* at 4.

284 *Id.* at 5.

285 *Id.* at 6.

286 *Id.* at 8.

287 *Id.* at 7.

288 *Id.* at 8.

Of the few defenders who acknowledged disparities in the system, about half did so only tentatively. “I’m sure there’s a level of racism inherent to the system, but none that I can specify.” “There is disproportionate representation, but I do not see inequity in the treatment of youth.” “There is a little, but I’m not sure how much is race/ethnicity versus who knows who.”

The other defenders who recognized disparate racial treatment understood the systemic nature of the problem: “Young African American youth are targeted, and once law enforcement knows your face, it’s over.” “There is a substantial disproportional impact on people of color, which is directly proportional to the amount of attention law enforcement focuses on minority neighborhoods.” One defender recognized disparate treatment in policing but not in the court system: “Cops are more likely to be patrolling in Hispanic neighborhoods than in white neighborhoods. But once they’re charged and get to court, the judge and attorneys don’t treat those people any differently.”

The vast majority of other stakeholders interviewed reported that they had never heard a defender raise race as an issue in defending their youth clients. Of the few who reported having witnessed defenders raise race, most described it as happening rarely. One probation officer reported that in their 16-year career, they had known defenders to raise race “once or twice,” and described their advocacy as “they might dance around it.” Prosecutors in two different counties reported that defenders rarely bring up race, and a judge in one of those counties acknowledged racial and ethnic disparities but explained that it is “seldom that defenders make these arguments.”

A judge in a different county reported that “defenders are raising these issues.” Interestingly, though, the defenders interviewed from this county did not report any concerns about racially disparate treatment of youth in the system.

Kansas must commit to combatting racial disparities at every step of the juvenile legal system, from school push-out to arrest to the juvenile court system. The state should analyze system involvement and outcomes and require debias training for all stakeholders. All stakeholders must recognize existing racial disparities in the juvenile court system and work to eliminate them, and juvenile defenders have a unique role and specific responsibilities to advance racial justice.

***Juvenile defenders
have a unique role and
specific responsibilities
to advance racial justice.***

Advocacy for equitable treatment is an essential part of the role of juvenile defenders.²⁸⁹ Defenders have a duty to educate themselves about the special needs of the populations they serve, and to confront their own biases and those inherent in the justice system.²⁹⁰ Defenders must recognize their own vulnerability “to the negative effects of implicit bias as they practice in a paternalistic system that is easily manipulated by perceptions of race and class,” and provide “loyal, client directed legal advocacy” to safeguard against the harms caused by the effects of racial injustice in the juvenile justice system.²⁹¹

289 See *Racial Justice for Youth: A Toolkit for Defenders: Case Advocacy*, GEO. LAW JUVENILE JUSTICE INITIATIVE & NAT’L JUVENILE DEFENDER CTR., <https://defendrationaljustice.org/case-advocacy/> (last visited Aug. 16, 2020).

290 See KRISTIN NICOLE HENNING, ANNOTATED BIBLIOGRAPHY: IMPLICIT BIAS STUDIES 1 (2019), <https://defendrationaljustice.org/toolkit-files/Confronting-Bias/Annotated-Bibliography-of-Implicit-Bias-Studies.pdf>.

291 Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 694 (2017). See *Racial Justice for Youth: A Toolkit for Defenders*, GEO. LAW JUVENILE JUSTICE INITIATIVE & NAT’L JUVENILE DEFENDER CTR., www.defendrationaljustice.org (last visited Aug. 6, 2020); *Confronting Bias*, GEO. LAW JUVENILE JUSTICE INITIATIVE & NAT’L JUVENILE DEFENDER CTR., <https://defendrationaljustice.org/confronting-bias/> (last visited Aug. 6, 2020).

E. Shackling

Thirty-two states have enacted legal limitations on the use of restraints in juvenile court.²⁹² Between 2014 and 2018, 18 states implemented reforms to eliminate the indiscriminate use of shackles on youth in juvenile court.²⁹³ Kansas has no statewide written limits or guidance on the use of shackling and permits the indiscriminate shackling of youth in juvenile court.

Shackling impedes the attorney-client relationship, chills young people’s constitutional right to due process, runs counter to the presumption of innocence, and draws into question the rehabilitative ideals of the juvenile court.²⁹⁴ The U.S. Supreme Court has recognized the due process implications shackling can have, particularly when questions of guilt and liberty are at issue, finding that “visible shackling undermines the presumption of innocence and the related fairness of the fact-finding process” and acknowledging that “shackles can interfere with the accused’s ‘ability to communicate’ with his lawyer.”²⁹⁵ Absent statutory guidance, the U.S. Supreme Court has recognized that the issue of when to shackle is a due process concern squarely within the court’s jurisdiction and, thus, should not be relegated solely to security personnel.²⁹⁶

Shackling youth also can have profoundly traumatic impacts. Clinical psychologists, pediatricians, and other adolescent development experts note that shackling is degrading for young people, it harms identity development, and young people are more vulnerable to lasting harm and humiliation.²⁹⁷ Across the country, jurisdictions are reevaluating how, when, and whether they use leg irons, belly chains, and handcuffs on youth in the juvenile court system, with most allowing their use only if a juvenile court judge finds, on the record, that the specific child in that specific moment is a threat to the safety of others in the courtroom and that, short of restraints, there is no other lesser restrictive means to provide safety.²⁹⁸

Stakeholder interviews and court observations conducted across counties for this assessment found that young people who are brought from detention or another secure facility are nearly always shackled—often with leg irons, handcuffs, and belly chains. Youth remain fully shackled throughout the entirety of their hearing and defenders rarely, if ever, ask the court to unshackle their young clients. Many stakeholders, including defenders, continue to see no problem with shackling young people, despite evidence of the harms it can cause.

Assessment team members observed 21 court hearings in which youth appeared in person and arrived at court from a detention center or other secure facility. In each of these instances, the young person was shackled when they were brought into the courtroom and remained shackled throughout the hearing. No defender was observed requesting that their client be unshackled, even partially, and no court stakeholder was observed addressing or even acknowledging the use of shackles.

292 NAT’L JUVENILE DEFENDER CTR., ELIMINATING SHACKLING IN JUVENILE COURT: CONTINUING THE MOMENTUM (2019), https://njdc.info/wp-content/uploads/NJDC_Shackling_FINAL_Web.pdf.

293 *Id.*

294 SEE CAMPAIGN AGAINST INDISCRIMINATE JUVENILE SHACKLING, TOOLKIT 4, 8 (2016), <http://njdc.info/wp-content/uploads/2016/01/Toolkit-Final-011916.pdf>.

295 *Deck v. Missouri*, 544 U.S. 622, 631 (2005).

296 *See id.* at 632 (finding that “given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.”).

297 *See, e.g., Affidavits*, CAMPAIGN AGAINST INDISCRIMINATE JUVENILE SHACKLING, <https://njdc.info/campaign-against-indiscriminate-jvenile-shackling/> (last visited Aug. 6, 2020).

298 NAT’L JUVENILE DEFENDER CTR., ELIMINATING SHACKLING IN JUVENILE COURT: CONTINUING THE MOMENTUM (2019), https://njdc.info/wp-content/uploads/NJDC_Shackling_FINAL_Web.pdf.

The youth observed in shackles were as young as 14. During three of the young people's hearings, their existing mental health issues or need for psychiatric evaluations were mentioned. At least two of the shackled youth were "crossover" youth who had open child in need of care (CINC) cases. One shackled youth was brought into the courthouse barefoot and remained so until a family member left the courthouse and returned with footwear for them to use.

In one court, assessment team members reported that three youth were brought into court in full shackles and chained together. They sat in the front row of the courtroom, fully shackled and chained together, for the entirety of their three, unrelated hearings. In another hearing, the judge released a youth from detention, but the youth remained in shackles to be transported back to the detention center to be processed out.

The shackling of youth is so commonplace that many stakeholders no longer even notice it. In one county, a judge "couldn't remember the last time a kid was shackled in my court," and a probation officer insisted that shackles were removed before youth entered the courtroom. Later that same day, however, assessment team members observed youth in full shackles in that county's court, including one crossover youth on the court's CINC docket.²⁹⁹

Several stakeholders reported never having thought about the use of shackles in juvenile court until they were asked about the issue by assessment team members. One probation officer responded, "Do I think shackling is detrimental to them? I hadn't thought about it. I'm numb to it." A defender reported that their clients are handcuffed, but they had "not paid attention to see if [their legs] are shackled."

"Shackling is a sentence."

Several stakeholders did recognize that shackling can inhibit a young person's communication. One probation officer reported that, "When kids are restrained, they don't feel like they can open up." Another explained that, "Communication is key and you cannot communicate when a kid is shackled. Shackling is a sentence. I am trying to build them up and not break them down."

Two defenders described that shackles impede their relationship and communication with their clients: "Youth are generally more difficult to work with when they appear in shackles. It is distracting, uncomfortable, and embarrassing." One defender and one judge remarked that shackling a young person can also cause trauma to their families: "The biggest issue here is the impact on the child and their families. It's traumatic and dehumanizing." Assessment team members in one county observed this impact in court: "One of the shackled youth's mother had already been crying and she began wailing loudly when she saw her son shackled, asking why they had to do that to him."

²⁹⁹ Although outside the scope of this assessment, the use of shackles on youth who are on the CINC docket is perhaps even more troubling than the use of shackles of youth in delinquency court. Unless they are crossover youth, CINC youth have not been charged with a crime. They are runaways, truants, neglected, abused, or abandoned. Shackling these young people acts only to further traumatize them.

Several prosecutors from different counties voiced disapproval of the indiscriminate shackling of youth. Two opined that youth should not be shackled unless there is a known risk of violence. Another believed shackles “make youth feel more intimidated,” and wished defenders would advocate for all shackles to be removed. Another prosecutor said, simply, “I don’t think kids should be brought over in restraints at all.”

Counter to the growing awareness of the harms of indiscriminate shackling of youth, several defenders and judges in a few of the counties did voice support for shackling based on beliefs that are directly at odds with opinions from psychologists, pediatricians, and legal experts³⁰⁰ on the impacts shackling has on young people. More than one saw the “humiliation” of shackling as a good thing for the young person or their family. Others saw shackling as a deterrent, either to the youth who was shackled or to other young people in the court. One defender characterized shackling as “a good lesson” that teaches young people “to make decisions that bring better things.” Another defense attorney had allowed their own view of their young clients to be warped by the shackles the children wear: “Usually the kids who are shackled are hardcore enough so they are not bothered by it.”

When asked how often defense attorneys challenge the use of shackles on their young clients, the vast majority of stakeholders responded “never.” One defender told assessment team members that “It is not my place to say anything about cuffs or shackles.” Asked how they feel about defender advocacy regarding the use of shackles, a prosecutor answered, “It’s not a thing.”

It is important to note how the racial disparities in Kansas juvenile courts, addressed in the previous section, play out when youth are shackled. Observers noted the race of the youth in 20 of the 21 hearings in which youth were shackled: six were white, eight Black, and six Latinx. In this small sample, observers witnessed roughly the same number of youth of three races shackled, despite the fact that Kansas’ population is only 6.1 percent Black and 12.2 percent Hispanic/Latino, but 75.4 percent white.³⁰¹

Kansas should join the growing majority of states that have reformed their use of restraints on young people in juvenile court and enact a statewide policy eliminating the indiscriminate shackling of young people in juvenile courts. All juvenile court stakeholders in Kansas, but especially defenders, must learn about and recognize the trauma shackling can cause young people. Short of a statewide rule or statutory changes, juvenile defense attorneys have an ethical obligation to advocate for the removal of youth’s shackles on an individual case basis, given the recognized psychological harms and due process deprivations shackling has on their clients.

300 See generally *Policy Statements & Position Papers*, CAMPAIGN AGAINST INDISCRIMINATE JUVENILE SHACKLING, <https://njdc.info/campaign-against-indiscriminate-juvenile-shackling/> (last visited Aug. 6, 2020).

301 *QuickFacts Kansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/KS> (last visited Aug. 6, 2020).



F. Continuum of Services

Juvenile courts should have “a continuum of options for youth” who cannot be released to their families for safety or other reasons after arrest.³⁰² This continuum should “enhance community safety, keep youth who need crisis mental health or substance abuse detoxification facilities out of secure detention, help youth build skills, and conserve resources.”³⁰³

Senate Bill 367, passed in 2016, significantly altered the Kansas juvenile court system. Among other modifications, the changes to the juvenile code established new, more restrictive criteria for holding youth in detention; established case-length limits for probation and juvenile court supervision, based on a youth’s assessed risk and the level of offense; and established a sentencing matrix that incorporates the new case-length limits and earned time. The legislature also established a Juvenile Alternatives to Detention Fund, “for the development and operation of community-based alternatives to detention.”³⁰⁴

Stakeholders consistently reported to assessment team members that the community-based programs and services promised by the reform have yet to materialize, leaving the juvenile court system in many jurisdictions without the continuum of services they believe it needs. Several prosecutors reported that they had “expected services would be in place when the law was implemented, but they were not,” and that “the law has been in place long enough that the programs should be in place.”

Numerous stakeholders reported needing “more options between home and locking kids up,” including functional family therapy, multi-systemic therapy, intensive home support, midlevel placements, psychiatric residential treatment facilities, and foster homes. Stakeholders reported waiting lists for the limited alternative placement options that do exist across the state.

302 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 62, at Ch. III, 26.

303 *Id.* at Ch. III, 29.

304 KAN. STAT. ANN. §79-4803(b) (2016).

As of July 1, 2019, youth alleged to be a child in need of care (CINC) can no longer be held in a juvenile detention facility if they are not also charged as a “juvenile offender” and meet the criteria for detention.³⁰⁵ However, youth alleged to be in need of care under the CINC system may be temporarily placed in a non-justice system secure facility, under certain circumstances.³⁰⁶

Stakeholders in several counties reported that because of a perceived lack of community release alternatives in the delinquency system, courts were using the CINC system to order placement for youth charged as juvenile offenders who were no longer eligible for detention. Stakeholders in multiple counties raised doubts as to whether the strict requirements of the CINC code were being met in these conversions of delinquency cases into CINC cases and raised concerns that these conversions might be a work-around of the new detention law.³⁰⁷

Kansas must provide and support a continuum of services for children and adolescents across the state. Where alternative services are available, defense counsel must be knowledgeable about and advocate for appropriate alternative placements and services for their youth clients. Even where recognized alternatives may not be available, defense attorneys are obligated to advocate for release and the development of creative or new release plans when it is consistent with the law and their client’s expressed interests.

305 KAN. STAT. ANN. §38-2288 (2019); KAN. STAT. ANN. §38-2202 (o) (2016); KAN. STAT. ANN. §38-2202(s) (2016).

306 See KAN. STAT. ANN. §38-2243 (2019).

307 Whether CINC is an appropriate placement for youth in the delinquency system is beyond the scope of this report. However, given that it affects delinquency defense and may be driven by a lack of services (either actual or perceived) likely warrants further examination.



STRENGTHS & PROMISING PRACTICES

Recent changes in Kansas law signal an openness to strengthening the provision of justice for the state's youth. The following examples of strengths and promising practices can help inform other changes recommended by this assessment report.

Little to no waiver of counsel

National best practices call for courts to safeguard the right to counsel by guarding against youth waiver of counsel, and Kansas law specifies that youth have the right to an attorney at every stage of juvenile court proceedings. Despite its geographical expanse and, in significant portions of the state, sparse population, Kansas has successfully ensured that young people are nearly always represented by counsel when they face delinquency proceedings. In this respect, Kansas lives up to national best practices by making youth waiver of counsel rare or non-existent.

Law recognizing the need for counsel at interrogation

Police questioning is an especially fraught experience for youth. Youth are particularly susceptible to manipulative strategies commonly used in interrogations, and they often waive their rights or offer confessions in response to unrealistic or short-term incentives. Kansas law recognizes the inherent imbalance of power when youth are questioned and does not allow admissions or confessions from youth under 14 to be admitted into evidence unless the youth consulted with their parent or attorney prior to waiving their right against self-incrimination.

Increased availability of diversion

Kansas has increased the availability of diversion programs, known as Immediate Intervention Programs (IIP), that provide opportunities for youth to avoid prosecution. IIPs have been leading to less youth involvement in the formal juvenile court system and greater youth success: the vast majority of youth diverted via IIPs successfully completed both pre-file and post-file diversion programs.

Dramatic reduction in use of detention & commitment

Kansas has dramatically reduced the number of youth detained pre-trial and held in secure commitment after adjudication. Detention facilities visited for this assessment reported population decreases significant enough to warrant closing entire units. Youth adjudicated for misdemeanors are no longer held in the state's secure commitment facility, the population of which decreased by nearly one-quarter in the first three years after significant juvenile law reforms.

OPPORTUNITIES FOR CHANGE: A CALL TO ACTION

RECOMMENDATIONS TO IMPROVE ACCESS TO COUNSEL & QUALITY OF REPRESENTATION

1 Implement a strong, specialized, state-supported system of juvenile defense

Kansas should implement and enforce a system of specialized juvenile defense representation. Through a state entity with oversight and enforcement authority, Kansas should support specialized juvenile defense practice, with adequate defender support services, like investigators and access to experts, and specialized juvenile defense training.

The preferred way to do so would be through a **statewide juvenile public defense system, separate and apart from the adult defense system**, that can create juvenile public defender offices in larger communities—with all of the support structures and oversight such an office brings—and develop, maintain, and oversee juvenile defense contracts in areas where there are insufficient juvenile petitions to justify a full-time dedicated office.

Short of a statewide system, Kansas could establish **a state-funded juvenile defense commission with oversight powers** that, while not providing direct representation to youth, would manage state funding and resources to supplement county systems, promulgate standards on which state funding would be predicated, and create statewide and regional training opportunities.

2 Create a statewide resource center to support juvenile defenders across the state

As Kansas implements a strong, state-supported system of juvenile defense, it should also create a resource center to provide support to juvenile defenders across the state. Such a center could partner with counties on the development of juvenile defense contracts, provide juvenile defense training opportunities across the state, and act as a resource for juvenile defense attorneys throughout their practice.

3 Create and enforce statewide juvenile defense practice standards for counties and defenders

Kansas should create, implement, and enforce statewide juvenile defense standards that provide juvenile defense attorneys with clear measures and expectations they must meet prior to defending young people and throughout their practice in delinquency court. Standards should outline core competencies every juvenile defense attorney must meet and performance standards attorneys must abide by when representing youth.

- 4 Establish, fund, and enforce statewide juvenile defense training standards**

Kansas should adopt minimum training requirements that defenders must meet prior to representing youth in delinquency court and should establish ongoing training requirements for juvenile defenders to continue accepting appointments throughout their tenure in delinquency court. Defenders should be required to attend training on a wide range of critical issues, including the long-term impacts a delinquency adjudication can have on youth; the importance of conducting an independent investigation of each client's case; communicating with youth; trial strategy and practices; dispositional advocacy, including challenging conditions of probation that are not youth- or case-specific, developing and presenting mitigating evidence for the court to consider in sentencing; and effective post-disposition advocacy, including opportunities to shorten dispositions or relieve youth of sentencing conditions and on effective appellate practice.
- 5 Create a system of automatically appointing defense counsel prior to the first appearance in juvenile court**

Courts should presume young people cannot afford to hire counsel, automatically assign court-appointed counsel to every youth, and notify the young person and their assigned attorney of the appointment at the time the court sends a summons for the youth to first appear in court. Automatic appointment of counsel *prior* to the first hearing at which a child sees a judge will increase court efficiency and promote greater communication between youth and their attorneys.
- 6 Ensure youth have access to counsel at all stages of the juvenile court process**

Kansas should expand the law regarding access to counsel during interrogation to all youth, regardless of age, and mandate the presence of counsel at all youth interrogations; ensure that youth whose cases move through diversion processes have access to qualified juvenile defenders; ensure that contracts for defense counsel allow for defenders to continue providing effective representation after a youth receives their disposition; and eliminate state law that forbids appellate review of negotiated guilty pleas.
- 6 Improve detention hearing structure and advocacy**

Juvenile courts in Kansas should hold detention hearings on Saturdays and ensure they are making an on-the-record probable cause determination at the outset of every initial detention hearing. Defense counsel must be better informed about, and present to the court, alternatives to detention for youth and the risks youth face when detained. Kansas should prohibit holding juvenile detention hearings remotely by video technology, unless there is valid consent by the youth and defense counsel and the court ensures means for confidential attorney-client communication during the hearing.
- 8 Eliminate fees and costs related to defense counsel**

Kansas should eliminate all fees and costs related to youth exercising their constitutional right to counsel. Charging youth and families for the services of a constitutionally required defense attorney may create pressure for youth to not fully challenge the charges against them, plead in order to end the case quickly, or not pursue an appeal, all in an effort to limit their family's financial exposure.

RECOMMENDATIONS TO IMPROVE JUSTICE & FAIRNESS FOR YOUTH

- 1 Eliminate fines, fees, and costs associated with juvenile court involvement**

Kansas should abolish all fines, fees, and costs associated with juvenile court involvement. Where existing law allows for discretion, judges should waive all financial assessments and defenders should advocate for courts to waive fines, fees, and costs for all youth. The goal of a rehabilitative juvenile court system should be to help youth and families achieve long-term success. Saddling them with debts and obstacles to that success is counterproductive.
- 2 Eliminate racial disparities in the juvenile court system**

Kansas must commit to combatting racial disparities at every step of the juvenile legal system, from school push-out to arrest to the juvenile court system. The state should analyze system involvement and outcomes and require debias training for all stakeholders. All stakeholders must recognize existing racial disparities in the juvenile court system and work to eliminate them, and juvenile defenders have a unique role and specific responsibilities. Advocacy for equitable treatment is an essential part of the role of juvenile defenders. Defenders have a duty to educate themselves about the special needs of the populations they serve, and to confront their own biases and those inherent in the justice system.
- 3 Eliminate the indiscriminate shackling of youth in juvenile court**

Kansas should follow the lead of 32 states that have reformed their use of restraints on young people in juvenile court and enact a statewide policy limiting the shackling of youth. All juvenile court stakeholders in Kansas, but especially defenders, must learn about the harm and trauma shackling can cause children and adolescents. Defenders should ask courts to remove shackles from young people while they are in court.
- 4 Provide all juvenile court stakeholders with training and resources relevant to adolescent development**

Kansas should ensure that every defender, prosecutor, judge, probation officer, police officer, and service provider receives regular training on adolescent development, how it affects youth comprehension and decision-making, and how that implicates each of their professional roles in the juvenile court system. All juvenile court stakeholders must have an understanding of how a young person's cognitive, psychosocial, and emotional development affects their juvenile court involvement.
- 5 Provide and support a continuum of services for children and adolescents across the state**

Kansas must provide and support a continuum of services for children and adolescents across the state. The state must ensure the CINC system is not used to circumvent the reforms to the juvenile detention statute or as a way to hold youth longer than they could be detained under the delinquency system. Defense counsel must become knowledgeable about and advocate for appropriate alternative placements and services for their youth clients.



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