

Delaware Office of Defense Services Indigent Juvenile Defense Strategic Plan

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Section I. Introduction

Almost fifty years ago, the United States Supreme Court held that children in delinquency proceedings are entitled to the same constitutional rights as adults.¹ *In re Gault* is a defining moment for all children. It is the moment that guarantees that all children are entitled to due process and equal protection in delinquency proceedings. It is the moment that illustrates that a child's loss of liberty is no less important than that of an adult. It is the moment that provides assurance that every child will have a voice and an advocate within the juvenile justice system.

Although Delaware has made considerable advancements to improve its indigent juvenile defense system, like many other states, we have fallen short of *Gault's* mandate and the full embodiment of its protections by failing to provide children with meaningful access to competent counsel from arrest through post-disposition. Children continue to face barriers that hinder access to qualified counsel during all phases of their legal proceedings. Fifty years after *Gault*, children are unrepresented at initial appearance, waive their right to counsel prior to meaningful consultation, or are represented by inadequate counsel. Providing a child with just any lawyer, who has no juvenile specific training, at some point in the legal process, does nothing more than provide a lawyer *in name only*. This flawed practice has even greater consequences for children of color in the delinquency and criminal justice systems as experience

¹*In Re Gault*, 383 U.S. 1 (1967).

increased pre-trial detention and longer sentences of confinement. In 2014, minority youth were detained 3.21 times more than white youth, sentenced to confinement 1.51 times greater than white youth, and prosecuted in adult court 1.92 times more than white youth.² To guarantee that the promise of *Gault* is simply not *in name only*, all children must be afforded meaningful access to well-trained, competent counsel from the time of arrest through post-disposition proceedings.

Science, common sense, and the law recognize that children are distinctly different from adults.³ Over the last decade, the United States Supreme Court has repeatedly acknowledged this distinction by recognizing that individualized factors, including age, personal characteristics, and the opportunity for rehabilitation, must be considered in both the legal process and legal decision making related to children. More importantly, this jurisprudence identifies the limits and vulnerabilities inherent in children in the legal system and the even greater obligation to protect their rights through competent counsel. It is this distinction, combined with the enhanced duty to ensure due process for children, which makes the representation of children a specialized area of legal practice that requires particular knowledge, skills, and advocacy.⁴ Competent, diligent representation is the core of a juvenile defender's responsibility, and, in essence, the heart of *Gault*.⁵

While the majority of the responsibility to ensure a constitutionally adequate system, anchored by competent advocacy, rests with the defense bar, juvenile justice stakeholders have

² The Delaware Criminal Justice Council, *Statewide African American/White Volume & RRI Values by Contact Point Report* (2014).

³ *Miller v. Alabama*, 567 U.S. ___ (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Montgomery v. Louisiana*, 577 U.S. ___ (2016).

⁴ National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems* (2008); *National Juvenile Defense Standards*, pp. 22 (citing *Specialized Training Advancing the Ethical and Professional Representation of Youth*, NJDC Issue Brief, pp.1); Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense*, 45 *Family Court Rev.* 466 (2007); Sue Burrell, *Juvenile Delinquency: The Case for Specialized Training* (2010) (<http://www.modelsforchange.net/publications/248>).

⁵ See generally National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005); *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 3.

also recognized the nationwide gaps in indigent defense services for children. In March 2015, the United States Department of Justice (the “US DOJ”) filed a landmark Statement of Interest in *N.P. et al., v. Georgia* which recognized that children are denied the right to counsel when an attorney is available *in name only*.

“[D]ue process requires that every child who faces the loss of liberty should be represented from their first appearance through, at least, the disposition of their case by an attorney with the training, resources and time to effectively advocate the child’s interest. If a child decides to waive the right to an attorney, courts must ensure that the waiver is knowing, intelligent, and voluntary by requiring consultation with counsel before the court accepts the waiver.”⁶

The improvement of indigent juvenile defense and the creation of a model system is not simply a goal but a shared responsibility in Delaware. As a recipient of the *FY 2015 Smart on Juvenile Justice: Enhancing Youth Access to Justice Initiative* grant, Delaware, through its Criminal Justice Council (“CJC”), invited key juvenile justice stakeholders to form the Smart on Juvenile Justice Access Committee (“SJJAC”), including representatives from: the Office of Defense Services (“ODS”), the Family Court, the Superior Court, the Justice of the Peace Court, the Department of Services for Children, Youth, and their Families (“DSCYF”), the Department of Education, the Department of Justice (“DOJ”), policymakers, the Delaware State Bar Association (“DSBA”), Widener University Delaware Law School (“Delaware Law School” or the “Law School”), private law firms, the Delaware Criminal Justice Information System, the Delaware Center for Justice, the American Civil Liberties Union, the Criminal Justice Council, and the Community Legal Aid Society.⁷ Six work-groups, consisting of various stakeholders, were formed to review the target areas of the grant and make recommendations.⁸ These work groups included: (i) Disproportionate Minority Contact, (ii) Initial Detention Hearings, (iii)

⁶<https://www.justice.gov/opa/pr/department-justice-statement-interest-supports-meaningful-right-counsel-juvenile-prosecutions>

⁷ The levels of participation varied by agency.

⁸ A list of all SJJAC and work group members is attached as *Appendix A*.

Specialized Training and Education, (iv) Post-Disposition Representation, (v) Transfer Laws, and (vi) Access to and Waiver of Counsel. Delaware's stakeholders are easily accessible and have previously worked together on various projects that resulted in ongoing juvenile justice reform.⁹ Most recently, in 2015, through similar collaboration, Delaware implemented the Civil Citation Program as an alternative to the arrest of children for certain crimes. This same group of stakeholders has also partnered on training opportunities and juvenile justice initiatives.

Juvenile justice reform and the treatment of children in the legal system is also a priority for the Delaware Legislature. In the last five years, legislation, spearheaded by ODS, has resulted in many positive changes to juvenile law including: limitations on the minimum age for prosecution, juvenile specific competency standards, discretionary sex offender registration/notification for children, elimination of mandatory life without parole sentences for children, expansion of the juvenile expungement statute, and waiver of financial obligations for children in delinquency court.¹⁰ Bills are currently pending to abolish the indiscriminate shackling of children in delinquency court and to mandate that all children are eligible for appointed counsel.¹¹ The Delaware Kid's Caucus, a group of legislators committed to children's issues, recently met with ODS and other advocates to discuss this grant, issues impacting children in the delinquency and criminal justice systems, and various legislative initiatives.

Although no federal funding will be used to engage in changes of law, substantial changes in law are required to create an effective juvenile defense system in Delaware.

⁹Delaware has been a Juvenile Detention Alternative Initiative (JDAI) state since 2003. Through JDAI, juvenile justice stakeholders created the Juvenile Justice Collaborative which worked on various issues through partnerships and collaboration.

¹⁰*E.g.*, House Bill 126 (prohibiting prosecution of children ages 10 and under unless a finding of competency exists); House Substitute 1 for House Bill 253 (establishing competency procedure for children); House Bill 182 (providing court discretion to register children on sex offender registry); Senate Bill 9 (eliminating life without parole sentences for children); House Bill 75 (expanding juvenile expungement); House Bill 290 (allowing court to waive financial obligations in delinquency cases).

¹¹House Bill 211 (abolishing indiscriminate use of restraints) and House Bill 382 (codifying ODS current practice of representing every child who requests representation).

Delaware is ripe for sustainable, wide-sweeping systemic change in its juvenile defense practice and the juvenile justice system. This change is supported by ODS leadership and its staff as well as other juvenile justice stakeholders. With Delaware’s small size and its statewide indigent defense system, change can be affected for all of Delaware’s children. ODS leadership and its juvenile defenders recognize that our practice must change to provide better legal services to our children. Juvenile justice stakeholders support change and collaboration as they recognize that a better indigent juvenile defense system leads to better outcomes for the children they serve. The Delaware Legislature and the Governor’s Office understand the necessity of a better system for the communities they serve.¹² ODS has formed sustainable partnerships with advocacy groups, including the Delaware Center for Justice (“DCJ”) and the Delaware chapter of the ACLU, to lead criminal and juvenile justice transformation. As such, Delaware has a strong network, both internally and externally, to support, implement, and sustain our strategic plan and ensure that children in the delinquency and criminal justice systems have early, meaningful access to, consultation with, and representation by competent, skilled juvenile defenders.

¹²For example, the Governor’s Office supported cabinet agency leaders’ testimony in support of changes to the juvenile sex offender registry and other legislative efforts.

Section II. The Juvenile Defense Delivery System and the Provision of Juvenile Defense: *Current Infrastructure, Policy, Practice, Funding, Laws, and Procedures*

A. The Office of Defense Services

The Office of Defense Services (“ODS”) is a statewide office that provides legal representation to indigent clients in all stages of their criminal and delinquency cases. The range of cases that ODS handles spans from a simple traffic offense to capital murder. ODS attorneys practice in all Delaware state courts and they represent their clients at the pre-trial, trial and appellate phases of their cases.¹³ In addition to its direct legal services, ODS spearheads numerous reform and policy initiatives in criminal and juvenile justice. ODS does not have a civil division and it does not provide representation in any civil or collateral matters for any of its clients.

ODS is comprised of three divisions: Central Administration, the Public Defender’s Office (“PDO”), and the Office of Conflicts Counsel (“OCC”).¹⁴ The Chief Defender, who oversees all divisions, is appointed by the Governor. ODS’ annual operating budget encompasses all divisions. Juvenile defense does not have its own independent budget. However, ODS juvenile defenders¹⁵ have access to any case-related funding necessary to represent clients in delinquency and criminal cases. Juvenile defenders routinely use expert witnesses in their cases and this practice is fully supported by ODS administration. Pursuant to the PDO attorney pay plan, all full time defenders (adult and juvenile) have pay parity with their counterparts at the prosecutor’s office. Juvenile defenders are afforded the same promotions and

¹³This includes violation of probation hearings, and diversion court hearings.

¹⁴In 1964, the PDO was created, pursuant to 29 *Del. C.* § 36, with the statutory mission of preserving the constitutional rights of indigent defendants through the assistance of counsel in criminal cases at every stage of adjudication process. Case law further establishes that the Public Defender, and now Chief Defender, as an officer of the court, has the professional duty to assist the court in every reasonable way in the improvement of justice. In 2015, legislation established this current structure and renamed the office as ODS.

¹⁵References to “ODS juvenile defender” include attorneys from both the PDO and OCC.

pay as adult defenders and, in fact, many of the juvenile defenders are at the higher end of the pay scale. In sum, juvenile defenders have the same funding and salary as adult defenders.

The function of Central Administration is to provide support for the PDO and OCC in areas such as training, fiscal matters, and creation of policy and procedures. PDO staff is comprised of attorneys and professionals who provide ancillary services including investigators, secretaries, psycho-forensic evaluators,¹⁶ forensic nurses, and mitigation specialists. The OCC is comprised of contract criminal defense attorneys who are assigned clients when the PDO has a conflict of interest. Although the OCC does not have similar ancillary on-staff services, OCC clients are provided the same services upon request of the attorney.¹⁷ As such, all ODS juvenile defenders have access to ancillary services for their clients whether it be in-house or on a contractual basis.

B. Obtaining ODS Legal Representation for Children in Delinquency and Criminal Court

Although there is no statutory presumption of indigence for children under Delaware law, per ODS policy, children are automatically eligible for legal representation regardless of their pending charges or their parent or guardian's income. House Bill 382, which is currently pending in the Delaware Legislature, will codify this practice. Legal representation of children by ODS generally commences following the child's arrest and/or initial court appearance.¹⁸

¹⁶Psycho-forensic evaluators ("PFEs") are master's level professionals who work as part of the defense team and assist with alternative sentencing plans, mitigation, review of records, treatment plans, experts, and addressing a client's holistic needs.

¹⁷OCC has two part-time PFEs on staff, one of which is dedicated to juvenile cases.

¹⁸Children must complete an intake interview to obtain ODS representation. If a child is detained, ODS will automatically complete this interview. If a child is not detained, the child must complete the interview at an ODS office. ODS staffs certain court proceedings so children can complete interviews and consult with an attorney at these appearances. During the intake interview, ODS staff gathers information including: the client's statement about the allegations, potential witnesses, and mental health, substance abuse, treatment, education, social media usage, and immigration information. The client and parent/guardian are also asked to sign a release of information so that relevant medical, educational, and treatment records can be obtained.

C. ODS Juvenile Defenders, Practice Structure, Supervision, Training, Standards, Scope of Representation, and Data Collection

There is no specialized juvenile practice in ODS. Attorneys representing children (“juvenile defenders”) handle both juvenile and adult cases in the Delaware courts. Currently, there are 14 juvenile defenders statewide in the PDO and 18 juvenile defenders statewide in the OCC. Juvenile defenders represent children from the time they are assigned to a case through the appeal. Juvenile defenders also represent children at violation of probation hearings. ODS does not fully implement the practice of vertical representation in delinquency cases. As a result, different attorneys may represent a child throughout his or her legal case. Currently, the PDO implements vertical representation only in the most serious delinquency cases.¹⁹ The OCC implements vertical representation once an OCC attorney is assigned which often occurs after a child’s initial court appearance.

The Chief Juvenile Defender supervises attorneys who handle delinquency cases in the PDO. The Chief Juvenile Defender has a reduced caseload and handles various administrative matters. The Chief Juvenile Defender routinely consults on delinquency cases with other attorneys. The Chief Juvenile Defender also has an assistant supervisor who works on administrative matters and has a full caseload. The Chief Conflicts Counsel does not carry a caseload but manages the assignment of juvenile and adult cases and all other administrative tasks for the office. The Chief Conflicts Counsel does not provide any direct or indirect supervision to the OCC attorneys.

The PDO has a comprehensive database system which enables the Chief Juvenile Defender to provide oversight. This system is comprised of numerous data fields which enables vast data collection. ODS technology staff can readily make changes to the database to enhance

¹⁹ For example, the PDO currently implements vertical representation in sex, weapons, robbery and transfer cases.

data collection as needed. Through the database, the Chief Juvenile Defender is able to review caseloads and case work as well as generate reports reflecting the number of attorney/client contacts or motions filed. The OCC has a similar database but OCC attorneys are unable to enter data into this state system because they are private practitioners. The Chief Conflicts Counsel cannot, therefore, provide case oversight through the current database system. In summer 2016, the OCC will begin using a new database system which will enable OCC and its attorneys to enter and track data similar to the PDO database system.

Although the majority of ODS juvenile defenders have extensive legal and trial experience, there is no requisite level of experience or training to be an ODS juvenile defender. ODS offers various juvenile specific trainings; however, there is no mandatory juvenile defender training curriculum. ODS does have client contact guidelines for its attorneys but it does not have any juvenile specific defense practice standards or guidelines.

Although ODS represents children in matters directly related to their delinquency cases, including sentence review hearings and violation of probation hearings, juvenile defenders typically do not have ongoing contact with their clients after disposition and sentencing. In March 2016, ODS commenced a pilot program with Rutgers School of Law to facilitate ongoing, regular communication with children who are sentenced to secure placement. ODS has partnered with the Delaware Law School to continue this project as an externship opportunity for its law students starting in summer 2016. ODS juvenile defenders do not represent children on any civil or collateral proceedings such as expungement or conditions litigation.

D. Delaware Delinquency Court Jurisdiction

Delaware has a unified, statewide court system with delinquency and criminal courts in each of its three counties.²⁰ The Family Court is Delaware's delinquency court. The Family Court has exclusive, original civil jurisdiction over any child charged with delinquency, subject to some statutory exceptions which allow for children to be prosecuted as adults.²¹ The purpose of Family Court is rehabilitative, rather than punitive, with all proceedings being "in the interest of rather than against the child."²² Under Delaware law, there is no absolute bar on the prosecution of children in delinquency court; however, for a prosecution to proceed against a child under the age of 10, a competency determination must first be made.²³ Judicial officers in the Family Court do not specialize in delinquency cases and their court dockets consist of delinquency, civil, and child welfare matters.

E. Prosecution of Children in Adult Criminal Court

Delaware law allows and, in many instances, requires that children be prosecuted as adults. Children can be prosecuted as adults when there is a finding, either by the Court or by stipulation of the parties, that the child is non-amenable to the Family Court's rehabilitative processes or when the child's charges are within the jurisdiction of the adult court.²⁴ In cases of adult jurisdiction, children may have the opportunity to have their cases transferred back to delinquency court for prosecution if a court so finds after a reverse amenability hearing.²⁵ However, this opportunity does not exist for all children as Delaware law requires that children charged with certain crimes be prosecuted as adults with absolutely no chance of return to

²⁰Delaware is comprised of three counties, Kent, Sussex, and New Castle County. New Castle County is the most urban county while Kent and Sussex counties are more rural.

²¹10 *Del. C.* §921.

²²10 *Del. C.* §1002(a).

²³10 *Del. C.* §1002(b)(1).

²⁴10 *Del. C.* §1010.

²⁵10 *Del. C.* §1011.

delinquency court.²⁶ The charge of Possession of a Firearm During the Commission of a Felony requires that any child, 15 years or older, be prosecuted as an adult and, if convicted, sentenced to a minimum mandatory sentence in adult prison.²⁷ In addition, any child, 16 years or older, who is charged with either Possession of a Deadly Weapon During the Commission of a Felony, Riot, Wearing Body Armor During Commission of a Felony, or Possession/Manufacture/Use/Transfer of a Bomb/Incendiary or Explosive Device must be prosecuted in adult court.²⁸ Judges are statutorily prohibited from transferring these charges to delinquency court for prosecution regardless of any individualized facts or circumstances about the child or the case.²⁹ Under these laws, the prosecutor is the sole decision maker having absolute authority to decide whether a child should be treated as an adult by the unilateral act of filing a criminal charge. Whether the evidence supporting the charge is weak or strong and whether or not any attempt at juvenile treatment would best rehabilitate the child is of no consequence - the charge must be prosecuted in adult court with adult consequences.³⁰

F. Juvenile Probation

The Department of Services for Children, Youth and their Families' ("DSCYF") primary responsibility is to provide and manage a range of services for children who have experienced abandonment, abuse, delinquency, mental illness, neglect, or substance abuse. DSCYF consists of three divisions: Division of Prevention and Behavioral Health Services ("PBH"), Division of Family Services ("DFS"), and the Division of Youth and Rehabilitative Services ("YRS"). YRS provides supervision and probation services through the delinquency system while PBH

²⁶Many of these charges require minimum mandatory jail sentences in adult prison upon conviction.

²⁷11 *Del. C.* §1447(f).

²⁸11 *Del. C.* §§ 1447, 1302, 1338, and 1449.

²⁹*Id.*

³⁰Ironically, other charges where original jurisdiction over a child may start in adult court, such as murder and rape, may be transferred to Family Court where there is no "fair likelihood of conviction" and when the interests of society and the child point toward the efficacy of Family Court programs and treatment. See 10 *Del. C.* § 1011.

provides all mental health, substance abuse and prevention services to children in all systems. Once a child is sentenced, YRS uses an assessment to determine the child's risks, needs, and strengths which, in addition to the sentencing order, guides the terms and level of supervision. YRS has no authority to make any decisions regarding the arrest, diversion, or prosecution of a child alleged to have engaged in a delinquent act. This authority rests solely with the police agencies and the Delaware Department of Justice.

G. Juvenile Diversion Programs

Delaware has diversionary programs available to children as alternatives to traditional prosecution in delinquency court. In September 2015, the Civil Citation Program commenced. This program, which is the only true alternative to arrest, allows the police to issue a civil summons to first offenders who commit certain misdemeanor offenses.³¹ If the child successfully completes the program, he or she will avoid an arrest and criminal record. Other diversion programs exist but they are only available after a child is arrested and enters the delinquency system. While these programs can and do have positive results, such as dismissal of a charge, they are only available after arrest and they are not available equally to children statewide as the programs vary by county. Even if a child successfully completes one of these programs, he or she will still have a criminal record for the arrest unless an expungement is granted.

³¹Delaware is in the process of codifying Civil Citation through the introduction of House Bill 405 which is pending in the Delaware Legislature this session. The offenses that are eligible for this program include: Criminal Trespass Third Degree, Disorderly Conduct, Possession of Alcohol, Possession of Marijuana, Shoplifting and Loitering.

H. Initial Appearance, Bail, Capias Return Hearings, and Video Court Proceedings in Delinquency Cases

Upon arrest, a child has an initial court appearance, which includes a bail determination, in either the Family Court or the Justice of the Peace Court (“JP Court”).³² The time of arrest determines the court in which the initial appearance is held. Bail determinations are guided by statute and the presumption is to release a child unless the Court determines that no less restrictive means will assure the child’s appearance.³³

1. Initial Appearance/Bail Hearing – Family Court

The police are statutorily required to take a child directly before the Family Court for initial appearance if court is in session.³⁴ These hearings are not scheduled at set times and are held throughout the day with the child appearing on a video from the police station rather than being physically present in the courtroom. The child is typically not represented by counsel at these hearings. The prosecutor is also not present for the hearing and the child’s parent or guardian may or may not be present. A YRS staff person is in the courtroom to provide the court with information to assist in the initial bail decision.

2. Initial Appearance/Bail Hearing – JP Court

Children arrested either before or after Family Court’s operating hours are presented to the JP Court for the initial appearance and bail hearing.³⁵ A YRS staff person is present at certain times to make bail recommendations to the court at these hearings.³⁶ When a YRS staff person is not present, the court relies on the recommendation of the arresting officer. Children do not have access to appointed counsel for these hearings.

³²10 *Del. C.* §1005.

³³10 *Del. C.* 1007 (governs setting of bail in delinquency cases and includes use of risk assessment in making bail decision). JP Court Magistrates are also guided by the 2010 Policy Directive in making bail decisions.

³⁴10 *Del. C.* §1004(2).

³⁵10 *Del. C.* §1005 (b).

³⁶The YRS staff person is present from 4:30 pm through 1:00 am Monday through Saturday.

3. Bail Review Hearings – Family Court

If the JP Court detains a child in default of bail, the Family Court holds a bail review hearing the next business day on a regularly scheduled calendar that is staffed by an attorney from the PDO.³⁷ Children arrested over a weekend or holiday may be detained for several days before a bail review hearing in Family Court. These hearings are conducted via video with the child and defense attorney at the detention center and the YRS staff person, parent/guardian, and prosecutor in the courtroom with the judicial officer. Prior to the hearing, ODS staff interviews the child via videophone so that a legal file can be opened in preparation for the hearing. During this same court calendar, bail review hearings may also be scheduled for children who are being held at a non-secure detention facility. These hearings are scheduled because there is a request by the non-secure detention facility to modify the child's bail such that they will be moved to the detention center, a secure facility. These children are physically present in court for their hearing while the ODS attorney who is representing them is still at the detention facility.

4. Capias Return Hearings

If a child fails to appear at a court hearing, a capias for the child's arrest is issued. The child may be brought into court by law enforcement or the child may return the capias by turning him or herself into the court. In either circumstance, a bail hearing is held that can result in detention. These hearings are also held throughout the day rather than being scheduled on a specific court calendar. ODS is typically not notified of these hearings. As a result, children are not represented at capias return hearings.

³⁷*Family Court Rule of Criminal Procedure 5.1.*

³⁷*Family Court Rule of Criminal Procedure Rule 44.*

I. Waiver of Counsel

Family Court Rule of Criminal Procedure 44 allows the Court to accept waivers of counsel from children.³⁸ The Family Court has implemented internal policies to limit waiver of counsel so children generally do not proceed to dispositional hearings without attorneys. However, these policies have not been codified and there are circumstances where children can appear *pro se* and resolve their cases without the benefit of counsel. In 2015, a total of 4,999 delinquency filings were initiated in Delaware. Out of these filings, 4,538 were new case filings and 461 were violations of probation. For the new case filings, ODS provided legal representation in only 3,499 cases. In all likelihood, the vast majority of these approximately 1,000 children were not represented by counsel for their resolution of the case.³⁹ These children's cases may have been resolved favorably without any adjudication or through a diversion program. While a *pro se* diversionary resolution is a positive outcome on its face, it is still problematic as there was no attorney to fully analyze the case and its merits, assess issues of competency, discuss the collateral consequences of the arrest itself, or advise whether diversion is, in fact, the best result for the child. The child may have to satisfy multiple conditions to complete the diversionary program and, if child does not successfully complete the diversionary program, then the likely result is termination from the program and adjudication for the offense.

J. Disposition and Sentencing of Children

Generally, Family Court has immense discretion in sentencing children in delinquency court.⁴⁰ Children are, however, subject to certain minimum-mandatory sentences which belie

³⁸*Family Court Rule of Criminal Procedure Rule 44*. This rule applies to both children and adults.

³⁹These statistics are calculated from the 2015 Family Court Annual Report Statistical Information and the PDO database.

⁴⁰10 *Del. C.* §1009 (c).

this discretion and the practice of individualized sentencing.⁴¹ The court also has the discretion to impose various special conditions, including psychological or substance abuse evaluation and treatment, counseling, payment of restitution, court costs, no contact orders, school attendance, compliance with house rules, or license suspension.⁴²

Although the purpose of Family Court is rehabilitative, Delaware law allows children to be treated like adults by subjecting them to adult collateral consequences such as the Child Protection Registry and the Sex Offender Registry. These consequences have grave implications for children far beyond delinquency court. Children adjudicated of an abusive act against another child can be placed on the Child Protection Registry which prohibits employment in certain fields, such as nursing and education, for specified periods of time.⁴³ Children adjudicated of a sex offense are subject to sex offender registration and notification in the same way as adult offenders unless the Court grants relief from these statutory requirements. Such relief is limited to children under 14 and those aged 14-17 who commit less serious sexual offenses.⁴⁴ In some cases, because of this registration, children are unable to continue to live with their families and are forced into the foster care system.

K. Post-Disposition Representation of Children

A juvenile's right to post-disposition representation has been addressed by both federal and state courts. The United States Court of Appeals for the First and Sixth Circuits established in *Germany v. Vance*⁴⁵ and *John L. v. Adams*⁴⁶ that the constitutional right of meaningful access

⁴¹10 *Del. C.* §1009(e) and (k).

⁴²10 *Del. C.* § 1009.

⁴³9 *Del. C.* § 923.

⁴⁴11 *Del. C.* §4123.

⁴⁵868 *F.2d* 9 (1st Cir. 1989).

⁴⁶969 *F.2d* 228 (6th Cir. 1992).

to counsel for adult prisoners extends to adjudicated children in delinquency proceedings.⁴⁷ The court in *John L.* further established that “in order to make this right meaningful[,] the State must provide children with access to an attorney.”⁴⁸

Under Delaware law, the right to counsel extends only through direct appeal in delinquency and criminal matters. Juvenile defenders handle their own appeals⁴⁹ and they provide representation at post-disposition proceedings related to the delinquency case, including sentence reviews, modifications of sentence, and violations of probation. Currently, one ODS attorney, whose position is funded through a federal grant, represents clients statewide in retroactive motions for removal from the sex offender registry.⁵⁰

ODS does not have a division of attorneys to represent children in civil, collateral matters. Historically, and by statute, the practice of ODS consists only of traditional criminal and delinquency defense. Consequently, juvenile defenders do not represent children in expungement or pardon proceedings and they do not engage in any conditions litigation or represent children in collateral hearings, such as school expulsion hearings. While ODS recognizes the direct benefit to their clients in providing access to counsel in these proceedings, limited resources prevent expansion into this area.

Children arrested and subsequently adjudicated in delinquency court face serious, long-term consequences that undermine their overall rehabilitation and success. Juvenile adjudications, and, even arrests, become part of a child’s permanent Delaware criminal record. Juvenile records are not confidential and can be accessed, under certain circumstances, by third

⁴⁷*Protecting Rights, Promoting Positive Outcomes Post-Disposition Access to Counsel*, NJDC Issue Brief, pp. 1.

⁴⁸*Id.* (citing *John L.*, 969 F.2d at 230); see also *John L.*, 750 F. Supp at 295.

⁴⁹ PDO attorneys may request assistance from the appellate unit but in general most juvenile appeals are handled by the juvenile defender who was the attorney of record in Family Court.

⁵⁰One attorney is, however, insufficient to provide representation in all eligible cases. At the time the legislation was enacted, there were approximately 650 individuals placed on the sex offender registry in Delaware as children. A search of the ODS database, alone, found over 350 individuals who were eligible to petition for removal from the registry.

parties.⁵¹ Delaware’s expungement law is very exclusive and its limits disqualify many children from being eligible for such relief. Presently, there is no immediate expungement provision⁵² and the waiting periods to apply for relief may be lengthy, even though children are often applying for college or employment close in time to their arrest or adjudication.⁵³ The process for filing for expungement is extremely complex and costly for children and their families.⁵⁴ In 2015, the Juvenile Law Center (“JLC”) released a national report on juvenile expungements in which Delaware ranked very poorly.⁵⁵ For many unrepresented children, obtaining an expungement is difficult, if not, impossible.

⁵¹See “*Juvenile Delinquency Adjudication, Collateral Consequences, and Expungement of Juvenile Records a Survey of Law and Policy in Delaware, Virginia, North Carolina and Florida*,” UNC Center for Civil Rights.

⁵² Senate Bill 198 is currently pending in the Delaware Legislature. This bill will allow the Court the discretion to order an immediate expungement of a misdemeanor offense terminated in favor of the child.

⁵³10 *Del. C.* §1017-18.

⁵⁴Expungement law and procedure will be discussed in detail in the Post-Disposition section of the Plan.

⁵⁵*Failed Policies, Forfeited Futures*, Juvenile Law Center (2014) (www.jlc.org). Delaware ranked 45 out of 50 states.

Section III. Identified Issues and Areas of Reform: *Evaluating the Provision of Juvenile Defense and the Juvenile Defense Delivery System*

1. No Access to Counsel at Initial Appearance/Bail Hearings/Capias Hearings in JP Court and Family Court

Children are not represented at their initial appearance/bail hearing in the JP Court and certain bail hearings and capias return hearings in the Family Court. There is no statute or court rule requiring that children be represented by counsel at the initial detention hearing. Due to a lack of ODS resources, court scheduling, and the multiplicity of JP Courts, ODS does not provide representation at the earliest stage in a case. Following the initial hearing, children can be referred to ODS for legal representation. However, this practice is problematic because the child has already had to advocate for him or herself at a critical stage of the proceedings that may have resulted in immediate detention or unreasonable bail conditions.

The initial appearance/bail hearing is a critical stage in the legal process for children. Even relatively short term detention, which removes a child from the familiar settings of family, community and school, can have harmful effects on his or her mental and physical health, educational outcomes, post-adjudication placement, and likelihood to reoffend. Research suggests that secure detention of children is a harmful practice that can exacerbate symptoms in children who already struggle with mental health conditions, trauma, and stress and is more likely to lead to recidivism than to promote public safety.⁵⁶ Studies also associate pretrial juvenile detention with increased likelihood of conviction at trial and imposition of the most restrictive dispositions.⁵⁷

⁵⁶Carla Cesaroni & Michele Peterson-Badaldi, *Understanding the Adjustment of Incarcerated Young Offenders: A Canadian Example*, 10 YOUTH JUS. 1-19 (2010).

⁵⁷Carla Cesaroni & Michele Peterson-Badaldi, *Young Offenders in Custody Risk and Adjustment*, 32 Crim. Adjustment and Beha. 251-277 (2005).

Legal representation at the initial hearing demonstrates an attorney's commitment to his or her client and provides the best possible foundation on which to build the attorney-client relationship. Counsel should have an opportunity to have meaningful contact prior to the initial hearing, must seek immediate release if doing so is consistent with the client's express interests, and should present the court with alternatives to detention and a pre-trial release plan.

2. Video Court Proceedings Limit Access to Counsel and Undercut Zealous Advocacy

The Family Court video proceedings not only limit a child's access to counsel but also wholly undercut a defense attorney's ability to act as a zealous advocate at hearing which can, and does, result in a child's loss of liberty. The current process creates challenges for the court, the child, and the defense attorney by separating the child and his or her attorney from the court for the hearing. The judicial officer, the prosecutor, the parent/guardian, and YRS staff are all present in the courtroom while the child and his or her attorney are alone at the detention facility and communicating via the videophone. The attorney is oftentimes obtaining critical information for the first time as the hearing progresses. The process is extremely confusing to the child and often fraught with technical difficulties that make it difficult for the child and the attorney to fully participate in the proceeding. Communication with the court is very difficult and communication with a parent or YRS staff is next to impossible.⁵⁸ There have been instances where defense attorneys were not given sufficient notice of scheduled hearings and they were unable to travel to the detention center in time for the hearing. Bail review hearings for children at non-secure detention facilities are also challenging because these children are brought to court for the hearing while the attorney remains at the detention center. This results in the child having absolutely no consultation with his or her attorney. As a result, children who

⁵⁸Anecdotally, when the videophone system has not worked, hearings have been held via telephone only.

are in court for bail review hearings essentially have no access to counsel prior to or during the hearing.

3. Waiver of Counsel in Delinquency Proceedings

Delaware's Family Court rule allows for unlimited waiver of counsel without any consistency in application. Under *Delaware Family Court Criminal Procedure Rule 44*, the Court can accept waivers of counsel from unrepresented children with virtually no restrictions:

“[a] waiver of the right to counsel by a child shall be in writing unless made in Court on the record or made in the presence of the child's custodian. The Court may appoint the Public Defender to represent a person charged if it finds at or after arraignment that the person charged, and if the person charged is a child the custodian as well, is indigent; if the person charged is an indigent child who wishes counsel but whose custodian is not indigent but has refused to obtain counsel for the child, the Court may appoint counsel to represent the child at the expense of the child's custodian.”⁵⁹

Thirty (30) states limit the ability of children to waive their right to counsel in delinquency court based on age, type of crime, type of hearing, and/or the possibility of incarceration. In Delaware, however, no such limitations exist allowing its rule to be one of the “least restrictive approach[es]” to allowing children to waive counsel.⁶⁰ In some instances, Family Court has permitted parents to waive the child's right to counsel without consulting with the child, even when there is a potential conflict of interest between the parent and child.⁶¹ This rule is also applicable to both adults and children, which, in and of itself, fails to recognize the enhanced need for children to have advocates in the delinquency system. In practice, it is

⁵⁹*Delaware Family Court of Criminal Procedure Rule 44.*

⁶⁰*Juvenile Justice Geography, Policy, Practice, & Statistics* (2015)(<http://www.jjgps.org>).

⁶¹Sixth Amendment Center, *The Crucible of Adversarial Testing: Access to Counsel in Delaware's Criminal Courts* (2014).

simply easier and more common for a child to waive the right to counsel in Delaware than in most other states.⁶²

Children also waive counsel because there are obstacles to receiving the assistance of ODS. For example, ODS is generally unable to provide OCC attorneys at arraignments to consult with children who are potential clients. Consequently, children referred to OCC do not have access to conflict-free representation at this stage and they must represent themselves if they wish to proceed immediately and resolve the case. An OCC attorney will be appointed to represent the child in future proceedings but is not available for immediate consultation. *“This of course adds pressure to conflicted defendants and/or their parents to just get it over with, and plead guilty that day.”*⁶³ In addition, when a child is released following a JP Court initial hearing, the child and parent/guardian must appear at an ODS office for an intake interview to secure representation. If the child and parent/guardian do not complete this process prior to the next court proceeding, the proceeding may be delayed. This potential delay often causes a child to proceed in court without counsel merely to get the case over with that day.

4. No Specialized Juvenile Defense Practice within ODS

Juvenile defense is not a specialized practice area in ODS with attorneys handling both juvenile and adult cases⁶⁴ in the Delaware courts. Although many ODS attorneys have represented children for the majority of their careers or have extensive trial experience, these attorneys have not necessarily developed an expertise in juvenile defense work. This deficiency hinders the level of advocacy and overall legal representation that children are provided by ODS.

⁶²Recognizing this issue, in December 2013, ODS hosted Marsha Levick, Juvenile Law Center, to present a seminar titled *“On Their Own: Waiver of Counsel”* which discussed the negative consequences associated with waivers of counsel.

⁶³Sixth Amendment Center, *The Crucible of Adversarial Testing: Access to Counsel in Delaware’s Criminal Courts* (2014).

5. Limited Vertical Representation Practice within ODS

ODS does not fully implement vertical representation which results in a child having different attorneys represent him or her throughout their case. Historically, the lack of vertical representation has been a product of court scheduling and the limited resources of ODS. The PDO does not represent children at JP Court initial appearance hearings and it only implements vertical representation in delinquency court in more serious cases. The OCC implements vertical representation but only after the child's initial appearance in either JP Court or Family Court. The current representation structure is contrary to best practices and also detrimental to establishing and maintaining the attorney client relationship.

6. Limited Direct Supervision of ODS Juvenile Defenders

The limited direct supervision of juvenile defenders is problematic as there is no real means to assess the quality of representation provided to children. The Chief Juvenile Defender consults routinely with other attorneys on their cases and provides support; however, given the limited resources of the PDO and her numerous responsibilities, the Chief Juvenile Defender is only able to provide limited direct supervision. Similarly, due to limited resources and the numerous functions of the Chief Conflicts Counsel, there is no direct supervision of the OCC attorneys.

7. No Specialized, Required Juvenile Specific Training Program for ODS Juvenile Defenders

While a number of ODS juvenile defenders have been handling delinquency cases for many years, these attorneys have not cultivated a true, highly skilled expertise in delinquency work grounded in a specialized training and educational curriculum. Although Delaware lawyers are required to complete continuing legal education credits to maintain their licenses, there is no requirement by ODS or the Delaware Bar, that any of these credits concentrate in

areas specific to representing children in delinquency or criminal matters. ODS has provided juvenile specific trainings and resources to its juvenile defenders, including two recent Juvenile Training Immersion Programs (“JTIP”) and attendance at the NJDC Summer Academy and NJDC Leadership Summit. However, juvenile defenders have not been required to participate in any on-going, juvenile focused training.⁶⁴ There is no mandated training curriculum for juvenile defenders and there is no requisite training or experience level for attorneys to be assigned delinquency cases. Similarly, there are no terms in the OCC attorney contracts that require experience or training prior to being assigned delinquency cases or as a requisite to maintaining this caseload. While the OCC contracts include a general training provision, there is no provision that mandates juvenile specific training for those attorneys representing children. Failure to mandate distinct, specialized training and develop expertise impacts the quality of representation afforded to children.

The current legal landscape of Delaware makes the lack of specialized training even further problematic. In 2015, Delaware’s Attorney General announced several plans aimed at “addressing the problems of juveniles carrying firearms,” the centerpiece of which was to charge more children accused of gun crimes as adults.⁶⁵ Prosecutors now routinely charge children as adults in cases involving offenses that cannot be returned to delinquency court.

⁶⁴ODS has presented five JTIP lessons to date. In addition, ODS has also provided trainings on, *inter alia*, Adolescent Brain Development, LGBTQ Youth, *Miller v. Alabama*, Collateral Consequences, Litigating Juvenile Sex Offender Cases, and Waiver of Counsel.

⁶⁵The Attorney General noted that, “[j]uvenile gun possession is one of the most serious threats to public safety that I have seen in my first eleven weeks in office....Part of the reason is that adults have told these juveniles that there are no real consequences to carrying guns – and too often that has been true. We have to ensure that there are consequences, and that juveniles know about those consequences.” Press Release, April 3, 2015 <http://news.delaware.gov/2015/04/06/departments-of-justice-taking-tougher-stance-on-juveniles-with-guns>.

A snapshot of recent statistics reflects that children are increasingly being treated as adults in the justice system.⁶⁶

- 17 cases pending where children charged as adults
- 10 children sentenced to adult prison with sentences ranging from 3-8 years in 2015 and 2016
- 6 additional children convicted of crimes which will result in mandatory sentences ranging from 3-8 years of adult prison time

As a result of this increase and the fact that many of these cases involve multiple defendants, ODS must assign these cases to attorneys with varying levels of juvenile training and experience. In Delaware, a reverse amenability hearing can be one of, if not, the most crucial hearing in a child's case as it is the only chance of having the case transferred back to delinquency court for prosecution. Even if a charge is ineligible for transfer back to delinquency court, defense counsel must be well trained in juvenile specific areas to effectively negotiate with the prosecution, aggressively challenge the evidence against a client, and raise constitutional claims as to the current law.⁶⁷ A reverse amenability hearing not only requires a skilled litigator but it also requires specific knowledge of the juvenile justice system, rehabilitative treatment, adolescent brain development, and use of experts in the fields of juvenile rehabilitation, child development and psychology/psychiatry. Given the critical nature of these proceedings, juvenile defenders, with the appropriate levels of experience, and training, must be assigned to these cases.

⁶⁶These statistics are from New Castle County cases only as of April 2016.

⁶⁷While at least one constitutional challenge to Delaware's mandatory transfer laws has been made and rejected, that case is now almost twenty years old and pre-dates existing, accepted knowledge about adolescent brain development and current research trends showing how ineffective adult incarceration is in reducing recidivism among children.

8. No Practice Standards or Guidelines for Representing Children

Further related to the adequacy of practice is the fact that ODS does not have practice standards or guidelines for the representation of children.⁶⁸ Although ODS attorneys have been trained on the National Juvenile Defender Center *Ten Core Principles* and other best practices, ODS does not have its own practice standards or guidelines for its juvenile defenders. As such, the expectations of the attorneys are abstract. Given the increased number of cases where children are prosecuted as adults, the need for these guidelines is absolute. This void, combined with the fact that there is limited direct supervision, makes it impossible to determine not only the quality of advocacy but also whether or not attorneys truly understand their complex role.

9. Limited Contact with Child Clients Post-Disposition

ODS juvenile defenders have limited, if any post-disposition contact with their child clients. Any issues that result from a sentence or while in placement will only come to the attorney's attention if the Court schedules a sentence review hearing. However, there is generally no affirmative action taken by the juvenile defenders to address any concerns proactively and children often feel like their attorney's job has ended once he or she is sentenced. Rather than being proactive, juvenile defenders are chronically reactive. As a result of this lack of contact, there is limited meaningful post-disposition advocacy for children by the juvenile defender.

10. Limited Access to Post-Disposition Representation of Children in Expungement Proceedings

ODS does not provide representation to children in civil, collateral matters including expungement proceedings. Exclusive of ODS, there is a glaring gap in legal services for

⁶⁸ODS does not have any practice standards or guidelines for representation for any clients.

indigent children in this area. This gap is even more concerning given the serious consequences that result from arrest and adjudication and the complex laws and process related to expungement. Delaware ranks well below the national average in the protection of juvenile records and the accessibility of expungement.⁶⁹ The ability to expunge juvenile records in Delaware is extremely limited. There is currently no immediate expungement provision and children are barred from seeking expungement for certain offenses. Children must petition the court for expungement and the waiting periods to apply for relief may be lengthy, particularly in the life of a child who is applying for college or employment close in time to his or her arrest or adjudication.⁷⁰ The expungement process is legally complex and cost prohibitive for many children and their families.⁷¹ A certified criminal record, which costs \$52.50, is required as part of the filing and the record can only be accessed at three locations in the state. Many children and their families do not have the financial means or even the transportation to obtain the required criminal record or the knowledge and expertise needed to file a petition for expungement.

11. Limited Access to Post-Disposition Representation and Advocacy in Educational Proceedings

Children in the delinquency system have limited, if any, access to counsel in educational proceedings which bear on their re-entry and success in the community. Access to post-disposition counsel for children in the delinquency system is necessary to improve educational opportunities and allow successful re-entry. A recent publication by the National Juvenile Justice Network (“NJJN”) reflects that academic achievement levels of children adjudicated delinquent rarely exceed the elementary school level. Estimates further suggest as many as 70

⁶⁹*Failed Policies, Forfeited Futures*, Juvenile Law Center (2014) (www.jlc.org)

⁷⁰10 *Del. C.* § 1014-1019.

⁷¹The process may also include presenting evidence and testimony if a hearing is scheduled.

percent of children in the delinquency system have learning disabilities. These children face many barriers to completing their education and, a majority of these children - 66 percent - do not return to school after release from secure custody.⁷² Contributing to these statistics is the fact that many children and their families are left to be their own advocates and navigate the complex federal and state laws associated with education and disabilities law. Without the benefit of counsel, this task is insurmountable for many children and their families.

12. Limited, Unequal Diversion Programs

In Delaware, diversion programs options are very limited for children and vary by county. All programs, with the exception of the Civil Citation Program, are post arrest so the child will, at minimum, incur an arrest record. Currently, the Civil Citation Program only encompasses six offenses and is not yet widely used by law enforcement apart from school resource officers. In addition, some of the post-arrest diversion programs are not offered throughout the state making the opportunity to benefit from these programs based solely on geography. This deficiency not only increases a child's chance of entering the delinquency system but also impacts the resources of ODS as it must represent a child who may otherwise have never entered the system.

13. Juvenile Data Collection

Although ODS has internal database systems than can capture significant data, this database is only useful for its clients. Therefore, it is unclear what juvenile specific data is tracked statewide for all delinquency matters and whether there is consistent data entry

⁷²The barriers include: (i) substandard education while incarcerated; (ii) failure of many correctional educational facilities to use curricula aligned with state standards, which can result in credits not transferring or being accepted by the home school district, (iii) significant delays in the transfer of youth's education records and credits from the correctional educational facility to their community school upon release; and, (iv) barriers some schools and states have enacted to prevent youth from re-enrolling in school.

statewide. The Delaware Judicial Information System (“DELJIS”) is the statewide agency that collects all criminal justice data. The Family Court also has the ability to collect data. While both agencies have been responsive to individual requests from ODS regarding juvenile specific data, specific fields may need to be added, or programs created, to track certain data, such as waiver of counsel. In addition, there is a gap in the collection of disproportionate minority contact (“DMC”) data in that such data is not collected specific to county or offense.

Section IV. Identified Strategies for Sustainable Reform: *Evaluating the Provision of Juvenile Defense and the Juvenile Defense Delivery System*

To develop a model juvenile defense system, below is a summary of strategies, based on issues identified through the grant and the NJDC assessment, which Delaware should adopt. This section identifies all strategies that would be required, over the long and short term, for Delaware to develop a model juvenile defense system. Some of these strategies require additional resources or the participation of another state agency while other strategies require no additional funding or staff with little impact on any state agency. Strategies that can be accomplished only through subsequent grant funding are outlined in Section V.

1. Deem Children Automatically Eligible for Counsel by Statute

Children should be presumed automatically eligible for appointed counsel in delinquency court under Delaware law. Although this presumption is current ODS policy, a statutory change will ensure that children are appointed counsel regardless of changes in leadership within ODS or any other agency. A statutory presumption is the best way to safeguard this practice.

The Delaware Legislature has already introduced a statute to this effect that has passed the House and is awaiting a vote in the Senate this session.⁷³ No federal funding was used to engage in this legislative change. This proposed statute has no fiscal note and ODS is fully prepared to continue to represent all children who seek its assistance.

2. Provide Children with Access to Counsel at Initial Appearance/Bail Hearings/Capias Hearings

ODS should provide children with access to counsel at all initial appearances, bail hearings, and capias hearings in JP Court and Family Court. Skilled lawyers are essential to

⁷³House Bill 382 (codifying ODS current practice of representing every child that requests representation).

preserving fairness and justice in delinquency proceedings and national standards promote not only early assignment of counsel but also continuity of representation in all phases of the delinquency process. Moreover, social science research suggests juvenile detention impacts case outcomes, adolescent development and recidivism.

Providing counsel at these hearings not only reflects best practices but may be required by state and federal due process protections.⁷⁴ From a legal perspective, pretrial detention triggers important procedural and substantive due process rights. Under federal law, a defendant's initial appearance before a judicial officer where he learns the charge against him and his liberty is subject to restriction marks the start of the judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.⁷⁵ Nationally, courts have held that an incarcerated juvenile has a right to a detention hearing and that procedures concerning notice, rights, information, disclosure and probable cause represent the minimum requirements to fair and meaningful hearings. Recently courts have held, as a matter of state constitutional law, that initial detention hearings for adults are critical proceedings, and due process protections entitled an indigent criminal defendant to a state-furnished counsel at an initial appearance.⁷⁶ In so holding, the Maryland Court concluded that incarcerating a defendant as a result of a hearing at which the defendant was unrepresented, absent a waiver of counsel, was fundamentally unfair.⁷⁷ Arguably, the uncounseled hearings occurring in Family Court and JP Court may be subject to the same challenge in Delaware.

⁷⁴*State v. Fann*, 239 N.J. Super, 507 (Law Division 1990) (bail review hearing is critical stage in process and defendant has a due process right to be present).

⁷⁵*Rothgery v. Gillepsie County, Texas*, 554 U.S. 191 (2008)(6th Amendment right to counsel attaches at initial appearance but declined to set out scope of a post-attachment right to the presence of counsel).

⁷⁶*DeWolfe v. Quinton Richmond*, 76 A.3d 1019 (2013).

⁷⁷*Id.*

3. Bail Hearings Should be Conducted by In-Person Hearings

Bail hearings should be conducted in-person with the child, defense counsel, and all other parties in the courtroom with the judicial officer. This procedure is the only way to ensure that children are zealously represented by their attorneys at fair, meaningful hearings. Juvenile defenders must have access to and meaningful contact with their clients before the hearing. Juvenile defenders must also be able to have contact with parents, prosecutors, and YRS staff before the hearing to prepare for the proceeding.

To the extent that children are not physically present in the courtrooms, defense counsel should consider requesting the court compel the physical presence of children during these hearings and/or make any other requests of the court that are necessary to competently defend their clients at these hearings. ODS will continue to discuss how to achieve this goal with representatives from Family Court and YRS administration.

4. Create a Work Group to Review Juvenile Bail Statutes, Process, and Procedure

One of the most critical areas of reform needed in Delaware is its juvenile bail process. Children have no access to counsel at the JP Court and there are barriers to access to counsel in Family Court based on limits on ODS resources and the current processes and procedures of the courts and other state agencies. Given that proposed changes may include new legislation, changes to the processes of ODS and other agencies, and increased resources, a work group should be created to review the laws and procedures related to the juvenile bail process and make recommendations. This group will be a natural extension of the Delaware SMART Pre-Trial committee. This committee is reviewing, through the related grant, modifications to its current bail laws related to adult offenders. The proposed work group can work in conjunction with the SMART pre-trial group on juvenile reforms. Although no federal funding will be used to engage

in changes of law, substantial changes in law are required to create an effective juvenile defense system in Delaware.

5. Adopt a Court Rule Specific to Juvenile Waiver of Counsel that Imposes Restrictions on Wavier of Counsel for Children in Delinquency Court

Delaware should draft a new court rule to address juvenile waiver of counsel. Although there is no national consistency in how states address the issue of waiver of counsel, there is agreement that waiver of counsel is different for children and adults, and, should, therefore, be addressed separately in procedural rule or statute.⁷⁸ Given the limited protections that Delaware's current court rule provides, a new rule should impose restrictions on waiver of counsel in delinquency proceedings. In furtherance of this goal, a workgroup, consisting of stakeholders including Family Court, has drafted a proposed rule which would prohibit waiver:

1. *By a child of any age where the delinquent act of which the child is accused is a felony.*
2. *By a child of any age who is in the custody of the Division of Family Services.*
3. *By a child who is younger than 16 years of age at the time of the attempted waiver.*
4. *By a child whose family member, guardian, or custodian is the alleged victim of the delinquent act or whose interest is adverse to the child.*

The rule further provides a sole procedure for the Court to follow when waiver is not expressly prohibited:

1. *If the juvenile wishes to waive his or her right to counsel, the juvenile shall be fully and effectively informed, through an in-person meeting with counsel, of the disadvantages of self-representation.*
2. *If, after this meeting, the child still wishes to waive the right to counsel, the Court shall conduct an in-court hearing to determine whether the waiver is knowing, intelligent, and voluntary. The child shall bear the burden of proving the waiver is knowing, intelligent, and voluntary by clear and convincing evidence.*

⁷⁸In drafting this section of the plan, a survey of the status of this issue nationwide was conducted. The above recommendations are based on research of all fifty states.

3. *In determining whether a child's waiver is knowing, intelligent, and voluntary, the Court shall consider the circumstances surrounding the waiver, including, but not limited to:*
 - A. *The child's physical, mental, and emotional maturity;*
 - B. *Whether the child understands the consequences of the waiver;*
 - C. *Whether the child understands the seriousness of the offense,*
 - D. *Whether the child understands the potential direct and collateral consequences being adjudicated delinquent of the offense.*
 - E. *Whether the parent, guardian, or custodian understands the consequences of the waiver;*
 - F. *Whether the waiver of the right to counsel is the result of any coercion, force, or inducement.*
4. *Before the Court may accept the waiver, the child must provide to the Court a written statement, signed by both the child and his or her parent, guardian, or custodian, that he or she has followed the procedures of this Rule and understands the rights he or she is waiving and the potential consequences of the waiver.*
5. *If a child waives counsel for any proceeding, the waiver only applies to that proceeding, and the child may revoke the waiver of counsel at any time.*

The Comment to the rule also suggests that the Court use the proposed inquiry, on the record, when determining whether the waiver of counsel is knowingly, intelligently, and voluntarily made:

- 1) *the reasons why the child wants to waive counsel;*
- 2) *information regarding the child's age, maturity, education, mental health issues, and any current substance abuse issues that may impair the child's decision-making skills;*
- 3) *the child's understanding of the right to an attorney, child's role when proceeding pro se, allegations in the petition against the child, possible consequences if the child is found delinquent, and whether the child consulted with an attorney.*

If it is determined that the child has not knowingly, intelligently, and voluntarily waived counsel, the court immediately is to appoint counsel for the child.

This rule requires the child to waive the right to counsel. A guardian may not waive the child's right to counsel.

In addition to the rule change, Delaware should also consider creating a proposed colloquy, based on best practices, for the court to use when addressing waiver of counsel.

To facilitate this strategy, the Family Court would need to propose a rule change which would be subject to the Delaware Supreme Court's approval. Family Court was part of the SJJAC and the workgroup that drafted the proposed rule. Family Court is in support of continuing to review the potential for a rule change.

6. Agency Structure and Policies Should be Modified to Decrease Unnecessary Hurdles to Access to Counsel

State agencies, such as ODS and Family Court should review infrastructure and practices to eliminate hurdles that prevent access to counsel. For example:

- ODS should conduct outreach to the community to ensure that children are aware of their right to counsel prior to appearing in court,
- ODS should conduct more intake interviews at the courthouses which makes representation more accessible,
- ODS and Family Court should review and modify court scheduling practices that could inadvertently be affecting waiver of counsel.

ODS is already involved in increasing its presence within the community to raise awareness and it intends to continue these outreach efforts with its current staff as well as with implementation funds if awarded. DCJ has committed to having ongoing community engagement forums to highlight various juvenile justice issues identified as critical by ODS. While ODS likely needs additional funding for juvenile defenders and related ancillary staff, it is unlikely that such additional funding will be awarded through the state budgeting process. Therefore, ODS will review its current staffing and resources to determine how to modify its policies and infrastructure to become more accessible to child clients. ODS will continue to

meet with Family Court regarding court scheduling and its unintended impact on access to counsel.

7. Recognize Indigent Juvenile Defense as a Specialized Practice Area Within ODS and Systemically through Education, Training, Resources, Structural Changes, and Leadership Support

Delaware's small size, its collegial pool of stakeholders, and the respected role of ODS in the juvenile justice community creates an environment ripe for collaboration and change on many levels. This intimate environment, however, also breeds complacency, and, can, in practice, undercut the advocacy provided to children. In essence, without specialization of practice, juvenile defense becomes *in name only*. A juvenile defender is able to be a much stronger advocate when his or her role is explicitly defined through specific guidelines, practice expertise, education, training, adequate supervision, leadership support, and mentoring. The creation of a specialized practice must be grounded in the *Ten Core Principles* promulgated by the National Juvenile Defender Center.⁷⁹ These principles should serve as a blueprint and must be further endorsed by ODS leadership, its juvenile defenders, and other stakeholders.

Juvenile defense requires an expertise based in established, juvenile specific training, and education. Such training is the cornerstone not only of effective representation but also a means by which the defense bar can ensure the fairness of the entire juvenile justice system. Failure to recognize the unique complexities associated with juvenile defense sets the stage for inadequate representation of children. Attorneys can neither be zealous advocates nor protect their client's rights without a full understanding of their complex role. Juvenile defense is unlike traditional criminal defense work. Being a skilled trial attorney, in and of itself, is not sufficient to be a juvenile defender. Juvenile defenders must embrace their role as representing a child's express

⁷⁹*Ten Core Principles for Providing Quality Representation through Public Defense Delivery Systems*, National Juvenile Defender Center (2008).

interest. Juvenile defenders must possess specific knowledge in substantive juvenile law, delinquency and criminal statutes, procedural rules, and related federal law specific to children. Juvenile defenders must communicate with children in a developmentally appropriate and trauma informed manner about complex legal issues. Juvenile defenders must manage their client's family who often may not understand the attorney's role in the case. They must fully understand and embrace their role as the child's advocate and the ethical obligations that accompany that role. Juvenile defenders must be trained in areas, such as adolescent brain development, competency, trauma, and collateral consequences, and be knowledgeable of the various and, often, changing systems and resources available to children within the delinquency and child welfare systems.

ODS leadership supports the specialization of juvenile defense practice and is committed to providing the continued resources and support to implement this new practice model as well as ensuring buy-in from its juvenile defenders. ODS is further committed to ensuring that all stakeholders understand the necessity of this change for the clients it serves.

8. Change ODS Infrastructure and Enhance Direct/Indirect Supervision

a. PDO Division

ODS should create a juvenile defender unit in the PDO that will be supervised by the Chief Juvenile Defender. The caseload for attorneys in this unit will consist solely of juvenile cases prosecuted in either delinquency or adult court. The Chief Juvenile Defender will provide increased direct supervision of the attorneys statewide by court observation, performance feedback, and mentoring. The Chief Juvenile Defender should also continue to add data fields to the PDO database system to monitor casework.

b. OCC Division

Although OCC attorneys, who are private practitioners, cannot have a caseload consisting solely of juvenile cases, the Chief Conflicts Counsel should ensure that attorneys representing children possess an expertise in the area of juvenile defense through mandatory ongoing training and education, requisite experience, and direct and indirect supervision. The Chief Conflicts Counsel and the OCC managing attorneys should assign juvenile cases according to experience and level of expertise so as to ensure the best possible representation and advocacy. The Chief Conflicts Counsel and the OCC managing attorneys should create criteria for case assignment. The Chief Conflicts Counsel and the OCC managing attorneys should engage in court observation, feedback, and mentoring of the juvenile defenders. The new OCC database should include data fields that mirror the PDO database so that oversight of case work can occur.

ODS already supports these structural changes and has begun to implementation within its office. These changes, combined with increased direct supervision, will result in better representation of children. Direct supervision will not only provide a means to gauge whether defenders are truly providing the zealous representation that their ethical obligations require but also to determine what hurdles, internally or systemically, juvenile defenders face.

9. Implement Vertical Representation

ODS should change its practice structure and internal policies to ensure that adequate and consistent counsel is assigned as early as possible in the legal process by fully implementing vertical representation statewide for all juvenile cases. Vertical representation is not only a best practice for the provision of indigent defense but a necessity in juvenile defense.

⁸⁰ In order to establish the rapport and trust necessary to the attorney-client relationship, a child

⁸⁰*American Bar Association Ten Principles of a Public Defense Delivery System*, Principle 7 (Approved by ABA House of Delegates, February 2002);

must be represented by the same attorney throughout the case who, will, in turn, continue post-disposition contact and advocacy. This practice is of even greater significance when a child is charged with a crime with jurisdiction in adult court. Ideally, representation should be available and offered at the earliest possible stage—within 24 hours of arrest - and counsel should be the same specially trained lawyer at every stage thereafter. The implementation of vertical representation from the outset of the case is critical not only to case preparation and the attorney client relationship but even more crucial to case resolution.

The Chief Juvenile Defender has already begun and should continue discussions with Family Court administration to make scheduling changes to accommodate the full implementation of vertical representation.

10. Implement Specialized, Mandatory Training and Education Curriculum for Juvenile Defenders

ODS juvenile defenders must receive ongoing, juvenile focused training and education in all areas related to their practice. The ODS Director of Training will be responsible for the creation and implementation of this curriculum. ODS administration should require participation in the training curriculum as a requirement to be assigned juvenile cases. The Chief Conflicts Counsel should review current juvenile defender contracts for the inclusion of a mandatory training and education provision specific to juvenile defenders. The PDO should make these training requirements part of its policies and procedures.

Meaningful access to counsel requires that juveniles be provided with access to competent, zealous advocates, well versed in the practice of juvenile defense. Counsel must have a strong working knowledge of the procedures of criminal law, the client's constitutional and statutory rights, Delaware statutes, case law, court practice, detention risk assessment instrument and use of detention and bail for children.

To do this, ODS should adopt a two-track training and education curriculum which will include the Juvenile Training Immersion Program (“JTIP”), and a program specifically tailored for attorneys representing children prosecuted as adults. The JTIP curriculum, created by the National Juvenile Defender Center, is considered the “gold standard” for juvenile defense training. This specialized curriculum consists of approximately forty (40) lessons that focus on substantive law, and trial skills related to every stage in delinquency proceedings from arrest through post-disposition. The JTIP curriculum also provides education in areas critical to juvenile practice such as adolescent brain development, mental health, competency, and interviewing skills. ODS has two certified JTIP trainers and it should strive to certify other defenders to teach the curriculum. Commencing by the end of 2016, these trainings should be offered to all ODS juvenile defenders on a quarterly basis with required continued participation.

ODS should require juvenile defenders representing children prosecuted as adults to complete a curriculum tailored to the specific issues presented in this type of litigation.⁸¹ These juvenile defenders must be educated in the statutory law, procedural rules, and state and federal case law applicable to this area as such are distinct to children and the attendant proceedings. Furthermore, juvenile defenders must be educated on how to raise constitutional challenges to Delaware’s laws given *Roper*, *Graham*, and *Miller* and the science and research that underlies these decisions. Through adequate training and education, ODS should also create legal resources for juvenile defenders to support these arguments for use in litigation.

⁸¹*J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2397 (2011); *National Juvenile Defense Standard 8.1*.

This curriculum should consist of sessions such as:

- Substantive and Procedural Law of Reverse Amenability Hearings
- Challenging Transfer to Adult Court
- Incorporating Adolescent Brain Development in Negotiation and Litigation
- Juvenile Probation and Adult Corrections - Programming and Treatment
- Competency Issues Related to Youth
- Interacting with Juvenile Clients
- Mitigation Evidence
- Use of Expert Witnesses in Juvenile Cases

In addition to these two mandated tracks, juvenile defenders should attend any other juvenile specific training as offered and/or avail themselves to online resources, such as webinars and list serves, related to their practice. ODS should continue to make available all resources to its juvenile defenders. To the extent resources allow, ODS should continue to send juvenile defenders to national or regional trainings.

ODS leadership is already in support of mandating these trainings for all juvenile defenders. The ODS Director of Training has already provided JTIP trainings and will continue to do so with other ODS attorneys and out-of-state counterparts.

11. Draft and Implement Juvenile Defender Guidelines

ODS should draft and implement Juvenile Defender guidelines. To date, many indigent juvenile defense offices have created similar standards or guidelines for their attorneys.⁸² These guidelines will result in juvenile defenders having a greater understanding of their roles and the expectations associated with them. Even more critical is the development of guidelines for attorneys handling cases in which children are being prosecuted as adults. Juvenile defenders must have a roadmap for representation that is tailored to specific nuances of these cases.

Reverse amenability hearings are similar in preparation to capital sentencing hearings. Juvenile

⁸²*National Juvenile Defense Standards* (2012). States such as, Pennsylvania, have implemented juvenile defense guidelines.

defenders must work with psycho-forensic evaluators, mitigation specialists, fact investigators, and experts to develop a complete social and family history, an assessment of the child's neurological psychology, and a factual investigation challenging the evidence which purports to justify prosecution as an adult. Given the state of Delaware's transfer laws, this preparation is equally as important for case negotiation with the prosecutor. Finally, guidelines can assist in educating other system stakeholders, like judges or prosecutors, as to the role and obligations of the juvenile defender.

ODS leadership is in support of the implementation of juvenile defender guidelines. The *National Juvenile Defense Standards* as well as other state models can serve as the blueprint for Delaware's guidelines. The Director of Training will draft these guidelines and also provide training sessions in this area.

12. Assist with Specialized Training and Education for Juvenile Justice Stakeholders and Enhance Community Engagement

ODS should continue to assist in providing juvenile specific training and education to all juvenile justice stakeholders. A constitutionally sound delinquency system that ensures due process at all stages of the proceedings requires more than just well-trained juvenile defenders. Juvenile specific training, in law, science, and procedure, is necessary for all professionals in the juvenile justice system including prosecutors, judicial officers, probation officers, mental health professionals, and *pro bono* attorneys.⁸³

ODS, through this grant, has already met with stakeholders to determine appropriate areas of and forums for training. As part of this grant, ODS is planning, in conjunction with other stakeholders, a juvenile justice summit for September 2016. The day long training will highlight the rights of children in the delinquency system, the importance of qualified, juvenile

⁸³See Post-Disposition Representation section that discusses plan for *pro bono* attorneys in expungement proceedings.

defenders, effective practices, and how stakeholders can work to ensure effective juvenile defense work and reform in Delaware. The Family Court has committed to having juvenile training sessions during judicial meetings and retreats. YRS has also committed to quarterly trainings for its staff on various topics, including but not limited to, expungement, collaboration and effective information sharing, and juvenile law updates.

Delaware should consider DMC-focused training for its stakeholders as such training has the ability to have far reaching impact on decisions from arrest through sentencing. Currently, Delaware does not provide any DMC-focused training to its numerous state, and local law enforcement agencies. The Pennsylvania Youth-Law Enforcement Curriculum is a DMC-focused training for law enforcement. ODS has researched this curriculum and it could be implemented for police with the assistance of grant funds.⁸⁴

ODS should continue to enhance community outreach with children and their families through forums, partnerships, presentations, resources, and education. ODS can provide programs to children in Delaware's residential facilities as well as those children on community supervision. YRS has a monthly family night at each of its residential facilities where ODS can present to both children and their families. ODS could also participate in events targeted for children on community probation with a focus on re-entry and expungement. ODS should continue its outreach efforts through its various partnerships by participating in community forums with non-profit partners, such as Delaware Center for Justice. Through its partnerships, ODS can provide educational programs and continue outreach efforts with parents and children throughout Delaware. Finally, ODS should create and provide resources, such as collateral consequences checklists, "Know Your Rights" brochures, and other similar documents, to children and the community.

⁸⁴ Delaware has applied for other grant funding to facilitate this training.

13. Enhance Access to Post-Disposition Counsel Within ODS and through Sustainable Partnerships in the Legal Community

Recognizing that post-disposition representation plays a critical role in the advocacy of children, juvenile defenders must ensure that due process is present at all stages of delinquency proceedings, including post-disposition.⁸⁵ A robust public defense system recognizes that the delinquency process is adversarial and children must be provided with continuous legal counsel through every stage of this process.⁸⁶ Counsel should maintain contact with their clients and continue to represent them while under court jurisdiction or agency supervision. This ongoing contact ensures that children have a voice in the system long after they have left the courtroom.⁸⁷ Counsel must have continued contact with their clients to ensure involved agencies are adhering to court orders and to guarantee that all clients' needs are met and safety is protected.⁸⁸

ODS should enhance access to post-disposition counsel both within its own practice and through partnerships with the legal community. A public defense system that practices holistic defense is the ideal to which ODS aspires. The model system is The Bronx Defenders where attorneys expand the scope of their representation to address the collateral consequences and enmeshed penalties of court involvement as well as the underlying issues that play a part in driving clients into the justice systems.⁸⁹ Given the current economic climate in Delaware and the gubernatorial priority to decrease state government, it is unlikely that ODS will obtain funding for a separate division of attorneys to handle civil post-disposition matters for children. However, competent *pro bono* post-disposition representation can still be provided to children through an already established collaboration between ODS, the Delaware Law School ("Law

⁸⁵*Protecting Rights, Promoting Positive Outcomes Post-Disposition Access to Counsel*, NJDC Issue Brief, pp. 3.

⁸⁶*NJDC Ten Core Principles*

⁸⁷*National Juvenile Defense Standard 7.1.*

⁸⁸*Id.*

⁸⁹*See <http://www.bronxdefenders.org/>.*

School”), the Delaware State Bar Association (“DSBA”), private law firms, and other non-profit organizations. This collaboration will enable ODS to immediately and sustainably fill gaps in services for children while continuing to advocate for resources to achieve a full holistic defense model.

14. Ongoing, Post-Disposition Contact by Juvenile Defenders

ODS should require juvenile defenders to have continued contact with their child clients following disposition and sentencing to ensure that children have a continued, affirmative voice in the delinquency system. Without counsel, children have the difficult, if not impossible task, of advocating *pro se* for additional services, or modification of sentence. Children are not equipped to alert the court to gaps in services, and, therefore, may be denied access the services they need or the services that have been ordered by the court. This advocacy can be achieved by adopting post-disposition juvenile defender guidelines and continuing the externship program that has been established with the Law School. Juvenile defender guidelines will define the post-disposition role and obligations of the attorneys and the externship program will guarantee continued contact with clients.

In summer 2016, ODS will commence a formal externship program with the Law School. To determine the viability of an externship program of this nature, ODS partnered with Rutgers School of Law Juvenile Law Clinic. Since March 2016, students from the clinic have met with children in Delaware secure facilities to address issues they faced. Any concerns raised in these meetings have been referred to ODS for appropriate legal action. Based on this pilot program, ODS pursued the partnership with the Law School to continue post-disposition contact and advocacy.

The Law School will provide students as externs with ODS each semester and during the summer. The law students will work as agents of ODS under the supervision of the Chief Juvenile Defender. The students will be responsible for making contact with ODS clients who are in placement. The students will meet in person, at least monthly, with ODS clients sentenced to placement in Delaware's secure facilities including: Ferris School, Grace Cottage, Mowlds Cottage and Snowden Cottage. The students will also meet in person, via phone or videophone (Skype), at least monthly, with ODS clients sentenced to placement in secure facilities outside of Delaware. When possible, the students will continue to communicate with the child after release from placement to determine if there are re-entry needs that are not being met.

ODS will provide the students with an initial orientation and ongoing trainings as needed which can be facilitated by the ODS Director of Training and the Chief Juvenile Defender. ODS will make referrals to the students who will interview the clients using an intake form that encompasses various areas. The students will record any concerns and report such concerns to appropriate ODS staff. After meeting with the client, students will work with ODS attorneys to take appropriate action, including but not limited to, filing motions for modification of sentence, meeting with YRS staff, and appearance at hearings.⁹⁰ ODS will also make referrals for any collateral services that are requested and determined to be necessary for the clients.

Through its pilot program with Rutgers Law School, ODS has proven that the externship program with the Law School is a sustainable program that will ensure ongoing communication

⁹⁰With the client's consent and ODS supervision, externs admitted under *Delaware Supreme Court Rule 56* may appear in court on behalf of the client. If the extern is not admitted under *Rule 56*, then the extern may work on the case as a law clerk but not officially appear in court on the client's behalf.

with and advocacy for its child clients. ODS is able to provide training and legal support with its current staff.

15. Enhance Access to Counsel in Expungement Proceedings

To address this gap both within ODS and the legal community, a group has been assembled to provide assistance through statewide expungement clinics, education and training, *pro bono* legal representation, and community outreach. This group recognizes the need for legal representation in this area and multiple participants have already committed to assisting on various initiatives. ODS will provide training and resources to all volunteer *pro bono* attorneys, law students, legal interns/externs, and summer associates. Trainings will be offered throughout the state on multiple occasions to accommodate volunteers' schedules and locations. ODS attorneys will also be available to provide guidance, mentoring, and assistance to all volunteers. Through this collaboration, many individuals who would otherwise lack the resources or knowledge to obtain an expungement will be helped. This collaboration is not only sustainable but also has the potential to greatly improve the lives of hundreds, if not thousands, of individuals throughout the state.

a. Statewide Expungement Clinics

Through expungement clinics, ODS, the Law School, DSBA, *pro bono* volunteer attorneys, and Delaware Volunteer Legal Services ("DVLS") will partner to represent eligible individuals in expungement proceedings. Partnerships will also be formed with the Delaware Center for Justice (a non-profit agency) and the APEX program (a non-lawyer pardon and expungement program through the Department of Labor - Division of Vocational Rehabilitation).

ODS will hold several expungement clinics in different locations statewide. To date, two clinics have already been scheduled. On July 6, 2016, a small clinic will be held at Delaware State Police Troop 2 which is one of the three facilities where the required certified criminal history can be obtained. Troop 2 has the ability to fingerprint 8 individuals per hour using the AFIS system. The clinic would target 32 pre-screened juvenile clients from the ODS database that are eligible for an immediate mandatory expungement. This clinic would be a “one stop shop” where the expungement requirements could immediately be completed. DCJ has initiated a fundraising effort to defray the costs associated with obtaining the certified criminal history. On July 22, 2016, ODS and the Law School will host a larger clinic at the law school’s campus which will be open to the public. Thereafter, subsequent clinics will be held 2-4 times per year throughout the state. ODS will provide staff attorneys for oversight and supervision. To ensure that as many potentially eligible individuals as possible are reached, the clinic will be advertised in local media, and to state agencies that serve children (such as YRS), schools, community organizations, and the Delaware Bar. ODS will also send notice to potentially eligible former clients.

The Law School will provide law students for the initial clinic. Various legal organizations have committed summer associates, interns, and *pro bono* attorney to provide assistance at the clinics as well as legal representation for the filing of expungement petitions. To the extent possible, ODS will partner with criminal justice agencies to provide certified criminal records so eligibility can be determined and filing of the petitions can be perfected immediately. ODS will also continue to partner with non-profit agencies to pay the criminal record fee for indigent adults and all children. The APEX program will assist in making

eligibility determinations and will also accept certain case referrals for ongoing assistance with the expungement and pardon process.

Volunteers from the Law School and legal organizations will complete interviews for all potentially eligible individuals. These volunteers will also review each case to determine eligibility and whether the expungement is mandatory or discretionary. For mandatory expungement cases, the volunteer will complete the petition with the individual for filing in Family Court. For discretionary expungement cases, ODS will refer the case to a *pro bono* attorney as the representation will likely require more substantive work and a court hearing. ODS will designate supervisory attorneys who will assist with management of the clinic, expungement eligibility determinations, and act as resources for any referred cases.

b. Network of *Pro Bono* Attorneys

ODS has also partnered with the Law School, DSBA, DVLS and other attorneys to create a pool of volunteer attorneys to provide ongoing representation for expungements.⁹¹ Currently, Delaware's Access to Justice Commission, which was established by the Delaware Supreme Court, is tasked with reviewing barriers to justice and the courts and making recommendations for change. *Pro Bono* representation is an area being examined by a sub-committee of the Commission and this sub-committee has agreed to include children's access to post-disposition counsel in its review. ODS has also discussed this initiative with the DSBA which has been extremely receptive to this *pro bono* opportunity. DSBA's executive committee has endorsed the expungement project and has contacted all members to encourage participation. DSBA's Women and Law Section Philanthropy Committee has also committed to assisting with

⁹¹The Delaware Office of the Child Advocate uses a similar volunteer model to provide representation to children in foster care in child welfare proceedings. This model has been extremely successful and well received by the Delaware Bar.

expungements. As a result of this endorsement by DSBA, a request for volunteers was sent to all Delaware Bar members and has resulted in over thirty five responses to date. In addition, ODS presented to the Melson Arsht Inn of Court (an Inn dedicated to Family Court issues) to encourage *pro bono* assistance for expungements and other post disposition matters. To date, various local media outlets and the state bar association magazine have published articles about this grant and post-disposition representation. On May 24, 2016, ODS, in collaboration with the Delaware Center for Justice, hosted a community forum for youth and their families to educate them on the collateral consequences of criminal records and encourage them to seek expungements when possible. ODS staff answered questions and offered assistance with this process.

As a result of these efforts, in summer 2016, volunteer attorneys will begin to receive expungement cases identified at the clinics. ODS will provide training for these attorneys. If additional implementation funding is not obtained, ODS will seek funding through other grants for an attorney to act as “juvenile expungement coordinator.” The coordinator would receive referrals from the clinics or any other sources. The coordinator will work with the law students (including those from the post disposition externship program) to determine eligibility and the type of expungement (mandatory or discretionary). The coordinator will also supervise the post disposition externship program. For mandatory expungements, the coordinator will work with the law students to file the petition. For discretionary expungements, the coordinator will refer the case to a *pro bono* attorney. The coordinator will also work with non-profit agencies to provide funding for the certified criminal record fee. The coordinator will also act as a resource for *pro bono* attorneys and will carry a small caseload of more difficult cases.

16. Form an Exploratory Committee to Improve Access to Representation in Education Proceedings

An exploratory committee should be established to identify and engage essential stakeholders, representatives and advocates to address access to counsel in education proceedings and the improvement of educational opportunities and re-entry education for children in the juvenile justice system. One of the long term goals of this group would be to create a network of *pro bono* attorneys, similar to that from the expungement project, to represent children in educational proceedings. Potential participants and resources may include: ODS, the Office of the Child Advocate (“OCA”), DSCYF, Department of Labor - Division of Vocational Rehabilitation, Department of Education, education and disabilities law advocates from Community Legal Aid Society, Inc. (“CLASI”), Education Voices, Inc., Parent Information Center, PACE Wilmington (Parent Advocacy Council for Education), National Alliance on Mental Illness (“NAMI”), Delaware Center for Justice, Delaware Law School, McAndrews Law Firm (which specializes in educational issues) , University of Delaware, Delaware State University, and Wilmington University.

Education for children in the juvenile justice system is an area of ongoing work in Delaware. Currently, a stakeholder workgroup, which includes ODS, is devising a Memorandum of Understanding (“MOU”) with the goal of implementing systems-level strategies to remove barriers to the successful educational re-entry of children leaving secure care. In addition, OCA has designed a number of initiatives to improve educational outcomes for youth in foster care and ODS will collaborate with OCA on these efforts especially as they relate to cross-over youth.⁹²

⁹²Delaware is a Casey Education Demonstration Project site. This project is a cross-systems collaborative effort to draw critical attention to the education and wellbeing needs of youth touched by the child welfare system. OCA and

17. Provide Continued Advocacy and Training on Holistic Defense and Collateral Consequences and Pursue Additional Resources to Enhance Holistic Defense Within ODS

ODS should continue to pursue avenues to incorporate holistic defense in its daily practice and endeavor to find resources to fund a post-disposition unit that will focus on civil and collateral matters, such as immigration, housing, employment, and education that are affected by juvenile records. Until this holistic defense model can be fully funded, which unfortunately may never occur, ODS will continue to advocate for partnerships and train the defense bar and other stakeholders about the harsh collateral consequences of arrest and adjudication and ways to ameliorate them.

18. Review Delaware’s Statutory Scheme

Juvenile defenders must continue to review and challenge Delaware’s laws related to the prosecution and sentencing of children. Delaware’s statutory framework allows for children to be prosecuted as adults with absolutely no chance of treatment in the juvenile system. Delaware law allows for children, through the imposition of minimum mandatory sentencing provisions, to be treated the same as adults regardless of their particular facts and circumstances, their lives, or their legal case. Delaware laws ignore accepted notions, founded in science and law, about children, their brain development, their ability to rehabilitate, and the overall individualized nature of the justice system. Delaware law disregards the fact that children are simply less culpable than adults for neurological and sociological reasons and should have the opportunity to be treated as children in the justice system. Mandatory transfer laws, coupled with mandatory sentencing laws that completely lack any discretion, do nothing to decrease recidivism or deter

the Casey Family Programs Project’s goals are to improve education outcomes for youth in foster care. The goals are: 1) to implement school programs and strategies that address the emotional and social needs of foster youth and create an optimal learning environment for at-risk youth; and 2) to improve interagency cooperation and coordination of services to maximize student services and school stability for children in foster care.

crime.⁹³ On a larger scale, these laws can also impact disproportionate minority contact with the criminal and juvenile justice systems for children. A major study of 18 jurisdictions established that minority children are charged as adults at a higher rate than white offenders and adult sentences for minority children tend to be harsher.⁹⁴

Juvenile defenders should advocate for changes that are aligned with the last decade of research on adolescent brain development and recent United States Supreme Court precedent must be explored. Armed with the knowledge that draconian policies are harmful rather than helpful, juvenile defenders must not quietly sit back and do nothing. Rather, they must take the lead role and educate system partners and advocate for systemic and legal change. These changes should incorporate the rationale of the *Roper*, *Graham*, *Miller*, *JDB*, and *Montgomery* line of cases allowing judicial discretion and individualized sentencing and decision making for all children in the justice system.

19. Expand Juvenile Data Collection

Delaware should review ways to enhance its juvenile data collection statewide. While ODS is able to collect extensive data for its cases, it is unable to collect data that encompasses the entire delinquency system. In addition, ODS should modify its database systems to collect data related to training of juvenile defenders.

⁹³Donna M. Bishop *et al.*, "The Transfer of Juveniles to Criminal Court: Does It Make a Difference?," *Crime and Delinquency*, vol. 42 (1996); Fagan, Jeffrey, 1996. "The Comparative Advantage of Juvenile versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders." *Law and Policy* 18:77-112; cited in Bishop, Donna, "Juvenile Offenders in the Adult Criminal System," 27 *Crime and Justice* 81 (2000).

⁹⁴Jolanta Juskiewicz, "Youth Crime/Adult Time: Is Justice Served?," *Building Blocks for Youth*, October 6, 2005, <http://www.buildingblocksforyouth.org/ycat/ycat.html>. The study, which tracked 2,584 juveniles, found that African American children were charged as adults disproportionately in 9 of the 10 jurisdictions that tracked race and ethnicity. For example, African-American children comprised 64% of the juveniles charged with drug offenses, but comprised 76% of the juveniles charged with drug offenses in adult court. As to sentencing, 43% of the African-American children received prison sentences while 26% of the white offenders were sentenced to prison time. The sentences for African-American children were longer than white counterparts in almost all the jurisdictions studied.

Delaware should determine what areas of data should be tracked to address gaps, needs, and strengths in the overall delinquency system and the provision and delivery of juvenile defense. Tracking these targeted areas of data on a broader scale will allow full systemic review to determine necessary changes, unintended consequences, and differences between Delaware's three counties. Delaware should also incorporate more detailed collection of DMC data to allow for a comparison of DMC challenges based on counties and offenses. This data collection will enable a more effective, efficient, and tailored DMC response. ODS should work with DELJIS and the Family Court to identify areas of data collection and implement a pilot data collection program to target these areas. A small work group can be created to facilitate this pilot program with training for necessary staff for implementation.

20. Expand Diversion Programs

Delaware should expand diversion programs, particularly the Civil Citation Program, and make post-arrest diversion programs available to all children regardless of the county in which they live. Expansion of the Civil Citation Program will enable children to receive intervention services targeted at their specific needs without delay and without entry into the delinquency system. Expansion of all diversion programs will not only result in better outcomes for children but it will also allow the time and resources of the juvenile justice system, including the defense bar, to be best utilized. Defense attorneys, prosecutors, probation officers, and the courts will be able to devote the time necessary to preparing, prosecuting, and defending more serious cases.

On a larger scale, programs like Civil Citation also have the ability to greatly impact DMC. In Delaware, children of color are less likely to be diverted than white children at a rate of 0.56.⁹⁵ To date, 67% of all referrals to the Civil Citation program are non-white youth.

⁹⁵The Civil Citation Program began in September 2015 as a statewide pilot with School Resource Officers. In January 2016, the program was made available to all law enforcement officers and agencies across the state. Since inception, data has and continues to be collected.

- 169 youth referred by law enforcement to program
- 14.5 - average age of youth referred to program
- 49% - referrals New Castle County, 28% - referrals Sussex County , and 23% - referrals Kent County
- 59% - youth referred are males
- 41% - youth referred are females
- 16% - youth referred deemed ineligible for program
- 78% - youth successfully completed program
- 6% - youth did not successfully complete program

Section V. Grant Funding Needed for Plan Implementation

Although Section IV identifies all strategies needed to develop a model juvenile defense system, this section outlines core recommendations that need to be funded through the 2016 SMART on Juvenile Justice: *Enhancing Youth Access to Justice State Reform Implementation Program*. The below strategies cannot be implemented without additional funding and are necessary to make a significant impact on juvenile defense practice in Delaware. As such, these recommendations address the overall need for zealous specialized advocacy in the area of juvenile defense.

- Two (2) juvenile defenders for Kent and Sussex Counties (one for each county)
- Juvenile Justice Policy Specialist
- Expungement/Post-Disposition Coordinator
- Juvenile Specific Training and Community Outreach Funds

1. Two (2) juvenile defenders for Kent and Sussex Counties (one for each county)

The first request for two juvenile defenders is in furtherance of building a specialized juvenile defender unit statewide in the PDO. The goal of ODS is to create a juvenile defender unit statewide whose attorneys specialize in and represent only children in delinquency and criminal court. In order to achieve this goal, two juvenile defenders will be required in the lower Delaware counties. With this additional staff, the PDO will be able to achieve a statewide juvenile defender unit with a specialized practice and fully implement vertical representation of children statewide.

2. Juvenile Justice Policy Specialist

The second request is for a new position that will not only support the specialization of juvenile defense within ODS but will also work with other stakeholders on the overall advancement of juvenile defense and policy reform. This position will put ODS on par with other highly regarded public defense agencies, such as the Defender Association of Philadelphia, as it will have a position solely dedicated to the area of juvenile defense. Currently, members of the ODS leadership team represent the office and provide training on juvenile issues; however, these juvenile matters are not their only duties.

The Juvenile Justice Policy Specialist will be solely dedicated to juvenile issues. The Juvenile Justice Policy Specialist will respond to the needs of the juvenile defender unit statewide, identify and assess issues, implement strategies for reform, provide legal support and training in conjunction with the Director of Training, and continue to create and enhance partnerships with stakeholders. The Juvenile Justice Policy Specialist will assist with drafting juvenile defense guidelines and with implementation of the juvenile defender training curriculum. The Juvenile Justice Policy Specialist will prioritize the Strategic Plan recommendations and work on the following issues during the grant period:

- Waiver of Counsel Rule Change
- Video Court Proceedings
- Access to Counsel at All Court Hearings
- Review Diversion Programs
- Enhance Juvenile Data Collection

This position will also enable the Chief Juvenile Defender, the Chief Conflicts Counsel and the OCC supervising attorneys to dedicate more of her role to supervision and mentoring as

outlined in the Strategic Plan. In essence, this position will ensure that the Strategic Plan and its recommendations are fully implemented over time.

3. Expungement/Post-Disposition Coordinator

The third request is for an Expungement/Post-Disposition Coordinator who will be responsible for the implementation of the Post-Disposition Representation Strategy outlined in the Strategic Plan. ODS cannot provide post-disposition services to children but recognizes its importance. Without this position, ODS cannot fully embrace the holistic representation model that it envisions for its clients and children will continue to suffer significant impediments to their successful re-entry to the community. Under current Delaware practice, most of the children who exit the delinquency system are tasked with the complex, if not impossible, job of representing themselves in expungement, educational, and other post-disposition proceedings. The collateral consequences of adjudication, combined with the complex laws and cost associated with expungement, undercut the lesser accountability that should be associated with children and their ability to rehabilitate. Without an advocate in these areas, children are left with limited options for their future success.

The Expungement/Post-Disposition Coordinator will be responsible for:

- managing expungement clinics
- referring cases to the established *pro bono* network of attorneys and providing training and legal support to these attorneys
- coordinating representation of children
- increasing community outreach through partnerships, resources, and education, increasing collaboration with the Delaware bar, private law firms and the Delaware Law School
- managing the Delaware Law School externship program
- pursuing grant and other funding opportunities to enhance post-disposition representation

4. Juvenile Specific Training and Community Outreach Funds

The fourth request is to utilize funding for juvenile specific training and community outreach efforts. ODS has a very limited training budget and none of this budget is specifically earmarked for juvenile defense. ODS will seek to fully implement the Juvenile Training Immersion Program, created by the National Juvenile Defender Center, as its attorney curriculum. Additional funding allocated solely to juvenile defense training will allow other juvenile defenders to become certified in this curriculum. The funding can be used to bring national experts in state to teach the curriculum and to send front line juvenile defenders to national trainings and conferences such as the NJDC Leadership Summit. Funding will be used to host an annual statewide juvenile justice stakeholder training. Finally, ODS seeks to enhance its community outreach efforts statewide. This funding will enable ODS to create and publish resources for its clients and the great community.

Section VI. Conclusion

Juvenile defense and juvenile justice reform are a priority for Delaware, its stakeholders, and its citizens. Recent legislation combined with prior collaborative efforts and strong leadership evidence Delaware's commitment to a better juvenile justice and juvenile defense system. The Strategic Plan captures the needed areas of reform as well as sets out concrete strategies to achieve sustainable, systemic statewide change that will result in better outcomes for all children and the community. ODS and its partners are in full support of this plan and will continue to pursue its implementation. With these core reforms, Delaware will be a leader in juvenile defense and create national model for change.

Appendix

Smart on Juvenile Justice: Enhancing Youth Access to Justice Initiative

Smart Juvenile Justice Advisory Committee (SJJAC)

Chairs:

Lisa Minutola, Esq.	Office of Defense Services
Dawn Williams, Esq.	Office of Defense Services

Members:

Michael Arrington, Esq.	Delaware State Bar Association
Addie Asay, Esq.	Family Court
Peggy Bell	Delaware Criminal Justice Information System
Carla Benson-Green	Department of Services for Children, Youth & their Families
Ashley Biden	Delaware Center for Justice
The Honorable Susan Cline	Justice of the Peace Court
Kirstin Cornnell	Delaware Center for Justice
The Honorable Alan Davis	Justice of the Peace Court
Matthew Denn, Esq.	Department of Justice
Nancy Dietz	Department of Services for Children, Youth & their Families
Brian Eng, Esq.	Community Legal Aid Society, Inc. (CLASI)
Rosemarie Griesmer, Esq.	Delaware Law School
Christian Kervick	Criminal Justice Counsel
Kathryn Lunger, Esq.	Public Defender's Office
Alison McGonigal	Department of Services for Children, Youth & their Families
The Honorable Vivian Medinilla	Superior Court
Lisa Minutola, Esq.	Office of Defense Services
The Honorable Michael Newell	Family Court
Brendan O'Neill, Esq.	Office of Defense Services
LaKresha Roberts, Esq.	Department of Justice
John Sadowski	Department of Education
Ryan Tack-Hopper	American Civil Liberties Union – Delaware Chapter
Stephanie Volturo, Esq.	Office of Conflicts Counsel
Dawn Williams, Esq.	Office of Defense Services

Work Groups

DMC

Co-Chairs

Monika Germono, Esq.

Donna Pugh

Public Defender's Office

Department of Services for Children, Youth & their Families

Members:

Lydia Cox, Esq.

James Hatfield

Carrie Hyla

Sergeant Bernard Miller

Public Defender's Office

Delaware State Police

Family Court

Delaware State Police

Initial Detention Hearing

Co-Chairs

Colin Dunlavy, Esq.

Kate Parker West, Esq.

Public Defender's Office

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