

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 9-10, 2010

RECOMMENDATION

RESOLVED, That the American Bar Association urges state, local, territorial, and tribal governments to provide legal counsel to children and/or youth at all stages of juvenile status offense proceedings, as a matter of right and at public expense.

REPORT

Relevant ABA Policy

The ABA has long supported the right to counsel in a variety of situations affecting indigent people, including children and youth. In 2006, the Association adopted policy that supports the right to counsel in non-criminal proceedings that affect significant aspects of people's lives, such as cases relating to safety, health, or child custody.

The ABA also supports the right to counsel for children and youth in a variety of situations. The IJA-ABA Juvenile Justice Standards state that parties involved in juvenile or family law proceedings *should* be provided with the assistance of counsel at all stages of the proceedings. These standards encourage counsel for youth involved in delinquency, status offense, child protective, custody, and adoption hearings.¹ The standards go on to state that a youth's right to counsel cannot be waived in delinquency proceedings.²

Association policy in 1992, supporting the reauthorization of the Juvenile Justice and Delinquency Prevention Act, calls for Congress to guarantee juveniles' right to counsel in delinquency proceedings. In 2001, the Association passed policy supporting a right to counsel for unaccompanied children at all stages of immigration proceedings. And in 2005, the ABA recommended that all youth in the dependency system have the right to quality legal representation, not simply a guardian *ad litem* or volunteer advocate.

The Association has also passed policies relating specifically to status offenders.³ In 2007, the Association passed a policy recommending that states and localities take steps to divert status offenders from the courts and to pass laws in support of policies and programs that provide early intervention and pre-court prevention services to status offenders and their families. The Association, however, has no policy on the right to counsel for status offenders. Even though the IJA-ABA juvenile justice standards encourage counsel for this population, they are silent on whether this should be an automatic right throughout status offense proceedings and issues relating to waiver.⁴

The ABA supports the right to counsel for individuals involved in civil proceedings that have substantial consequences, and has repeatedly supported the right to counsel for many children and youth involved in court proceedings. This policy would fill a much

¹ Shepherd, Robert E. Jr., ed. "Relating to Counsel for Private Parties," *IJA-ABA Juvenile Justice Standards Annotated*. Washington, DC: American Bar Association, Standards 1.1 and 2.3 (1996).

² *Ibid.*, "Standards Relating to Pretrial Court Proceedings," Standard 6.1(A): "A right accorded . . . in a delinquency case . . . may be waived . . . a juvenile's right to counsel may not be waived."

³ The IJA/ABA Standards Relating to Noncriminal Misbehavior (1977) (never approved by the ABA) support the appointment of counsel for status offenders in cases where the juvenile is removed from the home and where the juvenile's interests conflict with those of the parents.

⁴ See, e.g., Shepherd, Robert E. Jr., ed. "Standards Relating to Pretrial Court Proceedings," *IJA-ABA Juvenile Justice Standards Annotated*. Washington, DC: American Bar Association, Standard 6.1(A) (1996) (only discussing waiver in the delinquency context).

109A

needed gap in assuring that the hundreds of thousands of youth who enter the court system because of a *non-criminal* status offense, many of whom, nonetheless, may face incarceration afforded appointed counsel.

Background on Juvenile Status Offenders

A juvenile status offense is conduct by a child that is unlawful solely because of the offenders age. In other words, an adult may legally engage in the same acts that are unlawful if performed by a child. Common examples of status offenses include running away from home, truancy, out-of-control or incorrigible behavior, alcohol possession, or curfew violations.

In 2004, over 400,000 youth were arrested or held in limited custody by police because of status offenses. This number represented approximately 18% of all juvenile arrests that year. Of the 400,000 youth arrested, 159,000 status offense cases were formally processed in court. Seven percent of status offense cases resulted in the youth's detention and this number increases when including youth who were detained for violating an order of the court or technical violations. Status offenders represent a growing population in the juvenile justice system: between 1994 and 2004 the number of petitioned status offense cases increased by 39%.⁵

The federal law governing treatment of status offenders is the Juvenile Justice and Delinquency Prevention Act (JJDP Act), enacted in 1974. Under the Act, to receive federal money, states are prohibited from, among other things: (1) placing noncriminal status offenders in secure facilities; and (2) allowing contact between juvenile and adult criminal offenders. But, in 1980, the Act was amended to allow courts to place status offenders in secure confinement if they violated a valid order of the court. This amendment is commonly referred to as the "Valid Court Order Exception."

Juvenile status offenders are at high risk to enter the juvenile and criminal justice systems and research has clearly linked involvement in the juvenile status offense system with later delinquency.⁶ Many of these youth face a myriad of complex problems: abuse, neglect, high family conflict and domestic violence; desperately poor and violent neighborhoods; serious mental health needs, learning disabilities, emotional or behavioral problems; gangs; bad peer group choices; and poor educational and employment options.

Often they are brought before the court by their parents, not because they committed a criminal act but because of such things as chronically running away from home, being allegedly out of control or repeatedly missing school. When they arrive at court many are not advised of a right to counsel or appointed an attorney, even though they may

⁵ Stahl, Anne L. *OJJDP Fact Sheet: Petitioned Status Offense Cases in Juvenile Court 2004*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, February 2008. <<http://www.ncjrs.gov/pdffiles1/ojjdp/fs200802.pdf>>.

⁶ See, e.g., Henry, K. and Huizinga, D. "Effect of Truancy on Onset of Drug Use and Delinquency." Presented at Annual Meeting of American Society of Criminology, November, 2005.

later face detention or removal from their homes. In those instances where they are advised of their right to counsel, anecdotal evidence suggests that many waive the right, having not been fully informed of what they are waiving.⁷

Supreme Court Precedent and Federal Regulation Support for the Right to Counsel in Status Offense Cases

Although the U.S. Supreme Court has not addressed the issue of right to counsel for status offenders, several cases lend support for the notion that youth should have counsel in status offense proceedings. For example, in *In re Gault*, the Supreme Court held that youth in delinquency proceedings, where there is a possibility of incarceration, have a due process right to be informed of their right to counsel.⁸ The court reasoned that counsel is necessary to assist the youth “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.”⁹ The court went on to state that “[t]he most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot.”¹⁰

In *Gault* the court reasoned that youth, therefore, required the guiding hand of counsel at every step in the proceedings.¹¹ This reasoning similarly applies to status offense cases. Status offenders face the threat of incarceration in almost half the states and the possibility of removal from their home in all jurisdictions. Alleged or adjudicated status offenders are no more capable of preparing their own defense than are alleged or adjudicated delinquent youth. Status offense proceedings are just as technical and laden with legal jargon as delinquency proceedings. Though the Supreme Court has not directly addressed the right to counsel for status offenders, its holding on delinquents’ due process rights provides support for a due process right to counsel for status offenders throughout the status offense process, particularly when they face incarceration or removal from their homes.

A more recent Supreme Court case that supports the right to counsel in status offense cases is the Court’s 2002 decision in *Alabama v. Shelton*. Although it is an adult criminal case, it is relevant to status offense proceedings where youth face the possibility of incarceration. In *Shelton*, the court held that if a criminal defendant who was convicted of a crime and given a suspended sentence violates the terms of his

⁷ There is limited data on the frequency with which status offenders waive their right to counsel, however, there have been several state assessments which have shown a high rate of waiver in delinquency proceedings. See Nat’l Juvenile Defender Ctr., Assessments, at <http://www.njdc.info/assessments.php> (state-by-state reports containing information about juvenile defense counsel, including percentage of situations in which juveniles waive right to counsel); Mary Berkheiser, “The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts,” 54 *Fla. L. Rev.* 577 (2002) (discussing numerous status offense and delinquency cases that were overturned when youth waived their right to counsel); see also Feld, Barry “In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Courts, 34 *Crime and Delinquency* 393 (1988).

⁸ *Application of Gault*, 387 U.S. 1, 4 (1967).

⁹ *Ibid.* at 36 (citing *Powell v. State of Alabama*, 287 U.S. 45, 69 (1932)).

¹⁰ *Ibid.* at 38 fn.65 (quoting President’s Crime Comm’n, Nat’l Crime Comm’n Rep. 86-87 (1967)).

¹¹ *Ibid.*

109A

probation, the state may not impose a prison term unless the defendant was advised of his right to counsel at the initial adjudication.¹² The scenario the defendant in *Shelton* faced is similar to what happens in many status offense cases where adjudicated youth violate the court's dispositional order and then face incarceration. In many instances these youth were not advised of their right to counsel prior to adjudication, as was the case in *Shelton*. Also like *Shelton*, the youth's adjudication is a necessary pre-requisite to entering the dispositional order, which if violated can lead to detention. Hence, just as the violation of probation during a suspended sentence may lead to an adult defendant's incarceration, a violation of a court order following a status offense adjudication may lead to a youth's detention.

Federal regulations also support a status offender's right to counsel. The Juvenile Justice and Delinquency Prevention Act's regulations specify what due process protections must be afforded to status offenders who have violated a valid order of the court. At the violation hearing, the regulations state that status offenders must be afforded "the right to legal counsel, and the right to have such counsel appointed by the court if indigent[.]"¹³

State Law Support for the Right to Counsel in Juvenile Status Offense Cases

Most state statutes afford status offenders counsel at some stage of the proceedings and several automatically vest youth with the right at the first hearing. Maryland and Pennsylvania are two states that fall into this latter category.¹⁴ Maryland's statute provides that status offenders have the right to "prompt assignment of an attorney," and the child cannot waive the right to counsel unless he is in the presence of counsel, has consulted counsel and the court determines that the waiver is knowing and voluntary.¹⁵ Similarly, courts in Pennsylvania must appoint counsel to represent children in status offense proceedings, and children may only waive this right if the waiver is knowing, intelligent and voluntary, and the court has conducted a colloquy with the child on the record.¹⁶

Many other states advise youth that they may obtain counsel or have counsel appointed at the first hearing.¹⁷ Others don't inform youth of this right until they face the possibility of immediate removal or incarceration. For example, North Carolina's statute provides a right to counsel only in proceedings where the youth is alleged to be in contempt of court following the initial adjudication.¹⁸ Under Tennessee's statute, status offenders

¹² *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (citing *Argersinger v. Hamlin*, 407 U.S. 24 (2006); *Scott v. Illinois*, 440 U.S. 367 (1979)).

¹³ 28 C.F.R. § 31.303(f)(3)(v)(D).

¹⁴ See, e.g., Md. Cts. & Jud. Pro. § 3-8A-20; Pa.R.J.C.P.No. 1151 B(1) (2010).

¹⁵ Md. Cts. & Jud. Pro. at § 3-8A-20(b)(4)(iii).

¹⁶ Pa.R.J.C.P.No. 1151 & 1152.

¹⁷ See, e.g., Wyo.Stat. Ann. § 14-6-422(a)(iv) (2009); CT.R.Super.Ct.Juv. § 30a-1(b)(2) (2009); M.G.L.A. 119 § 39F (2010).

¹⁸ N.C. Gen. Stat § 7B-2000(a) (2009).

are entitled to counsel in proceedings “that place the child in jeopardy of being removed from the home.”¹⁹

Recent cases, however, have begun to challenge practices that do not afford status offenders the right to counsel at all stages of the case. For example, in 2009 in *Bellevue School District v. E.S.*, the Washington Court of Appeals held that truant youth have a due process right to counsel at every stage of truancy proceedings.²⁰ The court reasoned that status offense proceedings have the potential to affect children’s interests in privacy, education, and liberty and that youth who are accused of committing a status offense may not be in a position to advocate for themselves. It stated that “[e]xpecting a child to represent herself in truancy proceedings is to expect her to exercise judgment the law presumes she does not have, in a proceeding that may lead to her incarceration.”²¹ The court also noted:²²

A courtroom is an intimidating place, even in less formal juvenile proceedings. Confronted and opposed not only by her school district but in many cases her own parent, a child is unlikely to be a good advocate for herself, regardless of formality.

In 2005, Arizona’s Court of Appeals in *Lana v. Woodburn* examined the state’s statute that says that “a juvenile has the right to be represented by counsel” in juvenile proceedings “that may result in detention.” Under Arizona law, courts have the limited authority to hold adjudicated status offenders in detention pending the final disposition of the incorrigibility hearing. The court reasoned that since the initial incorrigibility hearing may result in detention, the youth has the right to an attorney at this hearing. The court is therefore obligated to inform status offenders of their right to counsel at the initial hearing and to appoint counsel if the youth is indigent.²³

Many states do not grant status offenders a right to counsel despite extant case law, policy arguments and data.²⁴ Even in states that do advise status offenders of their right to counsel, anecdotal evidence suggests that many youth waive this right without sufficient information to make an informed decision or knowledge of the consequences of waiving counsel.²⁵ Data collected on waiver in delinquency cases also suggests that youth in juvenile court, delinquent or status offense, frequently waive their right to counsel. Recent assessments by the National Juvenile Defender Center show that the rate at which youth in the delinquency system waive their right to counsel is high. For

¹⁹ Tn. Code. Ann. § 37-1-126(a)(1) (2010).

²⁰ *Bellevue School District*, 148 Wash. App. 205 (Wash. Ct. App. 2009) (this case is on appeal to the Washington state Supreme Court: *Bellevue School Dist. v. E.S.*, 166 Wash. 2d 1011 (Wash. 2009)).

²¹ *Ibid.* at 215.

²² *Ibid.* at 217.

²³ *Lana v. Woodburn*, 116 P.3d. 1222, 1224-25 (Az. Ct. App. 2005) (citing A.R.S. § 8-221(A)).

²⁴ See, e.g., Feld, Barry C. “The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make.” 79 *Journal of Criminal Law and Criminology* 1185 (1989) (looking at how effective representation can make a difference in delinquent and status offense cases in Minnesota).

²⁵ See, e.g., Mary Berkheiser, “The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts,” 54 *Fla. L. Rev.* 577 (2002).

109A

example, a state assessment in Indiana showed that about 50% of youth waived their right to counsel, with as many as 80% in certain localities. Fifty percent of youth in Ohio also waived their right to counsel, with one magistrate estimating that this number is closer to 60-70% in his jurisdiction. In Maryland, 40 to 58% of youth in the state's poorest counties routinely waived their right to counsel.²⁶ These youth waive this right, yet many face the possibility of incarceration or removal from their homes. To remedy high instances of waiver in the face of possible removal or detention, status offenders must be afforded the right to counsel at all stages of status offense proceedings and appointment must be early and automatic.

Conclusion

Juvenile status offenders are often at high risk for entering the delinquency system. Many also have been abused or neglected. Despite the myriad of problems they may face at home, their communities and in school, their entry into the court system may do more harm than good—leading them deeper into the justice system. In many states these youth enter the court system without the guiding hand of counsel even though they may be pitted against their parents and the government and face dispositional options that range from changed school placements, to removal from their home, to fines, and to incarceration. In these states they will not be afforded counsel until they immediately face removal or detention, most often after they have been adjudicated a status offender. These youth do not have an attorney assisting them through the fact-finding process, presenting defenses and legal arguments that can enhance the accuracy and fairness of proceedings leading up to and through the adjudication. Though federal and some state courts and laws support the right to counsel for status offenders early in the process, many jurisdictions do not provide youth this right until they face removal or incarceration. The American Bar Association can help change this by calling upon states to afford this vulnerable population of youth a right to counsel at every stage of the process. Doing so is consistent with the principles of fairness and justice espoused by the Association and adopted through its current right to counsel policies for children and youth.

Respectfully submitted,
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ABA Commission on Youth at Risk
August 2010
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²⁶ Kehoe, Elizabeth Gladden & Kim Brooks Tandy. *Indiana: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings*. Nat'l Juvenile Defender Ctr. & Central Juvenile Defender Ctr, April 2006. <<http://www.njdc.info/pdf/Indiana%20Assessment.pdf>>; Brooks, Kim & Darlene Kamine. *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio*. American Bar Ass'n Juvenile Justice Ctr. Nat'l Juvenile Defender Ctr. & Central Juvenile Defender Ctr., March 2003. <http://www.njdc.info/pdf/Ohio_Assessment.pdf>; Cumming, Elizabeth et al.. *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. American Bar Ass'n Juvenile Justice Ctr. & Mid-Atlantic Juvenile Defender Ctr, October 2003. <<http://www.njdc.info/pdf/mdreport.pdf>>.

GENERAL INFORMATION FORM

Submitting Entity: Commission on Youth at Risk

Submitted By: Laura Farber, Chairperson

1. Summary of Recommendation(s).

This recommendation urges state, local, territorial, and tribal governments to provide counsel at public expense to children and youth who are alleged or adjudicated juvenile status offenders at all stages of juvenile status offense proceedings. A juvenile status offender is a youth who engaged in conduct that is unlawful solely because of the youth's age, such as truancy, alcohol possession, and running away from home.

2. Approval by Submitting Entity.

The Recommendation was approved by the Commission on Youth at Risk on April 28, 2010.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This recommendation has not been submitted to the House or Board previously. However, the House has approved similar recommendations relating to the right to counsel. In 2006, the House of Delegates passed a resolution urging governments "to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, health or child custody." American Bar Association Task Force on Access to Civil Justice, et al., Report to ABA House of Delegates, Item No. 112A (Annual Meeting 2006).. The House has also passed resolutions on the right to counsel for children and youth in a variety of situations. In 1992, the Association adopted a policy calling for Congress to reauthorize the Juvenile Justice and Delinquency Prevention Act; stating it also "should include . . . guarantees of juveniles' right to counsel." American Bar Association Criminal Justice Section, Report No. 2 to ABA House of Delegates (Midyear Meeting 1992).. In 2001, the Association passed policy supporting "the appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and proceedings." American Bar Association Coordinating Committee on Immigration Law, Report No. 1 to ABA House of Delegates (Midyear Meeting 2001). . In 2005, the Association recommended that "[s]tate, territorial and local governments should provide increased funding for the delivery of indigent defense services in . . . juvenile delinquency proceedings at a level that ensures the provision of uniform, quality legal representation" and "establish oversight organizations that ensure the delivery of independent, uniform, quality indigent defense representation in all . . . juvenile delinquency proceedings." American Bar

109A

Association Standing Committee on Legal Aid and Indigent Defendants, Report to ABA House of Delegates (Annual Meeting 2005)..

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Existing ABA policy on juvenile status offenders will be enhanced by this resolution. In 2007, the Association passed a policy recommending that jurisdictions . . . “pass laws and support policies and programs that divert alleged juvenile status offenders from court jurisdiction that . . . [m]andate the development and implementation of targeted evidence-based programs that provide juvenile, family-focused, and strength-based early intervention and pre-court prevention services and treatment to alleged juvenile status offenders and their families.” American Bar Association Commission on Youth at Risk, et al., Report to ABA House of Delegates, Item No. 104C (Annual Meeting 2007).. However, existing policy is silent on the topic of the right to counsel for juvenile status offenders, if they still end up in the court system. This recommendation would bolster the ABA’s current stance on juvenile status offenders by calling for protections for youth beyond their pre-court experience and into the juvenile court system.

5. What urgency exists which requires action at this meeting of the House?

Studies have shown that the number of youth entering the court system because of a status offense is on the rise. Anecdotal evidence indicates that these youth often are not afforded the right to counsel and many who are waive that right, having not been fully informed of what they are missing. This occurs despite the fact that many of these youth face removal from their homes and even secure detention. State laws differ greatly on whether and when youth are entitled to counsel in status offense cases; policy from the ABA could guide more states in affording youth greater protections through the legal process. In addition, there have been several recent state court cases that have begun to challenge states’ failure to afford youth counsel on constitutional and statutory grounds.

6. Status of Legislation. (If applicable.)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

There is no known opposition at this time.

9. Referrals.

The recommendation was referred to the following entities on May 18, 2010: Judicial Division, Criminal Justice, Homelessness and Poverty, Young Lawyers Division, and State and Local Government.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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109A

EXECUTIVE SUMMARY

1. Summary of the Recommendation

This recommendation urges state, local, territorial, and tribal governments to provide counsel at public expense to children and youth who are alleged or adjudicated juvenile status offenders at all stages of juvenile status offense proceedings. A juvenile status offender is a youth who engaged in conduct that is unlawful solely because of the youth's age, such as truancy, alcohol possession, and running away from home.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the lack of state and local legislation assuring that youth entering the court system because of a non-criminal status offense will be afforded the rights and benefits of appointed counsel throughout the court process. It addresses the growing problem in this country of youth in juvenile status offense proceedings either failing to be advised of their right to counsel or waiving that right without being fully informed of what they are giving up.

3. Please Explain How the Proposed Policy Position will Address the Issue

This resolution calls upon state and local legislatures to enact laws that establish an automatic and immediate right to counsel for alleged juvenile status offenders at all stages of the proceedings. By bringing the ABA's influence to bear on the problem of states failing to either provide juvenile status offenders with counsel or properly advising them of the consequences of waiving that right, this resolution will encourage state and local governments to improve their laws and policies to properly ensure that children and youth in juvenile status offense proceedings receive adequate assistance of counsel.

4. Summary of Minority Views

No opposition to this recommendation has been identified.