

**TO: Winsome Gayle
Civil Rights Division
Special Litigation Section
US Department of Justice**

**Honorable Dan Michael,
Presiding Judge, Memphis-Shelby Juvenile Court**

**Honorable Mark H. Luttrell, Jr.
Mayor, Shelby County, Tennessee**

**Jina Shoaf,
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**FROM: Sandra Simkins
Due Process Monitor**

DATE: December 15, 2014

RE: Compliance Report #4—October 2014

Juvenile Court Memphis Shelby County (Juvenile Court) entered into a Memorandum of Agreement (Agreement) with the United States Department of Justice Civil Rights Division (DOJ) on December 17, 2012. According to the Agreement, compliance shall be assessed by two monitors and a facility consultant. I was named the Due Process Monitor, and have subject matter expertise in the area of due process and juvenile delinquency. The fourth regularly scheduled compliance review and site visit occurred October 6, 2014 through October 10, 2014. This report evaluates the extent to which Juvenile Court has complied with each substantive provision of the Due Process sections of the Agreement.

Format

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Executive Summary

Since my last compliance report there has been a significant leadership change at Juvenile Court. Dan Michael was elected Juvenile Court Judge on August 7, 2014 and has taken over for the Honorable Judge Curtis Person effective September 1, 2014. I commend Judge Person's commitment to the MOA which enabled Juvenile Court's progress to date. This is the first time an agreement of this type has been entered into by any jurisdiction and the efforts of Juvenile Court are significant. At the writing of this fourth compliance report, Juvenile Court has made noteworthy progress. The continued implementation of new court policies, the collection of data and the court training have all yielded positive results. I am particularly pleased about the following improvements:

1) The Public Defender's extensive training for juvenile defenders, juvenile attorney practice standards for use in Tennessee and the renovation of a conveniently located office space; 2) The probation department's implementation and continued success of the structured decision making grid (which details the numbers of youth who are diverted out of the system without appearing before a juvenile court judge); 3) The Juvenile Defender Coordinator's leadership in collecting useful data regarding the advocacy efforts of the panel attorneys, including recording the number of motions filed and evaluations requested; 4) The impressive work of the clinical services department which has developed new policies, trained all staff on best practices and provided detailed evaluations of court involved youth; and 5) The vigorous advocacy of the panel attorneys in the transfer cases handled between May 2014 and October 2014. These gains are impressive and many compliance measures reached substantial compliance for this reporting period.

At this point, a variety of previously mentioned concerns remain (such as the very high number of notice of transfers filed and the reliability of affidavits of complaint); however, from my perspective, the biggest remaining challenge facing Shelby County Government and Juvenile Court relate to juvenile defender services.

First and foremost, I have an overarching concern regarding the lack of independence of the Shelby County Public Defender and the lack of an independent body to oversee the panel attorneys. As previously stated, both the independence of the panel and the independence of the Public Defender are central to compliance of the MOA. In addition, multiple obstacles remain related to the filing of motions, requesting evaluations, obtaining records and audio tapes and discovery.

Overall, of the 55 Due Process Provisions assessed pursuant to the MOA, I find that Juvenile court's compliance status is as follows:

Compliance Standards	1st Compliance Report April 2013	2nd Compliance Report October 2013	3rd Compliance Report April 2014	4th Compliance Report October 2014
Substantial Compliance	0	0	0	24
Partial Compliance	1	26	44	23
Beginning Compliance	25	17	10	5
Non Compliance	3	0	0	1
Insufficient Information/pending	5	2	1	2
Total # of Due Process Provisions in Agreement	34	45	55	55

Definitions regarding compliance standards are found in the “Methodology” section of this report. Also, the “Performance Metrics for Due Process Reforms” are discussed in more detail on page 13 of this report.

Positive Developments

Juvenile Defenders: Shelby County Public Defender Juvenile Unit

Permanent Office Space, Statewide Standards, Training

During this last compliance period there has been much development within the Shelby County Public Defender’s specialized juvenile unit. All Public Defender staff were required and all panel attorneys were invited to participate in four Juvenile Training Immersion Program (JTIP) sessions (December 2013, January 2014, April 2014 and August 2014).

JTIP is meant to be the national “gold standard” in training for juvenile defenders. JTIP reflects a “core commitment to the unique role and critical importance of specialized defense counsel in juvenile courts across America, consistent with a young person’s fundamental right to counsel.”¹ Shelby County Juvenile Defenders, public and private, were trained on the following topics: interviewing the child client, 4th Amendment issues, ethics, transfer hearings, motions practice, cross examination, adolescent development, role of counsel, expressed interest and competency, collateral contacts, juvenile statements, probable cause and detention, experts, appeals, drug cases, disposition and disproportionate minority contact. Over 100 hours of complimentary continuing legal education was provided. The new Public Defender unit has also developed a framework to support continuing training and support for the unified juvenile defender bar.

The Public Defender has developed Proposed Juvenile Defense Practice Standards for use in Tennessee with the assistance of the National Juvenile Defender Center and an array of national and Tennessee experts. The creation of standards and holding attorneys accountable to standards is critical to address the deficiencies cited in the original DOJ investigation. The

¹ Juvenile Training Immersion Program, Coordinator and Trainer’s Guide, at 11. <http://njdc.info/our-work/publications/jtip-coordinator-trainers-guide/> JTIP was developed over a five year period and was drafted, promulgated and reviewed by national experts including judges, legislators, prosecutors, public defenders, appointed counsel and others. See Id. at 8.

National Juvenile Defense Standards represent “the best most comprehensive understanding of the role and duties of the juvenile defender in the 21st century juvenile court system.”² As stated in the standards:

*The role of the juvenile defender has evolved to require a challenging and complex skill set needed to meet core ethical obligations. Youth need attorneys to help them navigate the complexities of the justice system. The juvenile defender enforces the client’s due process rights; presents the legal case and the social case; promotes accuracy in decision making; provides alternatives for decision makers’ and monitors institutional treatment, aftercare, and re-entry.*³

While the standards are still under review and have not yet been implemented, they are significant as it is the first time a defender system has adapted NJDC’s National Juvenile Defense Standards⁴ for use in a particular state.

In addition, the Public Defender Unit now has permanent office space located at 600 Adams Avenue, next to the Juvenile Court building. This space is ideal in terms of proximity and design for working with young clients and their families. It is also designed to serve as a resource center for a unified juvenile defender bar.

From January 1, 2014 to October 6, 2014 the Public Defender Juvenile Unit has handled 358 cases, or 22% of cases, and anticipates gradually increasing its workload. Since the new unit began taking cases in February of 2014, several staff were required to complete and transfer their adult case load. Also staff time was allocated to create the above mentioned new juvenile practice standards as required by the MOA, to organize and engage in extensive JTIP training.

At the time of this report, current staff is as follows:

- 6 Attorneys
- 1 Supervising Attorney
- 1 Special Assistant
- 2 Investigators
- 1 Office Manager
- 1 Legal Assistant
- 1 Law Clerk

Juvenile Defenders: Panel Coordinator Creates Impressive Data Collection System

In my last compliance report, I had concerns about the lack of information available to evaluate the performance of the panel attorneys. I am very pleased to report that Ms. Marilyn Hobbs has done an outstanding job of creating a data collection system to measure attorney performance. The data revealed that panel attorneys had been very successful in transfer hearings and that the number of motions filed and investigations performed remains very high.

² National Juvenile Defender Standards(2012) <http://www.njdc.info/publications.php> at 7.

³ Id. at 8.

⁴ National Juvenile Defender Standards(2012) <http://www.njdc.info/publications.php>

Much of the information was obtained via the time-consuming process of going through individual case files.

The data collected reveals detailed advocacy efforts by individual panel attorneys and is a very important management tool. Ms. Hobbs has created data collection systems for the following: 1) motions granted and dismissed; 2) types of motions filed by individual attorney; 3) detention hearing spreadsheets indicating outcome, attorney, type of evidence presented, investigation and whether or not a rehearing was requested; 3) detention visitation records, 4) investigations requested by attorney; 5) delinquency case-tracking system; 6) number of trials by attorney and outcome. I commend Ms. Hobbs on her diligence in compiling these very helpful reports. It is clear that the panel is filing motions, submitting investigation requests, litigating trials and successfully keeping many youth in the juvenile justice system as opposed to transfer to the adult criminal system.

Clinical Services: Significant Increase in Evaluation Requests for Youth Facing Transfer

There have been many positive developments in Clinical Services. Dr. Tucker-Johnson has done an excellent job in ensuring that all staff has been trained in best practices by national expert Dr. Kirk Heilbrun. She has also created the new policies that are being implemented. The number of requested evaluations has increased significantly in this last reporting period. A total of 99 psychological evaluations were completed by Clinical Services between April 15, 2014 and October 15, 2014. I have reviewed a sample of evaluations and the quality is consistently high. The current reports are now much more in-depth and involve more interviewing of collateral sources and the gathering of records. While prior evaluations averaged 2.5 pages, current evaluations are typically between 10-12 pages. There is also increased oversight and quality control by Dr. Tucker-Johnson who typically spends three hours reviewing and editing each contractor report.

Consistent Success in the Probation Department

Performance of the probation department continues to be high. I had the opportunity to observe several probation conferences and I was very impressed by the probation officers' commitment to ensuring each child understood his *Miranda* rights, which was done by asking the child to repeat back his or her understanding of the rights explained. I was also impressed by the investigation and effort taken to divert as many cases as possible out of juvenile court. The graduated sanctions grid continues to produce promising results.

Ongoing Due Process Concerns

Note, between my visit in October 2014 and the date of this Compliance Report, Juvenile Court received a Draft⁵ of Compliance Report #4 pursuant to the Agreement. It is my current understanding that Juvenile Court has begun to address many of the concerns listed below. I have made note of efforts in the relevant subsections and will re-evaluate at the next compliance visit.

Insufficient Independence for Shelby County Public Defender Juvenile Unit and Panel Attorneys

At this juncture, independence for the defense bar remains a critical structural issue that will require leadership and collaboration. In order to achieve compliance with the MOA both the Public Defender and the panel system need to be independent. Independence requires freedom from judicial and political influence. Currently, the public defender is subject to political influence due to the Shelby County Charter. The panel attorneys are subject to judicial influence as evidenced by the reassignment of the panel coordinator to the supervision of the juvenile court judge and the “Plan for the Juvenile Court of Memphis and Shelby County, Tennessee, Providing Representation for Indigent Children in Delinquency Cases” (Plan).

The MOA requires that “Shelby County Government (SCG) shall take action to ensure independent ethical and zealous advocacy by the juvenile defenders representing children in delinquency hearings.”⁶ As I stated in my previous compliance report, “The requirements of the Agreement follow best practice standards including the ABA’s principles of public defense. Principles number one of the ABA Ten Principles of a Public Defense System is unequivocal about the importance of an independent public system.”⁷ In particular, ABA principle #1 states that the public defense function should be independent from political influence. The principle states: “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”⁸

⁵ See U.S. DEP’T OF JUSTICE, MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS & SHELBY COUNTY (Dec. 17, 2012) [hereinafter MEMORANDUM OF AGREEMENT], available at <http://www.shelbycountyttn.gov/DocumentCenter/Home/View/5759>, at 37. Which requires that the report shall be made available in draft form for comment within 30 days after each compliance review.

⁶ MEMORANDUM OF AGREEMENT, available at <http://www.shelbycountyttn.gov/DocumentCenter/Home/View/5759>, at 15.

⁷ See SANDRA SIMKINS, COMPLIANCE REPORT #3—APRIL 2014 (2014), page 5 [hereinafter SIMKINS #3], available at http://www.justice.gov/crt/about/spl/documents/shelby_firstmtrprt_6-5-13.pdf.

To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff. See National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter “NAC”], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter “NSC”], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter “ABA”], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter “Assigned Counsel”], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter “Contracting”], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter “Model Act”], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter “ABA Counsel for Private Parties”], Standard 2.1(D). Standard 2.1(D).

⁸ Id.

Shelby County Public Defender is Under the Direct Control of the Mayor

The Shelby County Public Defender is under the direct control of the mayor and the Shelby County charter, cited below, gives the county mayor unfettered discretion.⁹

Section 3.06. Creation of offices, division, departments.

B. The county mayor, subject to approval by resolution of the board of county commissioners, may create or abolish major divisions of county government with each division having a division director. The chief administrative officer, the division directors of the county, the county attorney, the ***public defender***, and the divorce referee shall be appointed by the county mayor, subject to approval by resolution of the board of county commissioners, and ***shall be subject to dismissal by the mayor without cause***, and shall be residents of Shelby County at the time they assume the duties of their office and at all other times while serving the county in such capacity.

C. Any function or duty may be assigned or reassigned by the county mayor to a major division of county government, except that the county mayor acting alone shall have the power to veto ordinances and resolutions of the board of county commissioners as set forth hereinbefore ***and the power to remove without cause the chief administrative officer, division directors, the county attorney, the public defender and the divorce referee.***

While the current County Mayor and Public Defender have an effective working relationship and I am not aware of any concerns of interference, when leadership changes this may not always be the case. Only when the public defender is free from political influence and can operate without fear of reprisal will independence be obtained. It is my understanding that in addition to unfettered discretion of the mayor, the public defender reports to the county attorney. It seems unlikely that a public defender could operate independently with a double layer or political influence.

Recommendation: I recommend that Shelby stakeholders explore local solutions and grapple with this challenge of creating true independence for the Public Defender. The Shelby Charter creates an obstacle. While I believe many potential solutions exist for this problem, the best solution will come as a result of an intentional and inclusive process driven by local leadership. It is my understanding that meetings will occur on December 17, 2014 to discuss this issue.

Juvenile Defender Panel is not Overseen by an Independent Body

With regard to the panel, the MOA states that Juvenile Court shall “establish a juvenile defender panel system, overseen by an independent body, to handle any delinquency cases that

⁹ Shelby Charter <https://www.shelbycountyttn.gov/index.aspx?NID=82>

...pose a conflict [or] breach workload restrictions.”¹⁰ The independence of juvenile panel attorneys was a core concern of the original investigation. I highlighted my continued concerns on this topic in the last several compliance reports.

On October 21, 2014, I received Judge Michael’s Plan for the Juvenile Court of Memphis and Shelby County, Tennessee, Providing Representation for Indigent Children in Delinquency Cases (Plan). The Plan cites Tennessee Supreme Court Rule 13 and the federal Criminal Justice Act Panel (CJA Panel) of 18 U.S.C. Sec 3006A. Tennessee Supreme Court Rule 13 addresses the “Appointment, Qualifications and Compensation of Counsel for Indigent Defendants.” The Plan, which may be an interim plan, is attached as Exhibit “A” to this compliance report. Unfortunately, I do not believe that the Plan meets the requirement of an “Independent Body” as envisioned by the MOA for the following reasons:

1. There is insufficient separation between the Juvenile Court Judge and the Panel Selection Committee. As the Plan states, “the Juvenile Court Judge shall appoint the Panel Selection Committee to select the Juvenile Defender Panel members annually.”¹¹
2. The Juvenile Court Judge retains control over who remains on the panel. The Plan states, “the decision to remove an attorney from the Juvenile Defender Panel is solely that of the Juvenile Court Judge. The decision of the Juvenile Court Judge to remove a panel attorney is final with no appeal.”¹²
3. Juvenile Defender Panel attorneys will continue to practice in front of the Juvenile Court Judge who will be making determinations about whether or not they should remain on the panel.
4. The plan may negatively impact caseload and workload concerns. The Plan limits the number of cases that a panel attorney may handle and limits the number of panel attorneys permitted to be on the roster.

Once implemented, the Plan could continue into the unforeseeable future, well beyond the tenure of the current Juvenile Court Judge. It is easy to imagine a situation where a defense attorney’s advocacy on behalf of a client could displease a presiding Juvenile Court Judge. Under this plan, a defense attorney could be forced to weigh whether to pursue a course of action on behalf of a client or continue to receive panel appointments. Given the historical problems of defense independence in juvenile court, I believe this Plan is too similar to the structure of the previous juvenile court where oversight of the panel attorneys belonged to the Juvenile Court Judge.

Many of the above concerns were previously raised in an October 30, 2014 letter sent by the Department of Justice to Juvenile Court.¹³ The letter also states that the “proposal provides no mechanism for ensuring that attorneys are removed for the appropriate reasons.”¹⁴

¹⁰ See MEMORANDUM OF AGREEMENT, *supra* note 2, at 15.

¹¹ Plan for the Juvenile Court of Memphis and Shelby County, Tennessee, Providing Representation for Indigent Children in Delinquency Cases

¹² *Id.*

¹³ Exhibit “C”

¹⁴ *Id.*, at 3.

Finally, I raise two concerns about the Plan's reliance on Rule 13. First, the "Preamble" of the Plan states: "The Judge of the Juvenile Court of Memphis and Shelby County, Tennessee, is required by Rule 13 Tennessee Supreme Court Rules, to maintain a roster of attorneys from which appointments will be made." However, the plain language of Rule 13 does not appear to require a juvenile court judge to maintain a roster because juvenile courts do not exercise criminal jurisdiction. Even if Rule 13 empowers the court to impose the controls described in the Plan, it does not mandate them. Rule 13 gives the Court considerable discretion to meet obligations under the MOA regarding defender services.¹⁵

Second, structural limitations embedded in Rule 13 demonstrate important distinctions between the Plan proposed by the Court and the CJA panel model it is based on. There is a large disparity in compensation between the federal CJA and Tennessee panel structure. The regular comp rate in the federal system is \$126/hour as compared to the maximum of \$50/hour for in-court attorney time. More importantly is a comparison of the standard \$1000 fee cap imposed on juvenile delinquency representations, including felony transfers, compared to \$9,800 for felony cases in federal cases, and \$2800 for misdemeanors. In the federal system, this reasonable compensation system supports quality defense representation that enables compliance with attorney standards. The proposed plan does not address how panel attorneys will be held to practice standards to ensure quality representation.

Recommendation: It is my recommendation that the leaders in Shelby explore local solutions in order to achieve real independence for the panel attorneys. By way of example, I point to the state of Massachusetts, which uses an independent board to provide oversight to both the assigned counsel system and the institutional public defender.¹⁶ The organizational chart of the Massachusetts system is attached as Exhibit "B." It is my understanding that the original plan has been revised and that continued discussions are occurring.

Numerous Administrative Obstacles to Defense Practice

Juvenile defense attorneys currently face the following administrative obstacles in their advocacy: 1) difficulty in filing motions; 2) multi-step process for obtaining an order for a clinical service evaluation; 3) difficulty in obtaining an audio recording; 4) refusal to provide

¹⁵ TENN. SUP. CT. R. 13 § 2(c)(1) ("The hourly rate for appointed counsel in non-capital cases shall not exceed forty dollars (\$40) per hour for time reasonably spent in trial preparation and fifty dollars (\$50) per hour for time reasonably spent in court.").

¹⁶ An oversight board can run both an assigned counsel system and institutional public defender office. Such a board would be vested with responsibility for protecting the independence of the public defense function, hiring the public defense executive director, and setting broad organization policy. Through an executive office, the board provides oversight and training, approves budgets, sets qualifying and performance standards, develops and enforces workload limits, and generates the list of private bar attorneys qualified to accept court appointments. To properly fulfill these functions, the board itself must be independent. To achieve board independence, the members of the board must not be appointed by or be beholden to any single person or entity. Rather, a variety of appointing authorities (bar associations, law school, community justice advocacy organizations, and other stakeholders), should appoint a diverse board, with each member having a demonstrated commitment to the delivery of quality indigent defense services. The Commonwealth of Massachusetts utilizes this type of board.
http://www.publiccounsel.net/administration/committee_members.html

copies of from the court clerk; 5) lack of a confidential space to interview girls in detention; and 6) delays in receiving discovery. Some of these issues have been mentioned previously. It is my understanding that all of these issues are in the process of being addressed by Juvenile Court.

Transfer Hearings: Continued investigation and comparison of juvenile crime in Tennessee

As I have previously stated, the number of youth transferred to adult court from Juvenile Court has consistently decreased over the past four years. As I have acknowledged in prior reports, the below chart indicates a significant and steady decline in transfer cases since 2008.

Shelby County	2008	2009	2010	2011	2012	2013
<u># of children transferred to adult court*</u>	225	194	151	121	99	90

*Data provided by JCMSC

However, despite that decrease, the number of youth transferred from Shelby is overwhelmingly higher than any other county in Tennessee. In conversations with Juvenile Court stakeholders the higher transfer rate was attributed to Shelby’s crime rate. I have continued to investigate this issue, and have collected the data below. First, it appears that the high number of “notice of transfers” filed by the prosecutor may be a contributing factor in Shelby’s high transfer rate, as indicated in the below chart.

Transfer based on County Population	Total Juvenile Population 10-17 ¹⁷	# of Juveniles Transferred to adult court in 2013	Notice of Transfer filed in 2013
Hamilton County	32,510	19	51
Knox County	42,056	2	5
Davidson County	55,522	8	37
Shelby County	109,199	90	266

Second, Between April 15, 2014 and October 15, 2014, 21 youth were transferred to adult court by Juvenile Court. Of the 21 youth transferred, over half were transferred for aggravated robbery, aggravated assault or aggravated burglary.¹⁸

Lead Charge for Transferred Shelby Youth	# of Shelby County Youth Transferred: 4/15/15 and 10/2/14
1 st degree Murder	2
Gag Robbery/Gag Assault/Gag	12

¹⁷ population data from 2012 is most recent available
http://oijdp.gov/ojstatbb/ezapop/asp/comparison_selection.asp?selState=47

¹⁸ It is important to note that in Tennessee the term “aggravated” can be misleading. For example, the term “aggravated burglary” in Tennessee would be considered a “burglary” in other jurisdictions.

Burglary	
Robbery	1
Carjacking	1
Gag Rape	1
Evading arrest/assault	1
Facilitating a felony	2
MFG/DEL/SELL/POSS w/into-MJ Unlawful possession of a weapon	1

However, Hamilton County, which contains the city of Chattanooga, actually has a higher juvenile crime rate for aggravated assault, aggravated robbery and aggravated burglary. Despite the higher rates of aggravated assault, aggravated robbery and aggravated burglary, youth in Hamilton County are being transferred at a lower rate.

Juvenile Crime Data 2013	Shelby County 2013 rate per 100,000	Hamilton County 2013 rate per 100,000
Aggravated Robbery	154	369
Aggravated Assault	237	569
Aggravated Burglary	366	470

The original 2012 investigation into Juvenile Court stated that “[o]verall, Juvenile Court’s approach to transfer hearings revealed that important stakeholders, including Magistrates, doubt the juvenile court’s ability to handle matters involving allegations of serious violent crimes.” That may partially explain why Shelby transfers more youth charged with aggravated assault, aggravated robbery and aggravated burglary than Hamilton. When a notice of transfer is filed, it is a significant event for the juvenile and Juvenile Court. In general, upon notice of transfer a thorough clinical services evaluation will be ordered in addition to a pre-transfer report, both of which require significant resources. I encourage continued analysis of this issue among stakeholders, and a re-evaluation of assumptions about the needs of older youth being addressed in the juvenile system.

Probable Cause: Insufficient Evidence on Affidavit of Complaints

During this compliance period I reviewed several Affidavits of Complaint (AOC) in which there was insufficient evidence to establish probable cause needed to detail youth. Despite this lack of evidence, several children were held in detention.

Establishing probable cause is required by the constitution, as stated in the original 2012 investigation:

Under the Fourth Amendment, in order for a state to detain a person arrested without a warrant, a judicial officer must determine that probable cause exists to believe the person has committed a crime. Gerstein v. Pugh, 420 U.S. 103 (1974). The judicial officer must make this determination “either before or promptly after arrest.” Id. At 124. Seventeen years later, the Court further refined its Gerstein decision, holding that probable cause determinations must be made within 48 hours of a warrantless arrest. County of Riverside v. McLaughlin 500 U.S. 44, 57 (1991).

Establishing probable cause prior to detention is also important because it is well established that even a short time in detention can have long-term negative effects on children. According to social scientists, time spent in detention increases the likelihood that a child will be a repeat offender.¹⁹ For children who have prior trauma or mental health issues, detention can exacerbate those issues. Children in detention are also exposed to negative peer connections and positive school and community-based connections are disrupted.

It appears that there are two distinct issues regarding juvenile court’s insufficient AOC’s. First, is the issue of how the AOC’s are written and whether or not they contain adequate information. I have discussed this matter with Juvenile Court and have been told that training for Juvenile Court and law enforcement regarding necessary details for an AOC will be conducted. The second issue is whether or not juvenile court, in the face of an insufficient AOC, is willing to dismiss the case or keep the child out of detention. The willingness of magistrates to make unpopular probable cause and detention decisions requires additional judicial oversight and leadership. I was pleased to learn that a Magistrate training will be held on this issue on December 16, 2014.

¹⁹ See, e.g., Carla Cesaroni & Michele Peterson-Badali, *Understanding the Adjustment of Incarcerated Young Offenders: A Canadian Example*, 10 youth Just. 1-19 (2010); Carla Cesaroni & Michele Peterson-Badali *Young Offenders in Custody: Risk and Adjustment*, 32 Crim. Adjustment and behav. 251-77 (2005). See, e.g., Thomas J. Dishion, Joan McCord & Francois Poulin, *When Interventions Harm: Peer Groups and Problem Behavior*, 54 *am. Psychologist* 755-64 (1999); T. Dishion & J. Tipsord, *Peer Contagion in Child and Adolescent Social and Emotional Development* 62 *aNN. rev. PsyChol.* 189-14 (2011); L. Leve & P. Chamberlain, *Association with Delinquent Peers: Intervention Effects for Youth in the Juvenile Justice System*, 33 *J. of Abnormal Child Psychol.* 339-47 (2005); Richard Mendel, *the Annie E. Casey Foundation, No Place for Kids: the Case for Reducing juvenile Incarceration* (2011); Catherine A. Gallagher & Adam Dobrin, *Can Juvenile Justice Detention Facilities Meet the Call of the American Academy of Pediatrics and National Commission on Correctional Health Care? A National Analysis of Current Practices*, 119 *Pediatrics* 991 (2007). 140 Stevens H. Clarke & Gary Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference*, 14 *law & soc’y rev.* 263, 293-94 (1980).

Discussion of Compliance Findings

Methodology

The information for this compliance report was obtained using the same methods as the previous three compliance reports. I have relied on information from a variety of Juvenile Court stakeholders. I have reviewed “Committee A” minutes and have maintained email correspondence with Juvenile Court. I requested and reviewed numerous documents before and during the site visit.

During the five-day site visit, I observed the following: 28 delinquency hearing, 14 detention/probable cause hearings, four probation conferences, and eight cases on the major crimes docket. Unfortunately I was not able to observe any transfer hearings. During the site visit I had meetings with the following: Juvenile Court staff, one magistrate, four individual probation officers, a group of four panel attorneys, four individual panel attorneys, the entire staff of the new public defender juvenile unit, the juvenile defender panel attorney coordinator, the chief defender, the Clinical Services Director, and the new chief of the District Attorney’s juvenile unit. I also reviewed the fourth compliance report prepared by Settlement Coordinator Bill Powell. All of the above provided useful information about current Juvenile Court operations, the progress that has been made toward compliance with the Agreement, and the areas where continued attention is needed.

The Agreement does not conceptualize or require specific compliance levels; however experience in other jurisdictions suggests that the following levels are useful in evaluation. Note, “significant period” of time means longer than one year.

Substantial Compliance means that Juvenile Court has drafted the relevant policies and procedures, has trained the staff responsible for implementation, has sufficient staff to implement the required reform; has demonstrated the ability to properly implement the procedures over a significant period of time and has ascertained that the procedures accomplish the outcome envisioned by the provision.

Partial Compliance means that Juvenile Court has drafted policies and procedures and has trained staff responsible for implementation. While progress has been made toward implementing the policy, it has not yet been sustained for a significant period of time.

Beginning Compliance means that the Juvenile Court has made initial efforts to implement the required reform and achieve the outcome envisioned by the provision, but significant work remains. Policies may need to be revised, staff may need to be trained, procedures may need continued implementation to accomplish outcome envisioned by the Agreement.

Non –Compliance means that Juvenile Court has made no notable compliance on any of the key components of the provision.

Insufficient Information/pending means that it is not possible to assess compliance at this moment.

PROBABLE CAUSE DETERMINATIONS	COMPLIANCE RATING	COMPLIANCE RATING	COMPLIANCE RATING	COMPLIANCE RATING
Within 90 days: revise policies to require prior to detaining a child Magistrate makes proper probable cause determination	BC	PC	PC	SC
Within 90 days: insure PC determination within 48 hours of warrantless arrest	BC	PC	PC	SC
Within 90 days: insure no child detained for more than 48 hours prior to Detention Hearing if Court has not made PC determination	BC	PC	PC	SC
Within 90 days: insure every child has meaningful opportunity to test PC by revising practices to <ul style="list-style-type: none"> a. Appoint defense attorney to represent any indigent child. Indigence should be presumed unless information to contrary is provided 	BC	PC	PC	SC
<ul style="list-style-type: none"> b. Require govt to prove existence of PC with reliable evidence or affidavit of complaint 	BC	BC	PC	PC
<ul style="list-style-type: none"> c. Allow defense attorneys opportunity to challenge PC 	BC	PC	PC	PC
<ul style="list-style-type: none"> d. Require record be maintained reflecting when defense counsel appointed, forms of evidence used, & whether defense attorney challenged evidence or provided alternative evidence. Such record should be accessible from the info system 	II/P	BC	PC	PC
Each month, Judge or designee shall review a sampling of case files to determine whether requirements regarding notice of charges are being followed. Shall also include periodic observations of Detention & Adjudicatory hearings. If not, immediate corrective action shall be taken.	II/P	BC	PC	PC

Insufficient AOC: As I mentioned in the Executive Summary, during this compliance period I reviewed several insufficient AOC's which resulted in children being held in detention. In addition I have heard complaints from a variety of defense attorneys that the AOC's are inaccurate. If the statement made by a child is going to be put in the AOC, it needs to be accurate. This is a particular problem as the prosecutor overwhelmingly relies on an AOC rather than call a witness at the probable cause hearing.

The MOA requires "the government to prove the existence of probable cause with reliable evidence such as a live witness or an Affidavit of Complaint completed and sworn to by a law enforcement officer with firsthand knowledge of the incident leading to the arrest of the child or by an officer who communicates with a reliable source who has firsthand knowledge of the incident leading to the child's arrest." Generally, the prosecutor does not present witnesses at the probable cause hearing; therefore the details and reliability in the AOC are extremely important. I am hopeful that the planned training will lead to consistently sufficient AOC's.

Rule 15: Tennessee Rules of Juvenile Proceedings: Rule 15 continues to be a work in progress. It seems clear that there are times when a defense attorney must be permitted to call a witness since the plain language of the MOA and Rule 15 provide for witnesses. This issue was discussed in detail in my last compliance report.²⁰ I am pleased to hear that there has been some positive movement and that occasionally witnesses are permitted to be called by the defense. This issue connects to the issue I raised above regarding insufficient AOC's. The availability of accurate information is important in order for the defense to challenge the state's evidence.

Judicial Narrative: During this compliance period there has been some adjustments made to how Juvenile Court will provide narrative summaries about the monthly data required by the MOA. It appears that the issues have been resolved and Judge Michael has created a new policy for the creation and distribution of the narrative report. I expect implementation of the new policy to take immediate effect.

²⁰ SIMKINS #3 at 13.

NOTICE OF CHARGES	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCT. 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCT. 2014
Within 90 days: revise policies to insure children & defense attorney receive copies of AOC as soon as available but at minimum before Detention Hearing. Also, insure Magistrates formally arraign children at all Detention Hearings.	BC	PC	PC	SC
When changes are made to charges as set forth in petition prior to adjudicatory hearing that could increase the penalty, Juvenile Court shall provide notice of final charges by providing copies of new Petition at least 14 calendar days in advance of hearing unless advance notice is waived.	BC	PC	PC	SC
When changes are made to charges as set forth in petition prior to adjudicatory hearing that could reduce the penalty, Juvenile Court shall provide notice of final charges by providing copies of new Petition within 24 hours of change in charges.	BC	PC	PC	SC
Each month, Judge or designee shall review a sampling of case files to determine whether requirements regarding notice of charges are being followed. Shall also include periodic observations of Detention & Adjudicatory hearings. If not, immediate corrective action shall be taken.	II/P	PC	PC	SC

Comments

Juvenile Court continues to be in compliance with this section. Nothing in the data, observations or meetings with various stakeholders raised concern in this area.

TRANSFER HEARINGS	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCT. 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER
Within 90 days: require Transfer Hearings comport with due process requirements. Specifically, shall insure all Transfer Hearings include: a. Asst DA presents evidence in support of petition for transfer	BC	PC	PC	SC
b. Children have right to attorney whose role is to represent their stated interest	BC	PC	PC	SC
c. Children, through their attorney, are provided opportunity to present evidence on their own behalf	NC	II	BC	PC
d. Children, through attorney, provided opportunity to confront evidence & witnesses	NC	BC	PC	PC
e. Children are protected from self-incrimination	BC	PC	PC	SC
f. Judge or Magistrate makes written findings that: child committed delinquent act, child is not committable to an institution for persons with developmental disability or mental illness and interests of community require Child be put under legal restraint or discipline	BC	BC	PC	PC
g. Judge or Juvenile Court Magistrate considers & documents consideration of factors relevant to findings including 7 factors	NC	BC	PC	PC
Each month, Judge, or designee, shall review all files related to Transfer Hearings to insure Hearings followed Agreement. Review shall include periodic observations of Transfer Hearings to insure Magistrates follow policies.	II/P	BC	PC	PC

Comments

Positive Developments among juvenile defense and Clinical Services: As I stated in the executive summary, there are positive developments in this area. Clinical Services is doing an outstanding job of delivering high quality evaluations according to best practices. In addition,

both the panel attorneys and the juvenile public defenders are doing good work in this area. The numbers of youth who remain in the juvenile system after a notice of transfer may reveal zealous advocacy on the part of defense or it may reveal that unwarranted “notice of transfer” motions are being filed. I am pleased to see that most youth who now face transfer hearings have had evaluations performed before the transfer hearing.

Amenability and Competency: Ability of child to present evidence on their own behalf and consideration of 7 factors: There was some discussion about whether or not Clinical Services should address the issue of amenability in the transfer evaluation. Amenability refers to whether or not a juvenile is amenable to treatment and services in the juvenile justice system. It is my position that the psychological evaluations should include an amenability assessment, and that an amenability assessment is part of the minimum criteria of a transfer evaluation. In addition, the Tennessee Code specifically addresses amenability. Tenn. Code Ann. § 37-1-134, (b)(5) states that the judge shall consider “[t]he possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state.” During my visit I was able to have discussions with court leadership on this issue and it is my understanding that going forward, psychological evaluations will have an amenability component.

The issue of whether or not it is appropriate to assess the competency of a child prior to a transfer hearing was also discussed. There is no clear Tennessee law on this subject. At the time of this report, Juvenile Court has not resolved the issue. Based on research provided below it is my position that competency should be determined prior to the transfer hearing.

Dusky v. United States, 362 U.S. 402 (1960) defines competence as “whether [the defendant] has sufficient present ability to consult with his lawyer with reasonable degree of rational understanding- and whether he has rational as well as factual understanding of the proceedings against him.” Models for Change: Systems Reform in Juvenile Justice Module 4: Legal Questions about Youth’s Capacities, Section VI (MFC) gives a detailed analysis of juvenile competence. Section VI refers to *Godinez v. Moran*. 509 U.S. 389 (1993) and states that “competence to stand trial pertains to all phases of the trial process, not merely the evidentiary trial. The legal tests for competence to stand trial and competence to plead guilty (and waive counsel) are the same, requiring capacity to make relevant decisions during the trial process.”²¹ According to MFC, “since the mid-1990’s all states (except Oklahoma) that have addressed the issue have decided that the right to be competent to stand trial applies to delinquency proceedings.”²²

I will follow up on my next visit.

²¹ *Legal Questions about Youth’s Capacities, Module 4*, Models for Change Systems Reform in Juvenile Justice Toward Developmentally Appropriate Practice: a Juvenile Court Training Curriculum, at 23. Available at <http://www.modelsforchange.net/publications/255>

²² *Id.* at 24. See footnote 8, page 24 “By 2008 (a) more than one-third of the states had developed statutes recognizing competence to stand trial in juvenile court; (b) many others recognized competence in juvenile court by case decisions, and (c) those without specific juvenile competence statutes applied definitions and procedures patterned after competence provisions in stat’ criminal laws. “

Protections Against Self-incrimination	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 90 days: prevent POs or other staff from eliciting info about Children's involvement in alleged delinquent act outside presence of Child's defense attorney	BC	PC	PC	SC
Within 90 days: notify Child's attorney in writing of any probation conference or interview which shall be open to defense attorney.	BC	BC	PC	PC
Within 90 days: insure POs advise Children of Miranda rights. Shall include	BC	BC	PC	PC
a. Description of role of defense attorney				
b. Statement Child is entitled to attorney & maybe at no cost	BC	BC	PC	PC
c. Statement that Child's statements regarding offense can be included in Probation report	BC	BC	PC	PC
d. Statement that Child's statement can be used against them.	BC	BC	PC	PC
POs have Children document understanding of rights against self-incrimination & must receive advice of attorney before waiving it.	BC	BC	PC	PC
Consider partnership w/non-profit or academic organization to provide advice and support to children during the probation intake process	S/ NR	S/NR	S/NR	S/NR
Within 30 days: prohibit adverse use of information obtained from child during probation conference	BC	PC	PC	SC
Within 30 days: insure Magistrates do not permit the govt to call Children as witnesses in Child's own Adjudicatory or Transfer Hearing	BC	PC	PC	SC
Within 30 days: Magistrates required to give oral advisement of rights against self-incrimination to any Child wishing to testify at own hearing	BC	PC	PC	SC

Each month the Judge or designee shall review sample of files to determine rights against self-incrimination are protected. This shall include periodic observation of probation conferences by appropriate supervisory staff of the probation dept as well as observation of Adjudicatory & Transfer Hearings	II	II	BC	PC
Immediately cease providing Visit & Contact forms to Magistrates prior to Adjudicatory Hearings.	PC	PC	PC	SC

Comments

Continued success from Probation Unit: As I mentioned in my executive summary, there has been continued success from the Probation Unit. Specifically, suggestions from prior compliance reports have been incorporated. I had the opportunity to observe several probation conferences and I was very impressed with the effort taken by the probation officers to divert the child out of the system if possible.

Conversations with probation officers confirm that the graduated sanctions grid is working. There are very few over-rides, and when an over-ride does occur it is frequently for a lower sanction. Continued implementation and validation of the grid are important next steps.

Lack of narrative from Juvenile Court: As I have already mentioned above a revised policy has been created for Juvenile Court narratives. I will continue to monitor this issue.

Few Lawyers at Probation Conferences: Data kept by the probation department reveals that very few lawyers attend probation conferences, despite the fact that the right to an attorney is explained during the probation conference. I observed no evidence that lawyers were being excluded or discouraged by the probation officers; however, the lack of payment provided from the AOC has resulted in no lawyers attending with clients. Occasionally a client will request an attorney during the probation conference, but that is rare. Below indicates the number of lawyers present at probation conferences from the sample of 40 cases reviewed.

	April 2014	May 2014	June 2014	July 2014	Aug. 2014
Number of Lawyers at Probation Conference	4	1	1	1	1

JUVENILE DEFENDERS	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCT. 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 1 year insure independent, zealous advocacy by juvenile defenders. This shall include: : h. Creation of specialized unit for juvenile defense within Office of the Public Defender	N/A	N/A	BC	BC
i. Support Juvenile Public Defender Training	N/A	N/A	BC	PC
j. Insure Juvenile Public Defender has appropriate administrative support, reasonable workloads & sufficient resources. Representation shall cover all stages of case as long as juvenile court has jurisdiction	N/A	N/A	BC	BC
k. Implement attorney practice standards for juvenile defenders	N/A	N/A	BC	BC
Within 1 year insure independent advocacy including: a. Appoint juvenile defender to represent children at detention hearings & probable cause determinations as soon as possible	N/A	N/A	BC	BC
b. Establish Panel System Overseen by independent body to handle conflicts	N/A	N/A	II	NC
c. Support attorney practice standards for juvenile defenders including training and evaluation.	N/A	N/A	BC	BC
d. Insure juvenile defender has confidential meeting space to confer with clients within the facility	N/A	BC	PC	PC

Comments

Public Defender and Panel Lack Independence

The biggest compliance challenge facing the county and juvenile court is the structure of juvenile defense. As indicated in my executive summary, there has been much progress,

including training, a new building, and the creation of a new juvenile unit within the Shelby County Public Defender. However despite these advances, the core requirement of independence is missing. The Public Defender does not have independence from the county mayor (*See Executive Summary above*). The Public Defender needs independence in order to enforce practice standards, reasonable workloads, and confront the court regarding the numerous administrative obstacles that prevent efficient defense practice.

At this time the Panel System is not overseen by an independent body. As I indicated above, the Plan proposed by Judge Michaels does not create sufficient panel independence from the judiciary.

Numerous Administrative Obstacles to Defense Practice and Lack of Response to Defense Concerns

As I mentioned in the executive summary, juvenile defense attorneys face many challenges in doing basic defense advocacy. For example:

1. It is difficult to get a motion filed. The straightforward system that exists in adult criminal court does not exist at Juvenile Court.
2. As of October 30, there was still a sign on the clerk's door stating that audio tapes (which are critical for rehearing and appeal purposes) would no longer be available.
3. Attorneys are unable to obtain copies of court files from the clerk's office.
4. Attorneys must go through a multi-step process to order Clinical Services evaluation.

Each one of these obstacles makes it difficult and more time consuming for defense attorneys to effectively represent their clients. These barriers discourage zealous advocacy for children.

In addition, on September 11, 2014 a group of panel attorneys wrote a letter to Juvenile Court enumerating a list of concerns. The list of concerns included discovery issues, delays in case assignments, Rule 15 concerns and the previously mentioned issues regarding motions.

At the time of this report, those concerns have not been addressed and Juvenile Court has not responded. At the closing meeting I strongly encouraged the establishment of a forum to discuss issues related to defense practice. I will continue to monitor this issue.

Report to Assess Juvenile Defense Capacity was never provided

The Public Defender provided very little data prior to the writing of the third compliance report. Therefore, I requested a detailed report from the public defender to "provide an objective assessment of all juvenile defender capacity (PD and panel) for both primary and conflict services. This report should set forth a framework to assess juvenile defender capacity and make recommendations for improving organization of service delivery. The report, to be provided prior to the next compliance tour, should include recommendations for establishing workload controls, enhancing operational independence, and improving supervision and evaluation of all juvenile defenders pursuant to practice standards."²³ The requested report has not been provided. I am renewing my request at this time and hope to be provided with the report shortly.

²³ SIMKINS #3 at 4.

Need for Post Disposition Representation

The MOA envisions that children will be represented throughout their involvement in the delinquency system.²⁴ At this point it is unclear whether or not any children are being represented post disposition. Post Disposition representation is particularly important for Shelby county youth. Sometimes, Juvenile Court commits a child to DCS and the child is sent to the John S. Wilder Youth Development Center in Somerville, TN. A 2012 study by the Department of Justice revealed that Wilder had the highest rate among all Tennessee juvenile centers for sexual violence against children held in facilities.²⁵ At Wilder it was reported that nearly 20% of the children surveyed reported being sexually victimized by staff members.

In addition to the high sexual assault rate at Wilder, there have been two other recent troubling events in Tennessee Juvenile Facilities. Violence and escapes at Woodland Hills Youth Development Center were reported on September 25, 2014.²⁶ In August of this year two youths committed suicide at the Mountain View Youth Development Center and their deaths are being investigated by the Tennessee Bureau of Investigation.²⁷

Post Disposition representation was envisioned by the MOA and is critical to ensure facility accountability and to assist in creating positive outcomes for youth. National Juvenile Defender Standards also stress the importance of post disposition representation. Section VII, Role of Juvenile Counsel after Disposition includes seven different standards: 7.1 Maintain Regular Contact with Client Following Disposition; 7.2 Disclose the right to appeal; 7.3 Trial counsel's Obligations Regarding Appeals; 7.4 Obligations of Trial Counsel to Appellate Attorney; 7.5 Represent the Client Post Disposition; 7.6 Sealing and Expunging Records; 7.7 Provide Representation at Probation and Parole Review and Violation Hearings. Of particular importance given the DOJ Wilder findings is Standard 7.5 section (d):

d. For clients whose circumstances have changed; clients whose health, safety, and welfare is at risk; or clients not receiving services as directed by the court, counsel must file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification of the court order;

Unfortunately, Wilder is not unique. Harmful conditions are well documented within juvenile treatment facilities²⁸ and that these practices cause additional trauma.²⁹ Harmful

²⁴ MEMORANDUM OF AGREEMENT at 15; III (A) (1) (e) (i) (c).

²⁵ <http://www.propublica.org/documents/item/709100-svjfry12-emb-052813>

²⁶ *More Violence at Troubled Nashville Juvenile Jail*, Lucus L. Johnson II, Associated Press, ABC news, 9/15/14.

²⁷ *DCS reports two hanging deaths at detention facility*, Anita Wadhvani, August 6, 2014.

²⁸ *Id* at 175, *See also*, U.S. Dep't of Justice Investigations of following states: Ohio

http://www.justice.gov/crt/about/spl/documents/scioto_findlet_5-9-07.pdf, Louisiana

http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC_findlet_01-18-11.pdf, New York

http://www.justice.gov/crt/about/spl/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf, Indianapolis

http://www.justice.gov/crt/about/spl/documents/Indianapolis_findlet_01-29-10.pdf

²⁹ Nationally there has been much attention on how trauma affects youth. This awareness has led to an effort to educate judges and attorneys about the effects of childhood trauma. For example, the National Council of Juvenile

practices include the use of isolation or solitary confinement,³⁰ physical and sexual abuse,³¹ lack of training and staff education regarding suicide prevention,³² and lack of training and education to address the needs of special populations such as LGBT youth.³³ The Justice Policy Institute recently reported that a focus on improving conditions can lead to a reduction in juvenile incarceration rates.³⁴ Solutions to these longstanding national problems include increased monitoring,³⁵ a function that coincides perfectly with the role of defense counsel, particularly the role of defense counsel in post disposition advocacy.

When juvenile defenders engage in post disposition advocacy they hear about the practices within facilities first hand, from their clients. If juvenile defenders are aware of the goals of trauma informed care they will be able to advocate not only on behalf of their individual clients, but will also be able to fulfill their duty under National Juvenile Defender Standard 10.8.³⁶ The Department of Justice recognizes the critical role of juvenile defenders and post disposition representation in ensuring trauma informed care. As stated in *Defending Childhood*:

One of the most vital roles of counsel is to protect children against unjustified placement and incarceration and to guard against abuses within facilities.The presence of counsel could help

and Family Court Judges published “Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency” to empower judges to be able to “best assist traumatized youth who enter the juvenile justice system.” (Kristine Buffington et al., *Ten Things Every Juvenile Court Judge Should Know about Trauma and Delinquency*, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES (JULY 1, 2010), http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_0.pdf.) The National Child Traumatic Stress Network (NCTSN) has created several projects and publications that explore how judges understand and approach children with trauma histories. (See, e.g., *Judges and Child Trauma* (reporting the results of focus groups conducted to understand how knowledgeable juvenile and family court judges are about child trauma and to identify ways to work to promote education on the issue. NCTSN has also established other projects that are more child-focused, and promote peer-to-peer support and empower youth and their families to share and reflect on their own stories and experiences.) And the Attorney General of the United States and the Justice Department have devoted significant resources to better understand childhood exposure to trauma across the country, and have begun to address it through the Defending Childhood Initiative. See *Taskforce on Children Exposed to Violence*, DEP’T OF JUSTICE, <http://www.justice.gov/defendingchildhood/task-force.html> (last visited Oct. 14, 2013).

³⁰ *Growing up Locked Down*, American Civil Liberties Union, (2012) <https://www.aclu.org/blog/criminal-law-reform-prisoners-rights/growing-locked-down-youth-solitary-confinement>; See also, see *Troy D. and O’Neill S. v. Mickens et al.*, JUV. L. CENTER, http://www.jlc.org/litigation/troy_d._and_oneill_s._v._mickens_et_al (last visited Oct. 30, 2011).

For additional information regarding the federal lawsuit, see *Troy D. v. Mickens*, No. 10-2902 (JEI/AMD), 2011 WL 3793920 (D.N.J. Aug. 25, 2011); *Troy D. and O’Neill S. v. Mickens et al.*

³¹ *OJJDP Bulletin: Nature and Risk of Victimization: Findings from the Survey of Youth in Residential Placement*, Andrea J. Sedlak, et., al., U.S. Dep’t of Justice (May 2013).

³² *Department of Justice Investigation of Juvenile Court Memphis Shelby County*, (April 2013) at 58.

³³ *Hidden Injustice: Lesbian, Gay Bisexual and Transgender Youth in Juvenile Court*, http://www.njdc.info/pdf/hidden_injustice.pdf

³⁴ *Common Ground: Lessons Learned from Five States that Reduced Juvenile Confinement by More than Half*, Justice Policy Institute, (2013).

³⁵ In numerous Department of Justice investigations monitors have been employed to ensure improved practices in juvenile court. See also, *OJJDP Bulletin: Nature and Risk of Victimization: Findings from the Survey of Youth in Residential Placement*, Andrea J. Sedlak, et., al., U.S. Dep’t of Justice (May 2013) at 11-12.

<http://www.ojjdp.gov/pubs/240703.pdf>

³⁶ *National Juvenile Defender Standards*, at 161.

<http://www.njdc.info/pdf/NationalJuvenileDefenseStandards2013.pdf>

ensure successful placements and aftercare programming. When exposure to violence is discovered, defense counsel would have the ability to file legal motions to stop abuse and to remove the child from the facility where it is occurring. Children who do not have these protections have no recourse when they are mistreated in facilities where they are cut off from their families and other caring adults.³⁷

No confidential Meeting Space for Girls in Detention: As I mentioned in my executive summary, at the time of my visit there was no confidential space to meet with girls who were in the detention center.

CONFIDENTIALITY OF JUVENILE DELINQUENCY PROCEEDINGS	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 30 days: revise policies to protect confidentiality in delinquency proceedings	BC	PC	PC	SC
Insure only person properly concerned with child's case are admitted into any delinquency proceeding	BC	PC	PC	SC

Comments

The policies continue to be incorporated into practice without incident.

PLEA COLLOQUIES	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 6 months: establish procedure for plea colloquies that is age-appropriate and clear to the Child	N/A	PC	PC	SC

³⁷ See *Taskforce on Children Exposed to Violence*, DEP'T OF JUSTICE, <http://www.justice.gov/defendingchildhood/task-force.html> at 187.

Insure Magistrates conduct interactive oral colloquy w/ child that includes: Nature of delinquent act charged, Child's right to attorney, Right to plead not guilty & have Adjudicatory hearing, Child's waiver of right to trial on merits & an appeal	N/A	PC	PC	SC
Within 6 months: insure children have a right to counsel whenever entering a plea of guilty	N/A	PC	PC	SC

Comments

Observations and recording indicate that judges and magistrates are conducting interactive oral colloquies that include all of the above requirements. It appears that Juvenile Court has incorporated the new policies into practice.

RESTITUTION GUIDELINES	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
<p>Within 6 months: establish guidelines for assigning restitution to any child adjudicated delinquent that provides the child a meaningful opportunity to challenge the evidence of restitution.</p> <p>At a minimum the restitution guidelines shall:</p> <ul style="list-style-type: none"> i. Require documentation to support the restitution request ii. Allow children adequate time to review the restitution request & opportunity to introduce evidence opposing the amount iii. Allow opportunity to request adjustment to restitution amount by introducing evidence of family income or obligations that would render the restitution an undue hardship 	N/A	PC	PC	SC

Comments

During this compliance visit I reviewed files where restitution was ordered. In addition, I observed restitution issues addressed during adjudicatory hearings. In each case it appeared that the policy was followed and that restitution was ordered only after appropriate documentation was obtained.

BOND SETTING GUIDELINES	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2014
Within 6 months: establish bond setting guidelines At minimum the guidelines shall: i. Prevent excessive bonds ii. Reasonably assure appearance in court iii. Take into account presumptive indigence of children iv. Allow parents to file statements of indigence	N/A	PC	PC	SC

Comments

During my fourth compliance visit I reviewed several files where bond was set and observed Bond being set in detention hearings. Bond amounts appear to be set in accordance to the guidelines.

LANGUAGE ACCESS PLAN	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 6 months: develop language access plan that complies with Title VI. Make summons & other crucial documents available in appropriate languages	N/A	PC	PC	II/P
Implement language access plan within 1 year	N/A	BC	PC	II/P

Comments

The language access plan has been in effect since April 15, 2013. Although I did not hear any complaints about the Language Line during my fourth compliance trip, I have yet to be able to listen to a recording from language line.

TREATMENT OF WITNESSES	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 6 months: revise procedures on treatment of witnesses to insure integrity of witness testimony is preserved. Include: All witnesses placed under oath All witnesses properly sequestered	N/A	PC	PC	SC

Comments

The new policy is being implemented. I was not made aware of any issues relating to the treatment of witnesses during my third compliance report.

JUDICIAL BENCH CARDS	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 6 months: develop bench cards Bench cards shall be readily accessible documents. Should be available upon request Juvenile Court shall produce bench cards for the following: a. Detention Hearing, PC determinations and bond settings b. Adjudicatory Hearings c. Plea colloquies d. Transfer Hearings e. Disposition hearings, including procedures for setting restitution f. Post-dispositional hearings	N/A	BC	PC	PC

Comments

The policy regarding bench cards was created June 17, 2013 and bench cards have been created. During my fourth visit I observed judges and magistrates utilizing the bench cards. Note: I have told that the judicial bench book was being placed online. I have not yet confirmed.

RECORDINGS OF JUVENILE DELINQUENCY HEARINGS	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 6 months: all hearings shall be recorded by electronic means, Private court reporters may provide written transcripts	N/A	BC	PC	PC
Juvenile Court shall insure recordings are complete & of good quality				
Juvenile Court shall make recordings accessible at no cost to defense counsel representing indigent children				
Recordings shall be stored for 2 years				

Comments

I had the opportunity to listen to recordings of court proceedings. I found the recordings to be clear and of good quality. However, during this compliance visit I heard many complaints from defense counsel that they were not permitted to obtain the recordings. Apparently there was a new policy issued by the juvenile clerk's office and a sign was posted on the door saying that recordings would not be available after November 1, 2014. On November 14, 2014 I received an order from Juvenile Court which will hopefully address the issue.

WRITTEN FINDINGS	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 6 months: require Magistrates to produce court orders containing the written findings of fact for each judicial decision made Written findings of fact shall include the relevant statutory requirements, legal reasoning that formed the basis for the court's decision and a narrative of the facts considered in decision	N/A	BC	PC	PC

Comments

During my fourth site visit I reviewed the files of all transfer hearings and 40 randomly selected adjudicatory hearings files. Each file contained a written finding of fact that appeared sufficient.

TRAINING	COMPLIANCE RATING APRIL 2013	COMPLIANCE RATING OCTOBER 2013	COMPLIANCE RATING APRIL 2014	COMPLIANCE RATING OCTOBER 2014
Within 6 months: develop a training plan for all employees involved with delinquency docket & submit training plan to Monitor and US for approval Training plan shall insure appropriate staff are trained on topics relevant to their role & responsibilities in delinquency proceedings including: Constitutional due process requirements <ol style="list-style-type: none"> i. Adolescent development ii. Dispositional planning iii. Best practices in social service & therapeutic options iv. Functional & practical purposes of juvenile court v. Appropriate professional role of different players within juvenile proceedings 	N/A	BC	PC	PC
Juvenile Court shall implement 1 st training plan within 12 months & shall create subsequent training plans on an annual basis thereafter	N/A	N/A	BC	PC

Comments

Juvenile Court has continued to conduct trainings. It is my understanding that there will be a specific training on Affidavits of Complaint for law enforcement and the court. This is an excellent idea given the insufficient AOC's I reviewed during this compliance period.

I also encourage Juvenile Court to have training on the role of defense counsel in delinquency proceedings. However, given the recent election and the new staff in leadership positions, additional training to ensure continuity is recommended.

Compliance Report #4—October 2014

EXHIBITS



A

Juvenile Court of Memphis and Shelby County

616 ADAMS AVENUE • MEMPHIS, TENNESSEE 38105

DAN H. MICHAEL
JUDGE

October 21, 2014

Ms. Winsome Gayle
Senior Trial Attorney
Special Litigation Unit
Civil Rights Division
U. S. Department of Justice
930 Pennsylvania Avenue, NW
Washington, DC 20530

Re: *MOA – DOJ and Juvenile Court of Memphis and Shelby County*

Dear Winsome:

MOA Section A. 1. (e)(ii)(b), page 15, concerns oversight of a juvenile defender panel by an independent body. I respectfully propose to establish an oversight entity with the structure and functions outlined in the enclosed *Plan Providing Representation for Indigent Children in Delinquency Cases*. (The Plan)

The Plan follows the general structure and operation of the federal Criminal Justice Act Panel (CJA Panel), 18 U.S.C. § 3006A, and is designed to fulfill the Juvenile Court's responsibilities under the above referenced MOA Section.

It is my intention to move forward immediately to implement the Plan. Please contact me if you have any questions or need more information.

Sincerely,

Dan H. Michael, Judge

Enclosure

- cc: Hon. Mark H. Luttrell, Jr.
- Mr. Stephen Bush, Esq.
- Ms. Marilyn Hobbs, Esq.
- Ms. Sandra Simkins, Esq.
- Mr. Bill Powell, Settlement Agreement Coordinator
- Jina Shoaf, Esq.

**PLAN FOR THE JUVENILE COURT OF MEMPHIS AND SHELBY
COUNTY, TENNESSEE, PROVIDING REPRESENTATION FOR
INDIGENT CHILDREN IN DELINQUENCY CASES**

PREAMBLE

The Judge of the Juvenile Court of Memphis and Shelby County, Tennessee, is required by Rule 13, Tennessee Supreme Court Rules, to maintain a roster of attorneys from which appointments will be made, and has adopted the following Plan for furnishing adequate representation to indigent children in delinquency cases.

Any child who is financially unable to obtain representation and eligible for appointed representation shall be provided counsel and related services pursuant to T.C.A. 37-1-126 and Rule 13 of the Tennessee Supreme Court Rules. Counsel furnishing representation shall be selected from the Office of the Shelby County Public Defender or from the Juvenile Defender Panel. Representation under this Plan shall include counsel and investigative/expert, and other services necessary for adequate representation which are available from the Administrative Office of the Courts.

1. Selection Process for Private Attorneys

A. Juvenile Defender Panel of Attorneys

All attorneys in active practice whose names appear on the rolls of this Court are eligible for admission to the Juvenile Defender Panel for the Juvenile Court of Memphis and Shelby County, Tennessee.

Applications for admission to the Panel shall be forwarded to the Clerk of Juvenile Court and shall be reviewed annually by the Panel Selection Committee. The Panel Selection Committee shall recommend and the Juvenile Court Judge shall appoint members of the bar to the Juvenile Defender Panel for a three (3) year term. The Committee shall meet each year in November to recommend additions or replacements to the Panel of the following calendar year. Attorneys who have completed their term may seek reappointment for an additional term.

The Juvenile Defender Panel shall contain no more than 20 attorneys. The Court may increase the number of panel members from time to time as workload necessitates. Any attorney named to the Juvenile Defender Panel shall reasonably expect to be appointed in approximately 3 to 10 cases per year.

B. Panel Selection Committee

The Juvenile Court Judge shall appoint the Panel Selection Committee to select the Juvenile Defender Panel members annually. The Panel Selection Committee will serve without compensation. One attorney from the Office of the Shelby County Public Defender shall be a voting member of the Selection Committee and serve as its permanent secretary. The remainder of the Committee shall consist of one Juvenile Court Magistrate, and at least three (3) members of the private bar who have engaged in an active criminal and juvenile delinquency practice for at least ten (10) years. The Committee may be expanded from time to time in the discretion of the Juvenile Court Judge. Panel Selection Committee members from the private bar shall serve terms of 3 years.

The Committee shall set standards for membership on the Panel and shall recommend panel members based on their proven experience and competence in the field of juvenile delinquency defense. In addition to applications, the Committee should also review recommendations from any interested citizen concerning the fitness of a particular applicant for admission to the Panel. Appointments to the Juvenile Defender Panel shall be made by the Juvenile Court Judge from recommendations submitted by the Panel Selection Committee.

C. Removal of Attorneys from the Juvenile Defender Panel

Each attorney appointed to the Panel will serve a term of three (3) years and may be removed for neglect of duty, malfeasance, or conduct in violation of the Tennessee Rules of Professional Conduct. The decision to remove an attorney from the Juvenile Defender Panel is solely that of the Juvenile Court Judge. The decision of the Juvenile Court Judge to remove a panel attorney is final with no appeal. A panel attorney may resign from the Panel upon giving notice to the secretary of the Juvenile Defender Panel Selection Committee. Upon giving such notice, the secretary of the Juvenile Defender Panel shall notify the Juvenile Court Judge who will remove the panel attorney prior to expiration of the attorney's term.

Any Juvenile Defender Panel member who does not accept at least one appointed juvenile delinquency case per calendar year shall be automatically removed from the Juvenile Defender Panel unless good cause can be shown.

D. Appointment of Panel Attorneys

In all cases in which a child qualifies for appointment of counsel pursuant to T.C.A. 37-1-126 and Rule 13, Tennessee Supreme Court Rules, Juvenile Court

personnel will immediately notify the appointed lawyer of the appointment and secure copies of all relevant available material concerning the appointment, the charge, the affidavit of complaint or petition, and any notices of future court appearances. Court personnel shall arrange for delivery of the materials to the appointed attorney.

Counsel appointed to represent a child shall make contact with that child as soon as possible after counsel is advised of the appointment. Counsel shall not accept the appointment if unable to expeditiously meet with a client in custody.

E. Training

Members of the panel will be expected to attend periodic JTIP training sessions arranged by the Shelby County Public Defender, as well as remaining current in CLE requirements. Failure to attend such training may constitute a basis for removal from the panel.

2. Qualifications for Appointed Counsel

A. Eligibility

Representation shall be provided for all financially eligible children described in T.C.A. 37-1-126 and Rule 13, Tennessee Supreme Court Rules.

The determination that a child is "financially eligible" for appointed counsel shall be made by the Juvenile Court, through the judicial officer hearing the case, from statements made under oath by the parents, legal custodians, or guardians of said child, in the presence of the judicial officer or by statements contained in an affidavit verified by any person empowered to administer oaths. However, if no parent,

legal custodian, or guardian of a child are present, counsel shall be appointed as a child is presumed to be indigent.

B. Person May Not Select Counsel

No person may select a lawyer from the Juvenile Defender Panel. The selection of counsel shall be the exclusive responsibility of the judicial officer.

C. Duration and Substitution of Counsel

A child for whom counsel is appointed shall be represented at every stage of the proceedings from the child's initial appearance before the judicial officer through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the judicial officer finds that the child is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize partial payments as the interests of justice may dictate. If partial payment by a child's parents, legal custodians, or guardians is required, those payments will be made to the Clerk who will periodically report to the Court the status of said payments. If at any stage of the proceedings, including an appeal, the judicial officer finds that the child is financially unable to pay retained counsel, counsel may be appointed and payment authorized, as the interests of justice may dictate, but the attorney previously retained will not necessarily be appointed in such circumstances. The judicial officer may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

D. Minimum Qualifications of Panel Attorneys on Major Crimes and Transfer Dockets

Any panel attorney handling cases assigned to the Major Crimes and Transfer Dockets shall have the following minimum qualifications:

- (1) Have participated in at least five (5) criminal jury trials, or have at least five (5) years of practice in the criminal courts;

(2) Have completed, prior to the appointment, all required JTIP training provided by the Shelby County Public Defender.

3. Payment for Representation

The attorney appointed pursuant to the provisions of this Plan shall be compensated pursuant to Rule 13, Tennessee Supreme Court Rules.

4. Appellate Representation

When a child wishes to appeal, the attorney appointed by the Court pursuant to the terms hereof is responsible for representing said child until relieved by the Criminal Court or Court of Appeals. If the attorney wishes to be relieved on appeal, the attorney shall comply with the applicable rules with regard to notice to the client and a motion to withdraw as attorney.

This Plan shall become effective immediately upon approval by the Juvenile Court Judge.


Dan H. Michael, Juvenile Court Judge

Date

OCTOBER 21st 2014

Committee for Public Counsel Services



Youth Advocacy Division

Youth Advocacy Foundation

Director
Josh Dohan

Juvenile Justice Policy

Assistant Director
Priscilla Duffy

Administrative Assistants: (shared by all directors)
Theresa Flaherty, Christina Liwski, and Huong Vo

YAD Offices

Fall River - AIC, 3 Attorneys, SSA, AA

Hyannis - AIC, 1 Attorney, 5 SSA, 5 AA

Lowell - AIC, 3 Attorneys, SSA, AA

Quincy - AIC, 3 Attorneys, SSA, AA

Roxbury - AIC, 3 Attorneys, SSA, AA

Salem - AIC, 3 Attorneys, SSA, AA

Somerville - AIC, 3 Attorneys, SSA, AA

Springfield - AIC, 5 Attorneys, 2 SSA, AA

Worcester - AIC, 3 Attorneys, SSA, AA

Sentencing Advocate - JIWOP

Director of
Training
Wendy Wolf

Training
Attorney
Holly Smith

Director of
Education
Advocacy
Marlies Spanjaard

Staff Attorney
Bryna Williams

Legal Fellow
Rachel Rosenberg

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Director of
Juvenile
Appeals
Barbara Kaban

Director of
Social Work
Jessica Edwards

Trial Panel
Director
Erica Cushna

Trial Panel
Oversight
Helen Fremont

Revocation
Advocacy
Attorney
Mara Voukydis

600 Private
Counsel

20 Revocation
Counsel

Rittsfield

Hadley

Greenfield

Orange

B



C

U.S. Department of Justice
Civil Rights Division

JMS:WGG:RG:pjc
DJ 207-72-3

Special Litigation Section - PHB
950 Pennsylvania Ave, NW
Washington DC 20530

October 30, 2014

Via Electronic and U.S. Mail

The Honorable Dan H. Michael
Juvenile Court of Memphis and Shelby County
616 Adams Avenue
Memphis, TN 38105

Re: Proposal to Reform the Juvenile Defender Panel

Dear Judge Michael:

As promised, we are writing in response to Your Honor's October 21, 2014 letter and proposal for restructuring the panel attorney process. Your proposal seeks to address the terms of our Memorandum of Agreement ("Agreement") regarding our findings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §14141. Based on our discussions with you, it is our understanding that this is an interim plan and that a final proposal will be submitted once you have conferred with local stakeholders. To assist in your review and revision of the proposal, we offer the following observations.

You should know that we share your desire to improve the panel attorney selection, appointment, and removal process in a manner that ensures that the children represented by panel attorneys receive the benefits of the zealous advocacy to which they are entitled. A main component of our Report of Findings (April 2012) concerned the "[m]isunderstandings about the role of defense counsel" and the panel defender office's lack of independence. *Id.* at 46, 50. Your sense of urgency and expressed need for focusing on this issue is very much appreciated and understood.

To frame our observations of your proposal, we would like to draw your attention to several key elements of the Agreement respecting the right to counsel. One foundational element is the requirement to establish an "independent, ethical, and zealous" defense function in the Shelby County Public Defender's Office and the appointed panel defender system.

See Agreement Section A.1.(e)(i) and (ii) at 14, 15. The independence of the defense function and individual defense counsel is necessary to the provision of ethical and zealous juvenile advocacy, a hallmark of a fair and reliable justice system, and essential to achieving substantial compliance with the Agreement. National standards recognize the imperative of maintaining an independent defender function. See e.g. Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System ("ABA Ten Principles")* at 2 (2002) (Principle 1); ABA, *STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION* (1993)(Standard 5-1.3). "Independence" in this context means that the defense function is "independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel." *ABA Ten Principles*, Principle 1, Commentary.

Another foundational element of the Agreement is the requirement to maintain reasonable defender workloads. *Id.* Section A.1(e)(i)(c) and (ii)(b) at 15. You have expressed a commitment to ensuring that the individual attorneys assigned to the panel provide quality representation to their clients. We share this commitment. We also note that, as with independence, workload controls, which include the attorney's caseload adjusted by other factors such as the complexity of the cases and the attorney's other duties, promote quality representation. See *ABA Ten Principles* at 2 (Principle 5); Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Eight Guidelines of Public Defense Related to Excessive Workloads (ABA Eight Workload Guidelines)* (2009). See also ABA Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 06-441* (May 13, 2006)(Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation)¹.

The final foundational element of the Agreement that we would like to note regarding the panel system is that the panel be "overseen by an independent body." *Id.* Section A.1.(e)(ii)(b) at 15. We understand that Tennessee Supreme Court's Rule 13 requires the Court to maintain a roster of attorneys for appointments. However, Rule 13 does not prohibit the Court from authorizing an independent body to oversee the selection, qualification, supervision, and removal of the panel members. We recognize that your proposal seeks to place some authority in the Panel Selection Committee ("Committee"). However, the process that you have described for the selection and appointment of members to the Committee does not distance the Committee from the Court sufficiently to allow for actual and perceived independence, both of which are crucial to creating and maintaining the integrity of the panel.

¹ Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_dof_ethics_opinion_defender_caseloads_06_441.authchockdam.pdf

While your proposal seeks to address the elements of the Agreement, it falls short of this goal in several important ways. In particular, the proposal undercuts the independence of the appointed attorneys in (a) the manner in which the Committee is structured, (b) the Court's option to expand the Committee at will, and (c) by providing the Court with the sole authority to remove attorneys from the panel.

As currently proposed, the Committee will consist of several members who will be beholden directly to the Court for their position. While we do not endorse a particular system for selecting Committee members, a system that satisfies national standards is likely to require that a diverse array of appointing authorities contribute selections to the Committee. *See, e.g.*, Report of the National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (April 2009) at 185 (Recommendation 2 – "The members of the Board or Commission of the agency should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments."). There are several systems where either the judiciary or the executive establishes an independent oversight body constituted of members selected by diverse authorities. *See e.g.* Kentucky's Public Advocacy Commission and Massachusetts' Committee for Public Counsel Services.²

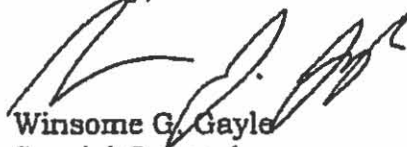
The proposal's removal provision also undercuts the independence of the panel. The proposal provides no mechanism for ensuring that attorneys are removed for the appropriate reasons. While you have assured us that you will abide by the limitations of focusing on neglect, malfeasance, or professional conduct violations, an appropriate structure that secures independence cannot be dependent on the passion and understanding that you personally embody, but must create a structure that ensures independence over time, without any of us knowing who, in the future will take the bench or what his or her sensitivities will be toward the right to zealous counsel for juveniles. In addition, even while we may accept Your Honor's good judgment on these matters, the Court's absolute power of removal sends the clear message to the private bar that their livelihood is dependent upon staying in the Court's favor, rather than aggressively advocating for their clients. One example of a more secure removal process would require the Committee to hear complaints against attorneys, find facts, and decide on a sanction, which the Court would have the authority to review and modify for good cause. As it stands, the Court's absolute authority to remove an attorney undermines the independence requirement.

² Although these are state systems, they can provide some insight into how members of such bodies are appointed.

Finally, the proposal creates serious workload concerns and is focused too heavily on criminal practice as opposed to the specialized practice of juvenile defense. The proposal's limited number of panel attorneys – twenty – will create an immediate workload crisis for both the panel and the public defender service. According to the court's most recent annual report (2012),³ the court handled 8,995 delinquency cases in 2012. The court's list of 2013 Top Ten Offenses,⁴ includes over 12,000 charges (the actual number of cases is unclear). Requiring twenty panel attorneys and eight public defenders (the current number of attorneys in the juvenile unit) to handle this many matters would immediately breach suggested caseload maximums and would create overwhelming and unmanageable workloads (which include factors other than the raw number of cases). See American Council of Chief Defenders Statement on Caseloads and Workloads (2007).⁵ Additionally, the proposal's focus on criminal experience as the basis for attorneys' qualifications to serve on the major offenses and transfer docket overlooks the importance of specialized juvenile training and practice. See e.g. National Juvenile Defense Standards, Standard 1.3, *Specialized Training Requirements for Juvenile Defense* (2013); National Juvenile Defender Center and National Legal Aid & Defender Association, *Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems*, Principle 7, Comment A ("The public defense delivery system recognizes juvenile delinquency defense as a specialty that requires continuous training in unique areas of the law.").

We hope that these observations will be helpful in your revision of the proposal. We appreciate and share your concern for improving the quality of the panel attorneys. We recommend that you work with others in the county to develop a panel system that is independent, ethical, and supports zealous advocacy on behalf of the children appearing on delinquency proceedings.

Sincerely,



Winsome G. Gayle
Special Counsel

cc: Mark H. Luttrell Jr.
Mayor of Shelby County
Vasco A. Smith, Jr. County Administration Building

³ Available at <http://www.shelbycountyttn.gov/index.aspx?nid=2596>.

⁴ Available at <http://www.shelbycountyttn.gov/index.aspx?NID=2884>.

⁵ Available at

<http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDSELOADSTATEMENTscpt6.pdf>; *ABA Eight Workload Guidelines*.

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