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SESSION 2 - ACCESS TO COUNSEL FOR JUVENILES
10:15 - 11:15
Eliza Solowiej leads First Defense Legal Aid, the only provider of free, 24-hour legal representation for people in Chicago police custody during the critical phase when a person can be held incommunicado by police and prosecutors for days before the public defender might be appointed. FDLA also teaches Chicagoans their rights and how to invoke them when in contact with police, through multimedia peer education initiatives in Englewood and Lawndale. As a Chicago Community Trust Fellow, she traveled internationally to meet with police leadership where systems for providing legal aid in police stations were established to interrupt police codes of silence. She serves on boards for the National Lawyers Guild Chicago, Southside Together Organizing for Power, and the Chicago Community Bond Fund. Eliza holds a BA from the University of Chicago, JD from the John Marshall Law School, and management certificates from Northwestern University’s Kellogg School of Business and the Civic Leadership Academy fellow at the University of Chicago Booth (business) and Harris (policy) Schools.

She is an active mentor, proud parent and foster parent based in Chicago's Marquette Park neighborhood, where violent crime, police misconduct, and record numbers of juvenile arrests have affected her and her family intimately.

Elizabeth Clarke is the founder and president of the Juvenile Justice Initiative (JJI). JJI has advocated for numerous reforms in Illinois that have positively impacted children in conflict with the law including raising the age of juvenile court from 17 to 18, ending automatic adult prosecution for drug offenses and for 15 year olds, and closing 3 juvenile prisons. In addition to JJI, Clarke co-founded the Midwest Juvenile Defender Center, the National Juvenile Justice Network, and the North American Council on Juvenile Justice. Prior to the Juvenile Justice Initiative, Clarke was the Juvenile Justice Counsel for the Office of the Cook County Public Defender in Chicago, Illinois, and served in the Office of the State Appellate Defender as an Assistant Appellate Defender, Legislative Liaison and Juvenile Justice Coordinator. Clarke has authored numerous articles and presentations on justice issues and was named a “Champion for Change” by the John D. and Catherine T. MacArthur Foundation, and a National Youth Advocate by the National Juvenile Justice Network.
Paul Killebrew serves as Senior Counsel in the U.S. Department of Justice's Office for Access to Justice, which was established in March 2010 to address the access-to-justice crisis in the criminal and civil justice systems. Paul joined DOJ's Civil Rights Division in 2013 as a Trial Attorney in the Special Litigation Section, where he investigated patterns or practices of constitutional violations by law enforcement agencies. He serves on the Division's Lesbian, Gay, Bisexual, Transgender, and Intersex Working Group and is co-chair of the Working Group’s Criminal Justice Subcommittee. He has also contributed to the Department’s efforts to support the constitutional right to counsel through the filing of several statements of interest on behalf of the United States in class actions alleging failures in indigent defense systems. Before coming to the Department of Justice, Paul served for four and a half years as a staff attorney at Innocence Project New Orleans, where he represented prisoners who had been convicted of crimes they did not commit and won the release and exoneration of men who had served decades of wrongful incarceration. Paul received his B.A. in 2001 from the University of Georgia and J.D. from New York University School of Law in 2007. Following law school, he clerked for the Honorable William J. Haynes, Jr., of the U.S. District Court for the Middle District of Tennessee.

Whitney Untiedt is a partner in the Miami office and Akerman's Director of Pro Bono Initiatives. She supervises the firm's many pro bono programs, and develops strategic partnerships and collaborations that align with Akerman's philanthropic focus on education and youth development. Prior to joining Akerman, Whitney spent a year as an Equal Justice Works AmeriCorps Legal Fellow, followed by nine years as an Assistant Public Defender in Florida, where she developed a specialized practice focusing on the representation of high-risk juveniles involved in delinquency and dependency proceedings. Whitney is co-director of the Southern Juvenile Defender Center, a member of the Florida Children's Justice Act Task Force, and immediate past chair of the Florida Juvenile Court Rules Committee. Whitney speaks regularly on issues of child advocacy, professional responsibility, and general litigation practice.
In the criminal justice system, children, like adults, are entitled to due process, and the rehabilitative focus of the juvenile courts cannot come at the expense of a child's constitutional rights. As the Supreme Court declared almost fifty years ago, "[u]nder our Constitution, the condition of being a [child] does not justify a kangaroo court." In re Gault, 387 U.S. 1, 28 (1967). To the contrary, due process requires that every child who faces the loss of liberty should be represented from their first appearance through, at least, the disposition of their case by an attorney with the training, resources, and time to effectively advocate the child's interests. If a child decides to waive the right to an attorney, courts should ensure that the waiver is knowing, intelligent, and voluntary by requiring consultation with counsel before the court accepts the waiver.

In this case, Plaintiffs allege, inter alia, that children in juvenile delinquency proceedings in the Cordele Judicial Circuit are denied their right to meaningful representation and are, at best, provided with "assembly-line justice." Amended Complaint ("Compl.") at 7, N.P. v. State, No. 2014-CV-24-1025 (Fulton Cnty. Super. Ct. Oct. 3, 2014). Several defendants have moved to
dismiss the complaint. Without taking a position on the merits of the case, the United States files this Statement of Interest to provide the Court with a framework for evaluating Plaintiffs’ juvenile justice claims and to assist the Court in determining the types of safeguards that must be in place to ensure that children receive the due process the Constitution demands.¹

**INTEREST OF THE UNITED STATES**

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal or state court. The United States has specific authority to enforce the right to counsel in juvenile delinquency proceedings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141.² Pursuant to that statutory authority, the United States is currently enforcing a comprehensive settlement with Shelby County, Tennessee, following findings of serious and systemic failures in the juvenile court that violated the due process and equal protection rights of juvenile respondents.³ An essential component of the

¹ The United States’ silence on other issues presented in this litigation is not intended to express any view or assessment of other aspects of this case. Plaintiffs here allege that adult defendants in the same jurisdiction regularly enter guilty pleas without any substantive attorney-client interaction. Compl. ¶ 7. The Department takes these allegations seriously and is troubled by any suggestion that citizens are being denied their right to counsel, but we confine our Statement in this instance to the allegations regarding juveniles in the Cordele Judicial Circuit. We have previously filed Statements of Interest in cases concerning the right to counsel in adult proceedings. See Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., Aug. 8, 2013), available at http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf; Statement of Interest of the United States, *Hurrell-Harring v. State of New York*, No. 8866-07 (N.Y. Sup. Ct., Sept. 25, 2014), available at http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf. There, as here, we took no position on the truth of the factual allegations or the merits of the case. In *Wilbur*, the United States provided its expertise by recommending that if the court found for the plaintiffs, it should ensure that public defense counsel have realistic workloads and sufficient resources to carry out the hallmarks of minimally effective representation. In *Hurrell-Harring*, the United States provided an informed analysis of existing case law to synthesize the legal standard for constructive denial of counsel.

² The statute provides, *inter alia*: “It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” 42 U.S.C. § 14141(a) (1994). (emphasis added).
Agreement, which is subject to independent monitoring, is the establishment of a juvenile public
defender system with “reasonable workloads” and “sufficient resources to provide independent,ethical, and zealous representation to Children in delinquency matters.”

The Department of Justice’s commitment to the due process rights of juveniles is
manifested in additional ways as well. For example, the Department’s Office of Juvenile Justice
and Delinquency Prevention (“OJJDP”) works “to develop and implement effective and
coordinated prevention and intervention programs and to improve the juvenile justice system so
that it protects public safety, holds offenders accountable, and provides treatment and
rehabilitative services tailored to the needs of juveniles and their families.” Through grants and
other programs, OJJDP supports efforts to reform state and local juvenile justice systems. Those
activities include programs aimed at providing juvenile defense counsel with “customized
technical assistance, training, and resources for policy development and reform,” reducing “the
overrepresentation of minority youth in the juvenile justice system” and improving “access to
counsel and quality of representation for youth with unique needs.”

In addition, in March 2010, Attorney General Eric Holder launched the Access to Justice
Initiative (“ATJ”), tasked with carrying out the Department’s commitment to improving indigent

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4 Id. at 15.


Improve Legal Defense Services for the Poor (Oct. 30, 2013), available at http://www.justice.gov/opa/pr/attorney-
general-holder-announces-67-million-improve-legal-defense-services-poor. Similarly, the Department’s National
Institute of Justice (“NIJ”) has funded research on indigent defense, and waiver of counsel in juvenile court is one
area of research that is ongoing. Investigators from Georgetown University and the University of Massachusetts are
presently studying “age-based differences in defendant knowledge regarding the role of counsel, presumptions about
counsel, and maturity of judgment when making decisions about whether to waive the right to counsel in juvenile
court. See National Institute of Justice, Indigent Defense Research, available at http://nj.gov/topics/courts/indigent-
defense/Pages/research.aspx. NIJ expects to release the results of this study in 2016.
defense.\textsuperscript{7} Within of a few months of its creation, Laurence H. Tribe, the first head of ATJ, emphasized the vital importance of early appointment of counsel, particularly in juvenile cases. In his remarks at the 2010 Annual Conference of Chief Justices, he stressed that “[e]very child in delinquency proceedings should have access to justice via a right to counsel at every important step of the way: before a judicial determination regarding detention, and during probation interviews, pre-trial motions and hearings, adjudications and dispositions, determination of placement, and appeals.” He urged state courts to “adopt a rule that at the very least requires consultation with an attorney prior to waiver of counsel” for juveniles.\textsuperscript{8}

Finally, the United States has taken an active role in providing guidance to courts and parties on the due process and equal protection problems that result from the nation’s ongoing indigent defense crisis. For example, the United States filed Statements of Interest in \textit{Wilbur v. City of Mount Vernon} in 2013 and \textit{Hurrell-Harring v. State of New York} in 2014. Both cases involved the fundamental right to counsel for indigent adult criminal defendants and the role counsel plays in ensuring the fairness of our justice system.\textsuperscript{9} Although these prior filings focused on adult criminal justice systems, the allegations at issue here are even more problematic because they apply to children.

In light of the United States’ compelling interest in protecting the right to counsel generally and the right to counsel for juveniles in particular, the United States files this Statement


of Interest to assist the Court with its analysis of the alleged failures of the juvenile defense system in the Cordele Judicial Circuit.

**BACKGROUND**

This country has seen significant development in the last century with respect to how courts and justice professionals treat children charged with delinquency. As explained in the Shelby County Findings Report, prior to 1899 the law treated children over seven years of age and adults the same way. “States prosecuted children in the same manner as adults and sentenced them to lengthy periods of incarceration in adult prisons.”

This harsh approach began to change in the late nineteenth century as states established separate courts for juveniles that explicitly endorsed judicial flexibility and informality rather than rigid procedural safeguards. The goal of these reforms was to enable juvenile judges to respond to the unique needs of accused and adjudicated youth. At the time, “bedrock due process protections afforded adults were considered restrictive for juvenile court judges, who sought to work informally to treat, guide, and rehabilitate young people.” Findings Report at 8. Soon, however, many became concerned that in juvenile courts “the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” *Kent v. United States*, 383 U.S. 541, 556 (1966).

As a result, in the 1950’s and 1960’s juvenile justice evolved again, culminating in the Supreme Court’s landmark ruling in *Gault*, 387 U.S. 1. In *Gault*, the Court recognized that the unintended consequence of the juvenile courts’ more flexible approach was the failure to

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11 *Id.* at 8.

12 *Id.*
prioritize due process. Rather than enshrine that disparity further, *Gault* eradicated it. *Gault* stands for the proposition that children involved in the juvenile justice system are fully entitled to due process in their dealings with the court. As the Department has previously observed:

*Gault* focused not on creating a system of rigid formality, but on ensuring that juveniles were afforded the protections of due process. In essence, the Court outlined important constitutional protections afforded to juveniles in the delinquency process — the right to counsel, the right to notice of the charges, the right to confront witnesses, and the right to be free from compulsory self-incrimination.\(^\text{13}\)

Despite *Gault*’s unequivocal command and the increasing recognition that children require counsel with specialized, training, supervision and skills, practitioners and scholars have recognized that the promise of *Gault* is threatened.\(^\text{14}\) And, if Plaintiffs’ allegations are correct, in the Cordele Judicial Circuit, juvenile defenders are absent altogether.

**DISCUSSION**

Plaintiffs seek declaratory and injunctive relief, alleging that juvenile defendants within the Cordele Judicial Circuit are routinely denied their right to counsel outright or that the right is reduced to a “hollow formality” lacking any semblance of a representational relationship between defense attorney and client. Compl. at 8. While taking no stance on the merits of these

\(^{13}\) *Id.* at 8-9.

\(^{14}\) See Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court – A Promise Unfulfilled*, 33 CRIM. L. BULL. 371 (May-June 2008) (reviewing and analyzing the findings of the 1995 national juvenile assessment by the American Bar Association’s Juvenile Justice Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* and 16 statewide juvenile defense system assessments subsequently undertaken by the National Juvenile Defender Center available at http://njdc.info/our-work/juvenile-indigent-defense-assessments/); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL’Y 543, 549-51, 561 (2009) (describing obstacles to effective representation due to inadequately funded juvenile defense systems and noting that “high caseloads also negatively impact indigent juvenile clients more than indigent adult clients” because defenders who handle both “often make ‘triage’ decisions, and it is not unusual for defenders to focus most of their attention on adult felony cases, at the expense of the delinquency clients.”). Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 791-92 (2010) (noting that Gault’s promise is “threatened by routine and widespread substandard representation” as “many attorneys for juveniles do not interview witnesses or visit the crime scene. They do not file pre-trial motions. They do not prepare for dispositional hearings” and they are unprepared for bench trials.).
factual allegations, the United States maintains that children, 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. A state further deprives children of their right to counsel if its courts allow them to
waive that right without first consulting with competent counsel.\footnote{If the Plaintiffs prevail, the Court may consider as one possible remedy the appointment of a monitor as part of its authority to grant injunctive relief. Monitors, or their equivalent, have been utilized in similar cases. In \textit{Wilbur}, pursuant to an order for injunctive relief, the court required the hiring of a “Public Defense Supervisor” to supervise the work of the public defenders. The supervision and monitoring includes extensive file review, caseload assessments, data collection, and reports to the court to ensure there is “actual” and appropriate representation for indigent criminal defendants in the cities of Mount Vernon and Burlington. \textit{See} Statement of Interest of the United States, \textit{Wilbur, supra} note 1, at 19.}

I. DUE PROCESS DEMANDS THAT CHILDREN BE PROVIDED WITH THE IMMEDIATE AND ONGOING ASSISTANCE OF SKILLED COUNSEL IN JUVENILE DELINQUENCY PROCEEDINGS.

A. The right to counsel is a central requirement of due process in delinquency proceedings.

The Constitution guarantees that every criminal defendant and child accused of
delinquency, regardless of economic status, has the right to counsel when their liberty is at stake.\textit{Gideon v. Wainwright}, 372 U.S. 335, 340-341, 344 (1963); \textit{Gault}, 387 U.S. at 36. The right to counsel is so fundamental to the operation of the criminal and juvenile justice systems that diminishment of that right erodes the principles of liberty and justice that underpin these proceedings. Although it was \textit{Gault} that first codified this procedural right for juveniles in state proceedings, the Supreme Court had long emphasized the critical role of counsel in ensuring fairness to the accused: “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] requires the guiding hand of counsel at every step in the proceedings against him.” \textit{Powell v. Alabama}, 287 U.S. 45, 68-69
In the half-century since *Gideon* and *Gault*, the Court has continually reaffirmed that zealous representation by qualified counsel is essential to a constitutional criminal justice system. The Sixth Amendment right to counsel now applies even where the actual likelihood of imprisonment is more remote, and it attaches at the accused’s initial presentment before a judicial officer. Specifically addressing the right to counsel for juveniles, the Court has noted that it “is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.” *Kent*, 383 U.S. at 561.

The *Gault* Court emphasized this point repeatedly, and criticized the reasoning that led some to argue that adults should be afforded greater procedural protections than children. *See Gault*, 387 U.S. at 27-28 (“[A detained juvenile’s] world is peopled by guards, custodians, state employees, and ‘delinquents’ confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’”); *id.* at 29 (“The essential difference between Gerald’s case and a normal criminal case is that the safeguards available to adults were discarded in Gerald’s case.”); *id.* at 47 (“It would indeed be
surprising if the privilege against self-incrimination were available to hardened criminals, but not to children.

Although the law has long recognized a distinction between children and adults, our understanding of these differences—and the law’s recognition of them—has increased over the last ten years. In that time, the Supreme Court has repeatedly underscored that age is “far ‘more than a chronological fact,’” and that the law must adapt accordingly. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (citation omitted).

Buttressed by scientific research, the Court has increased protections for juveniles out of recognition that “the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings.” Graham v. Florida, 560 U.S. 48, 78 (2010). In shielding juveniles from capital punishment, the Court found that “general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” Roper v. Simmons, 543 U.S. 551, 569 (2005). In Graham, the Court extended its own prior holdings to the sentence of juvenile life without parole for non-homicide offenses based on the recognition that scientific research “continue[s] to show fundamental differences between juvenile and adult minds.” Graham, 560 U.S. at 68. Children must now be afforded special consideration in the context of Miranda waivers because they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental

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19 See Donna M. Bishop & Hillary B. Farber, Joining the Legal Significance of Adolescent Development Capacities with the Legal Rights Provided by In Re Gault, 60 RUTGERS L. REV. 125, 149-60 (2007) (reviewing recent research from psychology, neuroscience and psychosociology on adolescent decision making).


21 J.D.B., 131 S. Ct. at 2403.
to them.”22 Most recently, the Court emphasized that its increased protections for juveniles in the sentencing context are compelled by the “hallmark features” of youth: “immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller v. Alabama*, 132 S.Ct. 2455, 2468 (2012). These same features make children more vulnerable than adults and more dependent on qualified counsel to navigate the justice system.

[Roper and Graham] relied on three significant gaps between juveniles and adults. First, children have a “lack of maturity and an underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking. Second, children “are more vulnerable . . . to negative influences and outside pressures,” including from their family and peers; they have limited “contro[ll] over their environment” and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as “well formed” as an adults’; his traits are “less fixed” and his actions less likely to be “evidence of irretrievab[le] deprav[ity]”.

*Id.* at 2464 (internal citations omitted). This reasoning applies not merely to the sentencing phase, but to the entirety of a juvenile’s contact with the justice system.23

Case law, practical experience, and scientific research compel the conclusion that children are entitled to procedural safeguards that acknowledge their vulnerability. Indeed, many states and localities have endeavored to do this by providing an array of enhanced safeguards for juveniles at all stages of the process, including a requirement that all custodial interrogations of juveniles be recorded, *e.g.*, Wis. Rev. Stat. § 938.195 *et seq.* (2008); a presumption that juveniles are indigent for purposes of attorney appointment, *e.g.*, Pa. R. Juvenile Ct. P. 151 (2014); statutory safeguards prohibiting the public disclosure of juvenile court records, *e.g.*, 33 V.S.A. § 5117 (2009); strict sealing and expungement requirements beyond those typically afforded to adults, *e.g.*, Mont. Code Ann. § 41-5-216 (2014); rules rendering any communications between

22 *Id.* (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

23 *Miller*, 132 S.Ct., at 2468 (noting that “incompetencies associated with youth” can include a juvenile’s “inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.”).
juveniles and court staff inadmissible, e.g., Ark. Code Ann. § 9-27-321 (2010); and prohibitions on juvenile shackling in court proceedings, e.g., Fla. R. Juv. P. § 8.100(b) (2014). Each of these measures is a concrete recognition of the reality that children are different, and each is a positive step in the provision of enhanced safeguards for our youth.

**B. Children who face the loss of liberty must be represented zealously by skilled counsel at every stage of delinquency proceedings.**

The right to counsel means more than just a lawyer in name only. Justice systems must ensure that the right to counsel comprehends traditional markers of client advocacy and adequate structural support to ensure these traditional markers of representation are met. The Department has previously discussed the requirements for effective counsel in its filing in *Hurrell-Harring*, and the standards set forth there are as applicable to juveniles as they are to adults. Indeed, the unique qualities of youth demand special training, experience and skill for their advocates. For example, although the need to develop an attorney-client relationship is the same whether an attorney is representing an adult or a child, the juvenile defense advocate’s approach to developing the necessary trust-based relationship differs when the client is a child.

Because the client in juvenile court is a minor, counsel’s representation is more expansive than that of a criminal defense lawyer for an adult. Lawyers for children must be aware of their clients’ individual and family histories, their schooling, developmental disabilities, mental and physical health, and the client’s status in their communities in order to assess their capacities to proceed and to assist in their representation. Once those capacities are understood, the lawyer must vigorously defend the juvenile against the charges with that capacity in mind, and then prepare arguments to obtain rehabilitative treatment should the child be found guilty.25


Attorneys representing children must receive the training necessary to communicate effectively with their young clients and build a trust-based attorney-client relationship. Without that relationship, they cannot satisfy their responsibilities as counsel. These well-established duties include advocating for the client at intake and in detention hearings, investigating the prosecution’s allegations and any possible defenses, seeking discovery, researching legal issues, developing and executing a negotiation strategy, preparing pre-trial motions and readying for trial, exploring alternative dispositional resources available to the client, uncovering possible client competence concerns, and providing representation following disposition and on appeal.

At all of these stages, the vulnerable juvenile client faces processes overwhelming to most adults, and accordingly, must have an advocate who can guide them in terms they can understand through a relationship built on trust. Every child who faces the loss of liberty must be

26 Nat’l Juvenile Defender Ctr., NATIONAL JUVENILE DEFENSE STANDARDS, Standard 3.6 (2012) (“Counsel must recognize barriers to effective communication. Counsel must take all necessary steps to ensure that differences, immaturity, or disabilities do not inhibit the attorney-client communication or counsel’s ability to ascertain the client’s expressed interest. Counsel must work to overcome barriers to effective communication by being sensitive to difference, communicating in a developmentally appropriate manner, enlisting the help of outside experts or other third parties when necessary, and taking time to ensure the client has fully understood the communication.”). The standards were developed during a five-year process by multi-disciplinary teams consisting of juvenile defenders, prosecutors, judges, legislators, academics, and other juvenile justice stakeholders. See also Nat’l Research Council of the Nat’l Acads., Reforming Juvenile Justice: A Developmental Approach 203 (Richard J. Bonnie et al. eds. 2013) (“The youth’s decision-making capacity and voice may be enhanced by the lawyer’s ability to create an appropriate environment for counseling, build rapport with the youth over time, engage the youth in one-on-one age-appropriate dialogue, and repeat information as many times as the youth needs to hear.”); Robin Walker Sterling, Role of Juvenile Defense Counsel in Delinquency Court 8 (2009) (“Juvenile defense counsel do not assume they know what is best for the client, but instead employ a client-centered model of advocacy that actively seeks the client’s input, conveys genuine respect for the client’s perspective, and works to understand the client in his/her own socioeconomic, familial, and ethnic context.”).


28 These challenges are complicated by the number of children in the juvenile justice system struggling with learning or developmental disabilities. See Joseph B. Tulman, Special Education Advocacy for Youth in the Delinquency System, in SPECIAL EDUCATION ADVOCACY 401, 405-06 (Ruth Colker, Julie K. Waterstone eds., 2010) (citing to studies on system involved children and noting their overrepresentation in the delinquency system); see also Mary M. Quinn, et al., Youth with Disabilities in Juvenile Corrections: A National Survey, 71 Exceptional Children 339-45 (2005) (Among other findings, number of youth needing special education services was almost four times that of children in public schools); Joseph P. Tulman & Douglas M. Weck, Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities, 54 N.Y.L. SCH. L. REV. 875, 876 n.2 and accompanying text;
represented from the time of arrest through the disposition of their case by an attorney with the skills necessary to zealously advocate their interests.

Georgia law recognizes the specialization of juvenile defense by requiring the creation of juvenile defense units with attorneys trained and dedicated to representing children accused of delinquency offenses.\textsuperscript{29} Ga. Code Ann. § 17-12-23(c) (2014). Specialization requires training and oversight to ensure that attorneys have the resources and support necessary for competent representation, including initial and on-going training on adolescent brain development and its implications for building an attorney-client relationship,\textsuperscript{30} protecting juvenile clients’ constitutional rights,\textsuperscript{31} the child’s relative culpability,\textsuperscript{32} the law of pretrial juvenile detention,\textsuperscript{33} and

\textsuperscript{29} See also 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, Principle 2A. (2d ed. 2008) (“The public defense delivery system recognizes that representing children in delinquency proceedings is a complex specialty in the law that is different from, but equally as important as, the representation of adults in criminal proceedings.”).

\textsuperscript{30} Graham, 560 U.S. at 78 (“Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in the defense. . . . Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all lead to poor decisions by one charged with a juvenile offense . . . These factors are likely to impair the quality of a juvenile defendant’s representation.”). See also Kristin Henning, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases, 81 NOTRE DAME L. REV. 245, 270-74 (2005); Nat’l Juvenile Defender Ctr., \textit{supra} note 26.

\textsuperscript{31} J.D.B., 131 S. Ct. 2394 (juvenile suspect’s age is relevant factor when determining whether he or she is in police custody and entitled to be warned prior to interrogation pursuant to \textit{Miranda v. Arizona}, 384 U.S. 436 (1966)).

\textsuperscript{32} Miller, 132 S. Ct. at 2465 (distinctive attributes of youth caused by on-going development of parts of the brain involved in controlling behavior, including transient rashness, proclivity for risk, and inability to assess consequences, lessen child’s moral culpability).

\textsuperscript{33} Nat’l Juvenile Defender Ctr., \textit{supra} note 26, at Standard 3.8(a) (“Counsel must be versed in state statutes, case law, detention risk assessment tools, and court practice regarding the use of detention and bail for young people.”).
dispositional resources, special education law, the collateral consequences of delinquency findings, and the ethical issues that arise in delinquency representation.

A juvenile division should have the resources to monitor workloads so that attorneys are available to advocate for clients at intake and during detention and probable cause hearings. Outside of court, they need adequate time to meet with clients, investigate the prosecution’s factual allegations, engage in a robust motions practice, devote time to preparing for trial and the disposition process, and to monitor and advocate for the needs of post-disposition clients who are still within the court’s jurisdiction.

34 American Bar Ass’n, Juvenile Justice Ctr., A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 36-38 (1995) (“The purpose of the dispositional process is to develop plans for juveniles that meet their educational, emotional and physical needs, while protecting the public from future offenses. . . . More than at any other stage of the juvenile justice system, counsel should explore every possible resource during the dispositional process.”).

35 Nat’l Juvenile Defender Ctr. & Nat’l Legal Aid & Defender Ass’n, supra note 29, at Principle 7C (juvenile defense team members “must receive training to recognize issues that arise in juvenile cases . . . [including] . . . Special Education”); id. at Principle 9A (“The public defense delivery system recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition”); See also Tulman, supra note 28 (special education rights provide opportunities to develop delinquency advocacy evidence and arguments otherwise unavailable to juvenile defender).

36 Gault, 387 U.S. at 32 (“[M]any [juvenile] courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers.”); The President’s Comm’n on Law Enforcement & Admin. of Justice, supra note 16, at 87 (“Employers, schools, social agencies have an understandable interest in knowing about the record of a juvenile with whom they have contact. On the other hand, experience has shown that in too many instances such knowledge results in rejection or other damaging treatment of the juvenile, increasing the chances of future delinquent acts.”). See, e.g., Padilla v. Kentucky, 559 U.S. 356 (2010) (defense counsel’s failure to correctly advise client regarding immigration consequences of accepting guilty plea is outside the scope of constitutionally reasonable professional assistance and therefore may be basis for finding of ineffective assistance of counsel).

37 American Bar Ass’n, supra note 34, at 26 (commentators have suggested that many of those who represent children “do not understand their ethical obligations, and as a result, fail to zealously represent their young clients.”); see, e.g., Nat’l Juvenile Defender Ctr., supra note 26, at Standard 1.1 (Ethical Obligations of Juvenile Defense Counsel), Standard 1.2 (Elicit and Represent Client’s Stated Interests), Standard 1.6 (Avoid Conflicts of Interest).

38 Nat’l Juvenile Defender Ctr., supra, note 26, at Standards 3.1, 3.2, 3.5.

39 Id. at Standards 3.7, 3.8.
When faced with severe structural limitations, even good, well-intentioned, lawyers can be forced into a position where they are, in effect, counsel in name only. For example, if they do not have the time or resources to engage in effective advocacy or if they do not receive adequate training or supervision because their office is understaffed and under-resourced, then they will inevitably fail to meet the minimum requirements of their clients’ right to counsel. These conditions lead to de facto nonrepresentation. *Hurrell-Harring*, 930 N.E. at 224; see also *State v. Peart*, 621 So.2d 780, 789 (La. 1993) (“We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance. As the trial judge put it, ‘[n]ot even a lawyer with an S on his chest could effectively handle this docket.’”).

In justice systems where lawyers regularly fail to advocate for clients in a manner traditionally expected of effective counsel and/or where lawyers lack the structural support necessary to do their jobs, it is tantamount to the system’s failure to appoint counsel. If the allegations in this case are ultimately proven true, then Plaintiffs are being systematically deprived of their constitutional right to counsel in the Cordele Judicial Circuit.

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40 In formulating remedies that address the Constitutional violations that the Department found during its Shelby County, Tennessee investigation, the Department required the establishment of a juvenile defender unit with “sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters.” Mem. of Agreement, supra n.3, at 15. The Department also required “training on trial advocacy skills and knowledge of adolescent development.” *Id.*

II. GIVEN THE UNIQUE STATUS OF JUVENILE OFFENDERS, THEIR RIGHT TO COUNSEL MAY BE DENIED WHEN THEY WAIVE THAT RIGHT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

Plaintiffs allege that children accused of delinquency in the Cordele Judicial Circuit routinely waive their right to counsel without ever having seen or being advised by a lawyer. According to Plaintiffs, juveniles are regularly presented with a Hobson's choice: waive counsel without ever speaking with an attorney and have your case resolved immediately or schedule another hearing, remain in detention and hope counsel can be present at the next proceeding. This alleged systemic deprivation of access to counsel is particularly troubling.

Because the right to counsel is “necessary to insure fundamental human rights of life and liberty”\textsuperscript{42}, . . . ‘courts indulge every reasonable presumption against [its] waiver’\textsuperscript{43} and ‘do not presume acquiescence in the loss of [this] fundamental right[.]’”\textsuperscript{44} Indeed, effective counsel is so central to the constitutional guarantee of due process in criminal proceedings that the decision to waive counsel must be knowing, intelligent, and voluntary. See \textit{Brady v. United States}, 397 U.S. 742, 748 (1970) (waiver must be a “knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances”). Determining whether a waiver of the right to counsel is made knowingly, intelligently, and voluntarily depends on the facts and circumstances surrounding the case, “including the background, experience, and conduct of the accused.” \textit{Johnson}, 304 U.S. at 464. A juvenile’s waiver of counsel cannot be knowing, intelligent, and voluntary without first consulting counsel.

\textsuperscript{42} \textit{Johnson}, 304 U.S. at 462.

\textsuperscript{43} \textit{Id.} at 464 (quoting \textit{Aetna Insurance Co. v. Kennedy}, 301 U.S. 389, 393 (1937).

The same characteristics of children that require skilled and specially trained counsel to represent them also demand that courts ensure that a child’s decision to waive counsel is knowing, intelligent, and voluntary. Many states have taken steps to limit and safeguard waivers of counsel by juveniles. Maryland, for example, prohibits a court from accepting a waiver unless “the child is in the presence of counsel and has consulted with counsel,” and “[t]he court determines that the waiver is knowing and voluntary.”\textsuperscript{45} Other states, such as Iowa, Kentucky, Louisiana, Texas, and Wisconsin, prohibit waiver of the right to counsel by children under a certain age or at many juvenile proceedings.\textsuperscript{46}

Those states recognize that the same principles that underlie juvenile right to counsel apply specifically with regard to juvenile waiver of rights. \textit{E.g.,} \textit{J.D.B.}, 131 S.Ct. at 2403 (citation omitted) (holding that juveniles are more likely to feel pressure to waive \textit{Miranda} rights during interrogation and courts must take juveniles’ age and suggestibility into account in assessing validity of waivers); \textit{Miller}, 132 S.Ct. at 2468 (identifying “incompetencies associated with youth—for example, [a juvenile’s] inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.”) (\textit{citing Graham} and \textit{J.D.B.}). The decision to waive one’s right to counsel, like the decision to waive one’s \textit{Miranda} rights, or to confer with prosecutors about a plea, must be well thought-out, with an understanding of present and future ramifications. This poses a particular challenge for young

\textsuperscript{45} Md. Code Ann. § 3-8A-20(b) (2008).

\textsuperscript{46} Iowa Code § 232.11(2) (2010) (child cannot waive right to counsel at detention, waiver, adjudicatory, and dispositional hearings); KY. Rev. Stat. Ann. § 610.060(2)(a) (Baldwin 2010) (court shall not accept plea or conduct adjudicatory hearing in any case where court intends to impose detention or commitment unless child is represented by counsel); Tex. Fam. Code § 51.10(b) (Vernon 2010) (child’s right to counsel shall not be waived at transfer, adjudicatory, dispositional, commitment, and mental health proceedings); Wis. Stat. § 938.23(1m)(a) (2010) (juvenile younger than fifteen may not waive right to counsel).
people, who “tend to underestimate the risks involved in a given course of conduct [and] focus heavily on the present while failing to recognize and consider the future.”

There is something unique, too, about the role courts play in assessing waiver of counsel, because the right to counsel “invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. The protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.” Johnson, 304 U.S. at 465; see also Westbrook v. Arizona, 384 U.S. 150, 150 (1966) (per curiam). And the Fourteenth Amendment’s Due Process Clause imposes its own serious and weighty duty on courts to determine whether rejecting offered assistance of counsel is intelligent. “Anything less is not waiver.” Carnley v. Cochran, 369 U.S. 506, 514-16 (1962). In order to properly fulfill this “serious and weighty responsibility” without abandoning its own judicial role in juvenile delinquency proceedings where a child faces a loss of liberty, a court should appoint an attorney who will explain the importance of counsel before the court accepts a waiver.

Recognizing that juvenile waivers must be afforded particular scrutiny in view of the child’s age and immaturity and that waiver of counsel is an area of special concern even in adult courts, national standards require that children be prohibited from waiving counsel without first consulting with counsel:

The problem with juvenile waiver of counsel is clear: children require the advice and assistance of counsel to make decisions with lifelong consequences in the highly charged venue of a juvenile court proceeding. As a result of immaturity, anxiety, and overt pressure from judges, parents, or prosecutors, unrepresented


children feel pressure to resolve their cases quickly and may precipitously enter admissions without obtaining advice from counsel about possible defenses or mitigation. In order to ensure the client’s due process rights are protected, the client must have meaningful consultation with counsel prior to waiving the right to counsel.49

When juveniles are not provided counsel, courts cannot ensure that their waivers are knowing, intelligent, and voluntary. Because this is what the Plaintiffs allege is happening in Cordele Judicial Circuit, should the Court determine that children are indeed regularly waiving counsel without first consulting with an attorney, the Court can and should find that the resulting waivers amount to a system-wide denial of the right to counsel.

CONCLUSION

If the Court determines that the juvenile justice system within the Cordele Judicial Circuit fails to provide the requisite due process protections afforded to juveniles, or the Court finds that juveniles are regularly waiving their right to counsel without the opportunity to consult with an attorney, then the Court should hold that Gault is not being fulfilled and juveniles’ constitutional rights are being violated.

49 Nat’l Juvenile Defender Ctr., supra note 26, at Standard 10.4 (commentary); see also Nat’l Juvenile Defender Ctr. & Nat’l Legal Aid & Defender Ass’n, supra note 29, at Principle 1(B) (“The public defense delivery system ensures that children do not waive appointment of counsel and that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.”).
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This is to certify that I have this day served the following with a copy of the within and
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Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles

Considerations for Compliance with Title VI of the Civil Rights Act of 1964, the Omnibus Crime Control and Safe Streets Act of 1968, and Related Statutes

January 2017

The Office for Access to Justice (ATJ), U.S. Department of Justice (Department or DOJ) and the Office for Civil Rights (OCR) at the Office of Justice Programs (OJP), DOJ jointly issue this Advisory to recipients of financial assistance from the OJP, the Office of Community Oriented Policing Services (COPS Office), and the Office on Violence Against Women (OVW) to remind them of their constitutional and statutory responsibilities related to collecting fines and fees from youth involved with the juvenile justice system. The Advisory also summarizes the enforcement actions available to the Department and offers recommendations to improve the administration of juvenile fines and fees.

On March 14, 2016, the DOJ distributed a letter to state and local courts on the enforcement of fines and fees in criminal justice proceedings. Many of the practices addressed in the March 14, 2016, letter also occur in juvenile courts where, in addition to fines, courts often impose fees on children for diversion programs, counseling, drug testing and rehabilitation programs, mental health evaluations and treatment programs, public defenders, probation, custody, and court costs. These fines and fees can be economically debilitating to children and their families and can have an enduring impact on a child’s prospects.

Young people will ordinarily be unable to pay fines and fees themselves. Families burdened by these obligations may face a difficult choice, either paying juvenile justice debts or paying for food, clothing, shelter, or other necessities. The cost of fines and fees may foreclose educational opportunities for system-involved youth or other family members. When children and their families are unable to pay fines and fees, the children often suffer escalating negative consequences from the justice system that may follow them well into adulthood. Perhaps not

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surprisingly, given the collateral negative consequences, there is evidence that fines and fees increase the risk of recidivism.²

The intent of this Advisory is to assist recipients of financial assistance from the Department—especially the leadership of juvenile courts, juvenile probation departments, and other juvenile justice agencies—in ensuring that the imposition and enforcement of fines and fees on juveniles does not violate their constitutional rights, violate the nondiscrimination provisions associated with the acceptance of federal financial assistance, or impose undue hardships on the development and rehabilitation of system-involved youth.

Constitutional Obligations

Youth in the justice system are entitled to all of the constitutional protections that adults receive when it comes to fines and fees. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."³ The Department’s March 14, 2016, letter identified seven constitutional principles relevant to the enforcement of fines and fees. All seven principles apply to juveniles.⁴

When it comes to youth, however, courts cannot stop at the protections afforded to adults. Indeed, the Constitution demands unique protections for juveniles in the justice system due to “children’s ‘diminished culpability and greater prospects for reform.’”⁵ “The law has historically reflected the . . . assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.”⁶ Our legal system is “replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.”⁷ As society’s understanding of children’s unique needs and vulnerabilities has grown over time, the Supreme Court has expanded protections for children.

² See Jessica Feierman, Juvenile Law Center, Debtors’ Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System 7-8 (2016), http://debtorsprison.jlc.org (discussing results of a criminology study “showing that youth of color in Allegheny County, Pennsylvania, were more likely to have costs or fees owed after case closing, which, in turn, was related to higher recidivism rates, even after controlling for a host of other demographics and case characteristics” (citing Alex R. Piquero & Wesley G. Jennings, Justice System Imposed Financial Penalties Increase Likelihood of Recidivism in a Sample of Adolescent Offenders (2016)).
³ In re Gault, 387 U.S. 1, 13 (1967).
⁴ The seven principles are as follows:
   1. Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful.
   2. Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees.
   3. Courts must not condition access to a judicial hearing on the prepayment of fines or fees.
   4. Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees.
   5. Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections.
   6. Court must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.
   7. Courts must safeguard against unconstitutional practices by court staff and private contractors.

The Department’s March 14, 2016, letter discusses these principles and their legal basis in greater detail. Recipients should familiarize themselves with these legal requirements.
⁷ Id. at 274 (citation and internal quotation marks omitted).
In *Roper v. Simmons*, the Court deemed children ineligible for the death penalty because of their “lack of maturity and an underdeveloped sense of responsibility,” their vulnerability “to negative influences and outside pressures,” and their “more transitory, less fixed” personalities.\(^8\) Five years later when the Court struck down life-without-parole sentences for juveniles who committed non-homicide offenses in *Graham v. Florida*, the Court noted that scientific research “continue[s] to show fundamental differences between juvenile and adult minds.”\(^9\) Accordingly, as in virtually every other context, the justice system, with respect to fines and fees, must recognize and protect the special vulnerabilities of children.

**Statutory Civil Rights Obligations for Recipients of Department Financial Assistance**

Federal statutes protect the rights of beneficiaries in federally assisted programs, including young people who receive services from Department-funded juvenile courts and other agencies in the juvenile justice system. Recipients of financial assistance from the OJP, the COPS Office, and the OVW must comply with the following federal cross-cutting statutes that apply to all recipients of federal financial assistance:

- Title VI of the Civil Rights Act of 1964 (Title VI), as amended, and its implementing regulations;\(^10\)
- Title IX of the Education Amendments of 1972 (Title IX), as amended, and its implementing regulations;\(^11\)
- Section 504 of the Rehabilitation Act of 1973, as amended, and its implementing regulations;\(^12\) and
- The Age Discrimination Act of 1975, as amended, and its implementing regulations.\(^13\)

Depending on the legislative source of authorized funding from the Department, recipients of financial assistance from the OJP, the COPS Office, and the OVW may also need to comply with the nondiscrimination provisions in the following DOJ program statutes:

- The Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), as amended, and its implementing regulations;\(^14\)
- The Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), as amended, and its implementing regulations.\(^15\)

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\(^{8}\) 543 U.S. 551, 569–70 (2005) (citations omitted).

\(^{9}\) 560 U.S. 48, 68 (2010); see also Montgomery, 136 S. Ct. at 734 (noting that “the distinctive attributes of youth” should have some bearing on the punishment that children receive); *J.D.B.*, 564 U.S. at 277 (holding that children must be given special consideration in the context of *Miranda* waivers because “[a] child’s age is far more than a chronological fact”).


\(^{15}\) 42 U.S.C. § 5672(b); 28 C.F.R. § 31.202(b)(3), (4) & pt. 42, subpt. D.
Collectively, in addition to other protections, the federal cross-cutting statutes and the Department’s program statutes prohibit discrimination in the delivery of services or benefits based on race, color, national origin, sex, religion, disability, sexual orientation, or gender identity. Title VI and the other federal civil rights statutes applicable to Department recipients prohibit not only intentional discrimination but also discrimination resulting from a neutral policy that adversely impacts a protected class, such as people of a particular race or national origin.  

The analysis of disparate-impact discrimination claims under Title VI follows the same burden-shifting scheme for employment discrimination claims under Title VII of the Civil Rights Act of 1964. A discrimination claim based on adverse impact ordinarily relies on statistical data showing that the neutral policy of a federally funded service provider has a significantly negative effect on a protected class in comparison to another similarly situated group. Despite the disparate impact on the protected class, the funded service provider may nonetheless legally retain the challenged policy if it can present a substantial legitimate justification for the policy. Even if the recipient can meet this requirement, it may still run afoul of Title VI and other related federal statutes, if “there exists a comparably effective alternative practice which would result in less disproportionality, or . . . the [recipient’s] proffered justification is a pretext for discrimination.”  

Recent investigative findings by the Department, as well as a number of comprehensive surveys, underscore state and local courts’ and juvenile justice systems’ responsibility to review data related to the assessment of fines and fees to ensure that they are providing nondiscriminatory services to juveniles and their families. The Department’s investigation of the Ferguson Police Department in St. Louis County, Missouri, concluded that the local practices of levying fines and fees on adults had an unlawful discriminatory impact on African Americans. Following a lengthy investigation, the Department similarly found in its review of the St. Louis County Family Court that, “compared to national data, Black children in St. Louis County have a higher

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17 42 U.S.C. § 13925(b)(13).
19 See, e.g., N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995).
21 Id.
rate of disparity in every decision point in the juvenile justice system.\textsuperscript{24} The Policy Advocacy Clinic associated with the School of Law at the University of California at Berkeley analyzed data on the allocation of fines and fees on juveniles in Alameda County, California, and found that African American youth were overrepresented at each step in the juvenile justice system, exposing them to significantly higher fees.\textsuperscript{25} These findings suggest that courts and other entities receiving financial assistance from the Department should carefully consider whether their collection of fines and fees from juveniles may have an unlawful discriminatory effect based on race or another protected class.

### Enforcement and Technical Assistance

The Department is committed to protecting the rights of youth in the juvenile justice system, and it has a range of options at its disposal to do so, including the administrative process, litigation, and technical assistance.

Through the regulatory administrative process, the OCR has principal responsibility within the Department for enforcing Title VI and related federal civil rights statutes that apply to recipients of financial assistance from the OJP, the COPS Office, and the OVW. The OCR has the authority to investigate administrative complaints alleging that Department-funded courts and other agencies in the juvenile justice system are unlawfully discriminating against youth of a protected class who have been adversely affected by the assessment of fines or fees.\textsuperscript{26} The OCR may also independently initiate compliance reviews (i.e., investigative audits) of Department-funded agencies to determine whether their administration of juvenile fines or fees may violate applicable federal civil rights laws.\textsuperscript{27} Significantly, the implementing regulations for the Safe Streets Act, which the OCR follows in enforcing not only the Safe Streets Act but also Title VI, Title IX, the JJDPA, VOCA, and VAWA,\textsuperscript{28} also contain a provision that defines prohibited discrimination in reference to constitutional standards: a recipient of financial assistance from the Department may not “deny any individual the rights guaranteed by the Constitution to all persons.”\textsuperscript{29} If the OCR finds evidence of a violation, it works with the funded agency to achieve


\textsuperscript{26} See, e.g., 28 C.F.R. § 42.205.

\textsuperscript{27} Id. § 42.206.

\textsuperscript{28} 42 U.S.C. § 13925(b)(13)(C) (implementing enforcement of VAWA’s nondiscrimination provisions in accordance with the Safe Streets Act); 28 C.F.R. § 42.201(a) (implementing the Safe Streets Act, Title VI, Title IX, and the JJDPA); Victims of Crime Act Victim Assistance Program, 81 Fed. Reg. 44,515, 44,532 (July 8, 2016) (to be codified at 28 C.F.R. § 94.114) (implementing VOCA’s nondiscrimination provisions in accordance with 28 C.F.R. pt. 42 and OCR guidance).

\textsuperscript{29} 28 C.F.R. § 42.203(b)(8).
voluntary compliance.\textsuperscript{30} If negotiations for voluntary compliance fail, however, the OCR may seek the suspension or termination of the Department’s financial assistance.\textsuperscript{31}

The Department also has litigation authority to enforce the rights of juveniles in the justice system pursuant to the Violent Crime Control and Law Enforcement Act of 1994.\textsuperscript{32} Through this statute, the Department is currently enforcing the rights of juveniles through a comprehensive settlement\textsuperscript{33} with Shelby County, Tennessee, following findings of serious and systemic failures in the juvenile court that violated the due process and equal protection rights of juvenile respondents.\textsuperscript{34} Similarly, the Department is enforcing the rights of juveniles in St. Louis County Family Court\textsuperscript{35} after finding systemic violations of children’s rights under the Due Process and Equal Protection Clauses.\textsuperscript{36} In 2015, the Department’s Civil Rights Division, the ATJ, and the U.S. Attorney for the Middle District of Georgia filed a Statement of Interest in the case \textit{N.P. v. State of Georgia}, a class action seeking to vindicate juveniles’ constitutional right to counsel in delinquency proceedings.\textsuperscript{37} The OJP and the other DOJ grantmaking components also have discretion to refer administrative investigations, which might include matters alleging disparate impact discrimination resulting from the imposition of fines and fees, to the Civil Rights Division for litigation.\textsuperscript{38}

The Department also has resources that are available to juvenile courts and juvenile justice agencies to help them comply with their constitutional and statutory civil rights obligations. In addition to the technical assistance that the OCR routinely provides to DOJ recipients, the OJP’s Office of Juvenile Justice and Delinquency Prevention works “to develop and implement effective and coordinated prevention and intervention programs and to improve the juvenile justice system so that it protects public safety, holds justice-involved youth appropriately accountable, and provides treatment and rehabilitative services tailored to the needs of juveniles.

\textsuperscript{30} \textit{Id.} §§ 42.205(c)(3)(iii), .206(e)(3).
\textsuperscript{31} \textit{Id.} §§ 42.210, .212(b)(1)(ii).
\textsuperscript{32} The statute provides, \textit{inter alia}, as follows:

\begin{quote}
It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by . . . employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
\end{quote}

\textit{42 U.S.C.} § 14141(a). If the Department finds a “pattern or practice” of constitutional violations in a juvenile justice system, the attorney general can file a lawsuit seeking “appropriate equitable and declaratory relief to eliminate the pattern or practice.” \textit{Id.} § 14141(b).


\textsuperscript{35} \textit{Civil Rights Div., U.S. Dep’t of Justice, Mem. of Agreement Between the United States Dep’t of Justice and the St. Louis Family Ct.} (Dec. 14, 2016), http://go.usa.gov/x9nfb.

\textsuperscript{36} \textit{Investigation of the St. Louis Cty. Family Ct.,} note 24, \textit{supra.}


\textsuperscript{38} 28 C.F.R. §§ 42.108(d)(1), 215(a).
and their families.” 39 OJP’s Diagnostic Center also provides customized technical assistance resources to local community leaders, providing access to relevant data and experienced subject-matter experts to help communities develop the capacity to address emerging public safety and criminal justice issues, including matters related to juvenile justice. 40

**Recommendations to Recipients on Assessing Fines and Fees Involving Juveniles**

Because children in the juvenile justice system are particularly vulnerable, they warrant special protections in regard to the imposition of fines and fees. Mindful of the needs of young people, the ATJ and the OCR offer five recommendations to Department-funded juvenile courts and juvenile justice agencies based on the principles articulated in the Department’s March 14, 2016, letter.

1. **Juvenile justice agencies should presume that young people are unable to pay fines and fees and only impose them after an affirmative showing of ability to pay.**

Young people typically have no meaningful resources of their own. For this reason, the Department’s comprehensive settlement with Shelby County, Tennessee, involving its juvenile court includes the acknowledged presumption that children are indigent for the purposes of appointing counsel and setting bond. 41 Pennsylvania, Louisiana, and North Carolina likewise presume that all children are eligible for the appointment of counsel. 42

The juvenile justice system should also presume that children are unable to pay fines and fees. Absent an affirmative showing of the ability to pay, imposing fines and fees will serve no useful purpose. Instead, assessing these costs may force juveniles into a cycle of further involvement with the justice system and have collateral consequences that inhibit rather than advance rehabilitation.

Presuming that children are unable to afford fines and fees will also help juvenile courts and other juvenile justice agencies comply with their legal obligations. If fines and fees are only imposed on those rare children who are able to afford them, courts and other agencies are far less likely to enforce fines and fees in a way that punishes children for their poverty in violation of the Fourteenth Amendment. In addition, because of the well-documented correlations between poverty and race in the juvenile justice system, 43 conditioning the imposition of fines and fees on a demonstrated ability to afford them may also reduce the chances that the imposition or

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42 See 42 PA. CONS. STAT. ANN. § 6337.1; LA. CHILD. CODE ANN. art. 320(A), 848; N.C. GEN. STAT. ANN. §§ 7B-2000(b), 7A-450.1, 7A.450.3.
enforcement of fines and fees will have a disparate racial impact on beneficiaries of federally assisted programs in violation of Title VI, the Safe Streets Act, and other related statutes.

2. **Before juvenile justice agencies punish youth for failing to pay fines and fees, they must first determine ability to pay, considering factors particularly applicable to youth.**

As emphasized repeatedly in the Department’s March 14, 2016, letter, courts must not incarcerate people solely because they are unable to pay fines or fees, because doing so violates their rights to equal protection and due process. The Constitution requires that before punishing someone for failing to pay a fine or fee, a court must inquire into the individual’s ability to pay.

When the person who has failed to pay a fine or fee is a child, courts should consider the unique circumstances that inhibit the child’s ability to pay. As noted above, children are presumptively unable to pay fines and fees, and, of course, young children cannot legally work. Requiring a teenager to work to pay fines and fees is often counterproductive: there are often negative consequences resulting from missing school to work, and there are also negative consequences resulting from missing work to attend school. Juveniles often lack their own means of transportation, which can make getting and keeping a job difficult. Many states restrict work for those under eighteen and limit their ability to enter into contracts. Finally, and most importantly, juveniles under probation or in a diversion or other program will likely find it extremely difficult to fulfill simultaneously the obligations related to their probation or program, school, and a job.

An ability-to-pay inquiry that recognizes the unique characteristics of children will help to ensure that juvenile courts and other juvenile justice agencies do not punish children for their poverty in violation of the Constitution and may also prevent the kind of disparate racial impact that may violate Title VI, the Safe Streets Act, and other related statutes.

3. **Juvenile justice agencies should not condition entry into a diversion program or another alternative to adjudication on the payment of a fee if the youth or the youth’s family is unable to pay the fee.**

Due process and equal protection plainly prohibit juvenile courts and other juvenile justice agencies from treating two similarly situated children differently based solely on their economic status or the economic status of their parents. Yet across the country, diversion programs or other alternatives to adjudication or detention for youth are accessible only to those who can afford the required fees. Such practices result in what the Constitution forbids: the incarceration

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45 E.g., Turner v. Rogers, 131 S. Ct. 2507, 2518–19 (2011) (court violates due process when it finds a parent in civil contempt and jails the parent for failure to pay child support, without first inquiring into the parent’s ability to pay).
46 Bearden, 461 U.S. at 671; Griffin v. Illinois, 351 U.S. 12, 24 (1956) (holding that the Fourteenth Amendment prohibits denial of right to appeal based on inability to pay fee); M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) (holding that indigent person could not be denied appeal of decision terminating parental rights based on inability to pay court costs); Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971) (holding that married couple’s divorce could not be denied based on inability to pay court costs).
or punishment of children based solely on poverty. Conditioning diversion and other
alternatives to formal adjudication or detention on ability to pay also means that the negative
consequences of adjudication and detention fall more heavily on children living in poverty.
Formal adjudication and a juvenile record can prevent youth from pursuing educational
opportunities, participating in school-related activities, living in subsidized housing, obtaining
employment, and even obtaining a driver’s license, while detention separates youth from
positive influences like family and school and increases the risk of recidivism. In addition, if a
disproportionate number of children who are unable to pay for diversion are also minorities,
making diversion programs available to all regardless of financial resources may help to prevent
disparate racial impacts that could violate Title VI, the Safe Streets Act, and other related
statutes. For these reasons, juvenile courts and juvenile justice agencies should not deny access
to diversion programs and other alternatives to adjudication solely based on inability to pay the
fees associated with the programs.

4. Juvenile justice agencies should collect data on race, national origin, sex, and disability to
determine whether the imposition of fines and fees has an unlawful disparate impact on
juveniles or their families.

Juvenile justice agencies should collect and analyze demographic data related to the imposition
of fines and fees on juveniles to assess compliance with the nondiscrimination requirements that
accompany acceptance of Department financial assistance. Establishing data-collection and
maintenance procedures are critical mechanisms for evaluating the impact that fines and fees
may have on a protected class over a period of time. Regular analysis of the relevant data would
allow recipients to take affirmative measures to identify and eliminate discrimination.

In tandem with gathering information on the national origin of beneficiaries, Department-funded
juvenile justice agencies should also collect data on the primary languages spoken by the
children and their families involved with the juvenile justice system. The data will allow funded
entities to determine, consistent with the Department’s language-access guidance for recipients
on complying with Title VI, whether they are taking reasonable steps to provide limited English
proficient (LEP) youth and LEP families meaningful access to the services that the recipient
offers. If a funded entity decides to translate vital documents into the commonly encountered

48 Collateral consequences of adjudications of delinquency vary based on state laws. For some examples, see the
resources collected on the National Juvenile Defender Center (NJDC) website. Collateral Consequences, NJDC,
49 See JAMES AUSTIN ET AL., OJJDP, ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE
OFFENDERS 2–3 (Sept. 2005), available at http://go.usa.gov/x9n7E.
50 See, e.g., Alex R. Piquero & Wesley G. Jennings, Justice System Imposed Financial Penalties Increase Likelihood
of Recidivism in a Sample of Adolescent Offenders 29 (2016) (noting, in study of Allegheny County, Pennsylvania,
“that Non-Whites were more likely to still owe costs and restitution upon case closing”).
51 Aside from barring access to diversion programs and other alternatives to adjudication, the inability to pay should
also not result in harsher consequences at any stage of a young person’s interaction with the juvenile justice system,
including access to rehabilitative services or the length of probation.
52 Dep’t of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against
languages in its service population, it should translate into the appropriate languages notices related to the assessment of fines and fees, including information on ability to pay, economic assessment procedures, and appeal rights.  

5. Juvenile justice agencies should consider whether the imposition or enforcement of fines and fees in any particular case comports with the rehabilitative goals of the juvenile justice system.

One overriding difference between the juvenile justice system and the criminal justice system is the former’s primary focus on rehabilitation. Before courts impose fines and fees on juveniles—even on those rare juveniles who might be able to pay—they should consider whether such financial burdens serve rehabilitation. In many cases, fines and fees will be more punitive than rehabilitative, and they may in fact present an impediment to other rehabilitative steps, such as employment and education.

Conclusion

The ATJ and the OCR find encouraging the innovative efforts that juvenile courts and other juvenile justice agencies around the country have taken to address the legal and practical harms that can result from the imposition of fines and fees. This Advisory supports the effort to ensure that the assessment of fines and fees on juveniles comports with federal law and the juvenile justice system’s rehabilitative goals.

Recipients of financial assistance from the Department seeking additional information, resources, or referrals related to the administration of fines and fees in the juvenile justice system may contact the OCR.  

Karol V. Mason  
Assistant Attorney General  
Office of Justice Programs

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53 See id. at 41,463–64.  
An Illinois juvenile-justice reform group says the state's new law to provide lawyers to more young offenders is a good start.

According to the Juvenile Justice Initiative, Gov. Bruce Rauner has advanced justice for children by signing Senate Bill 2370 into law. The move raises the age from 13 to 15 for requiring that a child be represented by an attorney during custodial interrogations for murder or sex crimes. The group's president, Elizabeth Clarke, said the new law will help protect young people's constitutional rights.

"I think this is a key measure to ensure that the youngest in our society receive particular protection," she said, "especially in light of the 50-year anniversary of Miranda."

Clarke was referring to the Miranda law read to people in police custody, explaining their right to remain silent and other rights. She said research shows that many young people end up waiving their Miranda rights without fully understanding what they are. She argued that children should not be allowed to waive their constitutional right to legal counsel without the advice of a lawyer.

According to a Chicago Police Accountability Task Force report from last year, less than 1 percent of children and adults had lawyers during police interrogations. That's why Clarke said she believes the state could do even more for juveniles in the future.

"We do believe that every child deserves the protection of a lawyer during interrogation, and certainly every child that faces any potential of adult prosecution," she said. "But we think this is a really significant step forward."

Clarke pointed to the United Kingdom and Europe which, over the past two decades, have added requirements that all alleged offenders have access to legal counsel while being interrogated by police.

The new Illinois law goes into effect in January. The text of SB 2370 is online at ilga.gov.
Authorities must be wary of false confessions

Editorials

Last Modified: Feb 10, 2014 08:13PM

The risk that innocent people will wind up in prison because of false confessions remains a serious problem, particularly in Illinois.

The National Registry of Exonerations, a joint program of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law, reported last week that across the nation exonerations of those wrongly convicted of a crime increased to a record 87 in 2013, and that 17 percent of the exonerees had pleaded guilty to a crime they did not commit.

Until recent years, most people had no idea how easily interrogators can persuade innocent people to admit to crimes or how frequently it happens. Often, the innocent suspects plead to a lesser charge to avoid risk of being convicted of a more serious crime.

By itself, the increase in exonerations is not bad — it indicates authorities are becoming more willing to review cases in which there might have been mistakes — but it remains a wake-up call for anyone who doesn’t want to see innocent people sent to prison. Illinois, with nine, had the second-highest number of exonerations. Texas had the most, with 13.

But Illinois continues to lead the nation in exonerations in false-confession cases. From 1989 through 2013, 46 Illinois defendants have confessed falsely, compared with 21 in New York, seven in Texas and five in California. Those 46 cases account for nearly 30 percent of all exonerations nationally for false confessions.

One Illinois case cited in the report was that of Nicole Harris, 23, who was convicted in 2005 of murdering her 4-year-old son after he was found with an elastic bedsheets cord around his neck. The Registry said Chicago police coerced Ms. Harris by pushing her, threatening her, denying her food and water, and withholding access to a bathroom. After 27 hours, Harris confessed to strangling her son and she was sentenced to 30 years.

Her conviction was overturned in 2012, and a federal appeals court said the confession was “essentially the only evidence against her” but that there “many reasons” to question its validity. She was freed last year.

In the past, authorities have tended to treat a confession as all that’s needed to support a conviction. Illinois’ experience shows that everyone in the criminal justice system must guard against placing too much weight on confessions that are not supported by other evidence.
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PUBLIC OPINION POLLING

ILLINOIS:
Registered Illinois voters overwhelmingly support broad criminal justice reforms, and would be more likely to vote for legislators who support measures to reduce the prison population, according to a new poll released this week by the U.S. Justice Action Network, a national nonpartisan organization focused on criminal justice reform.

The poll found that voters strongly believe too many people are imprisoned as a result of mandatory minimum laws for certain crimes, and that judges should have more discretion in determining sentences.

Two-thirds of voters indicated that knowledge of their state legislators’ support for reform bills would make them more likely to re-elect them, while only 5 percent said it would make them less likely to re-elect them, according to the poll conducted by Fako Research & Strategies.

April 20, 2016

NATIONAL:
On the heels of recent bipartisan efforts to reform the youth justice system, the Supreme Court decision guaranteeing parole hearings for youth offenders, and the Department of Justice decision to ban solitary confinement of youth, a new poll shows Americans overwhelmingly support shifting the youth justice system from incarceration and punishment to prevention and rehabilitation. A clear 77% majority favors this shift with broad support across partisanship (79% of Democrats, 80% of Independents, and 71% of Republicans). GBAstrategies.com

- 70% of Americans favor requiring states to reduce racial and ethnic disparities in the juvenile justice system, and
- 69% of Americans favor increased funding to provide more public defenders who represent children in court.
- 92% of Americans believe that when it comes to youth offenders, what is most important is that the system does a better job of making sure that he/she gets back on track and is less likely to commit another offense.

The survey of 1,000 adults age 18+ in the U.S. was conducted January 19-24, 2016 on behalf of Youth First. The sample is subject to a margin of error of +/- 3.1 percentage points at the 95% confidence level. The survey was conducted online using a web-based panel. Care was taken to ensure that the sample is representative of the U.S. adult population.
Station House Defense

The FDLA model, recent triumphs & top priorities
Why does FDLA exist when we have the Office of the Cook County Public Defender?
24/7/365 for 20 years!
SILENCE IS POWER

African Americans are more likely to be detained, arrested, stopped, searched, and intimidated into false confessions. You have the right to a lawyer at the police station.

I WILL NOT TALK, I WANT MY LAWYER.
FREE POLICE STATION REPRESENTATION DURING THE FIRST 48 HOURS.
1-800-529-7374

FDLA
FIRST DEFENSE LEGAL AID

NO HABLARÉ, QUIERO A MI ABOGADO.
NOSOTROS PROVEEMOS REPRESENTACIÓN GRATUITA EN LA ESTACIÓN DE POLICÍA DURANTE LAS PRIMERAS 48 HORAS.
1-800-529-7374

FDLA
FIRST DEFENSE LEGAL AID

Los hispanos son más probables de ser detenidos, arrestados, revisado e intimidados a dar una confesión falsa. Tienes derecho de tener un abogado contigo en la estación de policía.

1-800-529-7374

FIRST DEFENSE LEGAL AID (FDLA) IS A NON-PROFIT ORGANIZATION THAT PROVIDES FREE, LICENSED, EXPERIENCED LAWYERS TO INDIVIDUALS THAT HAVE BEEN ARRESTED BY THE CHICAGO POLICE DEPARTMENT. OUR LAWYERS VOLUNTEER THEIR TIME BECAUSE THEY PASSIONATELY BELIEVE IN FIGHTING TO UPHOLD THE LAW AND CIVIL RIGHTS. FDLA PROVIDES FREE POLICE STATION REPRESENTATION DURING THE FIRST 48 HOURS.

FIRST DEFENSE LEGAL AID (FDLA), POR SUS SIGLAS EN INGLÉS ES UNA ORGANIZACIÓN SIN FINS DE LUCRO QUE PROVEE ABOGADOS GRATIS, CON LICENCIA Y EXPERIENCIA, A INDIVIDUOS QUE HAN SIDO ARRESCADOS POR EL DIPARTEMENTO DE POLICÍA DE CHICAGO. NUESTROS ABOGADOS VOLUNTARIOS SUER SU TIEMPO VOLUNTARIAMENTE PARA DEFENDR LA LEY Y DERECHOS CIVILES. FDLA PROPORCIONA REPRESENTACIÓN GRATUITA EN LA ESTACIÓN DE POLICÍA DURANTE LAS PRIMERAS 48 HORA.
HISTORY In 1995, First Defense Legal Aid started as a program of the Chicago Commons: the Chicago Police Custody Hotline. 1 (800) LAW-REP4 (529-7374) remains the only way people in Chicago police custody might access free legal defense, 24-hours-a-day, 7-days-a-week, 365-days-a-year. We became a tax-exempt 501(c)3 not-for-profit in 2003.

STRATEGIC PLAN

Mission:
First Defense Legal Aid provides free, 24-hour legal defense to people held in Chicago Police stations and educates Chicagoans about the power of their rights. We undertake these activities to advance fairness and accountability in the criminal and juvenile justice systems.

Strategic Goal:
Increase our capacity to reduce false confessions, disproportionate minority confinement and waivers of rights, achieve our mission and cover more gaps in public defense through grassroots and national strategic partnerships for organizing attorneys, community leadership development, data reporting and community organizing.

*We are focused first on these 2 objectives.
In 2014, it was 1.5 in 500 with an up-to 168% increase in station visits in the campaign’s focal police districts.
Policy fixes

Access to the phones
Posting our number
Starting with the most vulnerable
Increase in Public Safety

Where there is access to legal aid in police custody or grassroots know your rights campaigns, violent crime goes down.
"The total fiscal savings for Cook County would be between $12.7 and $43.9 million annually if arrestees had access to a defense attorney within 24 hours after arrest."

increasing access to legal aid at police stations = Cost Savings
What can we do together?

- spread awareness of the gap between the right to counsel and access to counsel, & the problems it causes
- fill the gap and spread the word about the benefits to clients and society
- advocate for policy change that eliminates the gap