**Indiana Task Force on Public Defense**

**Juvenile Defense Subcommittee**

**Report and Recommendations**

**February, 2018**

**Introduction:**

In 2006, the National Juvenile Defender Center and the Central Juvenile Defender Center released their assessment of Indiana’s juvenile justice system entitled *Indiana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*.[[1]](#footnote-1) The Assessment identified significant problems with the number of youth who waived the right to counsel in juvenile delinquency proceedings, including those sent to the Indiana Department of Correction. It also noted inconsistent quality of representation, structural problems, and the lack of performance standards for attorneys handling juvenile cases. The Assessment recommended, among other things, the creation of a “statewide juvenile defender office to bring together the resources and expertise from across the state, continue the process of evaluating the delivery of legal services to Indiana’s children and implement specific policies and programs as appropriate.”[[2]](#footnote-2)

Since the release of the 2006 Assessment, Indiana has made substantial progress in increasing juvenile specific public defender training, developing a community of juvenile defenders within the state, and reducing waiver of counsel—including the adoption of Criminal Rule 25. However, additional improvements are needed to build upon these efforts to make a more effective, comprehensive juvenile defense system and ensure that mandates of the 14th Amendment and *In re Gault* are met for all of Indiana’s youth.

In October of 2015, Indiana was one of four states awarded an Office of Juvenile Justice and Delinquency Prevention (OJJDP) Smart on Juvenile Justice Access to Counsel Planning Grant. The grant provided resources to the Indiana Public Defender Council to assess the state’s delivery system for juvenile defense, and to propose ways to improve upon access to counsel, and quality of representation for youth in the delinquency system. With the input of stakeholders throughout the state, the “Indiana Statewide Plan for Juvenile Defense Improvement” was developed. In October of 2016, OJJDP awarded nearly $750,000 over two years for implementation of this plan. The plan included oversight by a 12 member Advisory Board, with additional widespread stakeholder involvement. It has focused on building juvenile defense as a specialized practice by increasing both trial level and post-dispositional support through training, technical assistance and resource development.

Several members of the Advisory Board also serve on the Indiana Task Force on Public Defense. Those members, as well as others on the Advisory Board have participated in the process to provide the findings and recommendations to the larger Task Force group.

1) What are the key attributes of an effective system of representation of children in delinquency and status offender cases?

Youth who come before the juvenile courts in Indiana should have access to a strong juvenile defense delivery system which recognizes the developmental differences between children and adults, yet fully affords the protection of their constitutional, statutory and human rights. In 1967, the landmark U.S. Supreme Court opinion *In re Gault[[3]](#footnote-3)* recognized certain fundamental due process protections for youth in delinquency proceedings including the right to counsel. Now, more than 50 years later, it is critical that Indiana ensure that all youth have the right to effective assistance of counsel.

To aid states in providing criteria to fully implement the holding in *Gault*, the National Juvenile Defender Center and the National Legal Aid and Defender Association created the Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems.[[4]](#footnote-4) NJDC has also provided guidance to states to ensure quality representation through national standards,[[5]](#footnote-5) as well as ethical considerations about the role of counsel in these proceedings.[[6]](#footnote-6)

The Task Force Subcommittee on Juvenile Defense, recognizes the following basic principles regarding its indigent defense delivery system:

* Representation of youth is a specialized area of the law which requires skilled, well-resourced, and trained lawyers.
* Youth are entitled to early appointment of counsel and representation at all critical stages, from arrest and detention until the youth is no longer subject to dispositional orders.
* Youth representation must be client-centered, developmentally appropriate, and bias-free.
* Youth should be treated with dignity and respect and have the opportunities to achieve their highest potential.
* An effective juvenile defense delivery system should be collaborative and engaged in the community.
* The juvenile defense system should cultivate leadership and ensure quality through oversight and accountability.
* All youth should have access to skilled and zealous advocacy from a public defense system regardless of geography.
* Juvenile defenders must have access to expert and ancillary services to provide quality services, including mental health experts, education specialists, social workers, paralegals, interpreters, and forensic experts.

2) How does Indiana’s system measure up against these key attributes? Where are the strengths? Where are weaknesses?

The OJJDP Planning Grant included an assessment of right to counsel issues in Indiana for youth in the delinquency system, with consideration given to statutory and rule provisions, policy and practice, and structural impediments within the public defense system that adversely affected both access to lawyers and quality of representation. Additional considerations addressed included the state’s system of data collection on juvenile defense indicators, and what measures were in place for the state to ensure effectiveness in the delivery of services.

The Indiana Statewide Plan for Juvenile Defense Improvement is based on evidence-based standards and best practices. The improvements follow guiding principles on the need for skilled, well-trained juvenile defenders found in: American Council of Chief Defenders & National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery System*s (2005); National Juvenile Defender Center and Models for Change, *National Juvenile Defense Standards* (2013); Institute of Judicial Standards-American Bar Association, *Juvenile Justice Standards Annotated Edition* (1996); National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005); Indiana Rules of Professional Conduct; Kaarin Lueck & Indiana Public Defender Council, *Performance Guidelines for Representation of Juveniles in Delinquency Cases* (2014); National Research Council, *Reforming Juvenile Justice: A Developmental Approach*; and, United States Department of Justice, *Report of the Attorney General’s National Task Force on Children Exposed to Violence* (Dec. 12, 2012); National Juvenile Defender Center, *The Role of Juvenile Defense Counsel in Delinquency Court* (2009). The materials from NJDC’s JTIP trainings also helped inform the project through the lens of adolescent development concepts.

Key findings made in that report include:

# A) Early Appointment of Counsel and Reducing Waiver of Counsel Remains a Priority

Juveniles in Indiana charged with committing delinquent acts have the right to be represented by counsel at every stage of juvenile proceedings, including disposition.[[7]](#footnote-7) By statute, juvenile court judges are required to appoint counsel at the detention hearing or initial hearing if the child does not have an attorney and if the child has not lawfully waived his or her right to counsel.[[8]](#footnote-8) If a youth is in detention, the court must appoint counsel at the detention hearing; however, if the youth is not detained, the court must appoint counsel at the initial hearing.[[9]](#footnote-9) The juvenile court judge must inform the child and his parent, guardian, or custodian of the child’s right to counsel and right to have counsel appointed at public expense if the family cannot afford a lawyer.[[10]](#footnote-10) The appointment of counsel is conditioned only on the determination as to whether the child has an attorney, and whether the child has waived the right to counsel.[[11]](#footnote-11) The determination of who shall pay the cost of counsel is secondary and an independent decision from the determination of whether appointment is made.[[12]](#footnote-12)

Additionally, in January 2015, the Indiana Supreme Court enacted Criminal Rule 25 which sets out mandatory appointment of counsel in certain delinquency proceedings, and prohibits waiver unless made in open court, on the record and confirmed in writing, and in the presence of the child’s attorney.[[13]](#footnote-13) Since the enactment of Criminal Rule 25, there has been a decrease in the number of children in court without a public defender, from 42.7% in 2014 in counties that adhere to the Public Defender Commission standards; 37.7% in 2015 and 31% in 2016.[[14]](#footnote-14)

While there is continued progress in reducing the number of youth who are before the juvenile courts without counsel, the state should provide continued oversight and monitoring to ensure access to counsel and early appointment of counsel in delinquency proceedings. The OJJDP Implementation Grant staff has identified a number of youth at the Department of Corrections since April of 2017 who were committed without having had the benefit of counsel. Lawyers are often not assigned to be present with youth at the initial hearings, particularly when youth are not detained. Lawyers should be present at these hearings unless a valid waiver has been made in accordance with Crim. R. 25.

**B) Indigency Determinations Should be Consistently Applied**

Standards for indigence relative to appointment of counsel are established for adults through the Indiana Public Defender Commission.[[15]](#footnote-15) There are no separate standards set by the Commission for youth indigence determinations.

Indiana law allows for a court to assess reasonable attorney’s fees against a parent of a child alleged to be delinquent.[[16]](#footnote-16) A court is required to consider the parent’s independently held assets, income, liabilities, and the extent to which such payments would burden the person and that person’s dependents.[[17]](#footnote-17) It is clear under Indiana law that appointment of counsel is conditioned only on whether a child before the court has a lawyer, and whether the child has waived the right to counsel.[[18]](#footnote-18) The determination as to who, if anyone, should ultimately pay the cost is an independent and secondary determination to be made.[[19]](#footnote-19)

But survey responses completed during the course of the planning process suggested that there is a need for clarification as to the presumption of indigence among Indiana’s youth in delinquency proceedings. Of those responding, 42% believed such clarification would be helpful. The state must ensure that there are adequate means to provide lawyers to youth without regarding to the parents’ ability to pay.

**C) Post-Disposition Advocacy Needs to be Strengthened**

Juvenile court adjudications and dispositions may be directly appealed to the Indiana Court of Appeals or the Supreme Court.[[20]](#footnote-20) Youth are entitled to an appeal as a matter of right.[[21]](#footnote-21) Youth committed to the Department of Correction may be entitled to counsel through the State Public Defender for parole revocations and relief from judgment through a Trial Rule 60 motion.[[22]](#footnote-22) Trial Rule 60 motions may be invoked as an appropriate way to vacate a dispositional order revoking probation,[[23]](#footnote-23) seek a belated appeal from delinquency adjudication,[[24]](#footnote-24) raise ineffective assistance of counsel,[[25]](#footnote-25) or challenge the validity of a guilty plea.[[26]](#footnote-26)

Indiana counties bear the responsibility of appellate representation, with Commission reimbursement provided to Commission counties at the 40% rate for both adult and juvenile appeals.[[27]](#footnote-27) From January 2010 through 2015, there were 298 appeals of delinquency cases, of which 58% came from Marion County. This means that among the remaining 91 counties, only 124 appeals were filed in six years. Two-thirds of counties had no appeals during 2014-15, and nearly half had no appeals during the six-year period studied.[[28]](#footnote-28)

The Indiana Public Defender provides post-conviction relief representation for incarcerated adults in non-capital cases after an indigent individual files a pro se petition for relief, and may provide representation at hearings and on appeal if there are meritorious post-conviction claims. The Indiana Public Defender office does not handle direct appeals, but will contract with attorneys to provide representation at trial or on appeal at county expense when requested by a trial court. The office provides legal representation for youth at the Department of Correction facing parole revocation hearings, and can provide representation to incarcerated youth in TR60(B) collateral challenges.

The void in juvenile appellate/post-dispositional practice in the vast majority of counties may be attributable to many factors, including the limited number of cases going to trial, financial constraints on counties, frequent waiver of rights by youth, a perception that the stakes are low for juvenile cases, or the unavailability of local qualified appellate counsel. Whatever the reason, the void results in a lack of guidance for trial courts and practitioners about the law as applied to juvenile proceedings, and raises questions about the lack of due process. Providing state funding for an office which may assume this responsibility from counties could provide a more robust and strategic appellate system, including as a high priority those cases in which youth are sent to the Department of Correction.

**D) Juvenile Defense as a Specialization is Lacking**

**Standards:**

Both the National Juvenile Defense Standards and Indiana Juvenile Defense Guidelines provide that juvenile defense counsel should be knowledgeable of relevant statues, case law, and court rules, and should be trained in a variety of topics specific to juvenile defense such as developmental science, collateral consequences, and adolescent interviewing techniques.[[29]](#footnote-29)

Indiana has no training requirements for juvenile representation. Counties participating in the Indiana Public Defender Commission must comply with Commission standards in order to qualify for reimbursement for public defense services. Commission standards for juvenile delinquency cases speak only to experience and do not required any juvenile specific training.52 The Indiana Public Defender Council published Performance Guidelines for Representation of Juveniles in Delinquency Cases in 2014. The performance guidelines are not used in most counties, and most juvenile delinquency attorneys and judges are unaware of the existence of the guidelines.

**Training:**IPDC offers an annual one day juvenile delinquency training for public defenders. Past topics have included adolescent brain development, incorporating education and special education issues into delinquency cases, mental health and substance use treatment, competency, disposition advocacy, waiver hearings, and ethical issues and considerations of juvenile representation.

In 2015, IPDC collaborated with NJDC to hold a JTIP trainer training that produced a pool of twelve JTIP certified trainers from several different counties. The Juvenile Training Immersion Program (JTIP) is a 40-lesson curriculum for developing a specialization in juvenile defense and is the cornerstone of NJDC’s training of front-line defenders. IPDC sponsored a statewide JTIP training in September 2015, using the certified trainers. 24 juvenile public defenders from across the state participated, and the training was enthusiastically received by the participants.

At the county level, public defender offices may provide training and mentoring opportunities. Marion County Public Defender’s Office, for example, conducts in house trainings targeted to public defenders handling juvenile cases. The trainings are free and some are mandatory.

Through the OJJDP Implementation Grant, providing quality JTIP training, particularly in rural areas has been a high priority. During 2017, for example, project staff provided intensive JTIP training free of charge in nine locations, reaching a total of 147 lawyers on three different topical areas. Training areas have focused in part of fundamentals such as Role of Counsel, Juvenile Detention Advocacy, and Adolescent Development Nine dates have been set up for 2018 for JTIP training on three separate topics.

### **Access to Expert and Ancillary Services Needed for Holistic Representation and Effective Assistance of Counsel:**

### An important element of effective juvenile defense representation as a specialized area is the recognition that youth are different than adults and that lawyers have an obligation to maximize each client’s participation in his or her own case to facilitate better understanding and decision making. The NJDC Ten Core Principles emphasize that public defense systems must pay special attention to providing high quality representation to the most vulnerable and over-represented groups in the delinquency system, including children of color, children with metal health and developmental disabilities, drug and alcohol dependent and dually diagnosed youth, and the special issues presented by LGBT youth.[[30]](#footnote-30) The Principles require support for expert services for delinquency cases when necessary for quality representation, including evaluation by and testimony of mental health professionals, educational specialists, forensic evidence examiners, DNA experts, ballistics analysts and accident reconstruction experts, to name some. It also includes access to necessary litigation support services such as interpreters, court reporters, social workers, investigators, paralegals and other support staff.[[31]](#footnote-31)

Public Defender Commission standards require each county’s comprehensive plan to provide for investigative, expert, and other services necessary to provide quality legal representation consistent with Standard 5-1.4 of the American Bar Association Standards for Criminal Justice, Chapter 5: Providing Defense Services (3rd ed. 1990).[[32]](#footnote-32)

In practice, there is little to no use of expert and ancillary services in juvenile cases in most counties. Reasons include the lack of funding for experts, the perception that experts are not necessary to the delinquency defense, lack of knowledge about how to get funding for or find an expert witness, and a lack of time.

**E) Oversight and Accountability Measures are Inadequate**

Each county has its own independent juvenile defense delivery system. Counties eligible for Indiana Public Defender Commission reimbursement commit to meet a set of Standards established by the Commission. These standards pertain to the creation of independent public defender boards, creation of a comprehensive plan including a description of the defense delivery system to be used, eligibility determinations, qualification of appointed counsel both at the trial and appellate level, compensation, support services and caseloads. Training requirements and handling of caseload excesses are also required to be included in the comprehensive plans developed by counties.

The Public Defender Commission’s two staff attorneys are responsible for monitoring compliance with the Standards for counties in the Commission’s reimbursement program. The counties submit quarterly reports, although the Commission can require further auditing procedures beyond those reports. The Commission’s authority includes issuing reimbursements upon the “determination . . . that the request is in compliance with the guidelines and standards set by the commission.” [[33]](#footnote-33)

There is no requirement of local public defender boards other than developing a

Comprehensive Plan, meeting regularly, and submitting the required reports to the Commission for reimbursement.

## OJJDP Implementation Grant

As a result, the OJJDP Implementation Grant is focused on 4 key objectives as a way to ensure Indiana meets its obligation of providing effective juvenile defense representation, and to address some of the deficiencies noted in the assessment. The grant has four main objectives to bolster effective representation, in spite of limited financial resources and structural challenges. The objectives are to:

**i.** Ensure that all youth have access to counsel in delinquency and status cases at all critical stages, including early appointment at detention hearings or initial hearings when the child is not detained;

**ii.** Create a strong system of post-dispositional representation for youth by increasing state resources, including appellate representation and civil legal services for re-entry;

**iii.** Create a system of comprehensive and thorough legal advocacy, which recognizes juvenile defense as a specialization; and,

**iv.** Enhance the current juvenile data collection systems to promote accuracy and to collect key defense data indicators statewide.

The progress achieved throughout the course of this grant is beyond the scope of this report, but the work has further confirmed the need for specialization of juvenile defense generally, and more specifically, documented need for enhanced oversight, technical assistance, and quality controls.

6) What models within Indiana or outside of Indiana might exemplify the identified attributes?

The subcommittee examined four other states with specialized juvenile defense offices designed to enhance quality of representation, and/or which provided direct services in some cases including appellate and other post-dispositional services. A summary of these states is included as an attachment herein, and includes a description of how the office was created and structured, design and major functions, and performance measures and outcomes. The state include Colorado, North Carolina, Ohio and Wisconsin.

Some of the major themes which emerged from these states included;

**a) Trial level support from juvenile defense experts is critical**

In each state, expertise in juvenile defense was shared through structured training, technical assistance on cases, listserves, website resources, and in some instances, assistance directly on cases. This supportive function was important particularly in rural counties, and in more complex or high profile cases.

**b) State appellate services provided better oversight and quality control of trial practices**

Each of the four states included an appellate office, even if it had discretionary authority and did not handle all juvenile appeals. For example, Ohio does not mandate its Office of the Public Defender to handle all appeals, but it does permit appeals to be done, particularly for those individuals who are incarcerated in state facilities. A specialized juvenile appellate unit was created for youth in DYS facilities, and to serve in a consultative role to local offices on other appeals. The statutory language is broad and allows for other post-dispositional advocacy for incarcerated youth. Colorado’s Office of Alternative Defense Services has attorneys who handle juvenile appeals which arise in conflict cases.

**c) Oversight of quality of representation in juvenile defense can be accomplished in a number of ways depending upon the service delivery model.**

A state office of juvenile defense may have various methods for monitoring and improving quality of defense representation. Performance standards are one method to enhance quality, but should be tied to performance reviews or other methods to ensure compliance. Colorado tied such standards to their contracts with lawyers and reviews the skills and performance of lawyers through more rigorous screening for contracts, period court observations, input from judges and period contract renewals. Similarly, North Carolina uses field observations and performance standards to identify and train effective lawyers around the state for participation in their contract program.

**d) Specific performance indicators and data collection can be effective ways to document outcome and achieve quality results.**

Colorado and North Carolina have annual reports with specific performance measures that document goals, objectives and outcomes of their work. Colorado is specifically mandated by law to report on specific data regarding juvenile defense, which becomes a cornerstone for the work of the office. North Carolina measures the effectiveness of their own office every four years with wide stakeholder input to determine if it is meeting its major objectives.

7) What would be needed for Indiana to achieve the attributes identified?

The approach to strengthening juvenile defense has thus far been piecemeal, and while recently bolstered by a 3 year federal project, a long term sustainable mechanism for the state to ensure quality of representation in juvenile defense must be accomplished through legislation. A state could be built into the existing structure through the Public Defender Commission or Council, or a separate entity. Key requirements, however, necessitate the additional authority to provide direct representation, development of separate standards, and mechanisms which can have a direct role in ensuring that service delivery systems adhere to those standards.

8) Recommendations for the Task Force

a) Centralize the support and oversight for an Office of Juvenile Defense Services in Indiana through a separate office, or one within an existing entity.

b) Provide legislative authority for the Office of Juvenile Defense Services to

1) Adopt trial and post-trial practice standards for juvenile defense with oversight and enforcement mechanisms.

2) Provide relevant, accessible training for juvenile defense lawyers and develop a mentoring program for new attorneys wishing to do juvenile defense work.

3) Improve juvenile defender access to experts, investigators, social workers, and paralegals, and provide other forms of litigation support including a motions and brief bank, listserve and resource library.

4) Oversee the recruitment and retention of high quality juvenile defense counsel, support services, and resources for juvenile defense in rural districts.

5) Provide appellate and other post-trial representation to youth who are incarcerated or at risk for incarceration.

6) Require the collection and annual reporting of data and specific juvenile defense performance indicators developed in the five areas above.

1. Elizabeth Gladden Kehoe & Kim Brooks Tandy, *Indiana: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* at 10 (Apr. 2006). [↑](#footnote-ref-1)
2. Id

   *In re* Gault, 387 U.S. 1 (1967). [↑](#footnote-ref-2)
3. 387 U.S. 1, 28 (1967) [↑](#footnote-ref-3)
4. The Principles were adopted in partnership with the American Council of Chief Defenders in December of 2004 and revised and reissued in July 2008, and again in October of 2012. They can be found at [↑](#footnote-ref-4)
5. <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf> [↑](#footnote-ref-5)
6. <http://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf> [↑](#footnote-ref-6)
7. Ind. Code §§ 31-32-2-2, 31-32-4-1; D.H. v. State, 688 N.E.2d 221, 223 (Ind. Ct. App. 1997). [↑](#footnote-ref-7)
8. Ind. Code § 31-32-4-2. [↑](#footnote-ref-8)
9. Ind. Code § 31-6-7-2. [↑](#footnote-ref-9)
10. N.M. v. State, 791 N.E.2d 802 (Ind. Ct. App. 2003). [↑](#footnote-ref-10)
11. Adams v. State,411 N.E. 2d 160 (Ind. Ct. App. 1980) [↑](#footnote-ref-11)
12. Id. [↑](#footnote-ref-12)
13. Crim. R. 25 [↑](#footnote-ref-13)
14. These percentages are based upon data from the Public Defender Commission and Indiana Courts Online Reports (ICOR) for 2014 and 2015. Such data is not necessarily complete, but is the most accurate format that currently exists in the state. [↑](#footnote-ref-14)
15. I.C. § 33-40-5-4; *see also* Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases* (Dec. 9, 2015), *available at* http://www.in.gov/judiciary/pdc/files/indigentdefense-non-cap.pdf [hereinafter, *Non-Capital Case Standards*]. [↑](#footnote-ref-15)
16. I.C. § 33-40-3-6. [↑](#footnote-ref-16)
17. I.C. § 33-40-3-7. [↑](#footnote-ref-17)
18. Adams v. State, 411 N.E.2d 160 (Ind. Ct. App. 1980). [↑](#footnote-ref-18)
19. *Id.* at 161. [↑](#footnote-ref-19)
20. Indiana Appellate Rule 5(A). [↑](#footnote-ref-20)
21. I.C. § 31-32-15-1; Jordan v. State, 512 N.E.2d 407, 409 (Ind. 1987). [↑](#footnote-ref-21)
22. I.C. § 33-40-1-2. [↑](#footnote-ref-22)
23. C.B. v. State, 553 N.E. 2d 488 (Ind. Ct. App. 1990). [↑](#footnote-ref-23)
24. Haluska v. State, 663 N.E. 2d 1193 (Ind. Ct. App. 1996). [↑](#footnote-ref-24)
25. S.E. v. State, 774 N.E.2d 536, 539 (Ind. Ct. App. 2001). [↑](#footnote-ref-25)
26. W.T. J. v. State, 713 N.E.2d 938 (Ind. Ct. App. 2001). [↑](#footnote-ref-26)
27. *Non-Capital Case Standards*, *supra* note 14. [↑](#footnote-ref-27)
28. These numbers were calculated based upon the number of JD appeals filed according to Indiana Supreme Court and Court of Appeals decisions and dockets. [↑](#footnote-ref-28)
29. Kaarin Lueck, *Performance Guidelines for Representation of Juveniles in Delinquency Cases*, Guideline 2.1, Indiana Public Defender Council (2014) [hereinafter, *Indiana Performance Guidelines*]. National Juvenile Defense Standards 1.1 & 1.3; *Indiana Performance Guidelines*, *supra* note 50, Guideline 1.2. [↑](#footnote-ref-29)
30. Ten Core Principles, pg. 1. [↑](#footnote-ref-30)
31. Id. at 2. [↑](#footnote-ref-31)
32. *Non-Capital Case Standards*, *supra* note 14, Standard I. [↑](#footnote-ref-32)
33. I.C. § 33-40-6-5(a). [↑](#footnote-ref-33)