

AMERICAN BAR ASSOCIATION COMMENTS
TO THE COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION

In response to the call for comments published in the Federal Register on July 8, 2010, the American Bar Association (ABA) has identified several key areas that the Coordinating Council on Juvenile Justice and Delinquency Prevention must address relating to the four identified priority issues. It is the ABA's position that, to facilitate the education of at-risk youth, as well as juvenile reentry and transitions to adulthood, and to alleviate the effects of racial and ethnic disparities in the juvenile justice system, the federal government must take action in the following pivotal and interconnected areas:

I. JUVENILE COLLATERAL CONSEQUENCES

Depending on the state or jurisdiction, juvenile adjudications of delinquency result in prohibitions and disqualifications that can adversely affect a juvenile's legal rights, opportunities, and benefits. Future access to education, employment, and housing, to name a few, can be adversely affected by a juvenile adjudication.

a. What does the federal government do well? What needs to be changed?

In keeping with its adopted policies, the American Bar Association urges the federal government to increase the opportunities of youth involved with the juvenile or criminal justice systems and to prevent the continuing discrimination against those who have been involved with these systems in the past by limiting the collateral consequences of juvenile arrests, adjudications, and convictions.¹

The American Bar Association also urges the federal government to adopt and enforce laws and policies that:

- Prohibit employers, colleges, universities, vocational and technical schools, financial aid offices, licensing authorities and similar agencies from inquiring about or considering an arrest of a juvenile that did not lead to a finding of guilt, an adjudication or a conviction, or basing the denial of educational or vocational opportunities to applicants on such arrest;
- Prohibit employers and educational institutions from considering any records pertaining to an arrest, adjudication or conviction of an applicant that occurred

¹ ABA Resolution 102A, Approved by House of Delegates at Mid-Year Meeting 2010, http://www.abanet.org/leadership/2010/midyear/daily_journal/102A.pdf.

while the applicant was a juvenile if such records have been sealed or expunged by the court.

- Prohibit colleges, universities, financial aid offices, other educational institutions and employers and employment licensing authorities: (1) from considering juvenile adjudications or criminal convictions unless engaging in the conduct underlying the adjudication or conviction would provide a substantial basis for denial of a benefit or opportunity even if the person had not been adjudicated or convicted, and (2) if the underlying conduct does provide such a basis: (a) from considering a juvenile adjudication, if three years have passed following the applicant's discharge from custody or supervision without being adjudicated or convicted of a subsequent offense; and (b) from considering a criminal conviction, if five years have passed following the applicant's release from custody or supervision without being convicted of a subsequent offense.²

The ABA urges the federal government to adopt and enforce policies encouraging employers, colleges, universities, financial aid offices, licensing authorities and other agencies to give consideration to a juvenile's successful completion of a community re-entry program or the terms of any probation.³

Finally, the American Bar Association urges the federal government to adopt and enforce policies encouraging employers, colleges, universities, financial aid offices, licensing authorities and other agencies to include on applications clear definitions of legal terms such as arrest, adjudication, and conviction.⁴

- b. Are there federal practices, policies, legislation, and/or regulations that support or restrict the successful education of youth; reentry and/or transitions to adulthood; or addressing of racial/ethnic disparities in the juvenile justice and related systems?*
- c. Are there legislative challenges affecting this issue that should be brought to the attention of federal agencies? What ought federal agencies do about them?*

There are significant legislative challenges with juvenile collateral consequences, especially as compared to the collateral consequences of adult convictions. Most of the collateral consequences for adult convictions are more severe and operate automatically. However, the majority of adult collateral consequences are statutory and therefore the method for eliminating them is clear. Juvenile collateral consequences on the other hand are for the most part discretionary, meaning that employers and educators can choose whether or not to deny an opportunity based on a juvenile record.

Therefore, effective legislation needs both to eliminate the access to juvenile records and prevent employers and educators from inquiring about juvenile records. Federal agencies should lead by example and eliminate the practice of inquiring about juvenile records when processing background checks and security clearances.

² *Id.*

³ *Id.*

⁴ *Id.*

- d. *What results and/or consequences might occur from the enacted recommendations?*

The obvious result intended is to have more former offenders working steady jobs and obtaining degrees while reducing recidivism rates across the country.

- e. *Is there anything else the federal government should be aware of concerning the topic?*

The American Bar Association is presently conducting two nationwide studies on collateral consequences. One study focuses solely on juvenile collateral consequences and the other focuses on the collateral consequences of criminal convictions. The juvenile study is on track to be completed by the end of this fiscal year.

II. LOAN FORGIVENESS

In 2008, Congress enacted the John R. Justice Prosecutors and Defenders Incentive Act in an effort to encourage qualified individuals to enter and continue employment as prosecutors and public defenders. This legislation and its effective implementation are crucial in the effort to ensure that juveniles receive adequate representation throughout the juvenile justice system.

- a. *What does the federal government do well? What needs to be changed?*

The federal government has attempted to make it easier for the best and brightest of law students to begin careers as prosecutors and public defenders. Having a sufficient number of competent attorneys in these positions is crucial to the functioning of our justice system (see ABA policy). This legislation represents an expansion of existing repayment systems for executive branch and DOJ employees, which has been beneficial in recruiting and retaining employees in both areas.

However, the program is suffering from a severe lack of funding that has crippled its ability to function. More than likely, no effective data can be generated on this program's impact unless funding is obtained and the expiration date of the program is extended or eliminated.

The American Bar Association urges Congress to ensure that funding for the John R. Justice Prosecutors and Defenders Incentive Act of 2008 (Section 951 of PL 110-315) is expanded beyond its original authorization of \$25 million to cover the actual national need.⁵ The ABA also urges Congress to lift the proposed expiration of the John R. Justice Prosecutors and Defenders Incentive Act of 2008.⁶

- b. *Are there federal practices, policies, legislation, and/or regulations that support or restrict the successful education of youth; reentry and/or transitions to adulthood; or addressing of racial/ethnic disparities in the juvenile justice and related systems?*

⁵ ABA Resolution 102J, Approved by House of Delegates at Mid-Year Meeting 2010, http://new.abanet.org/sdl/Documents/2010_MY_102J.pdf.

⁶ *Id.*

Lack of appropriations for this program is making it more difficult for offices nationwide to recruit and retain public defenders and prosecutors, resulting in a lack of effective and knowledgeable representation for juveniles. This lack of representation results in juveniles having less knowledge regarding potential collateral consequences and other pertinent issues relating to their cases (see Collateral Consequences section above).

- c. *Are there legislative challenges affecting this issue that should be brought to the attention of federal agencies? What ought federal agencies do about them?*

As it stands now, the program is suffering from a severe lack of funding that is currently tied up in the appropriations process. To function effectively, the program needs to receive funds at a level that is consistent with nationwide prosecutorial and public defender demands for these funds. The expiration date also needs to be revisited, given the delay in this program's implementation and the consequences that its expiration would have for its effectiveness and its evaluation by Congress.

- d. *What results and/or consequences might occur from the enacted recommendations?*

The act will provide additional incentives for law students to enter into careers as a public defender or a prosecutor, and greatly lessen turnover in these positions. This will allow these individuals to build expertise on juvenile justice issues and provide much more effective representation for their juvenile clients than was previously possible.

III. ALLEVIATING PUBLIC DEFENDER CASELOADS

In addition to loan forgiveness programs and funding, ensuring adequate representation for juveniles requires a reduction in caseloads for public defenders.

Nearly 50 years after the Supreme Court, in *Gideon v. Wainwright* recognized the right to counsel as “fundamental and essential to fair trials,”⁷ indigent defense services in the United States remain in a perpetual “state of crisis.”⁸ Many states are unwilling or unable to adequately fund and administer indigent defense delivery systems. As a consequence, states permit the judiciary to inject itself into the defense function; force attorneys to carry excessive caseloads; fail to provide attorneys with investigators, experts and essential support services needed for an adequate defense; neglect to provide meaningful supervision of lawyers; allow significant delays in the appointment of counsel; and refuse to make available on-going training to keep attorneys

⁷ 372 U.S. 335 (1963).

⁸ See e.g., American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise* (2006), available at www.indigentdefense.org; The National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect for Our Constitutional Right to Counsel* (2009), available at www.tcpjusticedenied.org.

abreast of ever-evolving criminal justice sciences and other matters related to their professional obligation. These dysfunctional systems of indigent defense prevent lawyers from providing constitutionally and ethically adequate representation of their clients.

The failure of states to meet their constitutional duty to provide effective representation under the Sixth and Fourteenth Amendments extends to juvenile delinquency proceedings, as well as felony and misdemeanor cases. In juvenile and misdemeanor cases especially, jurisdictions often attempt to save money and expedite cases by encouraging accused persons to waive their right to legal representation without adequately informing the accused of the consequences of that waiver.

a. What does the federal government do well? What needs to be changed?

Adoption of federal standards for effective counsel is critical to addressing the shortfalls in our current indigent defense systems, both in public defender systems and private attorney systems. Whether these standards are developed by Congress or the Department of Justice, the right to counsel is meaningless unless mechanisms exist to secure and protect those rights.

1. The American Bar Association urges adherence to the Eight Guidelines of Public Defense Related to Excessive Workloads, dated August 2009, which are as follows:

- a. The Public Defense Provider avoids excessive lawyer workloads and the adverse impact that such workloads have on providing quality legal representation to all clients. In determining whether these objectives are being achieved, the Provider considers whether the performance obligations of lawyers who represent indigent clients are being fulfilled.
- b. The Public Defense Provider has a supervision program that continuously monitors the workloads of its lawyers to assure that all essential tasks on behalf of clients, such as those specified in Guideline 1, are performed.
- c. The Public Defense Provider trains its lawyers in the professional and ethical responsibilities of representing clients, including the duty of lawyers to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable.
- d. Persons in Public Defense Provider programs who have management responsibilities determine, either on their own initiative or in response to workload concerns expressed by their lawyers, whether excessive lawyer workloads are present.
- e. Public Defense Providers consider taking prompt actions such as the following to avoid workloads that either are or are about to become excessive.

- f. Public Defense Providers or lawyers file motions asking a court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate, when workloads are excessive and other adequate alternatives are unavailable.
- g. When motions to stop the assignment of new cases and to withdraw from cases are filed, Public Defense Providers and lawyers resist judicial directions regarding the management of Public Defense Programs that improperly interfere with their professional and ethical duties in representing their clients.
- h. Public Defense Providers or lawyers appeal a court's refusal to stop the assignment of new cases or a court's rejection of a motion to withdraw from cases of current clients.⁹

2. The ABA also recommends statutory change to address inadequate adult and juvenile state indigent defense systems. We recommend amending 42 USC § 3751 specifically to permit indigent defense grants.

While detailed and complete data on state expenditures of Byrne Justice Assistance Grant (JAG) money are not readily available. Historically, a vast majority of funds has been used for law enforcement and prosecution purposes, leaving indigent defense systems with little or no federal funding. In FY 1999, of the almost \$500 million in formula grants awarded to states under the Byrne Grant program, JAG's predecessor, only 1.4% was granted to public defense programs.¹⁰ In 32 states, public defense programs received no such funding at all. As long ago as 1990, members of Congress recognized that federal grant programs to improve the criminal justice system "contemplate[d] a balance of support for *all components* of the court process, including prosecutorial, *defender* and judicial resources."¹¹

To rectify the current imbalance, Congress should amend the JAG authorizing legislation, adding indigent defense to the list of seven specific program categories identified in the statute.¹² This will clarify for Department of Justice and state personnel that support for indigent defense services is one of the central purposes of the JAG programs. Furthermore, either Congress, through legislation, or the Department of Justice, through its rulemaking authority,¹³ can require that each state include at least one representative of the state's indigent defense systems as a member of its State Administering Agency (SAA), which distributes the funds. This will ensure, at a minimum, that the needs and interest of the indigent defense system are heard during the SAA's deliberation process and will highlight to the indigent defense community its right to seek JAG funding.

⁹ ABA Resolution 119, Approved at Annual Meeting 2009, *available at* <http://www.abanet.org/crimjust/policy/cjpol.html> (last visited July 20, 2010).

¹⁰ See National Legal Aid & Defender Association report, *Federal Assistance to State and Local Indigent Defense Programs, FY 1998 and 1999*, *available at* <http://www.nlada.org/DMS/Documents/1013119600.02/Federal%20Assistance%20Report%20FY98-99.pdf>.

¹¹ H. Rep. No. 101-681[I], at 84 (1990).

¹² See 42 USC § 3751(a)(1).

¹³ DOJ can amend 28 CFR § 33.12(a) to achieve this result.

3. Congress should reauthorize the Justice for All/Innocence Protection Act to meet its original intent of providing much-needed resources to indigent defense systems that are at a stark disadvantage to comparatively better-funded prosecutors. Congress should eliminate the 50/50 split between indigent defense and prosecutors, so that all funding goes to defense. Additionally, Congress should remove restrictions on funding so that state indigent defense systems can use the money to hire defenders, rather than operate under the more limited purposes currently permitted under the Innocence Protection Act.¹⁴

4. The ABA also supports enactment of legislation to establish new federal grants specifically for indigent defense. Congress can further ensure that federal dollars supporting criminal justice systems in the states do not exacerbate the imbalance between prosecutors and defenders by requiring states to expend a minimum percentage of their federal funding on juvenile and adult indigent defense. Congress should create a separate federal grant program or allocate a percentage of existing grant money to provide funding for indigent defense systems. In determining indigent defense funding levels for each state, Congress would set a standard percentage applicable to all states or would require each state to submit a justice impact statement describing how its state and federal resources are currently allocated and the effect of these allocations on system components, including indigent defense.

IV. REAUTHORIZATION OF THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT (JJDP)

Although the authority for JJDP expired in 2007, the 110th Congress temporarily maintained its status under the 2002 reauthorization through a series of “continuing resolutions” order to consider reauthorization legislation. The Senate Judiciary Committee then approved bipartisan JJDP reauthorization legislation in July 2008, but no further action occurred.

In the 111th Congress, Senators Patrick Leahy (D-VT), Arlen Specter (R-PA), Herb Kohl (D-WI), and Richard Durbin (D-IL) on March 24, 2009 introduced S. 678, legislation aimed specifically at reauthorizing JJDP. S. 678 is substantially the same as S. 3155 (reauthorization legislation introduced in the 110th Congress), as amended and approved by the Senate Judiciary Committee in July 2008. The Senate Judiciary Committee approved S. 678 by a 12-7 vote on December 17, 2009.

a. What does the federal government do well? What needs to be changed?

S. 678, as introduced in March and approved by the Senate Judiciary Committee in December, includes the “Cardin Amendment” that phases out over three years the statutory exception to the 1980 version of the JJDP that currently allows states to hold

¹⁴ See 42 U.S.C. 14163(c)(2).

status offenders charged with non-criminal offenses in jail or secured confinement. The American Bar Association has long sought this change in the law so that homeless teens, runaways, truants, and other non-criminal youth are not moved into and socialized to the criminal justice system.

S. 678 as introduced also contains the “Kennedy Amendment” adopted by the Committee last July, which provides for early mental health assessment, referral, and treatment of youth who come in contact with the juvenile justice system who have mental health needs and disorders. The ABA strongly supports this provision.

The ABA supports reauthorization of JJDPA, including the state mandates, which are:

- (1) deinstitutionalization of status offenders;
- (2) sight and sound separation of juveniles from adult offenders;
- (3) removal of juveniles from adult jails and lock-ups; and
- (4) reduction of disproportionate minority contact with the justice system.

The American Bar Association also supports congressional efforts to strengthen the federal partnership with states under the JJDPA through the provision of sufficient resources and appropriations to effectively implement the JJDPA, to fully comply with its core mandates/protections and to ensure state and local adherence to high standards of performance.

Finally, the American Bar Association opposes trying juveniles younger than 15 as adults, and believes that juvenile court judges should decide after a hearing whether a waiver of juvenile court jurisdiction is appropriate in a particular case.

V. ADDRESSING RACIAL AND ETHNIC DISPARITIES IN THE JUVENILE JUSTICE AND RELATED SYSTEMS.

Youth of color are significantly over-represented in the juvenile justice system and related systems. Latino youth are incarcerated in local detention and state correctional facilities nearly two times more frequently than White youth. African-American youth represent 16 percent of adolescents in this county, but are 40 percent of the youth incarcerated in local detention and state correctional facilities. Research indicates that youth of color are treated more harshly than White youth, even when charged with the same category of offense. For drug offenses, White youth are much more likely than African-American youth to be placed on probation, and African-American youth are twice as likely as White youth to be sent to locked facilities. Latino youth are incarcerated for twice as long as White youth for drug offenses and are one and a half times more likely to be admitted to adult prison.

a. *What does the federal government do well? What needs to be changed?*

The ABA has long supported the Juvenile Justice and Delinquency Act (discussed in part IV) and called for strengthening its core mandates on state systems under the Act, including the current law requirement that requires states to “address” disproportionate minority contact (DMC) within the juvenile justice system. This vague requirement has left state and local officials without clear guidance on how to reduce racial and ethnic disparities. In the current Congress, the ABA has supported strengthening the DMC core protection by requiring states to take concrete steps to reduce racial and ethnic disparities in the juvenile justice system. States should be required to:

- 1) establish coordinating bodies to oversee efforts to reduce disparities;
- 2) identify key decision points in the system and the criteria by which decisions are made;
- 3) create systems to collect local data at every point of contact youth have with the juvenile justice system to identify where disparities exist and the causes of those disparities;
- 4) develop and implement plans to address disparities that include measurable objectives for change;
- 5) publicly report findings; and
- 6) evaluate progress toward reducing disparities.

The ABA has also called for action to address racial disparities in the child welfare system.¹⁵ For child welfare agencies we have called for the federal government to “require and fund states to track, report, analyze, and take and report on corrective action” related to racial disparities. The ABA has also called for “child welfare agencies, dependency courts and judges, and children’s and parents’ advocates to help racial and ethnic minority families readily access needed services and to help ensure that removal of children from their homes is based on objective child safety criteria so that all families in the child welfare system are treated fairly and equitably.”

Both with regard to the juvenile justice and the related child welfare system, we urge federal support for programs to provide “training on cultural competencies, institutional and unconscious biases, and avoidance of disparate treatment of racial and ethnic minority children and families and to develop and promote practices that encourage recruitment and retention of racially and ethnically diverse judges, attorneys, social workers and other staff, volunteers and foster parents.” Finally, recognizing that the homes from which juveniles come may be those they cannot return to, we urge governments to “decrease disproportionate representation of racial and ethnic minority children...by offering additional support to relative caregivers”.

VI. IMPROVING JUVENILE ACCESS TO EDUCATION IN THE CORRECTIONS SYSTEM

¹⁵ August 2008.

Although the best efforts at diversion might not prevent juveniles from entering the juvenile justice system, the provision of adequate educational opportunities during a juvenile's tenure is necessary to ensure that youth graduate and successfully transition back home and into the traditional education environment.

a. What does the federal government do well? What needs to be changed?

The American Bar Association supports legislation that would create an office or center of correctional education within the U.S. Department of Education to perform certain functions, including but not limited to the following:

- (A) coordinate all adult and juvenile correctional education programs within the Department of Education;
- (B) provide technical support to State and local educational agencies and to correctional systems on adult and juvenile correctional educational programs and curricula;
- (C) provide an annual report to Congress on the progress of the office or center and the status of adult juvenile correctional education in the United States;
- (D) cooperate with other federal agencies carrying out correctional education programs to ensure coordination of such programs;
- (E) advise the Secretary of Education on correctional education policy; and
- (F) distribute grant funds that may be available for correctional education within the Department of Education.¹⁶

The ABA also supports legislation that provides for funding of vocational education in adult and juvenile correctional institutions and programs through such mechanisms as the Carl D. Perkins Applied Technology Education Act and supports legislative initiatives, at the federal and state levels, that specifically recognize, address, and attempt to correct illiteracy within adult and juvenile correctional institutions and programs.¹⁷

- b. Are there federal practices, policies, legislation, and/or regulations that support or restrict the successful education of youth; reentry and/or transitions to adulthood; or addressing of racial/ethnic disparities in the juvenile justice and related systems?*
- c. Are there legislative challenges affecting this issue that should be brought to the attention of federal agencies? What ought federal agencies do about them?*
- d. What results and/or consequences might occur from the enacted recommendations?*
- e. Is there anything else the federal government should be aware of concerning the topic?*

VII. IMPROVED REENTRY AND AFTERCARE PROGRAMS

¹⁶ ABA Resolution 115C, Approved by House of Delegates at Mid-Year Meeting 1990, Retained at Annual Meeting 2000, available at <http://www.abanet.org/crimjust/policy/cjpol.html> (last visited July 19, 2010).

¹⁷ *Id.*

Juvenile reentry and aftercare programs are crucial to successfully transition juveniles back into society.

a. *What does the federal government do well? What needs to be changed?*

Federal support for reentry generally, including juvenile reentry programs, increased significantly with the 2008 enactment of the Second Chance Act. The Act provides federal grant support for a range of state programs that provide job training, family reunification, mental health and substance abuse counseling and housing assistance to the over 600,000 adults and 100,00 juveniles leaving jails, detention facilities and prisons each year in order to help them successfully return to their communities and avoid further criminal behavior. The Second Chance Act is authorized for two years for up to \$165 million each year.

The ABA supports full funding for FY 2011 in the yearly appropriations made for the Second Chance program (\$165 million per year).¹⁸

At the same time, we recognize that the federal support provided under the Second Chance Act will provide a limited number of grants and reach only a small proportion of the population who need reentry support each year. The Second Chance Act will be up for reauthorization in 2011, and the ABA strongly supports its expansion, particularly to provide new grant authority to support programs for youth offenders.

To achieve the optimal goal of a full and successful post-corrections transition, comprehensive reentry and aftercare programs must be developed and implemented after sentencing and throughout a juvenile's incarceration and immediate release.¹⁹ Successful programs must also combine training, counseling, mentoring, reunification with family members, drop-in facilities, and mental health programs, implemented together consistently and sustained for at least 6 months to a year, during which time the risk of recidivism is highest.²⁰ The American Bar Association, through its Criminal Justice Section Juvenile Justice Committee, has developed a Model Reentry Program in an effort to achieve these goals. Optimal programs should include:

- i. An individualized plan for reentry/aftercare, based on an assessment of each youth, which is developed and implemented well before the youth is released back into society;
- ii. Positive links with community resources and social networks must be created which involve the youth's family, school, peers, faith based

¹⁸ Thomas M. Susman, letter, https://www.abanet.org/poladv/letters/crimlaw/2010apr29_secondchances_1.pdf (supporting full funding of the Second Chance Act for FY 2011 on behalf of the American Bar Association and the Members of the Standing Subcommittee on Governmental Affairs).

¹⁹ American Bar Association Juvenile Justice Committee, Criminal Justice Section, *A Look at Juvenile Reentry and Aftercare Programs* 1, <http://new.abanet.org/sections/criminaljustice/CR200000/PublicDocuments/juvenilereentryprograms.pdf>.

²⁰ *Id.*

- institutions, after-school service provider and other relevant community networks;
- iii. Intensive surveillance and services must be provided; staff and counselors should have small caseloads and are available throughout the week; and
 - iv. A balance of incentives and graduated consequences must be applied, with a range of graduated sanctions proportionate to the seriousness of any violation.²¹

As part of its resolved policies, the ABA urges the federal government to assure that adequate and appropriate services are made readily available to at-risk youth and their caretakers by ensuring that:

- a) Community mental health systems serving youth are reinvigorated and significantly expanded to provide greater access to troubled youth and their caretakers;
- b) Stronger support is given to expanding availability of evidence-based programs for youth and greater investment is made in research to identify additional evidence-based programs worthy of replication and use for at-risk youth;
- c) A positive youth development perspective is incorporated into services and programs, including opportunities that support young people in developing a sense of competence, usefulness, belonging, and empowerment, through access to developmental services and activities facilitating positive connections among youth and with adults, and also offering young people valuable information and learning experiences to help them choose healthy lifestyles; and
- d) Needed services and/or treatment should be provided to youth in need of such services by appropriate juvenile justice and child welfare intervention systems without the necessity or requirement of courts exercising jurisdiction over or adjudicating them.²²

The ABA also urges the federal government to develop and adequately support permanent interagency and other youth resource coordination mechanisms to help assure that at-risk youth and their caretakers receive timely and effective services through public child welfare, youth services, mental health, schools, and other agencies.²³

Finally, the ABA urges attorneys and state, territorial, tribal, and local bar associations to help develop legal strategies to promote the above objectives while protecting youth rights to confidentiality and privacy, as well as to support government and private investment in coordinated, community-based mental health and other services to at-risk youth and families, available without involvement in juvenile justice or child protection systems.²⁴

²¹ *Id.* at 2.

²² ABA Resolution 10A, Approved by House of Delegates at Annual Meeting 2006.

²³ *Id.*

²⁴ *Id.*

Foster care youth also represent a unique transitioning population. To address their distinctive needs, the ABA urges Congress to amend federal law to expand services and support for transitioning youth by:

1. Clarifying the Family Educational Rights and Privacy Act as it pertains to sharing health and education information among agencies, judges and advocates involved with the care and education of and legal proceedings involving foster youth; and
2. Implementing requirements to preserve every foster youth's Social Security Act entitlements and other financial assets for use directly by that youth.²⁵

Even more so, the LGBT foster youth population must be addressed. The ABA urges the federal government, agencies, and courts to adopt and implement laws, regulations, policies, and court rules that promote the safety, well-being, and permanent placement of lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth who are homeless or involved with the foster care system. These efforts should be based on the following guidelines:

1. Agencies providing housing or supportive services for youth who are homeless or in foster care, those placing youth in foster family homes, and courts should prohibit discrimination and be prohibited from discriminating based on a youth's actual or perceived sexual orientation or gender identity.
2. Agencies providing housing or supportive services for youth who are homeless or in foster care, those placing youth in foster family homes, courts, attorneys, guardians ad litem, and court-appointed special advocates handling dependency or other legal cases involving the custody and care of youth should recognize the actual, and risk of, harm, violence, and harassment LGBTQ youth face in congregate care facilities and in-home placements and take steps to address and prevent this violence;
3. Agencies providing housing or supportive services for youth who are homeless or in foster care, those placing youth in foster family homes, and courts should conduct LGBTQ sensitivity training for all housing and supportive service staff, foster parents, and professionals handling dependency or other legal cases involving the custody and care of youth; and.
4. Agencies placing youth in foster family homes, courts, attorneys, guardians ad litem, and court-appointed special advocates handling dependency or other legal cases involving the custody and care of youth should take steps to ensure that LGBTQ youth remain safely and with healthy support in their homes of origin, where possible, and where it is not, that they are placed with LGBTQ-friendly foster families²⁶

VIII. ENSURING SCHOOL STABILITY AND CONTINUITY AND IMPROVING EDUCATION OUTCOMES FOR CHILDREN IN AND TRANSITIONING OUT OF FOSTER CARE

²⁵ ABA Resolution 104A, Approved by House of Delegates at Annual Meeting 2007.

²⁶ ABA Resolution 104B, Approved by House of Delegates at Annual Meeting 2007.

For the almost 800,000 children and youth served in foster care each year, educational success can be a positive counterweight to their experiences of abuse, neglect, separation, and impermanence in their family and living situations. Unfortunately, the educational outcomes of most children in foster care and those who have transitioned out of care are dismal. Although data are limited, particularly national data, research makes it clear that serious issues must be addressed to ensure the educational success of children both in and transitioning out of foster care. Our nation's education, child welfare, and juvenile justice systems must work together to provide support for children in foster care to enhance and reinforce the efforts being undertaken by the child welfare system to provide a safe and permanent home for the child, and ensure that the child's needs—including education needs—are being adequately addressed.

a. What does the federal government do well? What needs to be changed?

Currently, without the collaborative support of education, juvenile justice and child welfare systems, children in foster care face a number of barriers to their education:

- i. Lack of placement stability: School mobility rates are high for young people in foster care. Youth in foster care live, on average, in two to three different places each year. When youth move, they often are forced to change schools. In an ongoing three-state study by Chapin Hall of youth aging out of foster care, over a third of young adults reported having had five or more school changes. Studies indicate that frequent school changes negatively affect students' education growth and graduation rates.
- ii. Delayed enrollment and record transfers: When children change schools their education is adversely impacted by enrollment delays, delays in transferring records and credits, and an inability to access academic and extracurricular programs.
- iii. Lack of services for our youngest children in foster care: Young children in foster care make up the largest cohort of victims of abuse and neglect. More than 50% have developmental disabilities, four to five times more frequently than other children.
- iv. Confusion about education decision-making authority and rights: Education laws and processes are generally designed to support the rights of a student's parents. Birth parents should continue to make education decisions for their children when they are able; however there are many circumstances where children in foster care do not have an appropriate person to make these decisions. Child welfare agencies, education agencies and the courts must work together to ensure that an adequate

legal decision maker is identified at all points during a child's stay in foster care.

- v. Both over- and under-representation in special education: Studies suggest anywhere from 40-60% of children in foster care are receiving special education services. However, largely because of high mobility and lack of an education decision maker, many students who may qualify for special education are not identified or receiving services. Alternatively, many students in care are inappropriately identified for special education when they may need other additional educational supports and services.
- vi. Over-representation of children of color in foster care: Studies show that children of color – particularly African American children – are in foster care at rates disproportionate to their representation in the general child population. Child welfare and education agencies must ensure that all children, regardless of their cultural, ethnic, or racial identity, receive services that address the full spectrum of their needs in a manner that reflects the cultural strengths of their families.
- vii. Discipline, truancy, and dropout rates far higher than the general student population: When youth are frustrated by frequent moves and rough transitions, they are more likely to act out, skip school, or drop out altogether. Children who have experienced abuse or neglect and have been removed from their parents often experience emotional or behavioral challenges and other problems that interfere with learning and school success. These youth need appropriate support, programs, and interventions to keep them engaged and in school.
- viii. Extremely low post-secondary education attendance and completion rates: Like other students, youth in care want to obtain a postsecondary education. However, studies indicate that they realize this dream far less frequently than the general population. To achieve their full potential, youth need support and opportunities to enter, participate and complete postsecondary programs. These youth need targeted career and college counseling, assistance with applications and financial aid, and support while participating in their educational program of choice.

b. Are there federal practices, policies, legislation, and/or regulations that support or restrict the successful education of youth; reentry and/or transitions to adulthood; or addressing of racial/ethnic disparities in the juvenile justice and related systems?

The U.S. Department of Education, U.S. Department of Health and Human Services, Administration on Children and Families, and Office of Juvenile Justice and Delinquency Prevention can help change the trajectory of education outcomes for children in out-of-home care. Currently, the lack of coordination across agencies – particularly education and child welfare agencies – has resulted in too little attention being paid to the significant education needs and life experiences of children in foster care. Because the education needs of children

in foster care directly impact each of these agencies, a collaborative federal effort is required to mirror the collaboration required at the state and county level.

- a. Raise awareness and prioritize the education needs of children in foster care: Mirroring the great work of the Coordinating Council on Juvenile Justice and Delinquency Prevention, establish a formal collaboration between the U.S. Department of Health and Human Services, particularly the Administration on Children and Families, and other federal departments or agencies, including the U.S. Department of Education, or incorporate this issue into already existing workgroups to develop strategies for improving the education outcomes for children in foster care or incorporate the issues of education stability and success for children in and transitioning out of foster care. Ensure that the education needs of children in the foster care system are a priority of the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Health and Human Services, particularly the Administration on Children and Families, and U.S. Department of Education, and develop expertise across relevant programs on the unique barriers, education needs and life experiences of children in foster care. The task force should also include various groups representing the stakeholders involved in the lives of children including parents, youth, relatives, child welfare caseworkers and administrators, teachers and education administrators, courts, and children's attorneys and advocates. The task force would address issues including:
 - i. Increasing school stability and ensuring immediate and appropriate enrollment;
 - ii. Ensuring equal access to all programs and activities available to other students, as well as providing additional programs and services to support the unique education needs of children in care;
 - iii. Clarifying the process and procedure for identifying the appropriate education decision maker for students in both general and special education at all times while a child is in foster care;
 - iv. Ensuring coordinators at the state level and liaisons at the school district level to be the point of contact for education issues affecting children in foster care and to create a seamless school-based network of supports to ensure issues are addressed at all levels.
 - v. Engaging students, families and caregivers in school, including involvement in education and post-graduate planning for children in foster care; and
 - vi. Collecting data to track and guide states and localities in addressing education barriers and targeting strategies and resources.
- b. In addition to modeling collaboration between federal agencies and heightening awareness on this important issue, the following actions would mark great

- i. Create key points of contact within the U.S. Department of Education and U.S. Department of Health and Human Services Administration on Children and Families who will focus on the education needs of children in foster care. Issues affecting children in foster care are relevant to numerous divisions and departments including the Department of Education Offices of: Special Education and Rehabilitative Services, Elementary and Secondary Education, Postsecondary Education, Federal Student Aid; Vocational and Adult Education; and Civil Rights and Administration on Children and Families Offices of: Planning, Research and Evaluation, and Children’s Bureau.
 - ii. Create a federally supported technical assistance and training center to support the work of educators, child welfare professionals, and legal systems focused on the education needs of children in care. Similar to the technical assistance center for Title I “Neglected and Delinquent” youth, or “Homeless Children and Youth,” this center would advance innovations and strategies to support both the education and child welfare systems and collaboration across systems.
 - iii. Collect data to improve education outcomes for children in foster care. There are currently no national data that track the educational experiences and outcomes for youth in foster care. Even in the states that have already made great strides to improve education outcomes for children in care, there are minimal data to document these advances and ensure uniform compliance with legal requirements. States must collect these critical data and receive support and guidance to track improvements for children in care. States should be required to focus on the collection and reporting of data critical to education outcomes for children in care, as well as create the infrastructure to track improvements related to effective programs and initiatives.
 - iv. Dedicate resources to support children in foster care or provide additional resources to support collaboration. Prioritize youth in foster care for existing federal support, or dedicate specific resources to states to support state and local child welfare and education agency collaboration around education for children in foster care. For example, federal support is critically needed to ensure transportation to remain in a child’s same school, when in the child’s best interest, as required by the Fostering Connections to Success and Increasing Adoptions Act.
- c. In addition to the federal collaborative structures and supports necessary, several current laws and regulations could be clarified and implemented:

- i. Fostering Connections to Success and Increasing Adoptions Act: This relatively new child welfare law was a tremendous step towards improving school stability for children in care. The law requires child welfare agencies to coordinate with Local Education Agencies (LEAs) to support children in foster care remaining in their original school when living changes occur, and, if not in their best interest, to enroll them immediately in a new school. Since the legal requirements of Fostering Connections cannot be met without LEA participation, reciprocal mandates on the education agencies are needed, including the right to remain in the original school, the right to be immediately enrolled in a new school, and a full range of support and services similar to those in place for homeless children and youth. Furthermore, federal funding to support the collaboration required by the act, including transportation to ensure school stability and designated points of contact in the state and local child welfare and education agencies, is necessary to ensure meaningful school stability and continuity for children in care.
 - ii. The Family Education Rights and Privacy Act (FERPA): Clarification is needed to guide school districts on how child welfare professionals and caretakers working with a child in the custody of a child welfare agency can access necessary education records in compliance with FERPA.
 - iii. Individuals with Disabilities Education Act (IDEA): While existing law provides some parameters for identifying a special education decision maker when a child is a “ward of the state,” additional clarification is needed to ensure consistent interpretation of these complex rules and to ensure that all children in care have a legal active decision maker to represent the child’s interests throughout the special education process.
 - iv. Elementary and Secondary Education Act (ESEA): Existing law specifically identifies some students with unique educational challenges, but ESEA is silent on children in foster care. Reauthorization of ESEA must include identifying and guaranteeing the education services and support children in foster care need to be successful, and tracking their education outcomes.
- c. *Are there legislative challenges affecting this issue that should be brought to the attention of federal agencies? What ought federal agencies do about them?*
 - d. *What results and/or consequences might occur from the enacted recommendations?*
 - e. *Is there anything else the federal government should be aware of concerning the topic?*

This Administration’s deep commitment to addressing the education achievement gap for all children in this country creates a critical and timely opportunity to address the unique education barriers and needs of children in foster care. The U.S. Department of Health and Human Services, U.S. Department of Education, and Office of Juvenile Justice and

Delinquency Prevention should collaborate to change the education trajectory for children in foster care. Leadership at the federal level is imperative to spur leadership and change at the state and local level.